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**Master's degree in *International Relations*  
Major in *Global Studies***

“The Modernization of the Legal Agreements in EU-Russia Relations:  
Limits and Possibilities”

**SUPERVISORS**

Prof.ssa Flavia Lattanzi (LUISS)  
Prof. Alexander Tevdoy-Burmuli (MGIMO)

**STUDENT**

Jacopo Resti  
No. 624922

**CO-SUPERVISOR**

Prof. Igor Pellicciari (LUISS)

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## **FOREWORD**

The idea to research and write about the modernization of EU-Russia relations came to my mind in very particular circumstances. At the beginning of this master degree program, I thought that my thesis would either consist of a deeper analysis of what I had written for my bachelor thesis (the Challenges to the Welfare State) with a focus on Russia, or of a completely new research in the field of international law, namely on the relation between the latter and Russian domestic law.

Regardless of the fact that I had spent a year in Brussels studying EU law and institutions and I was already studying in Moscow since a few months, I was convinced that a thesis on EU-Russia relations would have been a dull repetition and a predictable outcome for my academic background. I obviously wanted to look for something closely related to my studies, yet I was eager to come up with something original and far from the mainstream.

In a surprisingly warm winter day in Moscow last year, I had to reconsider my conviction. On the 10<sup>th</sup> of February 2015, I was back to Moscow from an adventurous trip to China. My friends and I had skipped the first day of classes in which oral presentations are usually assigned to the students for the whole semester. As a result, for some courses, we could not choose either the topic of our presentation or the day on which we were supposed to deliver them. They were simply assigned randomly. I soon found out that one of the topics of my presentations was the modernization of EU-Russia relations. The term “modernization” made the topic of EU-Russia relations sound even duller and more predictable than I used to think.

I would have never imagined that my presentation on this topic the very next day would have such a success. Not to mention that it would be the topic of my thesis. In fact, while discussing and presenting the topic with the class that day, I

realized that what I had considered dull and predictable was instead a valuable and interesting part of my experience, of my culture, of my life. That day I felt proud of myself and I decided that I would write about something which may be dull and predictable but which truly represents my experience, rather than something original which has nothing to do with whom I am.

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## **Introduction**

Europe and Russia have been knowing each other for centuries. Their foreign policies have acted as a shaping force in the political history of the continent notably since the mid XVII century, a remarkable watershed in Europe's history characterized by the birth of nation states in Western Europe, following the Peace of Westphalia (1648), and by Russian statehood being firmly established under Tsarist rule. Since then, Russia has been deeply concerned about its involvement in the establishment of the new political and military arrangements in Europe. The goal of the Russian elite, to build strong political and cultural ties with Western Europe and to be recognized as a strong and influential neighbor, found concrete implementation with the rule of Russian Tsar and later Emperor Peter the Great (1682-1725). He was soon to be known for his openness towards the West and hence became the first representative of a particular school of Russian foreign policy known as that of the "Westernizers". At the same time, European powers wanted to preserve the long awaited political stability and to secure Europe's eastern borders through Russia's loyalty and alliance. Over the centuries, Europe had turned out to be particularly vulnerable to foreign invasions coming from the East, as the threatening incursions of the Arabs, the Mongols and the Ottomans demonstrated. Both parties were thus bound to a long and inevitable coexistence.

For most of their history, relations between Russia and European great powers have been characterized by a strong discontinuity and unpredictability, suggesting that besides the existence of common interests and challenges, bilateral relations could not ignore the deep rifts in political cultures and the different perceptions of the international world. Their state of relations has been highly dependent on both the international and the internal political developments of a certain historical period. Relations went from direct confrontation, such as the Napoleonic invasions (1812-1815) and the Crimean wars (1853-1856), to solid and decisive alliances, such as the

one which led to the victory over the Third Reich in World War II. The division of Europe in the aftermath of the war entirely froze political relations between Russia (then Soviet Union) and most West European countries, increasingly concerned with containing the communist threat from the East and with preventing the rise of communist parties in national governments. A turn for the better did not come until the 1970s, when West European countries, namely Germany with its Chancellor Willy Brandt, inaugurated an era of renewed openness towards their eastern neighbors with the so-called *Ostpolitik*. However, a new era of relations between Russia and Europe only came to life with the demise of the Soviet Union in the East and the birth of the European Union (EU) in the West. In fact, just a few years after the independence of the former Soviet Republics, the EU and Russia formalized for the first time their bilateral relations into a comprehensive cooperation agreement. In 1994, the two parties signed a Partnership and Cooperation Agreement (PCA), which came into force on the 1<sup>st</sup> December 1997.

Almost two decades went by and the PCA remains the main legal framework in EU-Russia relations. The agreement was negotiated in the years of Yeltsin's presidency, a period in which Russia was on its way to experience a transition from the Soviet system, inspired by Western principles such as liberal democracy and market economy. Therefore, the PCA was meant to ease and support Russia's transformation after the dissolution of the Soviet Union. In the light of the internal developments which took place both in the EU and Russia in the last twenty years, several provisions of the agreement have become obsolete. Russia developed into a market economy and has eventually acceded to the World Trade Organization (WTO) in 2012. The EU enlarged to twenty-eight member states and gradually extended its competences as the new treaties came into force.

Given the rapid evolution of both political actors and the ever-changing international order of the last twenty years, the PCA seems to have lost much of its effectiveness in managing EU-Russia relations and fails to step up to the common

challenges of the 21<sup>st</sup> century. This is why both parties have long agreed that their bilateral framework of relations needs modernization and negotiations on the conclusion of a new comprehensive agreement were launched in June 2008. However, over the last few years negotiations have stalled, bringing about a more pessimistic view on the possibilities of modernization and eroding much of the initial enthusiasm.

As of 2016, successful negotiations on the most important issues have been seriously jeopardized since the outbreak of the Ukrainian crisis which deteriorated political relations. As a result, the conclusion of a new agreement in the near future is unlikely to take place. Nevertheless, the establishment of trustful and solid bilateral relations relying on practices and institutions formed in early 1990s might be just as hard. Working for the consolidation of strong and trust-based political relations should entail the shared goal of the modernization of EU-Russia legal framework of relations. The two goals are complementary to each other and go hand in hand.

Therefore, the aim of this thesis is to revolve around the issue of the modernization of the legal agreements in EU-Russia relations in order to better appreciate its topical interest and potential contribution to a qualitative leap in bilateral relations.

In order to do so, the first chapter analyzes the international and the internal developments occurred both in the EU and Russia which impinged on EU-Russia relations since the conclusion of the PCA and which were not met by likewise developments and adjustments in their bilateral legal framework. To put it simple, it will focus on “why” their bilateral framework of relations needs modernization. Moreover, the obsolescence of some of the provisions of the PCA and the reasons why the agreement has become politically irritating for Russia are analyzed.



The second step consists of describing and analyzing the content of modernization, namely those issues which are currently hindering the conclusion of a new agreement and which are accountable for the poor state of bilateral relations. In sum, chapter two revolves around the issue of “what” prevents EU-Russia legal relations from successful modernization. The analysis is not exhaustive and cannot cover all minor and major issues concerned in this process. As a result, it is limited to only three dimensions of “what” hampers modernization which are deemed to be among the most important, namely the issues of political cultures and values, energy relations and neighborhood policies. Each of these issues is covered separately and the EU’s and Russia’s diverging perceptions, interests and strategies are explained and critically compared.

Whereas the second chapter dwells on the limits of modernization, the third and last chapter deals with the possibilities for the conclusion of new agreements in the short and in the long term. The main question is whether a new comprehensive and legally binding agreement, whose negotiations were launched in 2008, is a viable and desirable solution for the modernization of bilateral relations, or whether the rejection of legally binding formalism, in favor of more effective multilateral arrangements and more flexible and sector-specific bilateral agreements, is preferable.

Finally, a few recommendations are put forward on the basis of our findings and on the issues examined with the aim of providing general guidelines for future negotiations on the modernization of EU-Russia relations.

## Chapter one

### **1. EU-Russia framework of relations and the need for modernization**

In this chapter our analysis revolves around the reasons why the current bilateral legal framework needs modernization. In order to do so, the historical evolution of the bilateral framework in the last twenty years is addressed first. Subsequently, the reasons why it needs modernization are presented. The analysis starts from those internal developments which took place both in Russia and in the EU in the last twenty years and which significantly changed the context of EU-Russia cooperation which was in place when the PCA was negotiated. It is argued that these developments were not met by likewise developments in the structure of the bilateral legal framework. Finally, the analysis concludes with a short legal assessment of the PCA. The aim is to show not only that the context for bilateral relations has changed, but also that most provisions of the PCA are by now obsolete and cannot effectively tackle EU-Russia challenges of the 21<sup>st</sup> century.

#### **1.1 EU-Russia bilateral framework of relations in historical perspective**

The year 1989 represents a watershed not only for the history of Europe and for world contemporary history at large, but also for the development of the European Economic Community (EEC) - and a few years later of the European Union (EU)<sup>1</sup>- external relations with its eastern neighbors. Even though signs of a conciliation with the East came to the fore already by the early seventies thanks to the so-called *Ostpolitik* initiated by West Germany's Chancellor Willy Brandt, the fall of the Berlin Wall officially brought the Cold War to an end, thus inaugurating a new era in the relations between the members of the EEC and their eastern neighbors. Following

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<sup>1</sup> With the Treaty of Maastricht, signed in 1991 and in force since the 1<sup>st</sup> of November 1993, the EEC was renamed the European Community and was embedded into the EU.

a relatively smooth transition to democratic regimes in countries such as Hungary, Czechoslovakia and Poland, formerly under Soviet control, the European Community straightforwardly committed itself to foster and support in the newly established regimes successful transitions to liberal democracy and market economy.

However, a positive turn in the relations between the EEC and Central and Eastern European Countries<sup>2</sup> (CEECs) was already perceivable in the second half of the 1980s. In 1988, an historical milestone was provided by the adoption of the “Joint Declaration on the establishment of official relations between the European Economic Community and the Council for Mutual Economic Assistance (CMEA)”<sup>3</sup>. The agreement opened a window of opportunity for concluding bilateral Trade and Cooperation Agreements (TCAs) with all CMEA countries, including the Soviet Union, between 1988 and 1990. A year later, the “Poland and Hungary: Assistance for Restructuring their Economies (PHARE)”<sup>4</sup> was launched and was soon extended to other CEECs. Even nowadays, the PHARE program plays a significant role in the EU’s relations with CEECs, as it is one of the three pre-accession instruments to assist these countries in their preparations for joining the EU. Its pre-accession focus dates back to 1993, to the Copenhagen Council’s invitation to CEECs to apply for membership.

Nevertheless, the Community’s unilateral aid instruments, which were put in place for most CEECs in the post-communist period, were not extended to the countries of the former Soviet Union, which could instead benefit from a specific program of Technical Assistance to the Commonwealth of Independent States (TACIS)<sup>5</sup>. This distinction is not to be underestimated since it can be considered as a first sign of the EU’s differentiated policy between CEECs on one hand and the countries of the former Soviet Union on the other. As a matter of fact, this

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<sup>2</sup> Central and Eastern European Countries (CEECs) is an OECD term for the group of countries comprising Albania, Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, Slovenia, and the three Baltic States: Estonia, Latvia and Lithuania.

<sup>3</sup> Council Decision, Official Journal of the European Communities, L 157/35, 1988

<sup>4</sup> Originally French (Pologne Hongrie Assistance aux Réformes Economiques)

<sup>5</sup> The three Baltic states are the only exception, since they were included in the PHARE in 1991

differentiation continued when the EU signed the so-called “Europe Agreements” with the CEECs. These agreements initiated the EU’s model of comprehensive bilateral agreement with its eastern neighbors and were devised to respond to CEECs’ applications for full membership in the EU at the beginning of the post-communist period.

Instead of concluding similar agreements with the former Soviet republics, a new type of external agreement was signed with the Newly Independent States : the “Partnership and Cooperation Agreement” (PCA). These agreements can be considered as an alternative provided by the EU to the countries of the former Soviet Union which were excluded from the conclusion of the EAs. Even if there was apparently no reason to grant former Soviet Republics with a prospect of full membership in the EU, Russia soon turned out to be deeply unsatisfied with the provisions of the PCA since the agreement generally implied a substantial legal approximation of the Russian legal system to the EU’s *acquis communautaire*<sup>6</sup>. Moreover, if on one hand the PCA seemed to be a suitable device to frame the EU’s bilateral relations with most countries of the former Soviet Union, on the other hand it did not consider Russia as an “equal partner” in its relations with the EU. The PCA can therefore be considered as a weaker derivative of the EAs, with weaker commitments and fewer prospects of integration with the EU, and at the same time a unilateral instrument of the EU whose aim was to drive Russia towards an ever-growing compliance with the EU’s standards and regulations.

Finally, with Russia’s growing political and economic assertiveness in the early 2000s and the EU’s recent enlargement and institutional reform process, most of the PCA’s provisions became increasingly obsolete as they were conceived at the beginning of the 1990’s in a completely different bilateral and international context. As a result, the agreement has been subject not only to increasing discontent for its unilateral approach from the Russian side, but also to greater concerns from both the

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<sup>6</sup> The accumulated legislation, legal acts, and court decisions which constitute the body of European Union law

EU and Russia on how to deal with its obsolescence, namely on how to amend or review the current legal framework provided by the PCA.

The relative weakness of the PCA with Russia, signed in Corfu on the 24<sup>th</sup> of June 1994 and entered into force in 1997, was first addressed in 1999 by the EU's Cologne European Council adoption of the "Common Strategy on Russia"<sup>7</sup> (CSR). This was a unilateral attempt by the EU to upgrade the PCA with a new Common Foreign Policy instrument introduced by the Amsterdam Treaty. The CSR reflected the development of the EU towards a stronger involvement in issues such as foreign policy and international crime and it aimed at redefining its relations with Russia in a more coherent and integrated approach. However, after several failures to review and renew the strategy, the document was increasingly ignored and allowed to expire in 2004. The same year the CSR was adopted, Russia responded to the EU by devising its own "Medium-Term Strategy for Development of Relations between the Russian Federation and the European Union". This foreign policy document stressed the importance of an "equal partnership" in bilateral relations with the EU and insisted on a "*joint elaboration and conclusion of a new framework agreement on Strategic Partnership and Cooperation in the 21<sup>st</sup> century*"<sup>8</sup>. Contrary to the EU's strategy which contained detailed instructions and advice on how to reform Russia, the official Russian view was that cooperation should not be conditional to democratic reforms or common values but rather based on the full respect for Russian sovereignty. In President Putin own words, the main different between the two strategies was that Russian emphasized geopolitics, great power interests and the instrumental bases of cooperation.

A second and certainly more successful attempt to revise the legal and strategic framework of EU-Russia relations was the adoption, in the context of the EU-Russia Saint-Petersburg Summit in 2003, of the Common Spaces agenda which replaced the

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<sup>7</sup> Council Decision, Official Journal of the European Communities, L 157/1, 1999.

<sup>8</sup> Medium-Term Strategy for Development of Relations between the Russian Federation and the European Union (2000–2010), <http://goo.gl/VLR4w>.

old and unilateral CSR. For the first time in history, Russia and the EU agreed upon a joint and comprehensive agenda for future cooperation on a wide range of issues. The new agreement established four Common Spaces for future cooperation, namely a Common Economic Space, a Common Space of Freedom, Security and Justice, a Common Space of External Security and a Common Space of Research and Education, including Cultural aspects. As a result, the EU and Russia engaged extensively in various fields of cooperation such as trade and energy cooperation, internal and external security, fight against organized crime, weapons of mass destruction, migration and asylum, culture and education<sup>9</sup>. Their added value to the new strategic framework of bilateral relations replacing the CSR was the adoption, in the framework of the EU-Russia Moscow Summit in 2005, of specific “road maps” whose aim was to provide concrete action points for the implementation of the ambitious agenda.

Contrary to the CSR, which was essentially a unilateral document of the EU, the Common Spaces agenda better reflected Russian insistence on “equal partnership” and “joint ownership” in bilateral relations, leading towards a more pragmatic cooperation, namely a selective cooperation in those areas where Russia and the EU had a clear common interest. Examples of this more pragmatic approach were, among others, the conclusion of visa-facilitation and readmission agreements, the bilateral deal on Russia’s WTO accession and its ratification of the Kyoto Protocol<sup>10</sup>. However, although the Common Spaces agenda may have replaced the CSR as the new strategic framework, it did not replace the legal framework of EU Russia relations. As a matter of fact, the Common spaces agenda has been adopted in the framework of an EU-Russia summit and, therefore, it has a political rather than a legal significance. As a result, the road maps do not replace the PCA as the bilateral legal framework and their implementation has to take place within the PCA.

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<sup>9</sup> For a detailed analysis of the issues covered by the four Common Spaces agenda see : “The European Union and Russia. Close Neighbours, Global Players, Strategic Partners”, European Commission (2007).

<sup>10</sup> Van Elsuwege, P. (2008a), ‘The Four Common Spaces: New Impetus to the EU-Russia Strategic Partnership?’, in Dashwood, A. and Maresceau, M. (eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, pp. 334–359.

However, with the creation of the Common Spaces the new bilateral agenda stretched beyond the areas of cooperation envisaged by the PCA. For instance, relatively new policy areas of the EU, such as the CFSC and the justice and home affairs agenda, which nowadays refer to the Common Spaces of external and internal security, barely existed at the time when the PCA was signed. This is the reason why the EU and Russia agreed to develop a new, comprehensive framework agreement at the EU-Russia Sochi meeting in 2006.

However, negotiations stalled for more than two years due to the worsening of relations between some of the new EU member states and Russia. Negotiations for the new comprehensive agreement were scheduled for the Helsinki EU-Russia summit in November 2006 but their opening was vetoed by Poland as a retaliation to Russia's ban on the import of Polish meat. According to Poland, Russia's measures infringed article 19 of the PCA which states that veterinary or phytosanitary restrictions on trade between the parties are not permissible if applied in an arbitrary or unjustified manner. The Polish meat crisis lasted for a couple of years until January 2008 when the meat ban and other restrictions on Polish products were lifted following a change of government in Poland and Polish Foreign Minister Radoslaw Sikorski visit to Moscow. Additional controversial issues such as the status of Kosovo and that of Russian-speaking minorities in Estonia and Latvia also contributed to the postponement of EU-Russia negotiations for a new comprehensive agreement.

Eventually, negotiations were launched at the June 2008 EU-Russia summit in Khanty-Mansiysk, which was chaired by the new Russian President Dmitry Medvedev. On the wave of a new atmosphere of trust between the parties, the summit was marked by the adoption of a Joint Statement "on the launch of negotiations for a new EU-Russia Agreement"<sup>11</sup>. According to the document, the aim was to conclude a strategic agreement which would provide a comprehensive framework of cooperation

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<sup>11</sup> Joint Statement on the launch of negotiations for a new EU-Russia agreement (2008) <http://goo.gl/S2T2i>

together with a strengthened legal basis and legally binding commitments covering all areas of cooperation included in the four EU-Russia common spaces. In sum, the EU and Russia aimed to establish the necessary legal instruments for the implementation of the Common Spaces road maps. Notwithstanding the new achievements, negotiations were not undertaken until the end of 2008, as a result of the outbreak of the conflict in Georgia in August 2008.

Since 2009, apart from the adoption of the “Partnership for Modernization”<sup>12</sup>, there has been no major improvement in the relations between EU member states and Russia and this situation can be partly though effectively explained with the EU’s enlargement eastwards. With the expansion of its sphere of political and economic influence in Eastern Europe through recent waves of enlargement and unilateral instruments of neighborhood policy, the EU has increasingly come at loggerheads with Russia by interfering with what is known as the post-Soviet space. By strengthening bilateral ties and fostering integration of post Soviet countries with European institutions and NATO without adequately addressing Russia’s strategic interests, the EU has irremediably jeopardized its political relations with Russia, which considers the EU’s increased attractiveness and influence in its neighborhood as a threat to the country’s national security and geopolitical dominance in the region. The Georgian war in 2008 and the Ukrainian crisis in 2014 can also be read as a clash of values and neighborhood concerns and ambitions between the EU and Russia. It goes without saying that in the current state of relations, negotiating a new comprehensive agreement to improve EU-Russia legal framework is a very difficult exercise and that there can be no significant progress with regards to a new strategic partnership without a new common political will based on mutual trust and cooperation. Having said that, it is also true that accomplishing a good level of confidence relying on practices and institutions formed in early 1990s cannot be considered an easier task. This is why working for the creation of a new legal

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<sup>12</sup> Joint Statement on the Partnership for Modernisation, EU-Russia Summit, 31 May – 1 June 2010 (2010), <http://goo.gl/YBwk3>.



framework of EU-Russia relations is to be deemed as important as working for the consolidation of strong and trust-based political relations. The two goals are complementary to each other and go hand in hand.

## **1.2 The evolving context of EU-Russia cooperation**

Much has changed both in Russia and in the EU since the PCA was signed and ratified. Russia has definitely become politically more assertive in the international arena and more prosperous economically than it used to be at the start of the 1990s. A will to fully integrate with the West, which characterized Russian elite especially in the first half of the 90s, gradually yielded the floor to the will to preserve Russia's sovereignty and sphere of influence in the post-Soviet space. Russia even joined the World Trade Organization in 2012, therefore officially completing its transition to a market economy. At the same time, the EU underwent a long and winding process of institutional reform and enlarged several times to comprise twenty eight member states by 2013. However, the legal basis for EU-Russia relations basically stayed the same. It looks like the bridge is too old and weak to support the weight of two heavy lorries wanting to cross to the other end.

### ***a) Russia's evolving stance in bilateral relations with the EU***

The PCA was conceived in the geopolitical and psychological context of the early 1990s, shortly after the dissolution of the Soviet Union. It was signed on the 24<sup>th</sup> of June 1994 in Corfu and entered into force three years later<sup>13</sup>. The procedure for ratification took more time than expected because of the first war in Chechnya, which added to Russia's general political and economic turmoil of the time, and to the fact that every member state of the EU had to ratify the agreement, since the PCA

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<sup>13</sup> Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part' (PCA) (1997), Official Journal of the European Union, L 327/3, <http://goo.gl/31ltE>.

is a comprehensive agreement which envisages area of cooperation which go beyond the EU's exclusive competences.

Russia had lost most of its international prestige after the fall of the Soviet Union, a phenomenon which lately President Vladimir Putin would not hesitate in defining as “the greatest geopolitical tragedy of the 20<sup>th</sup> century”<sup>14</sup>. As a matter of fact, with the demise of the Soviet Union, Russia had lost around a sixth of its territory and 25 million ethnic Russians found themselves to live out of the borders of their homeland almost overnight. Economic conjuncture and projections were also very dark and the so-called “shock therapy” carried out by the then President Boris Yeltsin brought most of the Russian population to its knees. According to the World Bank, by the end of 1993 almost half of the Russian population was living in poverty. Although it was partly due to the decrease in military spending, it is estimated that Russian GDP contracted by an astonishing 40% between 1991 and 1998<sup>15</sup>. On the other hand, Western European countries were experiencing new political unity after the fall of the Berlin Wall and the reunification of Germany, and a new impulse in the field of European Integration. The Maastricht treaty was a significant achievement in the framework of European political and economic integration, as it created the European Union and led to the creation of the single European currency, the euro. Moreover, it established what was to be the pillar structure of the EU, with the first pillar comprising areas of policies for which a supranational approach was foreseen, and with the second and third pillar mostly functioning according to an intergovernmental logic, in which member states were the main decision-makers.

In this positive and promising outlook, adherence to the EU's attractiveness and successful model of economic market was seen by CEECs as a way to distance themselves from Russian dominance and played as a major incentive to hasten their transitions towards democratic forms of state and market economies in order to apply for full membership and benefit from the EU's common market. Therefore, most of

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<sup>14</sup> Vladimir Putin's annual state of the nation address to parliament, 29 April 2005

<sup>15</sup> See World Bank database on Russian Federation for further details

the EU's unilateral instruments worked as "instruments of transition" for those countries who were willing to harmonize their legislations and institutions with those of the EU in exchange of a full-fledged membership in the near future. Although no membership was ever planned for Russia, the PCA also played as an instrument of transition for a country which was back then convinced of the benefits deriving from integration with the West. It is not by chance that the dominant school of foreign policy among the Russian elite at the beginning of the 90s was that of the Westernizers<sup>16</sup>. Represented by the first Minister of Foreign Affairs of the Russian Federation Andrey Kozyrev (1991-1996), this school of foreign policy, which had always been present in Russian history since Peter the Great, advocated the economic, political and military integration of Russia in the West. In the early 1990s integration with the West, chiefly represented by the EU and the US, was considered to be the only viable way in order for Russia to resurge and contribute to the construction of a new international order in which Russia could have a voice and be recognized as a world power. In order to so, Russia was willing, supposing that it really had the choice, to endorse the West recipes and prescriptions oriented to swift democratization and liberalization of economic policies. As a result, the EU was more than happy to offer Russia and other former soviet countries an agreement, the PCA, stemming directly from the EU's nomenclature, therefore implying a strong institutional and legal approximation to the norms and standards of the EU.

However, already by the time the PCA with Russia was negotiated and signed, it was clear that the approximation with EU law and standards was not very appealing for a country which increasingly aimed at becoming a strong regional and independent power. Moreover, in most cases market-oriented economic reforms turned out to be disastrous, at least in the short term. The economic uncertainty of the early 90s, fueled by the "shock therapy" and by economic policies of privatization and liberalization, was the result of Russia's systemic dysfunctions and historical

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<sup>16</sup> For a thorough analysis of Russian schools of foreign policy see: A.P. Tsygankov "Russia's Foreign Policy: Change and Continuity in Russian National Identity", 2006, Rowman and Littlefield, London.

dependence on planned economy, not to mention its lack of a consolidated private sector devoid of any guarantee or protection by the state. However, we can argue that also the West was to be blamed for the failure of Russia's reform process and integration with the former. The Western nations did not provide much of the assistance that the Russian leadership had expected in response to its new pro-Western vision. On the contrary, NATO was expanded eastward while excluding Russia from the process.

Most importantly, the appointment in 1996 of Russia's new Foreign Minister, Evgeny Primakov, was a landmark of a sharp turn in Russian foreign policy. By the mid-nineties Westernizers had lost most of their credit both among the Russian elite and the Russian population. The new dominant school of Russian foreign policy, which will heavily influence Russia's international stance in the following years and up to present, will be that of the Statists. Contrary to the Westernizers, Statist did not agree that Russia had to become part of the West and they advocated an image of Russia as a power holder with its own areas of influence and geopolitical interests. They appealed to the historical notion of *Derzhava*, namely a holder of international equilibrium of power. Conceiving Russia as a *Derzhava* meant that Russia had to be able to defend its self with its own strength, without any reliance or dependence on foreign assistance. This did not imply a confrontation with the West, rather that "Russia was destined to act as a bridge between Western and non-Western civilizations"<sup>17</sup>. According to Russia's National Security Concept of 1997, Russia had to maintain equal distancing in relations to the "global European and Asian economic and political actors".

The failure of Russia's "integration" with the West and the more assertive stance in international relations, revealed Russia's uneasiness in being a "junior" power of the west. The asymmetrical nature of bilateral relations with the EU was also enshrined in the provisions of the PCA and this proved to be irritating for Russia.

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<sup>17</sup> Ibid. pag 99

It is worth to point out that this feeling of political irritation from the Russian side about the PCA was one of the first symptoms of the need to revise the PCA in the framework of a more equal partnership. This symptom emerged even before the ratification of the PCA in 1997, while conviction about its obsolescence both by Russia and the EU and consensus on the need to modernize it was not really present at that time. Both parties did not really elaborate a common approach until the establishment in 2005 of the road maps for the Common Spaces agenda. Evidence of this is provided by the fact that in 1999 both the EU and Russia came up with unilateral strategies on their bilateral relations with quite diverging interests and views.

Even though in the second half of the 1990s Russia became increasingly critical and disappointed with its relations with the EU and the West in general, its aggressiveness and power was mostly rhetorical and deeds did not match the words. The reason why Russia was not capable of pursuing a more assertive foreign policy, thus remaining subjected to the EU's unilateral will, was that it lacked political unity and appropriate economic resources. While the Kremlin lost most of its ability to govern due to internal political fragmentation, energy prices were still low and the economic crisis in 1998 was a heavy blow to Russia's economic recovery. It was not until the mid 2000s that Russia could conduct a truly assertive foreign policy vis-à-vis its western neighbours.

Nevertheless, Vladimir Putin's rise to power in 2000, carried new hopes and enthusiasm for the development of cooperative relations with the West and the EU. In contrast with Primakov's more defensive stance in foreign policy, Putin immediately embraced the idea of Russia as part of the West while endorsing the value of preserving a great power status. He also committed to a new foreign policy towards Europe, even supporting the France and Germany-led coalition of those opposing the unilateral American war in Iraq. At the same time cooperation with the US in the fight

against international crime and terrorism, notably after 9-11 events, was increasingly advocated since Putin and Bush meeting at the Asian Pacific Economic Forum<sup>18</sup>.

It is not by chance that the most significant achievements in EU-Russia relations of the new century were attained in this period. As we stressed earlier, the Common Spaces agenda represented a landmark in EU-Russia relations since it was the first time that the two parties agreed on a joint and comprehensive agenda whose action points ranged from trade and energy to educational and research cooperation. However, this is not to suggest that Russia's discontent for the asymmetrical nature of the legal framework of bilateral relations provided by the PCA was overcome. As a matter of fact, President Putin was among the first to point out the need for a new comprehensive agreement in EU-Russia relations already in 1999.

As it was mentioned earlier, new openness for cooperation on both sides did not last but for a few years. By the time of Putin's second term, relations were back in a state of mounting distrust and belligerency. The main cause for the deterioration of relation can be found in the West's unilateral policy of regime change in the post-Soviet space. Part of this unilateral policy was NATO's second and third wave of enlargement (in 2004 and 2009 respectively), EU's eastern enlargements (2004 and 2007) and the USA and EU's alleged support for the so-called color revolutions in countries experiencing weak post-authoritarian transitional regimes such as Georgia (2003) and Ukraine (2004). According to Putin, they represented a threat to national security as they implied "tragic consequences" for Russia<sup>19</sup>. This also prompted a reaction in Russian foreign policy oriented to establishing stronger control on post-Soviet countries and to shield them from the West's enlarging sphere of influence. Evidence of this change is also grounded in a Russian foreign policy documents such as a new doctrine from 2006 known as "The New Russian Security Doctrine". Quoting his author Sergei Ivanov, Deputy Prime Minister and Minister of Defence of Russia, "*our top concern is the internal situation in some members of the*

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<sup>18</sup> I. Jeffries "Political Developments in Contemporary Russia", 2011, Routledge, p.47

<sup>19</sup> Vladimir Putin's address to advisory Security Council, 20 November 2014.

*Commonwealth of Independent States, the club of former Soviet Republics, and the regions around them*”<sup>20</sup>.

Differently from the late 1990s, this time dissatisfaction with the West’s policies disrespect of Russia’s independence and sovereignty led to a more assertive foreign policy not only in political rhetoric but also in Russia’s active foreign policy in its near neighborhood. Russia was no longer lacking the political and economic means for the implementation of a stronger and assertive foreign policy. While Putin favored a centralization of political power, Russia also recovered economically thanks to the soar in energy demand and in the price of oil and gas. By 2007 the economy had recovered to its 1990 level and economic growth stabilized around 7 percent per year.

In sum, the shift toward assertiveness reflected both the Kremlin’s dissatisfaction with the West’s policies and Russia’s new domestic confidence<sup>21</sup>.

Once again, it is not by chance that negotiations for a new EU-Russia comprehensive agreement completely halted at the beginning of Putin’s second term. Enduring political mistrust and hostility had once again jeopardized a joint modernization of the bilateral legal framework. The opening of negotiations which were scheduled to start in 2006 were vetoed by Poland and stalled for more than two years. The Georgian war was probably the heaviest blow, yet not the only, to the rather strained relations between the EU (and the West at large) and Russia during Vladimir Putin’s second presidential term.

Things seem to take a turn for better in 2009, with the election of Dmitri Medvedev as President after Putin had stepped down, given that Russian Constitution did not allow three presidential mandates in a row. Medvedev’s term can be considered as relatively successful with regards to Russia’s relation with the West.

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<sup>20</sup> S.Ivanov “Russia Must be strong”, Wall Street Journal, January 2006.

<sup>21</sup> A.P. Tsygankov “Change and Continuity in Russian Foreign Policy”, Russian Analytical Digest n° 109, 8 March 2012.

On one hand, it attempted to “reset” the relations with the US in the direction of tightened cooperation and equal partnership<sup>22</sup>. On the other hand in 2010, the new warmth in political relations between the EU and Russia resulted in the adoption of a joint declaration known as “Partnership for Modernization”<sup>23</sup>. Although similarly to the Common Spaces agenda it carried a political rather than a legal significance, this declaration enshrined EU-Russia mutual commitment to address common challenges with a balance and oriented approach, notably in the two broad areas of trade facilitation and strengthening the rule of law.

Finally, despite the declared will to pursue close and mutually beneficial modernization by Putin at the beginning of his third mandate in 2012 and Russia’s accession to the WTO in the same year, political relations with Europe confirmed their unpredictability and fragility with the outbreak of the Ukrainian crisis. For the umpteenth time, a major geopolitical crisis impinged on the possibility of modernizing EU-Russia legal relations. In the current state of play, major achievements in this area are seriously compromised, at least in the short term.

It should be clear by now that internal developments of Russia with regards to its foreign policy dimension towards the EU (and the West at large) since the dissolution of the Soviet Union, were not adequately matched by likewise developments in the legal framework of EU-Russia relations. Russia is by far more powerful both politically and economically today than it was 25 years ago and it has increasingly claimed its rightful sphere of influence in the post-Soviet space. However, the PCA remained “an instrument of transition” devised to pull out a bogged Russia from the mire created by a liquefied Soviet Union. It is not a surprise that Russia is unhappy with it after more than two decades in which there has been no legal upgrading or modernization nor full implementation of the PCA. The unilateral

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<sup>22</sup> For detailed information see : “Assessing the Reset and the Next Steps for U.S. Russia Policy”, Center for American Progress, April 2010

<sup>23</sup> See note 12



and asymmetrical nature of the PCA is nothing but the legal declination of a much broader approach adopted by the EU in its relations with Russia which aims at “taming” Russia and the post- Soviet space through recipes of democratization and market liberalization. In most cases this old school approach irritates Russia and often leads to major geopolitical crises as witnessed in Georgia and Ukraine recently. As we have shown, the deterioration of political relations which is triggered by those crises, leads in turn to the inability to progress with the negotiation of legal agreements. It is therefore a vicious circle which can be broken only by devising a more inclusive and balanced EU approach towards Russia and by changing the rules of the game, that is the legal framework of bilateral relations.

***b) The EU’s internal developments and asymmetry in bilateral relations with Russia***

In the previous paragraph we underlined how Russia’s internal developments and subsequent changes in bilateral relations with the EU were not met by any upgrading or improvement of the legal framework which basically stayed the same. The “crystallization” of the legal framework despite this developments not only led to the obsolescence of the PCA, but also to strained political relations and major geopolitical clashes between Russia and the EU, of which the Ukrainian crisis is only the latest example.

But internal developments are also an important part of the history of the EU in the last twenty years, as it underwent major institutional reforms and several waves of enlargement. At the time of the negotiations of the PCA the legal basis of the EU was the Maastricht Treaty. Since then, the treaty was revised three times, by the Treaty of Amsterdam in 1997, by the Treaty of Nice in 2001 and finally, after a lengthy process of ratification, by the Treaty of Lisbon in 2009. The latter aimed at completing the process started by the former two “with the view of enhancing the efficiency and

democratic legitimacy of the Union and to improving the coherence of its actions”<sup>24</sup> In these lengthy process of institutional reform the EU has considerably extended its competences<sup>25</sup> strengthened the role of the European Parliament and streamlined decision-making in most areas by moving from unanimity to qualified majority voting in the Council of Ministers. It also provided for additional benefits to European citizens by introducing European citizenship, the “European citizens initiative”, which allows to present a legislative proposal to the Commission, and improved protection of rights by making “The Charter on Fundamental Rights”<sup>26</sup> legally binding. Most importantly, thanks to the Treaty of Lisbon the EU acquired legal personality, meaning that the EU is capable of concluding international agreements on its behalf<sup>27</sup>. In “mixed agreements” however, where areas of cooperation go beyond the EU’s exclusive competence, member states have to ratify the agreement. Finally, today the EU can boast a better integrated market than it used to be at the beginning of the 1990s, when not even a common currency was in place.

Furthermore, when the PCA was signed in 1994, the number of EU member states amounted to only twelve. Today, we witness an enlarged EU that has grown over a hundred percent since the PCA negotiations. Back in 1994 it was difficult to imagine former Soviet countries such as Estonia, Latvia and Lithuania and former communist CEECs , such as Czech Republic, Hungary and Bulgaria integrated into the West and full members of the EU. With Croatia’s accession in 2013, EU members amount to twenty-eight, further complicating the creation of a common foreign policy approach towards Russia. In fact, the absence of this common approach has incentivized Russia to deal bilaterally with EU members states on issues such as trade and energy, thereby disuniting the EU in its foreign approach towards Russia even further. Therefore, we face a clear asymmetry within the EU as

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<sup>24</sup> Quoted from the Treaty of Lisbon Preamble.

<sup>25</sup> For further details on EU competences in external relation after the Treaty of Lisbon see: M. Cremona “Defining competences in EU external relations : lessons from the Treaty reform process” in *Law and Practice of EU External Relations*, Cambridge University Press, 2008.

<sup>26</sup> “Charter of Fundamental Rights of the European Union” OJ C 364/1, 2000

<sup>27</sup> For a quick guide to the Treaty see: Explaining the Treaty of Lisbon, EC press release database, 1<sup>st</sup> December 2009.

far as bilateral relations with Russia are concerned. The waves of enlargement which shifted eastwards the borders of the EU in the new millennium, granted full membership to a group of countries (Poland, Bulgaria, Czech Republic etc.) which are characterized by a completely different historical and political heritage of relations with Russia compared to other member states, especially in Western Europe.

EU experts regularly tried to come up with definite categories of member states based on the extent of their “friendliness” towards Russia according to various criteria such as trade and investment flows, energy dependence, political disputes and historical backgrounds.

One of the most prominent study is that of the European Council on Foreign Relations (ECFR) published in 2007<sup>28</sup>. The ECFR identifies five different approaches which best describe the relationship between EU member states and Russia. These approaches range from the most loyal to the most hostile towards Russia. “Trojan Horses”, for instance, are those countries such as Greece and Cyprus, which often defend Russia’s interest in the EU and even veto certain EU proposals. The second group is that of “Strategic Partners” and comprises countries such as France, Italy, Germany and Spain which decided to keep strategic partnerships with Russia in order to enjoy most benefits that go beyond EU policies. Countries which have chosen to keep their business interests as a core factor of their relations with Russia are classified as “Friendly Pragmatists”. Part of this group are small member states such as Austria, Belgium and Slovakia which put their business interests with Russia above political considerations. The fourth category are the “Frosty Pragmatists” which even though keep their business interest as a core factor of relations with Russia, they also criticize it especially for human rights issues. Belonging to this category are countries such as Czech republic, Latvia, Romania, Sweden and the United Kingdom. The last and fifth category is the least loyal and friendly to Russia and belongs to the “New Cold Warriors”. Poland and Lithuania are part of the group

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<sup>28</sup> M.Leonard and N.Popescu “A Power Audit of EU-Russia Relations”, ECFR, 2007.

since they are considered to have the worst relations with Russia among all member states of the EU.

Other studies also highlight the categorization of EU member states according to their foreign policy approach to Russia and the great obstacle that this division within the EU implies for EU-Russia relations and the modernization of their legal framework<sup>29</sup>. EU common voice towards Russia has never been loud but after the two waves of enlargement eastwards and the mounting political controversies between Russian and the new member states, EU common voice towards its largest neighbor has been silenced to little more than a whisper.

This brief analysis of institutional and political developments both in Russia and in the EU in the last couple of decades was meant to illustrate how, despite these remarkable changes, parties did not modernize their legal framework of relations which is based on the PCA since 1994. Therefore, the question of why does the legal framework need modernization was addressed so far. In the last section of this chapter a brief legal analysis of the PCA will be conducted in order to show how most provisions of the agreement fail to effectively address the new context of EU-Russia cooperation.

### **1.3 A brief legal assessment of the PCA**

The Partnership and Cooperation Agreement is the current legal basis for EU relations with Russia. It is a comprehensive agreement and it was signed between the Russian Federation and the European Communities and their member states on 24 June 1994. The ratification procedure was concluded on the 30 October 1997 and the agreement finally entered into force on 1 December 1997.

As we have explained in the first section of this chapter, the long text of the PCA was a weak derivative of the EAs which were concluded with newly CEECs

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<sup>29</sup> See also: S. Braghiroli and C. Carta “The EU attitude towards Russia : Condemned to be Divided?” University of Siena, 2008.

which wanted to apply for future accession to the EU<sup>30</sup>. In fact, from a legal point of view, whereas the EAs are a type of association agreements and were therefore concluded on the basis of art. 310 EC, the PCA is a trade and tariff agreement based on art. 217 TFEU (ex art. 133 EC). Besides their legal basis, association agreements and trade and tariff agreements also differ in the way they are adopted. While the former needs unanimity in the Council of Ministers and the assent of the European Parliament, for the latter a majority vote in the Council is sufficient and no assent from the Parliament is needed.

The EAs are not the only example of the EU's association agreements. Besides them, we have the Association and Stabilization Agreements (for Western Balkans) and the European-Mediterranean Agreement (for South Mediterranean states). The EAs were yet the first model of comprehensive agreements and they were not signed only with EU's neighbors but also with countries as far as Chile. From a legal point of view, the most advanced form of association is the EU-EFTA agreement. EFTA is the European Free Trade Association which includes Switzerland, Norway, Iceland and Liechtenstein.

Although the PCA has a similar structure and scope in terms of policy areas covered as the EAs, the commitments are much more limited in the PCA since in 1994 Russia was not an EU accession candidate and lacked market economy status<sup>31</sup>. Despite mentioning the goal of establishing a free trade area, the PCA does not contain any operative provision about the liberalization of the movement of goods, persons, services and capital. Moreover, contrary to EAs and other association agreements, the PCA is devoid of a clear timeframe for a gradual reduction of customs and equivalent duties aimed at their elimination.

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<sup>30</sup> For a detailed analysis : M.Maresceau, "Europe Agreements : A new form of Cooperation between the European Community and Central and eastern Europe, in : *East Central European States and the European Communities : Legal adaptation to the market economy*, Nomos, 1997.

<sup>31</sup> For a detailed analysis : M.Maresceau "Bilateral agreements concluded by the European Community", *Recueil des cours de l'Academie de droit International*, 2004.

From a strict legal point of view, modernization of the PCA is not an issue. Since 2007, a clause of the treaty has allowed for automatic extension of the PCA every year, thus avoiding the problem of a legal void in EU-Russia relations. In fact, art.106 reads out:

*“This Agreement is concluded for an initial period of 10 years. The Agreement shall be automatically renewed year by year provided that neither Party gives the other Party written notice of denunciation of the Agreement at least six months before it expires.”*

This means that the agreement will live on automatically in the absence of and expressed notice of denunciation from one of the Parties. This has been the case since 2007, when the initial period of validity of 10 years expired. However, as we have stressed so far, the bilateral context of cooperation has evolved profoundly and continuously in a way that the PCA, conceived as an “instrument of transition” for Russia, has become obsolete. Most importantly, obsolescence and redundancy characterizes directly most provisions contained in the PCA.

For instance, the abovementioned asymmetrical nature of the PCA is not only something that can be perceived politically in EU’s relations with Russia. As a matter of fact, it is also well illustrated in art. 55 in relations with the objective of achieving legal approximation of Russia’s legislation to that of the EU :

*“The Parties recognize that an important condition for strengthening the economic links between Russia and the Community is the approximation of legislation. Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community”.*

The fact that the PCA was conceived as an “instrument for transition” in order for Russia to comply with the EU’s legislation and standards is also clearly illustrated in the preamble of the agreement which recognizes Russia as “a country with an

*economy in transition and that continued progress towards a market economy will be fostered by cooperation between the Parties in the forms set out in this Agreement”.*

Since the PCA was devised to favor Russia’s transition to a market economy and progressive integration in the open international trading system, economic commitments to liberalize trade were based on the principles contained in the General Agreement on Tariffs and Trade (GATT)<sup>32</sup>. In this logic, art. 10,12 and 13 of the PCA introduce, respectively, the most-favored-nation principle (MFN), freedom of transit and customs valuation, fees and formalities of import-export, marks of origin and the publication of trade regulations. Furthermore, in the interpretation and application of these provisions, interpretations given to the corresponding relevant articles of GATT have to be taken into account<sup>33</sup>. Despite these and other commitments to economic liberalization and economic cooperation there is no hint to regional integration. Art. 3 does not go beyond a mere consideration of the Parties on “whether circumstances allow the beginning of negotiations on the establishment of a free trade area”.

Moreover, since Russia’s accession to the World Trade Organization (WTO) in 2012, these provisions became redundant. The provisions of the GATT which were incorporated in EU-Russia trade relations at the beginning of the 90s, were largely replicated by the multilateral framework of the WTO which Russia eventually came to be part of<sup>34</sup>.

A part from the redundancy of most economic provision after Russia’s accession to the WTO, a few of these provisions even limit the scope of the liberalization process. It is the case of the so-called safeguard clauses which allow both parties to take adequate measures when imported products may be detrimental

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<sup>32</sup> See PCA preamble.

<sup>33</sup> Article 94 PCA

<sup>34</sup> “Accessions. Russian Federation” WTO 2012. Russia joined the WTO in July 2012 after approval of its accession package on 16 December 2011. A bilateral agreement in the form of exchange of letters with the EU preserves the application of those beneficial market access conditions, such as maritime transport services and movement of people for business purposes, where the PCA goes further than the General Agreement on Trade in Services (GATS).

for domestic products. These concessions are made for “sensitive sectors” such as textiles, coal and steel which are left outside the PCA and are regulated by sector-specific agreements.

Another major shortcoming of the PCA, which came to the fore especially after WTO accession, is the Agreement’s vagueness with regards to energy, one of the most relevant issues in EU-Russia trade relations. This is well-illustrated by art 65 which states that “*cooperation shall take place within the principles of the market economy and the European Energy Charter, against a background of the progressive integration of the energy markets in Europe*”. Since Russia never ratified the European Energy Charter and even withdrew its signature in 2009, EU-Russia energy cooperation only relies on non-legally binding commitments and soft-law mechanisms”. Among these, we have an early warning mechanisms for emergency situations in the energy sector<sup>35</sup> and a common understanding on the preparation of a road map for EU-Russia energy cooperation until 2050<sup>36</sup>. The most relevant base for cooperation in the energy sector is the EU-Russia Energy Dialogue, established in 2000 at the EU-Russia Paris Summit.

Finally, a relevant institutional shortcoming concerns the lack of the possibility to adopt legally binding decisions. Specific bilateral agreements and statements only have a political significance. This is particularly true for the issue of dispute settlement which whose rules of procedures were adopted by the Cooperation Council in December 2003. According to art.110, disputes can be referred to the Cooperation Council when they relate to the interpretation or to the application of the agreement. However, neither the Cooperation Council nor the conciliators can adopt binding decisions upon the parties. Both of them can only adopt recommendations to settle the problem. The fact that the mechanism was not even contemplated in the

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<sup>35</sup> “Memorandum on a Mechanism for Preventing and Overcoming Emergency situations in the Energy Sector within the Framework of the EU-Russia Energy Dialogue”, 2011.

<sup>36</sup> “Common Understanding on the Preparation of the Roadmap of the EU-Russia Energy Cooperation until 2050”, 2011.



Polish meat row shows its weakness and ineffectiveness in dealing with Russia's often arbitrary bans and restrictions in its trade and energy relations with the EU<sup>37</sup>.

In the light of what has been discussed, it should be clear by now that without a thorough modernization of EU-Russia legal framework of relations there cannot be any significant quality leap in EU-Russia relations. As it was argued, it is hard to establish a good level of confidence between the two parties relying on practices and institutions formed in early 1990s. Having said that, after having analyzed "why" the legal framework needs modernization, the question of "what" of the legal framework has to be modernized can be addressed. Thus, the following chapter focuses on the main issues which hamper modernization, namely the issues of values and institutions, energy relations and neighborhood policies.

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<sup>37</sup> For further assessment see: P. Van Elsuwege "Towards a Modernization of EU-Russia Legal Relation?", CEURUS, 2012.

## Chapter Two

### **2. The main issues affecting the modernization of EU-Russia framework of relations**

In the first chapter, the question of “why” EU-Russia legal framework of relations needs modernization was addressed. Ultimately, the main point is that the main arrangements in bilateral relations established in the 1990s are no longer effective in managing EU-Russia relations given the political and economic developments which took place in the last decades both within and between the two parties. The PCA, which underwent no changes at all since 1997, has therefore become increasingly obsolete and has been constantly criticized because of its asymmetrical and unilateral approach with regards to Russia.

Notwithstanding the weakness of this framework to cope with the common challenges of the 21<sup>st</sup> century and the expressed commitment of both the EU and Russia to modernize it, negotiations on the conclusion of a new agreement - which could better reflect internal developments in both political actors and changes in the context of their cooperation - have stalled and lost most of their initial enthusiasm.

In order to better understand the current crisis in EU-Russia relations and the limits to the modernization of their legal framework, we must address the question of “what” hampers this modernization, in other words the most controversial issues which currently do not allow for a qualitative leap in bilateral relations and which require special consideration in the drafting of a new agreement. Although there is indeed a plethora of bilateral and multilateral issues which are currently challenging the stability of EU-Russia relations and, as a result, an effective upgrade of their legal framework, the analysis contained in this chapter is limited to only three core issues, deemed to be among the most important.

The three dimensions of “what” hampers modernization in EU-Russia relations can be identified in the following issues : values, energy and neighborhood policy. Besides the strategic and economic interests put forward by both parties in all of these issues, it can be argued that each of these dimensions reveals the very essence of the EU and Russia conceptions of themselves as political actors and of the international world as a place which either strengthens or challenges their political culture and societal identity. Having said that, a thorough analysis of these three dimensions together with a sound understanding of the conflicts at play in each of them, can help to develop a new and successful approach to the issue of modernization of EU-Russia legal framework of relations.

## **2.1 The issue of values in EU-Russia relations**

Before plunging into the technicalities concerned with EU-Russia energy relations and neighborhood policies, a close attention must be drawn on the issue of values. As vague as it may sound, it has a great impact on the behavioral culture of both actors in the international arena and on their different reactions to similar international phenomena. In contrast with common knowledge, value diversity hardly leads to any cultural conflict or “clash of civilization”. However, this is true only as long as this diversity is accepted and integrated in a wider *ensemble* of common values and values ambiguity is internalized in a pluralist way rather than eliminated or minimized.

Although it is crucial to dig deep into the roots of the crisis of EU-Russia relations, the importance of values and social identities in shaping EU-Russia relations has often been underestimated. As a matter of fact, conflicting interests and diverging foreign policy approaches of EU and Russia are usually analyzed under the

lenses of two major theories and schools of thought in international relations, that is to say Liberalism and Realism<sup>38</sup>.

The main tenets of Liberalism are often used to describe the EU's political and economic nature and the main underpinnings of its foreign policy. The endorsement of liberal democracy, the rule of law and the market economy are among the main features of liberalism which in foreign policy translate into the struggle to strengthen international cooperation, the liberalization of international trade and the promotion and support for democracy worldwide. Furthermore, liberalism is based on the conviction that international cooperation in whatever field can bring to a win-win situation in which all parties gain. The EU's enlargements rounds and neighborhood policy in the last decades well-illustrate how some of the main principles of liberalism find concrete implementation in the EU's foreign policy. In particular, the idea underlying the EU's policies in the near abroad is to establish a circle of "friends" through increased institutional convergence and economic interdependence both among member states and neighboring countries. Strengthened cooperation and mutual interdependence not only brings to shared prosperity, but also to greater stability and peace thanks to the consolidation of democratic practices and institutions in neighboring countries.

On the other hand, the lenses of Realism are often used to read and analyze Russia's foreign conduct. Supporters of this theory are much more skeptical about international cooperation as they mostly consider the international world to be anarchic and devoid of any supranational order. States are the main and very often the only relevant actors in international relations and are bound to play a "zero-sum game" in which their main driver is that of survival and national interest. The idea implies that, just as in a chess match, there is very little space for win-win situations. On the contrary, since there can be no "power vacuum", every time a State "wins" politically, economically or militarily, the others automatically loose. Therefore, in

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<sup>38</sup> For further analysis on Liberalism and Realism : "Security Paradigms", in C.W. Hughes, L.Y Meng "Security Studies, A Reader", Routledge 2011.

the international scene, States will hold tight on their sovereignty and try to maximize their power at the expense of other States. In this line of thought, States are greatly concerned with their own sphere of influence and are willing to preserve it as much as possible from external threats. Russia's foreign policy towards the Commonwealth of Independent States (CIS), namely the post-Soviet space, represents a good example of a realist approach to international relations. In its essence, the realist school highly values the geopolitical factors in foreign policy.

As effective as they may be in explaining certain EU and Russia foreign policy conducts and their stance with regards to other bilateral issues such as trade, energy and security, Realism and Liberalism do not seem to have the right explanatory potential when discussing the differences between EU and Russia's core values inherent to their distinct political cultures. In fact, Liberalism and Realism have more to do with the notion of interests than with the notion of values. However, this latter notion is as important as the former notion since political relations are often "constructed" through the social interaction on basic values between different social identities. This link bridging political relations with social identities, which is missing in both realism and liberalism is instead provided by a third theory : Constructivism<sup>39</sup>. This theory explains how, according to their own social identity and to perceptions of foreign social identities, groups draw political borders and perform their political actions. In our case, constructivism provides a good explanation of the shortcomings of EU-Russia relations from a value-centered perspective as it focuses on the need for shared values and identities as a precondition for successful bilateral cooperation.

In the framework of this brief theoretical introduction, the following questions arise : How can we identify the EU and Russia core values and identities? Moreover, how do they interact with each other, are they shared values? And finally, how do

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<sup>39</sup> For thorough analysis see : A. Wendt, "Social Theory of International Politics", Cambridge University Press 1999

they translate in everyday's international relations and how are they expressed in foreign policy?

***a) Five value-rifts in EU-Russia relations***

Assuming that both the EU and Russia have their own political cultures which were shaped by common yet also by profoundly different historical developments, it can be argued that their social interactions, which ground their broader political relations, take place along five major rifts which are drawn between different and sometimes opposing political and cultural values. Before describing these rifts, it is worth pointing out that political culture consists of perceptions, shared goals and values of the political world. In addition, political cultures include both normative predispositions on how the world should work and empirical understandings of how the world does work. They are the result of a lengthy process of formation and bear the heritage of broad historical phenomena which often led to paradigm shifts in the social and political life of a country or even of a whole continent<sup>40</sup>.

On one hand, European political culture carries the legacy of major historical phenomena such as the Renaissance and the Enlightenment. On the other hand, it would be difficult to understand Russian political culture without taking into account historical phenomena such as the century old Tartar-Mongol domination and the Russian Revolution in 1917 which deeply shaped Russian political culture and behaviors. Furthermore, it can be argued that the different evolutionary paths of Christianity had indeed a strong impact on the formation of distinct political cultures in Russia and in Europe. As a matter of fact, the schism in the Christian church between Rome and Constantinople did contribute to the drawing of a dividing line between Russia and the rest of Europe.

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<sup>40</sup> For an introduction on European and Russian political cultures and their respective values see : R. Bova "Russia and Europe after the Cold War: cultural convergence or civilizational clash?", in K. Engelbrekt and B. Nygren "Russia and Europe: Building Bridges, Digging Trenches", Routledge 2010.

Bearing in mind this conception of political culture, we can identify five main rifts along which European and Russian political culture interact.

- **State-Church relations.** The first rift concerns the political cultures' traditions with regards to the relation between the Church and the State. In European political culture, or broadly speaking in Western political culture, there is a strong tradition of separation between Church and State and their respective spiritual and secular spheres of influence. A brief historical research on this notion immediately reveals that it stemmed and developed mainly from Western and European prominent political and religious figures such as Martin Luther, James Madison, John Lock and Thomas Jefferson. Quoting a speech of the third President of the United States of America: *"I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State"*<sup>41</sup>. In contrast to the stark separation of the secular and spiritual spheres of influence, in Russian political culture we can rather detect a substantial unity of Church and State. Russia expressively recognized the special role of Orthodoxy for the country's history and for the establishment and development of its spirituality and culture<sup>42</sup>. Church, state and society constitute an organic unity and mutually reinforce each other.
- **Governance.** Another major divide can be found in the concept of governance. A founding principle of liberalism and of western governance and institutions is the so-called "rule of law". The principle of the rule of law can be expressed with the idea that governance is exercised through laws to which both the governed and the governing elite are subject. Just as the notion of the

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<sup>41</sup> Quoted from Thomas Jefferson's letter to the Danbury Baptists Association (1802). In his letter, the then President of the USA reinstates the provisions of the Bill of Rights introduced with the First Amendment which prevent the establishment of a national church and government interference with the right of free exercise of religion.

<sup>42</sup> See Preamble of the "Law on Freedom of Conscience and Religious Association", 1997.

separation between Church and State, that of the rule of law is also rooted in the development of the new liberal thinking in eighteenth century Europe. However, historical phenomena such as the Enlightenment and the French Revolution from which this notions sprouted and blossomed, did not extend to impact Russian political culture which by 1721 was already an empire under tsarist rule. As a result, in opposition to the rule of law, Russia has been historically characterized by a system of governance which heavily relies on “personalized authority”<sup>43</sup>, thus implying a predisposition to a succession of strong and autocratic monarchs. The notion of personalized authority comes easily at odds with that of the rule of law, which implies a strong “rationalization” of political authority under the law and a system of checks and balances between main institutions.

- **Sovereignty.** Russia and European political culture also have different values and conceptions regarding the role of the State and the concept of sovereignty. In Russia, a strong attachment to state power can be observed as state institutions and structures have always played a crucial role in the life of Russian society. This also explains the emergence in the last years of the claim of Russia’s own way to democracy, an idea which was defined as “sovereign democracy”<sup>44</sup>. In Russian political culture, sovereignty is mostly conceived and interpreted as a unitary and monolithic concept. Although it does not exclude the existence of diverse groups and interests within its political culture, it requires that they are expressed as a unitary will under a unitary state sovereignty. The main task of the political authority is thus to preserve the state’s sovereignty and territorial integrity both from internal and external threats. On the other hand, in European political culture a weaker attachment to state power leaves space to social pluralism. Sovereignty is a multifaceted

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<sup>43</sup> See note 37.

<sup>44</sup> The term was first coined by Vladislav Surkov, Russia’s Deputy Head of the Administration of the Preseident of Russia, on 22 February 2006 in his speech before an assembly of the Russian political party United Russia.



concept comprising diverse groups, classes and interests which are equally recognized as legitimate and which legitimately compete with each other. This concept is well-illustrated by the gradual emergence in the West of what has been defined the Pluralistic State. Furthermore, the nature of the EU strongly challenges the unitary conception of sovereignty which is instead further dissipated between supranational institutions, members states and regions which in turn represent different levels of sovereignty and governance.

- **Role of the individual.** It goes without saying that European and, generally speaking, Western political culture is based on a strong sense of individualism. This is the main element grounding social pluralism and therefore the assumption that diverse societal groups and interests legitimately compete. However, as described earlier, even though Russian political culture does not deny the existence of different identities and interests, it strongly demands that their will is cast as a unit, as a unitary political will. This is because contrary to European political culture which revolves around the individual, Russian political culture stresses the importance of a collective will and organic unity of social purposes, what is defined as *sobornost*. This is indeed a hallmark which can be found in most Asian political cultures as well. However, often its implications are mostly social rather than political as it is for the case of Russian political culture.
- **Freedom and Order.** The fifth and last rift, which is also closely related to the previous two, can be drawn between the values of freedom and order. The combination of the importance of social pluralism and the strong attachment to individualism in European political culture lead to the asserted primacy of individual rights and freedoms. In addition, there is a strong sensitivity to political and social representativeness in European political culture which sometimes may impinge on the rapidity and effectiveness of the decision-

making process. On the other hand, the fear for chaos and disorder which historically characterizes Russian political culture, provides an explanation for Russia's emphasis on the search for order even if it comes at the expenses of individual rights and liberties. This concerns further grounds the need for a personalized authority with a "firm hand". Russia's turn to a more authoritarian regime under President Putin after the chaos and disorder of post-communist Russia well-illustrates the case.

This short description of the five major value-rifts between European and Russian political culture mostly reveals substantial differences between the parties' perceptions and goals of the political world, which most of the time are at cross-purposes. The next step is to analyze how these political cultures influence and shape EU-Russia bilateral relations and whether a common and shared approach can be devised notwithstanding the abovementioned divides in core values and social identities. Briefly, does social interaction between different political cultures inevitably lead to clashing political relations? If it does, is there a way out?

In order to limit the scope of our analysis we will briefly go through two phenomena which can be considered to be the main current manifestations of European and Russian political cultures in EU-Russia relations: "Europeanization" and "Sovereign Democracy".

### ***b) Europeanization vs Sovereign Democracy***

In EU-Russia relations, the rifts in political cultures seem to have a negative impact on their political relations. But are these rifts themselves responsible for the current crisis in EU-Russia relations? Are they on their own strong enough to hamper modernization or is it the way political cultures are projected into bilateral relations which should be modernized?

Europeanization is one of the ways, arguably the main one, in which European political culture is projected in its external relations, including relations with Russia. According to the Center for European Policy Studies, it can be defined as the set of policies and instruments intended to govern the relations of the EU with its external environment and which aims at the “transformation of national politics and policy making in the line with modern European values and standard”. This goal can be attained through various means such as legal and institutional obligations, objective changes in economic structures and also subjective changes in identity, beliefs and expectations. This logic is strongly present in the PCA, as thoroughly illustrated in the first chapter, as well as in other documents intended to govern EU’s external relations such as the European Neighborhood Policy (ENP). All of these documents are written according to the grammar of the EU’s bureaucratic language and are mostly designed to make neighboring countries, including Russia, comply with the EU-defined code of conduct.

But why is it that the EU can rightfully define norms and standards for others to follow? The reason for this can be effectively described by quoting Romano Prodi’s speech at the European Parliament in 2000:

*“Europe needs to project its model of society into the wider world. We are not simply here to defend our interest: We have a unique historic experience to offer. The experience of liberating people from poverty, war, oppression and intolerance. We have forged a model of development and continental integration based on the principles of democracy, freedom and solidarity and it is a model that works”*<sup>45</sup>

In these line of reasoning, the reason for the projection of the European model into the wider world goes even beyond the idea of Western missionary tradition based on the conviction that the universal nature of its values entitles the West to intervene in the political and social development of other countries. The European model is not

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<sup>45</sup> R. Prodi, “2000-2005: Shaping the new Europe”, 15 February 2000

only a “just” model based on the principles of democracy, freedom and solidarity, but it is also morally worthy because it was born from the experience of liberating people from poverty and war. It is not by chance that the EU as such has been defined as the first truly postmodern political form<sup>46</sup>. The fact that the EU is “post-modern” implies a departure from the main features of modernity such as nationalism, sovereignty and war. The EU was in fact born as a peace project which represented a sharp break with Europe’s past and a sort of redemption from historical aberrations such as the two world wars, totalitarianism and the Holocaust. In short, having reached a moral high peak in history, the EU sees itself as a normative power whose norms can be rightfully promoted and exported in the wider world.

In sharp contrast with Europeanization, we find Russian concept of “Sovereign Democracy”<sup>47</sup>. The idea, which developed shortly after the Color Revolutions in Georgia and Ukraine, is that sovereignty is a precondition for democracy and therefore a means to realize Russian national idea. The idea suggests that Russia should have its own way to democracy and should protect the state and those in power from foreign meddling. It follows that the notion of sovereign democracy can be only at odds with that of Europeanization which implies the imposition of a different normative order through “foreign meddling”. Moreover, it should come with no surprise that this concept stems directly from Russian political culture. As described earlier, Russian political culture is characterized by a strong attachment to state power and an historical quest for order, even when this comes at the expenses of individual rights and freedoms. This is also reflected in the fact that Russian experts and scholars mostly resort to traditional voluntarist doctrines to explain the source of validity of international law. The basic idea underlying this conception is that only state will is creative of international law and that the wills of state are determined by laws of societal development. As a result, voluntarist doctrines are often skeptical

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<sup>46</sup> R. Cooper, “The Breaking of Nations. Order and Chaos in the Twenty-First Century”, Atlantic Books, 2003.

<sup>47</sup> For further analysis see : K. Engelbrekt and B. Nygren “Russia and Europe: Building Bridges, Digging Trenches”, Routledge 2010, pp. 39-99 on norms, values and institution.

about international customary law and consider it as a tool for the imposition of strong normative powers<sup>48</sup>. In this sense, Russia can still be described as a “modern” political entity based on the Westphalian model of nation-state in which sovereignty and hard power have special importance.

Contrary to Europeanization which aims at projecting the European order in the wider world through its normative power, Sovereign Democracy aims at protecting internal order through strengthened state power and authoritarian rule. After all, Putin’s rule was marked by a reconstruction of the power of the Russian state and a deconstruction of the power of oligarchs, civil society and the West.

As conflicting and contradictory with each other as they may sound, Europeanization and Sovereign Democracy represent a different reaction to the same phenomenon. In particular, they are the result of political cultures reaction to the process of Globalization<sup>49</sup>. This phenomenon has been defined by the Organization for Economic Co-operation and Development (OECD) as “an increasing internationalization of markets for goods and services, the means of production, financial systems, competition, corporations, technology and industries”. In a globalized world States and societies are increasingly interconnected and interdependent and the emergence of new local and international actors challenges the State sovereignty in many respects. In order to step up to this challenge States have no choice but to adapt. Various strategies of adaptation can be implemented, however the key variable stays the same : the role of the nation-state. The latter is in fact under great pressure both by the forces of globalization and integration and by the forces of protectionism, nationalism and localism.

It can be argued that Europeanization and Sovereign Democracy are exactly what European and Russian political culture propose as a strategy of adaptation to

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<sup>48</sup> For further analysis on Russian scholarship of international law see: T.Langstrom, “Transformation in Russia and International Law”, Martinus Nijhoff Publishers, 2003, pp. 173-178.

<sup>49</sup> On this point and on the notions of Europeanization and Sovereign Democracy see : S. Medvedev, “Limits of Integration: Identities and Institutions in EU-Russia Relation”, University of Helsinki, 2008.

these opposing forces unleashed by the encompassing phenomenon of globalization. On one hand, the features of European political culture, among which we find social pluralism and a diluted conception of sovereignty, are prone to pool sovereignty with other nations and yield to supranational governance. On the other hand, Russian political culture opts for consolidating sovereignty and reinstating a strong statehood. Both strategies constitute a reaction to globalization and to try to minimize ambiguity of global challenges either by projecting the internal order (EU) or by strengthening and reinstating the internal order (Russia).

However, it is clear that once again both the EU and Russia have opted for unilateral strategies with their respective bureaucracies at their core. What was referred to as the “ambiguities of global challenges”, is being addressed unilaterally in EU-Russia relations with the aim to minimize or eliminate differences instead of internalizing them in a pluralist way. Even though it would be unreasonable for the EU and Russia to change their political cultures, it would be reasonable if not mandatory for them to change the way in which they decide to translate them in their political relations. The forces of globalization, as destabilizing as they may be, provide an excellent opportunity for the EU and Russia to base their bilateral relation on new understandings which overlook the ancestral rifts in political cultures and integrate differences instead of repelling them.

As easy as it may sound, there can be no modernization of EU-Russia legal framework of relations without prior modernization of the social interaction of their political cultures on which the legal framework is based.

## 2.2 Energy issues in EU-Russia relations

The energy issue may seem a marginal and sectoral issue far from the scope of EU-Russia main stage of political relations. However, it is very representative of the latter since it reveals, at the same time, both EU-Russia interdependency and clash of interests. EU-Russia interdependency in energy matters and in the political world at large can be hardly overcome, at least in the short to medium term. Nevertheless, interests can be accommodated and common strategies formed.

### *a) The nature of EU-Russia energy relations*

In order to better understand the nature of EU-Russia energy relations, a few preliminary points have to be covered.

First of all, being it symmetrical or asymmetrical, there is a strong energy interdependence between the parties. The EU is Russia's first trading partner and around 80% of Russian export revenues are directly linked to the EU energy market. Oil and natural gas sales account for almost 70% of Russia's total exports and the EU accounts for more than 70% of these revenues<sup>50</sup>. At the same time, the EU receives approximately 30% of its oil and almost 40% of its natural gas imports from Russia<sup>51</sup>. Energy consumption in Europe is expected to rise in the short to medium term and with the depletion of gas reserves and the absence of short term effects which characterizes EU's attempts to increase energy efficiency, energy imports will inevitably soar. The International Energy Agency foresees that the EU will have to import more than 80% of its natural gas requirements by 2030<sup>52</sup>. With Russia currently providing around half of the EU's natural gas imports, energy

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<sup>50</sup> U.S Energy Information Administration (EIA), Archive, 2014.

<sup>51</sup> "Energy Dialogue EU-Russia. The Tenth Progress Report", The European Commission, 2009.

<sup>52</sup> International Energy Agency (IEA), "World Energy Outlook", 2004.

interdependency will characterize bilateral relations for quite a few years to come. In this scenario, EU's diversification efforts will hardly change the course of events as other gas imports from Norway or Algeria may only complement but not replace Russia as EU's main supplier of natural gas.

In addition to their energy interdependency, the EU enlargements in 2004 and 2007 had important implications for EU-Russia energy relations. Most of the countries which became members of the EU in those years such as Bulgaria, Hungary, Poland, Romania, Slovakia, Estonia, Lithuania, Latvia and Czech Republic are mostly if not entirely dependent on Russian gas supplies. As demonstrated by the 2006 Ukraine gas crisis, gas cuts had an instant effect on these countries which lost from 15% up to 40% of their gas supplies from Russia almost overnight. EU enlargements in the last decade have hence led to the sharpening of two phenomena. On one hand, the goal of coming up with a coherent and cohesive energy policy at the EU level has increasingly drifted beyond reach. Given members states' varying degrees of energy dependence on Russia and their heterogeneity of energy production and preference for different sources of energies, decision-making in energy policy at the Community level has weakened and fragmented in the last decade. As a result, instead of a multilateral approach towards energy relations with Russia, a strong bilateralism has emerged in the last decade. This is well illustrated by the long-term contracts deals between Gazprom and the national energy companies of EU's main net importers such as Germany's EON, Italy's ENI and France's Gaz de France Suez<sup>53</sup>. Along with wide spreading bilateralism, EU-Russia energy relations also suffered from a revived politicization after the enlargements. In the last years, there seems to be little doubt that Russian political leadership was exploiting its status of "energy superpower" to control energy resources, maximize revenues and pull countries with a pro Western stance in the post-Soviet space dominated by Moscow<sup>54</sup>.

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<sup>53</sup> E. Kirchner, C. Berk, "European Energy Security Co-operation: Between Amity and Enmity". *Journal of Common Market Studies*, 2010.

<sup>54</sup> For more on Russian bilateralism in energy cooperation with the EU see : K.Engelbrekt, I. Vassilev, "European energy policy meets Russian bilateralism" in K. Engelbrekt and B. Nygren "Russia and Europe: Building Bridges, Digging Trenches", Routledge 2010.



Although Russian “pipeline diplomacy” or “energy blackmailing” practices have been mainly conducted against countries of the CIS such as Georgia, Belarus and Ukraine, their resort largely impacts EU members states especially those which recently joined the EU and are highly dependent on Russian gas supplies. It is interesting to note that the two phenomena of bilateralism and politicization in energy relations were greatly strengthened by EU’s 2004 and 2007 eastern enlargements.

Thirdly, what further complicates EU-Russia energy relations is the spatial and logistical dimension of gas trade. It is a remarkable difference when compared for example with the oil trade. Whereas the latter has a global dimension, the former is dependent on transport through inflexible pipelines and therefore countries usually lack alternatives in terms of trade routes and suppliers. Moreover, even though the technology of Liquefied Natural Gas (LNG) allows for gas transportation via the sea on a global scale, it may be viable only in the long term since at present requires expensive technology and special infrastructure. These explains why gas crisis with Russian state-owned giant Gazprom have immediate impacts on energy availability in the EU’s consumer countries.

Lastly, the EU and Russia display opposite approaches towards their own energy security. On one hand, the EU is primarily concerned with its energy “security of supply”, defined as the availability of energy in sufficient quantity and at affordable prices. On the other hand, Russia’s energy relations with Europe are based on the quest for “security of demand”, which entails the quest for a market for its energy exports which correlates to increased revenues<sup>55</sup>. In particular, given the substantial shortage of Russian modes of transportation to alternative markets in Asia, Russia’s quest for security of demand is mainly about selling gas to EU

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<sup>55</sup> See note 47.

countries and ensuring long term access to the European energy market by directly controlling gas sales and distribution networks.

It is clear the EU and Russia share the concern for energy security, yet the opposing dimensions of what they mean by energy security result in conflicting interests in their energy relations.

Ultimately, the rooted interdependence in their energy relations, EU's eastern enlargements in 2004 and 2007, the regional dimension of gas trade and the respective dimensions of energy security are some of the main reasons which explain the complexity of EU-Russia energy relations and, as a result, the challenge which a legalization of this relationship in a broader bilateral framework has faced.

### ***b) Legalizing EU-Russia energy relations***

It is hard to argue that EU-Russia energy relations ever had a legal framework. As we have noted in the first chapter, the PCA did include a section on energy yet it was almost exclusively drawn from the Energy Charter Treaty (ECT) which was never ratified by Russia which even decided to withdraw its signature in 2009. The ECT is a binding international treaty, born out of a Dutch initiative from 1990, whose aim is “to strengthen the rule of law on energy issues by creating a level playing field of rules to be observed by all participating governments”<sup>56</sup>. Initially designed to establish a legal framework for energy investments and trade with former Soviet states, it regulates energy issues so as to provide participating countries with secure and stable access to energy resources, to attract and protect investment and to ensure a reliable and free transit of their energy resources to their consumers. For countries which are net importers of energy resources such as the EU, the ECT provides quite effective multilateral regulations to ensure energy “security of supply”, namely the availability of sufficient supplies at affordable prices. Therefore, the EU's reiterated

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<sup>56</sup> The Energy Charter Treaty (1994) <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>

call for Russia joining the treaty should come with no surprise, since it represented the best option to increase the reliability and predictability of energy inflows and hence to de-politicize energy relations with Russia. However, the principles of the ECT are hardly compatible with Russian interests as its withdrawal from the treaty demonstrates. In fact, the ECT transit provisions imply third party access to energy transport infrastructure. To put it simple, they would subject Russia's pipeline network to multilateral regulations promoting "reliable cross-border energy transit flows and non-discriminatory conditions for trade in energy materials"<sup>57</sup>. The ultimate goal for the EU would be to de-monopolize the EU's energy trade with Russia and its pipeline monopoly, a monopoly that Russian gas giant Gazprom is not willing to give away for obvious geopolitical and economic reasons.

Despite the ECT substantial failure in providing a legal framework for EU-Russia energy relations, bilateral cooperation in this field was pushed forward thanks to the establishment of the Energy Dialogue which was set up at the sixth EU-Russia summit in Paris on 30 October 2000. Although it may be considered as a weaker derivative of the ECT and as a second attempt of the EU to link Russia to at least some of the principles of the ECT, it must be noted that the energy dialogue was warmly welcomed by the two parties. Most importantly, it had the virtue of establishing a diplomatic forum which improved the institutional framework of bilateral energy relations by setting up annual summits and regular expert group meetings. Moreover, the energy dialogue was recently strengthened by other soft law mechanisms such as the aforementioned early warning mechanisms, for likely interruptions of gas and electricity supply, and the establishment of an EU-Russia Gas Advisory Council which brings in the expertise of leading EU and Russian gas companies and academic research organizations. Finally in 2011, a longer term commitment for strengthened energy cooperation was reflected in the "Common Understanding on the Roadmap of the EU-Russia Energy Cooperation until 2050". In spite of these achievements, disagreement is still firm on a number of issue, arguably

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<sup>57</sup> Ibidem.

the most crucial, such as contracts on gas transit and gas pricing while the creation of a common energy market between the EU and Russia is beyond the horizon. In addition to disagreements on substantial issues, it is worth noting that the energy dialogue, namely the most relevant base for EU-Russia energy relations, does not have any legal significance as it is merely a political platform devoid of any binding decision or commitments. Just as the Common Spaces agenda or the Partnership for Modernization, the Energy dialogue can be defined as a broad and ambitious agenda which is not matched by adequate means of implementation. To take matters worse, its operation has been largely put on hold as a result of the Ukrainian crisis and “its gradual, selective and conditional re-launch could be considered provided the overall geopolitical situation linked to Ukraine allows”<sup>58</sup>.

As a result of the failure of the ECT and the poor performances of the Energy Dialogue in providing a legal framework for EU-Russia energy relations, the EU has increasingly relied on the liberalization of its internal energy market to legalize its energy relations with Russia. Since the late 90s, the EU has passed several packages of directives with the goal of creating a cohesive policy to energy issues. The First Package introduced the first set of common rules for the internal electricity market which were extended to the natural gas market two years later. In the early 2000s a Second Package was introduced with the aim of further liberalizing energy supply and production. The logic underlying these measures was to modernize and restructure European electricity and gas markets by breaking up state-owned energy monopolies. This new approach, which focused on the internal market instead of relying on international treaties or bilateral arrangements with Russia, crystallized with the EU’s 2006 Green Paper entitled “Secure, Competitive and Sustainable Energy for Europe”. This broader approach singled out competitiveness and

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<sup>58</sup> M.Sefcovic, “The state of play of EU-Russia Energy relations”, European Commission Press Release, 24 March 2015.

reasonable price levels, the security of supply and the environmental sustainability as the main objectives for achieving an internal energy market<sup>59</sup>.

The Green Paper was published shortly after the Ukrainian gas crisis in 2006 which raised serious doubts among members states on Russia's reliability as main gas supplier. A year later, the Green Paper was followed by another package of EU directives: the Third Energy Package. This third wave of directives pushed the liberalization of the EU's internal energy market even further. Most importantly, it introduced the concept of "ownership unbundling" which was to become an irritant requirement for Russia. In fact, similarly to the ECT transit provisions, this notion runs counter to the notion of a vertically integrated company such as Gazprom. While a vertically integrated company operates in the whole energy value chain comprised of production, transportation and distribution of energy, the ownership unbundling requirement implies the separation of these functions. In this line of reasoning, energy companies are required to sell supply networks or to place them under entirely independent management. Moreover, a reciprocity clause stipulates that companies from non member states can operate in the EU market only under the same unbundling principle, a clause which is also known as the "territorial clause" or, more infamously, the "anti-Gazprom clause" since it is allegedly directed against Gazprom's access to European markets. In this sense, the ownership unbundling requirement clashes with Russia's and Gazprom objective of stipulating long term contracts and directly controlling sales in the European market<sup>60</sup>.

To conclude, an outright legalization of EU-Russia energy relations has never seen the light of day. Tellingly, we had to wait Russia's accession to the WTO in 2012 to witness a morsel of legalization in energy relations. In fact, general WTO principles such as the MFN and the National Treatment (NT) also apply to energy

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<sup>59</sup> For further analysis on the same issues : L. Pick "EU-Russia energy relations : a critical analysis", POLIS Journal Vol.7 University of Leeds, 2012.

<sup>60</sup> L. Tichy, "Controversial Issues of the EU-Russia energy relations", CENAA, 2012.

trade. A part from that, the relevant base for cooperation remains the Energy Dialogue, a currently put on halt diplomatic platform which does not provide any legal framework to EU-Russia energy relations.

This seems to suggest that it is difficult to base a legal framework on opposing views and interests in energy relations such as liberalized energy markets and multilateral regulations on one hand and monopoly policies on the other. Similarly to Europeanization and Sovereign Democracy in the issue of values, the EU and Russia are displaying “modern” instead of “postmodern” strategies in energy issues as well. They represent unilateral strategies aimed at preserving or projecting their own order in the new globalized context of EU-Russia relations.

Currently, staunch economic liberalism on one side and monopolistic practices on the other seriously hamper legal modernization in bilateral energy cooperation. Both parties seem to forget what their energy cooperation is based on, namely a critical interdependence and the assurance of greater energy security in a common energy market.

### **2.3 The issue of neighboring policies**

The third issue which significantly accounts for the current state of EU-Russia relations is that of the parties’ interests and strategies towards their common neighborhood, or what was defined in a more sober way in bilateral documents as the “regions adjacent to the EU and Russian borders”<sup>61</sup>. In the last decade, in particular since the outbreak of the so called “color revolutions” in 2004, the EU and Russian foreign policies in their shared abroad have increasingly diverged and conflicted, turning their common neighborhood in a competitive battle ground rather than a cooperative playing field. The confrontational stance which developed in the last few years led to greater instability in the region which has seriously jeopardized the possibility of modernizing EU-Russia relations through the negotiation of a new legal

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<sup>61</sup> Road Map and Common Space of External Security, (2005). [http://ec.europa.eu/delegations/russia/documents/eu\\_russia/road\\_maps\\_en.pdf](http://ec.europa.eu/delegations/russia/documents/eu_russia/road_maps_en.pdf)

framework. This is mainly the result of long standing neighboring issues in the post-Soviet space, such as the so-called “frozen conflicts”<sup>62</sup>, which were simply dragged out from under the carpet after the fall of the Soviet Union and remained unsettled for decades.

***a) EU’s and Russia’s perceptions of their common neighborhood***

One of the reasons why EU-Russia relations are highly sensitive to the approaches that the parties adopt vis-à-vis their common neighborhood, is that both the EU and Russia can be considered as evolving political actors whose spheres of influences are continuously challenged and redefined. In the EU, a clear sign of this can be found in its frequent and progressive treaty reviews, in recent enlargements and evolving relations between its institutions and the members states as far as the distribution of powers and competences are concerned. With regards to Russia, as thoroughly illustrated in the first chapter, its political and economic system has undergone remarkable evolutions which only a few other countries have witnessed in the post-Cold War era. Still today, relevant political and economic developments such as Russia’s projects of Eurasian regional integration characterize the country as a dynamic political reality. The evolution of the EU and Russia as international political actors is primarily reflected in their neighborhood relations which have become not only increasingly dynamic but also tense and problematic. For the very first time a powerful actor has emerged just next to Russia. It tends to block Russia’s expansion and it may even pose a threat of eliminating Russia from the European order. Russia has never faced a single Europe and for much of its history it has always remained a crucial component of the European balance of power<sup>63</sup>.

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<sup>62</sup> Such cases include Abkhazia and South Ossetia in Georgia, the autonomous and contested region of Nagorno-Karabakh between Azerbaijan and Armenia, the region of Transnistria bordering Moldova and Ukraine’s eastern border and Novorossiia, which includes breakaway areas in Ukraine.

<sup>63</sup> M. Kaczmarek, “The policy of Russia towards the European Union”, Center for International Relations, Warsaw, 2005.

From a theoretical perspective, it seems that Liberal and Realist conceptions of international relations shape most of the EU and Russia's perceptions and policies in their common neighborhood. In this sense, major international geopolitical crisis as recently witnessed in Georgia and Ukraine can be effectively analyzed in the framework of the conflict between the views and understandings of the international political order which these theories imply. On one hand, in the EU political elite there is the conviction that Europe can be kept whole and free on the basis of the EU fundamental liberal principles such as, but not limited to, democracy, the rule of law and human rights<sup>64</sup>. The respect for such principles is also a precondition for the conduct of foreign relations with other international actors<sup>65</sup>. On the other hand, this liberal approach to international relations is at odds with Russia's more realistic perception of the international order which, accordingly, is considered as an arena of competition in which concepts such as "zero sum game" and "power vacuum" retain their significance. Quoting President Putin : *" if Russia were to abstain from an active policy in the Commonwealth of Independent States or even embark on an unwarranted pause, this would inevitably lead to nothing but other, more active, states resolutely filling this political space "*<sup>66</sup>.

What Putin had in mind was mainly the EU and the North Atlantic Treaty Organization (NATO) eastern expansion in the post-Soviet space. As a matter of fact, the latter is characterized by special political, economic, historical and cultural ties with Russia which in turn claimed to have "privileged interests" in this area and a legitimate sphere of influence which cannot be undermined by competing foreign forces. In this line of reasoning, Russian policies towards the post-Soviet space can be regarded as lying on a continuum between domestic and foreign policy or as an extension of domestic policies. Russia considers the EU as a potential center that may attract post-Soviet countries, which directly weakens Moscow's power to integrate

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<sup>64</sup> From article 2 TEU

<sup>65</sup> From article 21 TEU

<sup>66</sup> President Vladimir Putin speech to Russian Ambassadors in Moscow, 12 July 2004.



the post-Soviet area. At the same time, developments in this region have a strong impact on Russian domestic policies. Pro-Western or European shifts of even some of these countries such as Ukraine and Georgia, can therefore impact Russia's internal political developments as well<sup>67</sup>.

### ***b) Competing strategies in a fragmented neighborhood***

As a result of their different perceptions and strategic interests in the post-Soviet space, the EU and Russia have also elaborated different neighborhood policies and strategies, once again mostly being unilateral and in competition with each other. In 2004, the EU launched the European Neighborhood Policy (ENP), a new instrument of foreign policy with the aim of establishing closer ties with those countries located at the East and South of the EU in order to ensure security, stability and prosperity around its borders. The logic of the ENP is that partner countries are offered financial assistance and “a stake in the internal market” in return for legislative and regulatory approximation to EU standards and norms. Approximation shall be carried out through political and economic reforms set out in specific Action Plans (APs). According to the European Commission “Country Reports” on the political, legislative, economic and social situation of the partner country concerned, each AP establishes a list of priorities for reform which the country has to implement in exchange for a close relationship with the EU.

It is worth to remark that the ENP did not develop accordingly to the classical legal procedures provided by the Treaties, but it rather involved particular interplays among EU's institutions, notably between the Commission and the Council, including the High Representative (HR) for the CFSP. In particular, while the Commission is in charge of elaborating APs for partner countries and of drawing up periodic progress reports on their implementation in cooperation with the HR for CFSP, the Council decides on the development of the Partnerships and on the review

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<sup>67</sup> For a thorough analysis on this issue see : H. Adomeit, “Russia and its Near Neighbourhood : Competition and Conflict with the EU”, Natolin Research Papers, April 2011

of their financial assistance. The ENP institutional arrangements, although not designed to prepare for membership, heavily borrow the main features of the enlargement policy and the pre-accession strategy. The ENP is in fact conceived as a comprehensive promotion of the EU's values and standards in its close neighborhood<sup>68</sup>.

Having said that, it is not by chance that Russia politely refused to become part of the ENP and opted for the more balanced approach offered by Common Spaces agenda established in 2005. However, Russia's irritation and opposition could hardly be concealed when the Eastern dimension of the ENP was launched. In 2009, following a Polish and Swedish initiative in 2008, the Eastern Partnership (EaP) was inaugurated with the aim of improving political and economic relations with six post-Soviet States considered of "strategic importance", namely Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine. Through the EaP, the EU aims at strengthening relations with its Eastern neighbors mainly through the conclusion of Association Agreements and Deep and Comprehensive Free Trade Agreements, as it was recently the case for Georgia, Moldova and Ukraine. The promotion of human rights and the rule of law in these countries is also at the core of the EaP<sup>69</sup>. Russia critically reacted to the new unilateral initiative and defined it as a "blatant and unacceptable attempt to extend the EU's sphere of influence in post-Soviet countries"<sup>70</sup>. In 2008, referring to the post-Soviet space, Russia's foreign minister Sergey Lavrov had already condemned all attempts to intervene from outside in determining "the paths along which these countries are developing" and reinstated that Russia is the country where their privileged interests are concentrated. Evidence from the last years suggest that the EU turned a blind eye on these claims

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<sup>68</sup>For further analysis : C. Hillon, "The EU's Neighbourhood Policy towards Eastern Europe", in *Law and Practice of EU External Relations*, Cambridge University Press, 2008.

<sup>69</sup> Joint Declaration, Prague Eastern Partnership Summit, 2009. For more information see the Eastern Partnership Key Documents, available at : [http://www.eeas.europa.eu/eastern/docs/index\\_en.htm](http://www.eeas.europa.eu/eastern/docs/index_en.htm)

<sup>70</sup> "EU Expanding its Sphere of Influence, Russia Says.", *Euobserver*, 21 March 2009.

and it is currently aiming at differentiating its neighborhood policy in partner countries according to their specificities and needs<sup>71</sup>.

However, Russia did not just stand by and watch. In turn, it reinvigorated its projects of regional integration with the CIS with the goal of reinforcing economic integration and forming an alliance between post-Soviet states. Shortly after the inauguration of the EaP by the EU, Russia established a Custom Union with Belarus and Kazakhstan entailing common external tariff policy and the elimination of tariff and non-tariff barriers. Subsequently, growing economic integration was confirmed by the establishment in 2014 of the Eurasian Economic Union between the same countries, with Armenia and Kyrgyzstan acceding in 2015. The long awaited “Eurasian Union”, whose idea was first introduced back in 1994 by Kazakhstan’s President Nursultan Nazarbayev, introduced among its member states the free movement of goods, capital, services and people, common transport, agriculture and energy policies, with provisions for a single currency and greater integration in the future.

Besides reinforcing political and economic ties with the CIS, the EEU was also conceived in order to counterbalance Western integration unions such as the EU and its EaP. It is not by chance that Russia’s Eurasian integration projects heavily rely on EU’s governance experience for the development of its institutional arrangements. As openly declared by Vladimir Putin in 2011 : *“it took Europe 40 years to move from the European Coal and Steel Community to the full European Union. The establishment of the Customs Union and the Common Economic Space is proceeding at a much faster pace because we could draw on the experience of the EU”*<sup>72</sup>. As a matter of fact, the EEC has developed, in a relatively short time, both supranational

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<sup>71</sup> For updated information on the ENP : “Progress reports on implementation of the European Neighbourhood Policy”, adopted on 25 March 2015. Available at : [http://eeas.europa.eu/enp/documents/progress-reports/index\\_en.htm](http://eeas.europa.eu/enp/documents/progress-reports/index_en.htm)

<sup>72</sup> V.Putin “A new integration project for Eurasia: The future in the making”, *Izvestia*, 4 October 2011. Full version available at : [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/d-ru/dv/dru\\_2013\\_0320\\_06\\_/dru\\_2013\\_0320\\_06\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-ru/dv/dru_2013_0320_06_/dru_2013_0320_06_en.pdf)

and intergovernmental institutions which highly resemble the EU's political architecture. Comparably to the EU, the EEU is endowed with the Supreme Economic Council composed of the heads of the member states, the Eurasian Commission as the executive body of the Union, the Eurasian Intergovernmental Council composed of the prime ministers of the member states and even a judicial body known as the Court of the EEU. Although the EEU is still far from the level of integration of the EU and will hardly include any significant political integration in the near future given Kazakhstan's current opposition to delegate any sovereignty to the Union's institution, it is becoming an influential trading block in Eurasia which can boast a gross domestic product of over 4 trillion dollars and a single market with almost 190 million people.

However, the EEU success is not only ascribable to its attractiveness for CIS countries, but also to Russia's coercive and intimidating practices towards the latter to join the Union. Contrary to the EU, relations within the EEU are highly asymmetrical since Russia enjoys a much stronger leverage both in multilateral and in bilateral relation with Belarus and Kazakhstan. The fact that both countries made clear that their political autonomy was not to be challenged in the EEC Treaty provides evidence for this. In addition, it can be argued that Russia resorted to coercive pressures even with regards to countries involved in the EaP such as Moldova or Ukraine and to new members such as Armenia, which relies on Russia's military protection, and Kyrgyzstan, whose gross domestic product is highly dependent on remittances from its own citizens working in Russia. This suggests that membership in the EEU is not based solely on the voluntary decision of a candidate country, but can be induced by making an offer that the country's leadership simply cannot afford to refuse<sup>73</sup>.

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<sup>73</sup> S. Stewart "The EU, Russia and a Less Common Neighbourhood", German Institute for International and Security Affairs, 2014.

To put it briefly, it is clear that in the EU-Russia common neighborhood two different and competing projects of integration are in place. Both the EU and Russia, in their own ways, are trying to “win friends” in the post-Soviet space. Post-Soviet countries are not sure whether to change “party” or not : the one offered by the EaP seems appealing, however Russia’s party is not over yet and Russia urges them not to leave. Joking asides, the “geopolitical games” which are being played by both sides can turn out to be detrimental and destabilizing for their common neighborhood. As recent events have shown, the EU and Russia –not to mention NATO- are eroding the “buffer zone” between them, thereby compelling post-Soviet states to choose either of the two blocs. In fact, full membership of the EEU and DCFTAs with the EU are mutually exclusive since members states of the EEU loose part of their sovereignty over trade policy and share common tariffs that are incompatible with the elimination of tariffs foreseen by the DCFTAs<sup>74</sup>. This incompatibility abruptly surfaced in the outbreak of the Ukrainian crisis when Russian backed Ukrainian President Viktor Yanukovich was intimated not to sign an Association Agreement with the EU and to opt for closer ties with Russia. Legal and political frictions concerning the position of Ukraine and other post-Soviet countries with regards to their relations with the EaP and the EEU are seriously undermining Russia-EU relations and hence complicate the modernization of their legal framework. As correctly pointed out by Lavrov, the EU (and the West) should refrain from “determining the paths along which these countries are developing”. So should Russia. In post-Soviet countries, both parties should avoid accelerating developments artificially and shaping untransparently the requests of the countries concerned.

The goal of this chapter was to highlight the main issues currently challenging the negotiation of a new bilateral framework in EU-Russia relations. Conflicting perceptions, interests and policies in the fields of political values, energy relations

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<sup>74</sup> L. Delcour and H. Kostanyan, “Towards a Fragmented Neighborhood : Policies of the EU and Russia and their consequences for the area that lies in between”, CEPS, 2014.

and neighborhood policies have halted this process and contribute to a rather pessimistic view on the future of EU-Russia relation and their legal agreements. However, a better understanding of “what” hampers modernization is a first step to avoid future misunderstandings and to forge new and common strategies which can yield to a more constructive and mutually beneficial era in bilateral relations.

## Chapter Three

### **3. Limits and possibilities for a new legal framework**

Having analyzed in the first chapter “why” the EU-Russia bilateral framework of relations needs modernization and, in the previous chapter, the three dimensions of “what” is currently hindering this process, this chapter is entrusted with the demanding task of dwelling on the limits and possibilities in drafting a new legal framework, namely on “how” this modernization process should actually take place.

As the second chapter has attempted to demonstrate, the process of modernization of EU-Russia legal framework is, for the time being, challenging at best. The two parties come from different political cultures and have mostly opposite approaches to the core issues of energy relations and neighborhood policies. At present, contradictions in bilateral relations have crystallized and came to the fore with the outbreak of the Ukrainian crisis. This leaves little scope for negotiations on a new legal agreement and sets clear limits for the process of modernization. This suggests that in the long run, what is needed is a change in the political will of both political leaderships who seem to benefit from the current situation of widespread mistrust and enmity in bilateral relations.

Having said that, in the next few years, are there any possibilities of modernizing the bilateral framework notwithstanding the poor state of current political relations? Is there any chance of establishing a new legal framework which can better adapt to the rather dynamic and conflictual EU-Russia relations? Most importantly, is a new comprehensive and binding bilateral agreement as wished for in 2008 a viable and desirable solution?

### 3.1 Options for a new legal framework

Since 2007, the year in which the initial duration of ten years of the PCA formally expired, there has been a lot of discussion around the issue of how to modernize the agreement. Suggestions have ranged from simple extension and revision of the PCA to the formulation of a new bilateral treaty comprising the commitments and achievements made in bilateral relations since the PCA's first entry into force<sup>75</sup>.

In order to have a general view of the possibilities for the modernization of the agreement which have been discussed back then and most of which are still valid nowadays, it is worth to recall briefly at least some of them together with their implications and goals.

According to Emerson, Tassinari and Vahl, there could be six scenarios for the post-2007 outlook of EU-Russia relations<sup>76</sup>. They are described from the least to the most innovative and ambitious option for the modernization of the legal framework and they can also be understood as lying on a short-medium-long term timeline:

- The first scenario foresees the repeal of the PCA without replacement. Given the obsolescence and asymmetrical nature of the PCA, its retirement is not inconceivable. Moreover, Russia's accession to the WTO in 2012 has introduced a new multilateral legal base for EU-Russian trade relations which can now do without most of the outdated and redundant provisions of the PCA. However, given the poor state of political relations between EU and Russia, the

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<sup>75</sup> For a comprehensive outlook on the possibilities for a new EU-Russia agreement discussed in 2007 see : "The Elephant and the Bear Try Again. Options for a New Agreement between the EU and Russia", Center for European Policy Studies, 2006. It includes contributions of A.S. Makarychev, N.Arbatova and T. Bordachev, among others. This chapter makes special reference to the scenarios for the negotiations of a new agreement foreseen by M. Emerson, F.Tassinari and Marius Vahl, since it better serves the goal and scope of our analysis.

<sup>76</sup> M. Emerson, F. Tassinari, M. Vahl "A New Agreement between the EU and Russia: Why, What and When?", in "The Elephant and the Bear Try Again. Options for a New Agreement between the EU and Russia", Center for European Policy Studies, 2006.



act of repealing the PCA by one of the two parties<sup>77</sup>, might appear as a further political rupture which both parties, especially the EU, would prefer to avoid. This scenario has therefore not been the case since 2007.

- The second scenario, which we have witnessed to in the last years, is that of the extension of the status quo. As a matter of fact, the PCA has continued to live on and extended year after year since 2007 alongside the negotiation of sectoral agreements. It can be stated that the latter have been quite successful as far as Russia's WTO accession and the implementation of part of the agenda of the four Common Spaces is concerned. However, in the light of what we have discussed so far, it should be clear that further extension of the status quo is not desirable and it is clearly at odds with the goal of modernizing EU-Russia legal relations.
- The third scenario envisages, besides the preservation of the PCA, the addition of a Political Declaration on Strategic Partnership providing an updating of the de facto EU-Russia relations. According to this scenario, the adoption of the Declaration would warrant the replacement of the PCA whose remaining significant operational provisions after Russia's accession to the WTO could be retained through the conclusion of sector-specific agreements. This scenario seems to have taken place, although without the replacement of the PCA, in EU-Russia framework of relations in 2010 with the adoption of the abovementioned Partnership for Modernisation (P4M). The latter is in fact a political declaration according to which "*the European Union and Russia, as long-standing strategic partners in a changing multipolar world, are committed to working together to address common challenges with a balanced and result-oriented approach, based on democracy and the rule of law, both at*

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<sup>77</sup> For the PCA to be repealed, denunciation of one of the parties is needed. According to Art. 106 PCA : "The Agreement shall be automatically renewed year by year provided that neither Party gives the other Party written notice of denunciation of the Agreement at least six months before it expires."

*the national and international level*"<sup>78</sup>. The Partnership was concluded in a time when EU-Russia relations experienced a rather positive trend and it aimed at economic and judicial reform such as trade facilitation through harmonization and standardization of technical regulations and strengthening of the rule of law. However, in the years after the finalization of the declaration there was hardly any concrete transformation of EU–Russia relations into a truly strategic partnership<sup>79</sup>. Recent trends in EU-Russia relations demonstrate that a Political Declaration calling for a strategic partnership is way too little to bring about a convincing modernization of EU-Russia legal framework and hence a qualitative leap in bilateral relations.

- The fourth scenario, which can be considered a variant of the previous one, calls for the replacement of the PCA with a short Treaty of Strategic Partnership instead of the milder Political Declaration. Hence, in this case, the top-document would have a binding nature and from a procedural point of view it would need ratification. The latter need introduces serious questions about its feasibility. The finalization of the new agreement would in fact require parliamentary ratification from all twenty eight EU member states, entailing a high risk of stalemate in the negotiations because of political incidents especially between Eastern European member states and Russia. In this case, a single parliament negative vote would block the entire process of ratification. The risk of negotiating legally binding agreements, as it is now the case in EU-Russia relations since 2008, cannot be underestimated given the thoroughly discussed widespread instability in EU-Russia relations and major political disagreements between former Soviet states (Estonia, Lithuania and Latvia) and Russia. Further complicating the issue is the inflexibility and

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<sup>78</sup> Joint Statement on the Partnership for Modernisation, EU-Russia Summit, 31 May – 1 June 2010 (2010), <http://goo.gl/YBwk3>.

<sup>79</sup> For an assessment: M.Larionova, "Can the Partnership for Modernisation Help Promote the EU–Russia Strategic Partnership?", *European Politics and Society*, Forthcoming, 2014.

potential rapid obsolescence of a legally-binding agreement in the context of ever-changing EU-Russia political relations. The case of the PCA is an example to bear in mind.

- The fifth scenario stems from the previous one but it is even more ambitious. It aims at replacing the PCA with a comprehensive Treaty of Strategic Partnership. This treaty would modernize EU-Russia legal relations through the conclusion of a comprehensive treaty integrating all significant developments in bilateral relations since 1997, such as the general provisions contained in the Road Maps for the four Common Spaces, the Partnership for Modernization and it would also reflect changes in EU's competences and policies in the last decades. Although it would be a logical step in a situation of solid and trustful political relations, this scenario entails and exacerbates all disadvantages of the fourth scenario. The ratification procedure of a comprehensive treaty – as agreed at the Khanty-Mansiysk EU-Russia summit in June 2008 – would in fact involve even lengthier and riskier negotiation processes which would be highly sensitive to the current state of poor political relations between the EU and Russia.
- The last scenario is by far the most ambitious one, but it is also very unlikely for it to take place, at least in the short to medium term. The goal would be the establishment of a Treaty of Strategic Union, a very ambitious agreement raising the level of mutual commitment and common positions to the highest possible level on matters such as foreign and security policy. The new paradigm would be one of common purpose, of total trust on major issues and quest for enduring agreements on as many domains of common interest as possible. In light of the major impediments discussed in chapter two, the probability for this scenario to become a reality in the near future is close to zero. The Treaty of Strategic Union could be born only out of an enlightened

and visionary future leadership. This has not been the case up to now at the top levels of EU-Russia relations.

The presentation of these six possible scenarios which were discussed shortly before the expiration date of the initial duration of ten years of the PCA (1997-2007), represents a useful reference scheme to analyze and draw a few lessons on how the negotiations for a new legal framework in EU-Russia relations evolved in the last years (2007-2015) and how they might or should evolve in the next few years (2016-2020).

Almost a decade has elapsed and it can be confidently argued that there has been no outright modernization in EU-Russia legal framework of relations. Some of the reasons for this have been thoroughly illustrated in the previous chapter when the issues of political values, energy and neighborhood relations were covered. Far from the conclusion of any new kind of bilateral treaty or revision of the current one, legal relations in recent years have been characterized by the developments described in the second and third scenario, that is to say by the extension of the status quo and by the introduction of a poorly performing Political Declaration (P4M) which basically failed at upgrading EU-Russia relations to the level of “Strategic Partnership”.

Given both parties’ growing dissatisfaction regarding their state of legal relations, negotiations on a new strategic agreement, providing a comprehensive framework and legally binding commitments on all main areas of EU-Russia relations, were officially launched in June 2008. This suggests that the EU and Russia opted for the realization of the fifth scenario, namely for the replacement of the PCA with a comprehensive treaty establishing the necessary legal instruments for the implementation of the political framework provided by the Common Spaces road maps. However, as formerly discussed, there are several disadvantages related to this scenario which the current state of EU-Russia relations exacerbates, hence complicating the feasibility of this option at least in the short term. The slow pace

with which negotiations are proceeding and the poor results delivered in terms of modernization since 2008 provide convincing evidence for this.

In fact, a comprehensive framework with legally binding commitments would provide for the inclusion of policy areas going beyond the EU's exclusive competences and therefore would require a "mixed procedure", namely the involvement and ratification of all EU member states for the process to finalize. In addition, it would require, according to article 218 TFEU on the rules on the conclusion of international agreements on behalf of the EU, unanimity in the Council of Ministers and the consent of the European Parliament. This is an extremely cumbersome and winding process which would require a considerable amount of time and resources, even in the presence of a constructive context of EU-Russia relations.

Not to mention the issue of the choice of the EU internal legal basis for the new agreement. This could be found in art. 217 TFEU in case of a "*Strategic Association Agreement*", in art. 8 TEU in case of "*specific agreement developing a special relation with a neighboring country*" or in art. 212 TFEU in case of "*agreement concerning economic, financial and technical cooperation with a third country*", only to mention a few possibilities. Even assuming that there could be a consensus among EU member states on the choice of the legal basis, this would in any case imply a strong conditionality approach which would be hard for Russia to accept politically<sup>80</sup>. Besides these limits to the feasibility of this scenario, one could question whether it is even desirable to opt for a comprehensive and binding agreement between evolving political actors with evolving and unpredictable political relations. All of these issues seriously question, for the time being, the validity of this scenario<sup>81</sup>.

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<sup>80</sup> Whichever the EU legal basis for the new agreement, the Union's external action on the international scene should be consistent, according to art 21 TEU, with "*the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world*". This conditionality is, as shown, opposed by Russia.

<sup>81</sup> For further analysis on these issues see: P. Van Elsuwege "Towards a Modernization of EU-Russia Legal Relation?", CEURUS, 2012.

Ultimately, the modernization of EU-Russia legal relations seems to have reached an impasse. On one hand, disagreements on a growing number of issues call for new and jointly agreed rules of the game, that is a new legalization of EU-Russia relations which could improve the shortcomings of the existing arrangement. On the other hand, disagreements on core issues (political values, energy and neighborhood relations) are also accountable for the stalemate in the modernization process. As hinted in the previous chapter, revision of the approaches which both parties are currently endorsing on these issues may take a long time and need internal developments in both EU and Russia.

Does this mean that EU and Russian officials and negotiators are handcuffed? Is a legally binding and comprehensive agreement the best option at our disposal and hence worth waiting even if it may materialize only in ten years or more from now?

### **3.2 Recommendations**

To put it bluntly, it looks that with the launch in 2008 of the negotiations for a new and legally binding comprehensive agreement, the EU and Russia have bitten off more than what they could chew. This prompts a few recommendations for future negotiations.

First of all, the conclusion of a comprehensive agreement, even if desirable to upgrade EU-Russia relations, is out of reach if lasting disagreements on core issues are not addressed and settled first. To this regard, the aim of the second chapter was to highlight these core issues (political values, energy and neighborhood relations) and the main conflicts going on in each of them. Therefore, it can be argued that resolution of major disagreements on these issues constitute an essential prerequisite

for drafting a comprehensive and legally binding agreement in EU-Russia relations. A systemic and joint approach to these controversial issues shall be adopted, since they are closely intertwined and dependent on each other.

On the contrary, major disagreements on these issues, as it is the case nowadays, seriously hamper the conclusion of a new agreement in many ways. Most importantly, since they are greatly accountable for the poor state of EU-Russia relations, they exacerbate the risk of stalemates in a winding negotiation which would require the contentious choice of a legal basis and members states' ratification for the EU. Furthermore, even if negotiations were to be successful under great political pressure, the new agreement would carry little if no significance at all and would crystallize disagreements into a legally binding document.

As a result, assuming that a new comprehensive agreement is desirable but feasible only in the long run:

- *the EU and Russia should postpone its negotiation until major disagreements on the core issues examined are overcome.*

This would imply a preliminary modernization of the EU and Russia unilateral and disjointed approaches to these issues which is hard to envisage without significant internal developments in both political actors. These developments would imply the formulation, in the context of EU-Russia relations, of “post modern” strategies in which political diversity is integrated in a wider *ensemble* of common values and in which values ambiguity is internalized in a pluralist way rather than eliminated or minimized. To put it simple, an enlightened and visionary future leadership is needed as a catalyst force for the conclusion of a comprehensive legal agreement.

Secondly, we can go as far as questioning whether a binding agreement can be adequate to cope with the EU's and Russia's evolving political nature and ever-

changing political relations. Common features of a binding agreement, such as inflexibility and potential obsolescence, may not be desirable as the case of the PCA partly demonstrates. Moreover, a new legal agreement would hardly exclude any conditionality approach from the side of the EU, a constant which has irritated Russia for quite a long time.

As a result, assuming that a new comprehensive agreement is neither feasible nor desirable,

- *the EU and Russia should refrain from establishing a new comprehensive bilateral agreement and reorient their efforts towards the negotiation of a limited number of important sector-specific treaties only where there is a functional need for them.*

Similarly to the EU-US model of cooperation, the arrangements usually provided by an overarching bilateral agreement would be replaced by the arrangements provided by the backbone of the evolving multilateral order, such as the United Nations (UN), the WTO, the Organization for Security and Cooperation in Europe (OSCE), and other informal structures of global governance such as the G20. The weakness of most of these multilateral organizations should not count as a reason for disengagement but rather as a reason to work on fairer and stronger commitments for all the parties involved. The EU and Russia would then negotiate sector-specific bilateral agreements in fields of common interest included in the EU-Russia Common Spaces agenda, such as energy and custom cooperation, judicial cooperation in criminal matters and visa facilitation policies, and security and crisis management, only to give some examples. All of these fields, in fact, have not been regulated by any bilateral agreements so far and mostly rely on political dialogues which are devoid of any binding effects and do not provide for a clear legal framework for the implementation of the measures adopted in each field. The chart below illustrates this possibility, providing the Common Spaces agenda as the framework of reference for the extension of the network of sector-specific agreements in EU-Russia relations.



**Agreements and dialogues concluded in the framework of the Common Spaces Agenda**

|                             | <b>Common Economic Space</b>   | <b>Common Space of Freedom Security and Justice</b>   | <b>Common Space of External Security</b>   | <b>Common Space of Research and Education, including cultural aspects</b> |
|-----------------------------|--|---|--|---|
| <b>Bilateral Agreements</b> | Trade in steel products;<br>Trade in nuclear material and nuclear co-operation;<br>Trade in textile products;<br>Veterinary certification;<br>Cooperation in fisheries and living marine sources in Baltic Sea.                                  | Readmission;<br>Visa Facilitation;<br>Co-operation with the European Police Office (EUROPOL). | Participation of Russia in the EU Police Mission in Bosnia and Herzegovina;<br>Participation of Russia in the EU Military Mission in Chad and the Central African Republic | Science and Technology  |
| <b>Dialogues</b>            | Regulatory dialogue on industrial products<br>Enterprise policy and industrial policy<br>Financial services<br>Transport<br>Information society<br>Energy<br>Environment<br>Climate change<br>Agriculture<br>Space co-operation<br>Public health | Human Rights<br>Visa policy<br>Justice and Home Affairs                                       | Security and crisis management<br>Non-proliferation, export controls and disarmament   | Research and Development  |

Source: P. Van Elsuwege 2009, Agreements Database of the Council of the EU<sup>82</sup>

<sup>82</sup> For additional and updated information, access database at: <http://eur-lex.europa.eu/collection/eu-law/inter-agree.html>

In an ever-changing international world order, EU-Russia relations could benefit from rejecting legally binding formalism, represented by a comprehensive agreement, in favor of increased reliance on multilateral arrangements and on functional sector-specific agreements concluded within a political framework such as the Common Spaces agenda.

With this framework of possible options in mind, it is worth remarking that the two scenarios suggested, – in favor or against a comprehensive agreement- are not mutually exclusive and can also be understood as contiguous options in a short to long term timeline. On one hand, it is hard to ignore the benefits that a comprehensive agreement would have for EU-Russia bilateral relations in the long run in terms of legal certainty and institutional strength for their Strategic Partnership<sup>83</sup>. Thus, the option of a comprehensive agreement can be seen as desirable in the long term when EU-Russia relations will hopefully normalize. However, it should be clear that in the short to medium term this option is neither desirable nor feasible. On the contrary, in the next few years cooperation should be carried out on a functional basis and negotiations limited to the conclusion of sector-specific agreements and to the strengthening of multilateralism, which can provide new bases for cooperation as recently demonstrated by Russia's accession to the WTO<sup>84</sup>. Having said so, we cannot exclude that this functional approach, based on the goal of modernizing bilateral relations through functional cooperation in technical areas, combined with joint policies adopting a systemic approach to the resolution of major disagreements on the core issues discussed, might eventually bring about the consensual and natural conclusion of a new and comprehensive legal agreement in EU-Russia relations. Time and, above all, political will of our leaderships will tell...

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<sup>83</sup> For an analysis see : P. Van Elsuwege, "Towards a new Strategic Partnership Agreement: EU-Russia Relations at the Crossroads", European Institute Ghent University, 2009.

<sup>84</sup> For further analysis on the functional approach to EU-Russia relations : T.Bordachev, "Russia and the European Union after 2007" in "The Elephant and the Bear Try Again. Options for a New Agreement between the EU and Russia", Center for European Policy Studies, 2006.

## **Conclusion**

In the framework of EU-Russia relations, most, if not all, scholars and professionals agree on the need to modernize the current legal agreements. The main reasons for this, thoroughly discussed in the first chapter, are the obsolescence of the PCA and the weakness and redundancy of most of its provisions, not to mention its asymmetrical nature and conditionality approach with regards to Russia. Even though the PCA could have been a useful instrument for the economic and political transition of Russia in the 1990s, in the last couple of decades it failed to provide an effective framework for bilateral relations. This failure is ascribable to the fact that legal arrangements stayed the same notwithstanding remarkable internal developments in both the EU and Russia. As a matter of fact, the EU has enlarged up to twenty-eight member states and it underwent significant institutional reforms of which the Treaty of Lisbon is only the latest example. At the same time, Russia has left behind the hard times of political and economic instability experienced in the 1990s and it is currently claiming a stronger voice in the new multipolarity of the international order. Moreover, after a long period of negotiations, it finally became part of the WTO in 2012.

Nevertheless, as argued in chapter two, the need for modernization has not been fulfilled since long standing issues have been hindering this process for quite a long time and, as a result, the negotiations for a new comprehensive and legally binding agreement which were launched in 2008 have delivered poorly convincing achievements. Among the issues characterized by major disagreements in EU-Russia relations, the issues of political values, energy relations, and neighborhood policies were analyzed. For each of them, diverging perceptions, interests and strategies were thoroughly discussed and compared. Considerable attention was drawn on the fact that both parties essentially follow competing and opposing approaches to all of the issues examined.

As far as the issue of values is concerned, the political cultures of the two parties clearly differentiated from one another as far as their conceptions of governance, sovereignty, religion, freedom and individual are concerned. These issues were examined in the framework of five major value-rifts which characterize bilateral relations. Most importantly, it was argued that the EU aims at projecting its political culture abroad, whereas Russia aims at strengthening its political culture within the country and in the post-Soviet space.

With regards to energy relations, staunch economic liberalism on one side and monopolistic practices on the other have clashed ever since the demise of the Soviet Union. This has prevented the successful legalization of EU-Russia energy relations and prompted Russia's firm opposition to the EU's Third Energy Package and the withdrawal of its signature from the Energy Charter Treaty in 2009.

Finally, with respect to neighborhood policies, the way EU and Russia relate to their near abroad has been one of the main reasons for the deterioration of political relations in the last decade. In particular, the EU's liberal approach to its neighborhood through the foreign policy instruments of the ENP and of the EaP, is at odds with Russia's more realistic perception of the international order which, accordingly, is considered as an arena of competition in which concepts such as "zero sum game" and "power vacuum" retain their significance. This adds to the fact that Russia's close neighborhood, the Post-soviet space, is characterized by special political, economic, historical and cultural ties with Russia which claims to have "privileged interests" in this area and a legitimate sphere of influence which cannot be undermined by competing foreign forces. Competing policies in the EU-Russia common neighborhood which bring about the erosion of their "buffer zone" and compel post-Soviet states to choose either of the two blocs, are mostly accountable for the recent ruptures in EU-Russia relations as the Ukrainian crisis demonstrates.

As a result, all of these issues heavily limit the scope for the modernization of EU-Russia legal relations for the time being. As argued in chapter three, with regards to the possibilities for the modernization of EU-Russia relations, the EU and Russia should postpone the negotiations for a comprehensive legal agreements until major disagreements on these issues are settled. The negotiations on a comprehensive agreement are unlikely to succeed since the poor state of bilateral relations exacerbates the risks of a stalemate in the long and winding process implied by the conclusion of this kind of agreement. Since a consensual breakthrough on these core issues is conditional to a systemic and jointly agreed approach between the EU and Russia on the very same issues, the conclusion of a new comprehensive agreement is feasible only in the long term. In this line of reasoning, future internal developments in both parties will be particularly relevant. Furthermore, a hastened conclusion of this kind of agreement in the current political environment would risk to crystallize major disagreements in the new legal framework.

In the current state of play, in the short term the EU and Russia should focus first of all on the conclusion of sector-specific agreements in fields of common interest such as energy and custom cooperation, judicial cooperation in criminal matters and visa facilitation policies, and security and crisis management. In the next few years, bilateral relations should be based on pragmatic cooperation and legal agreements should be concluded only in the technical areas provided by the Common Spaces agenda. In addition, negotiations aimed at a comprehensive bilateral agreement should be replaced by negotiations aimed at strengthening the application of multilateral agreements to EU-Russia relations. Russia's accession to the WTO in 2012 is a case in point as it brought to the obsolescence of most provisions of the PCA related to trade and investment. In addition, further effort could be made for increasing the effectiveness of multilateral organizations such as the OSCE or other informal structures of global governance such as the G8 or the G20. Lastly, greater

consideration should be given to regional cooperation initiatives such as the Northern Dimension.

Ultimately, it was argued that this functional approach, aimed at modernizing the bilateral legal framework through the conclusion of sector-specific agreements in technical areas, could eventually lead to a successful conclusion of the desired comprehensive agreement thanks to its potential *spill-over* effects. For this scenario to take place, Russia should draw inspiration from the current integrationist forces within the Eurasian Economic Union to reinvigorate cooperation with the EU. At the same time, the EU should look back at its history of political integration born out of an agreement on a purely technical area, such as the Coal and Steel Community, and provide valuable experience for its future relations with Russia. In both cases, nothing can make as much difference as the political will of our leaderships.

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## **“The modernization of the legal agreements in EU-Russia relations: limits and possibilities” - Summary**

### **1. EU-Russia framework of relations and the need for modernization**

#### **1.1 EU-Russia bilateral framework of relations in historical perspective**

The year 1989 represents a watershed not only for the history of Europe and for world contemporary history at large, but also for the development of the European Economic Community (EEC) - and a few years later of the European Union (EU) - external relations with its eastern neighbors. A new type of external agreement was signed with the Newly Independent States : the “Partnership and Cooperation Agreement” (PCA). This agreement can be considered as an alternative provided by the EU to the countries of the former Soviet Union which were excluded from the conclusion of the so-called “Europe Agreements” with the Central and Eastern European Countries (CEECs).

A few years after the fall of the Soviet Union, the EU and Russia formalized for the first time their bilateral relations into a comprehensive cooperation agreement. In 1994, the two parties signed the PCA, which came into force on the 1<sup>st</sup> December 1997. Almost two decades went by and, notwithstanding remarkable political and socio-economic change both within and between the EU and Russia, the PCA remains the main legal framework of their bilateral relations. The need for modernization is now stronger than ever.

As of 2016, successful negotiations on the most important issues have been seriously jeopardized since the outbreak of the Ukrainian crisis and the conclusion of a new agreement in the near future is unlikely to take place. However, the establishment of trustful and solid bilateral relations relying on practices and institutions formed in early 1990s might be just as hard. Working for the

consolidation of strong and trust-based political relations should entail the shared goal of the modernization of EU-Russia legal framework of relations. The two goals are complementary to each other and go hand in hand.

## **1.2 The evolving context of EU-Russia cooperation**

Much has changed both in Russia and in the EU since the PCA, the legal basis of EU-Russia bilateral relations, was signed and ratified. Russia has definitely become politically more assertive in the international arena and more prosperous economically than it used to be at the start of the 1990s. A will to fully integrate with the West, which characterized Russian elite especially in the first half of the 90s, gradually yielded the floor to the will to preserve Russia's sovereignty and sphere of influence in the post-Soviet space. Russia even joined the World Trade Organization in 2012, therefore officially completing its transition to a market economy. At the same time, the EU underwent a long and winding process of institutional reform and enlarged several times to comprise twenty eight member states by 2013. However, the legal basis for EU-Russia relations basically stayed the same. It looks like the bridge is too old and weak to support the weight of two heavy lorries eager to cross to the other end.

### ***a) Russia's evolving stance in bilateral relations with the EU***

As thoroughly illustrated in this section of the thesis, internal developments of Russia with regards to its foreign policy dimension towards the EU (and the West at large) since the dissolution of the Soviet Union, were not adequately matched by likewise developments in the legal framework of EU-Russia relations. Russia is by far more powerful both politically and economically today than it was 25 years ago and it has increasingly claimed its rightful sphere of influence in the post-Soviet space. However, the PCA remained "an instrument of transition" devised to pull out a bogged Russia from the mire created by a liquefied Soviet Union. It is not a surprise that Russia is unhappy with it after more than two decades in which there has been no

legal upgrading or modernization nor full implementation of the PCA. The unilateral and asymmetrical nature of the PCA is nothing but the legal declination of a much broader approach adopted by the EU in its relations with Russia which aims at “taming” Russia and the post- Soviet space through recipes of democratization and market liberalization. In most cases, this old school approach irritates Russia and often leads to major geopolitical crises as witnessed in Georgia and Ukraine recently. As we have shown, the deterioration of political relations which is triggered by those crises, leads in turn to the inability to progress with the negotiation of legal agreements. It is therefore a vicious circle which can be broken only by devising a more inclusive and balanced EU approach towards Russia and by changing the rules of the game, that is the legal framework of bilateral relations.

***b)The EU’s internal developments and asymmetry in bilateral relations with Russia***

Internal developments are also an important part of the history of the EU in the last twenty years, as it underwent major institutional reforms and several waves of enlargement. At the time of the negotiations of the PCA the legal basis of the EU was the Maastricht Treaty. Since then, the treaty was revised three times, by the Treaty of Amsterdam in 1997, by the Treaty of Nice in 2001 and finally, after a lengthy process of ratification, by the Treaty of Lisbon in 2009. The latter aimed at completing the process started by the former two “with the view of enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its actions”. In this lengthy process of institutional reform the EU has considerably extended its competences, strengthened the role of the European Parliament and streamlined decision-making in most areas by moving from unanimity to qualified majority voting in the Council of Ministers. It also provided for additional benefits to European citizens by introducing European citizenship, the “European citizens initiative”, which allows to present a legislative proposal to the Commission, and improved protection of rights by making “The Charter on Fundamental Rights” legally binding. Most importantly, thanks to the Treaty of Lisbon, the EU acquired



legal personality, meaning that the EU is capable of concluding international agreements on its behalf. Today, the EU can also boast a better integrated market than it used to be at the beginning of the 1990s, when not even a common currency was in place.

Furthermore, when the PCA was signed in 1994, the number of EU member states amounted only to twelve. Today, we witness an enlarged EU that has grown over a hundred percent since the PCA negotiations. Back in 1994, it was difficult to imagine former Soviet countries such as Estonia, Latvia and Lithuania and former communist CEECs, such as Czech Republic, Hungary and Bulgaria integrated into the West and full members of the EU. With Croatia's accession in 2013, EU members amount to twenty-eight, further complicating the creation of a common foreign policy approach towards Russia. In fact, the absence of this common approach has incentivized Russia to deal bilaterally with EU member states on issues such as trade and energy, thereby disuniting the EU in its foreign approach towards Russia even further. Therefore, we face a clear asymmetry within the EU as far as bilateral relations with Russia are concerned. The waves of enlargement which shifted eastwards the borders of the EU in the new millennium, granted full membership to a group of countries (Poland, Bulgaria, Czech Republic etc.) which are characterized by a completely different historical and political heritage of relations with Russia compared to other member states, especially in Western Europe.

### **1.3 A brief legal assessment of the PCA**

The PCA is the current legal basis for EU relations with Russia. It is a comprehensive agreement and it was signed between the Russian Federation and the European Communities and their member states on 24 June 1994. The ratification procedure was concluded on the 30 October 1997 and the agreement finally entered into force on 1 December 1997.

As formerly discussed, EU-Russia bilateral context of cooperation has evolved profoundly and continuously in a way that the PCA, conceived as an “instrument of transition” for Russia, has become obsolete. Most importantly, obsolescence and redundancy characterizes directly most provisions contained in the PCA.

The fact that the PCA was conceived as an “instrument for transition” in order for Russia to comply with the EU’s legislation and standards is also clearly illustrated in the preamble of the agreement which recognizes Russia as “*a country with an economy in transition and that continued progress towards a market economy will be fostered by cooperation between the Parties in the forms set out in this Agreement*”.

Moreover, since Russia’s accession to the World Trade Organization (WTO) in 2012, most of the PCA’s trade and investment provisions became redundant. The provisions of the GATT which were incorporated in EU-Russia trade relations at the beginning of the 90s, were largely replicated by the multilateral framework of the WTO which Russia eventually came to be part of. Another major shortcoming of the PCA, which came to the fore especially after WTO accession, is the Agreement’s vagueness with regards to energy, one of the most relevant issues in EU-Russia trade relations.

Finally, a relevant institutional shortcoming concerns the lack of the possibility to adopt legally binding decisions. Specific bilateral agreements and statements only have a political significance. This is particularly true for the issue of dispute settlement whose rules of procedures were adopted by the Cooperation Council in December 2003.

## **2. Main issues affecting the modernization of EU-Russia framework of relations**

The three dimensions of “what” hampers modernization in EU-Russia relations can be identified in the following issues : values, energy and neighborhood policy. Besides the strategic and economic interests put forward by both parties in all of these issues, it can be argued that each of these dimensions reveals the very essence of the EU and Russia conceptions of themselves as political actors and of the international world as a place which either strengthens or challenges their political culture and societal identity. Having said that, a thorough analysis of these three dimensions together with a sound understanding of the conflicts at play in each of them, can help to develop a new and successful approach to the issue of modernization of EU-Russia legal framework of relations.

### **2.1 The issue of values in EU-Russia relations**

Although it is crucial to dig deep into the roots of the crisis of EU-Russia relations, the importance of values and social identities in shaping EU-Russia relations has often been underestimated. As a matter of fact, conflicting interests and diverging foreign policy approaches of EU and Russia are usually analyzed under the lenses of two major theories and schools of thought in international relations, that is to say Liberalism and Realism.

As effective as they may be in explaining certain EU and Russia foreign policy conducts and their stance with regards to other bilateral issues such as trade, energy and security, Realism and Liberalism do not seem to have the right explanatory potential when discussing the differences between EU and Russia’s core values inherent to their distinct political cultures. In fact, Liberalism and Realism have more to do with the notion of interests than with the notion of values. However, this latter notion is as important as the former notion since political relations are often

“constructed” through the social interaction on basic values between different social identities. This link bridging political relations with social identities, which is missing in both realism and liberalism is instead provided by a third theory : Constructivism. This theory explains how, according to their own social identity and to perceptions of foreign social identities, groups draw political borders and perform their political actions. In our case, constructivism provides a good explanation of the shortcomings of EU-Russia relations from a value-centered perspective as it focuses on the need for shared values and identities as a precondition for successful bilateral cooperation.

*a) Five value-rifts in EU-Russia relations*

Both the EU and Russia have their own political culture which was shaped by common yet also by profoundly different historical developments. A political culture consists of perceptions, shared goals and values of the political world. In addition, political cultures include both normative predispositions on how the world should work and empirical understandings of how the world does work. They are the result of a lengthy process of formation and bear the heritage of broad historical phenomena which often led to paradigm shifts in the social and political life of a country or even of a whole continent.

On one hand, European political culture carries the legacy of major historical phenomena such as the Renaissance and the Enlightenment. On the other hand, it would be difficult to understand Russian political culture without taking into account historical phenomena such as the century old Tartar-Mongol domination and the Russian Revolution in 1917 which deeply shaped Russian political culture and behaviors. Furthermore, it can be argued that the different evolutionary paths of Christianity had indeed a strong impact on the formation of distinct political cultures in Russia and in Europe. As a matter of fact, the schism in the Christian church between Rome and Constantinople did contribute to the drawing of a dividing line between Russia and the rest of Europe.

We argue that EU-Russia's political cultures' interactions take place along five major rifts which are drawn between different and sometimes opposing political and cultural values. These value-rifts are represented by the parties' conflicting conceptions on the issues of governance, sovereignty, religion, freedom and the individual which reveal substantial differences between the parties' perceptions and goals of the political world.

***b) Europeanization vs Sovereign Democracy***

In EU-Russia relations, the rifts in political cultures seem to have a negative impact on their political relations.

Europeanization is one of the ways, arguably the main one, in which European political culture is projected in its external relations, including relations with Russia. It can be defined as the set of policies and instruments intended to govern the relations of the EU with its external environment and which aims at the transformation of national politics and policy making in the line with modern European values and standard. This logic is strongly present in the PCA as well as in other documents intended to govern EU's external relations such as the European Neighborhood Policy (ENP). All of these documents are written according to the grammar of the EU's bureaucratic language and are mostly designed to make neighboring countries, including Russia, comply with the EU-defined code of conduct.

The fact that the EU has been defined as a "post-modern" political actor, implies a departure from the main features of modernity such as nationalism, sovereignty and war. The EU was in fact born as a peace project which represented a sharp break with Europe's past and a sort of redemption from historical aberrations such as the two world wars, totalitarianism and the Holocaust. In short, having reached a moral high peak in history, the EU sees itself as a normative power whose norms can be rightfully promoted and exported in the wider world.

In sharp contrast with Europeanization, we find Russian concept of “Sovereign Democracy”. The idea, which developed shortly after the Color Revolutions in Georgia and Ukraine, is that sovereignty is a precondition for democracy and therefore a means to realize Russian national idea. The idea suggests that Russia should have its own way to democracy and should protect the state and those in power from foreign meddling.

Contrary to Europeanization which aims at projecting the European order in the wider world through its normative power, Sovereign Democracy aims at protecting internal order through strengthened state power and authoritarian rule. After all, Putin’s rule was marked by a reconstruction of the power of the Russian state and a deconstruction of the power of oligarchs, civil society and the West.

Finally, it can be argued that Europeanization and Sovereign Democracy are exactly what European and Russian political culture propose as a strategy of adaptation to these opposing forces unleashed by the encompassing phenomenon of globalization. On one hand, the features of European political culture, among which we find social pluralism and a diluted conception of sovereignty, are prone to pool sovereignty with other nations and yield to supranational governance. On the other hand, Russian political culture opts for consolidating sovereignty and reinstating a strong statehood. Both strategies constitute a reaction to globalization and to try to minimize ambiguity of global challenges either by projecting the internal order (EU) or by strengthening and reinstating the internal order (Russia).

## **2.2 Energy issues in EU-Russia relations**

The energy issue may seem a marginal and sectoral issue far from the scope of EU-Russia main stage of political relations. However, it is very representative of the latter since it reveals, at the same time, both EU-Russia interdependency and clash of interests. EU-Russia interdependency in energy matters and in the political world at

large can be hardly overcome, at least in the short to medium term. Nevertheless, interests can be accommodated and common strategies formed.

***a) The nature of EU-Russia energy relations***

The EU and Russia display opposite approaches towards their own energy security. On one hand, the EU is primarily concerned with its energy “security of supply”, defined as the availability of energy in sufficient quantity and at affordable prices. On the other hand, Russia’s energy relations with Europe are based on the quest for “security of demand”, which entails the quest for a market for its energy exports which correlates to increased revenues. In particular, given the substantial shortage of Russian modes of transportation to alternative markets in Asia, Russia’s quest for security of demand is mainly about selling gas to EU countries and ensuring long term access to the European energy market by directly controlling gas sales and distribution networks.

It is clear that the EU and Russia share the concern for energy security, yet the opposing dimensions of what they mean by energy security result in conflicting interests in their energy relations.

Ultimately, the rooted interdependence in their energy relations, EU’s eastern enlargements in 2004 and 2007, the logistical and spatial dimension of gas trade and the respective dimensions of energy security are some of the main reasons which explain the complexity of EU-Russia energy relations and, as a result, the challenge which a legalization of this relationship in a broader bilateral framework has faced.

***b) Legalizing EU-Russia energy relations***

An outright legalization of EU-Russia energy relations has never seen the light of day. Tellingly, we had to wait Russia’s accession to the WTO in 2012 to witness a morsel of legalization in energy relations. In fact, general WTO principles such as the Most Favored Nation (MFN) and the National Treatment (NT) also apply to energy

trade. A part from that, the relevant base for cooperation remains the Energy Dialogue, a currently put on halt diplomatic platform which does not provide any legal framework to EU-Russia energy relations.

At present, staunch economic liberalism on one side and monopolistic practices on the other, seriously hamper legal modernization in bilateral energy cooperation. Both parties seem to forget what their energy cooperation is based on, namely a critical interdependence and the assurance of greater energy security in a common energy market.

### **2.3 The issue of neighboring policies**

The third issue which significantly accounts for the current state of EU-Russia relations is that of the parties' interests and strategies towards their common neighborhood, or what was defined in a more sober way in bilateral documents as the "regions adjacent to the EU and Russian borders". In the last decade, in particular since the outbreak of the so called "color revolutions" in 2004, the EU and Russian foreign policies in their shared abroad have increasingly diverged and conflicted, turning their common neighborhood in a competitive battle ground rather than a cooperative playing field. The confrontational stance which developed in the last few years led to greater instability in the region which has seriously jeopardized the possibility of modernizing EU-Russia relations through the negotiation of a new legal framework. This is mainly the result of long standing neighboring issues in the post-Soviet space, such as the so-called "frozen conflicts", which were simply dragged out from under the carpet after the fall of the Soviet Union and remained unsettled for decades.

#### ***a) EU's and Russia's perceptions of their common neighborhood***

The evolution of the EU and Russia as international political actors is primarily reflected in their neighborhood relations which have become not only increasingly



dynamic but also tense and problematic. For the very first time a powerful actor has emerged just next to Russia. It tends to block Russia's expansion and it may even pose a threat of eliminating Russia from the European order. Russia has never faced a single Europe and for much of its history it has always remained a crucial component of the European balance of power.

From a theoretical perspective, it seems that Liberal and Realist conceptions of international relations shape most of the EU and Russia's perceptions and policies in their common neighborhood. In this sense, major international geopolitical crisis as recently witnessed in Georgia and Ukraine can be effectively analyzed in the framework of the conflict between the views and understandings of the international political order which these theories imply. On one hand, in the EU political elite there is the conviction that Europe can be kept whole and free on the basis of the EU fundamental liberal principles such as, but not limited to, democracy, the rule of law and human rights. The respect for such principles is also a precondition for the conduct of foreign relations with other international actors. On the other hand, this liberal approach to international relations is at odds with Russia's more realistic perception of the international order which, accordingly, is considered as an arena of competition in which concepts such as "zero sum game" and "power vacuum" retain their significance. Quoting President Putin : *" if Russia were to abstain from an active policy in the Commonwealth of Independent States or even embark on an unwarranted pause, this would inevitably lead to nothing but other, more active, states resolutely filling this political space"*.

### ***b) Competing strategies in a fragmented neighborhood***

In the EU-Russia common neighborhood two different and competing projects of integration are in place. Both the EU and Russia, in their own ways, are trying to "win friends" in the post-Soviet space. Post-Soviet countries are not sure whether to change "party" or not : the one offered by the Eastern Partnership (EaP) seems appealing, however Russia's party is not over yet and Russia urges them not to leave.

The “geopolitical games” which are being played by both sides can turn out to be detrimental and destabilizing for their common neighborhood. As recent events have shown, the EU and Russia –not to mention NATO- are eroding the “buffer zone” between them, thereby compelling post-Soviet states to choose either of the two blocs. In fact, full membership of the Eurasian Economic Union (EEU) and Deep and Comprehensive Free Trade Agreements (DCFTAs) with the EU are mutually exclusive. Members states of the EEU lose part of their sovereignty over trade policy and share common tariffs that are incompatible with the elimination of tariffs foreseen by the DCFTAs. This incompatibility abruptly surfaced in the outbreak of the Ukrainian crisis when Russian backed Ukrainian President Viktor Yanukovich was intimated not to sign an Association Agreement with the EU and to opt for closer ties with Russia. Legal and political frictions concerning the position of Ukraine and other post-Soviet countries with regards to their relations with the EaP and the EEU are seriously undermining Russia-EU relations and hence complicate the modernization of their legal framework. As correctly pointed out by Russia’s Foreign Minister Sergey Lavrov, the EU should refrain from “determining the paths along which these countries are developing”. So should Russia. In post-Soviet countries, both parties should avoid accelerating developments artificially and shaping untransparently the requests of the countries concerned.

### **3. Limits and possibilities for a new legal framework**

Are there any possibilities of modernizing the bilateral framework notwithstanding the poor state of current political relations? Is there any chance of establishing a new legal framework which can better adapt to the rather dynamic and conflictual EU-Russia relations? Most importantly, is a new comprehensive and binding bilateral agreement as wished for in 2008 a viable and desirable solution?

### **3.1 Options for a new legal agreement**

Since 2007, the year in which the initial duration of ten years of the PCA formally expired, there has been a lot of discussion around the issue of how to modernize the agreement. Suggestions have ranged from simple extension and revision of the PCA to the formulation of a new bilateral treaty comprising the commitments and achievements made in bilateral relations since the PCA's first entry into force.

Almost a decade has elapsed and it can be confidently argued that there has been no outright modernization in EU-Russia legal framework of relations. Some of the reasons for this can be found in the long standing disagreements on the issues of political values, energy and neighborhood relations. Far from the conclusion of any new kind of bilateral treaty or revision of the current one, legal relations in recent years have been characterized by the extension of the status quo and by the introduction of a poorly performing Political Declaration (the Partnership for Modernization) which basically failed to upgrade EU-Russia relations to the level of Strategic Partnership.

Given both parties' growing dissatisfaction regarding their state of legal relations, negotiations on a new strategic agreement, providing a comprehensive framework and legally binding commitments on all main areas of EU-Russia relations, were officially launched in June 2008. This suggests that the EU and Russia opted for the replacement of the PCA with a comprehensive treaty establishing the necessary legal instruments for the implementation of the political framework provided by the Common Spaces road maps. However there are several disadvantages that the current state of EU-Russia relations exacerbates, hence complicating the feasibility of this option at least in the short term. A comprehensive

framework with legally binding commitments would provide for the inclusion of policy areas going beyond the EU's exclusive competences and therefore would require a "mixed procedure", namely the involvement and ratification of all EU member states for the process to finalize. In addition, it would require, according to article 218 TFEU on the rules on the conclusion of international agreements on behalf of the EU, unanimity in the Council of Ministers and the consent of the European Parliament. This is an extremely cumbersome and winding process which would require a considerable amount of time and resources, even in the presence of a constructive context of EU-Russia relations.

### **3.2 Recommendations**

The EU and Russia should postpone the negotiations for a comprehensive legal agreements until major disagreements on the issues of political values, energy and neighboring relations are settled. The negotiations on a comprehensive agreement are unlikely to succeed since the poor state of bilateral relations exacerbates the risks of a stalemate in the long and winding process implied by the conclusion of this kind of agreement. Since a consensual breakthrough on these core issues is conditional to a systemic and jointly agreed approach between the EU and Russia on the very same issues, the conclusion of a new comprehensive agreement is feasible only in the long term. In this line of reasoning, future internal developments in both parties will be particularly relevant. Furthermore, a hastened conclusion of this kind of agreement in the current political environment would risk to crystallize major disagreements in the new legal framework.

In this state of play, in the short term the EU and Russia should focus first of all on the conclusion of sector-specific agreements in fields of common interest, such as energy and custom cooperation, judicial cooperation in criminal matters, visa facilitation policies, security and crisis management. Bilateral relations should be

based on pragmatic cooperation and legal agreements concluded only in the technical areas provided by the Common Spaces agenda. In addition, negotiations on comprehensive bilateral agreement should be replaced by negotiations aimed at strengthening the application of multilateral agreements to EU-Russia relations. Russia's accession to the WTO in 2012 is a case in point as it brought to the obsolescence of most provisions of the PCA related to trade and investment. Further effort could be made for increasing the effectiveness of multilateral organizations such as the Organization for Security and Cooperation in Europe (OSCE) or other informal structures of global governance such as the G20.

Ultimately, it is argued that this functional approach, aimed at modernizing the bilateral framework through the conclusion of sector-specific agreements in technical areas, could eventually lead to a successful conclusion of the desired comprehensive agreement thanks to its potential *spill-over* effects. The EU should look back to its history of political integration born out of an agreement on a purely technical area, such as the Coal and Steel Community, and provide valuable experience for its future relations with Russia. In both cases, nothing can make as much difference as the political will of our leaderships.

