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The Eastern Partnership Panel on Migration and Asylum¹: recent developments

1. A "variable geometry" of the Eastern Partnership?

In May 2008, Poland and Sweden proposed to launch Eastern Partnership (EaP) as a joint initiative between the European Union (EU) and six Eastern European countries; Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine. This initiative over the years has found its own place in the context of the EU's external action, and more precisely in the course of the reformed European Neighbourhood Policy (ENP, 2015), with the stated aim of promoting the principles that have informed the creation of the Union as declared in art. 21, par. 1 of the [Treaty on European Union \(TEU\)](#).

As an articulation and external dimension of the neighbourhood policy and as part of the Global Strategy of the EU in the field of Foreign and Security Policy (2016), the EaP was finally launched in May 2009 at the Prague Summit. The Eastern Partnership was established in order to deepen relations between the EU and the above-mentioned countries, promote political stabilization, social resilience and economic prosperity in accordance with international law standards and core values, such as democracy, rule of law, respect for human rights, fundamental freedoms and gender equality, as well as the social market economy, sustainable development and good governance. Although the Eastern Partnership, for the countries that belong to it, is not equivalent to accession to the EU, the aims of cooperation it pursues concern significant and important aspects of the economic and institutional set-up of the partner States and of the EU *acquis*.

¹ According to the results of EaP Summit in November 2017, the Panel is to be transformed into the EaP Panel on Migration, Mobility and Integrated Border Management



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Among certainly most interesting features of the partnership is the ability to pursue its objectives using both bilateral and multilateral cooperation tools in ways that, however, are only partly used in negotiations with candidate countries. The choice of instruments for negotiation depends on political and economic peculiarities of each partner state as well as on the extent to which each country wants to deepen its relations with the EU, with a flexible approach to the degree of inclusion of individual countries in the neighbourhood policy. This characteristic feature can be seen as an expression of the principle of strengthened differentiation that aims to consider different ambitions of the partnership countries. If for some countries, first of all for Georgia, followed by Republic of Moldova and Ukraine, the prospect of accession and therefore access to the status of a candidate country is a strong stimulus to increase cooperation in various sectors (“more for more” principle), for other states the conclusion of *ad hoc* cooperation agreements is not necessarily linked to the implementation of an internal program of economic and political reforms prior to joining the EU. This is a model of *ex-post* conditionality in which the protection of fundamental values and the implementation of reforms appear more like the objective to be achieved, through the development of cooperative and contractual relations, rather than a pre-requisite for the establishment of these relationships with partner countries (*ex ante* conditionality).

While this mechanism was designed to show respect for the different pace of reforms in each particular partner country, nevertheless the order of priorities in the EU action, that a notion of such conditionality sets, draws some perplexity if placed in relation to the principles, which must inspire the EU in establishing partnerships. In fact, according to par. 2 of the art. 21 of the TEU, compliance with the principles on which EU action is based must already be shared by those third countries or international organizations which tend to develop relations or establish partnerships with the Union. So these principles cannot be perceived exclusively as a goal to be achieved, in the absence of which it’s still possible to establish such relationships, as assumed by *ex post* conditionality that allows an option of not necessarily consider the values/principles as *prius* to start cooperation with the third countries.



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In practice and from an "operational" point of view the application of the principle of differentiation allowed the EU to conclude in 2014 three Association Agreements (AA) and three Deep and Comprehensive Free Trade Agreements (DCFTAs) with Georgia, Ukraine and Republic of Moldova. These agreements have already entered into force, aiming to establish a comprehensive and in-depth free trade area together with a visa-free regime, starting from 2017 with Georgia and Ukraine, and from 2014 with Republic of Moldova, with their inclusion into the list of third countries whose citizens are exempted from visa for travelling to most of the EU Member States. In practice, according to the above-mentioned agreements, citizens of these three countries who have biometric passports are allowed to travel to the Schengen area without visas for 90 days during the period of 180 days, solely for tourism purposes but not for work. From a medium to long-term perspective, the correct and effective implementation of these agreements could represent a good path for these three countries towards accession to the European Union. In fact, bilateral relations have so far proven to be more effective than any form of multilateral cooperation when it comes to achievement of the objectives set for the Eastern Partnership. The other partnership states preferred to follow an *ad hoc* strategy, tailored to their individual needs. This is how negotiations for a global and strengthened partnership agreement were held with Armenia, the country that has joined the Eurasian Economic Union, and how negotiations for a new global agreement with Azerbaijan were commenced, while with Belarus, considering its political and institutional situation, the EU is proceeding with what has been dubbed as the "critical engagement" policy.

During the recent EaP Summit in Brussels, the progress achieved so far by these three countries has been evaluated: as a result, the Comprehensive and Enhanced Partnership Agreement between the European Union and Armenia was signed, while Azerbaijan went further in its negotiations with the EU regarding the new global agreement. As for Belarus, on the other hand, *ad hoc* forums (EU-Belarus Coordination Group, Human Rights Dialogue and Dialogue on Trade) have been established to guarantee a wider framework for relations with this country. The initiation and development of a dialogue which aimed to define an action plan on visa liberalization with Armenia, Azerbaijan and Belarus were linked on the one hand to the



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implementation of the readmission agreements, for the repatriation of irregular migrants, and on the other hand to the achievement of significant progress on the protection of fundamental values. At present, although visas are still needed, administrative burdens for the citizens of these countries who go to the Schengen area have decreased.

During the EaP Summit in Prague in 2009, it was proposed to set up several thematic platforms that would contribute to boosting multilateral cooperation within the Eastern Partnership. This is how [the Eastern Partnership Panel on Migration and Asylum](#) was established, following the principles outlined in the Global Approach to Migration and Mobility (GAMM) and the European Agenda on Migration, the promotion of cooperation and dialogue on the issues of democracy and good governance through the harmonization of policies and practices. The Eastern Partnership Panel on Migration and Asylum (EaPPMA) was given a status of the Regional Consultative Process (RCP's)², as well as the Prague and Budapest Processes in Europe and Rabat and Khartoum in Africa, and thus represents one of the soft modalities for cooperation with the third countries in the fields of migration and asylum.

2. The objectives of the Eastern Partnership Panel on Migration and Asylum

The Panel's activities include, inter alia, strengthening the immigration and asylum systems of the partnership countries; developing the dialogue on issues of immigration and asylum between the partnership countries

² The RCPs are ongoing, regional information-sharing and policy dialogue meetings dedicated to discussing specific migration issue(s) in a cooperative manner among States from an agreed (usually geographical) region, and may either be officially associated with formal regional institutions, or be informal and non-binding. While being usually state-led, they are often supported by the international organizations. In many cases, including EaPPMA, the UN Migration Agency (IOM) provides the comprehensive secretarial and technical support to RCPs functioning ensuring the dialog is conducted in line with the best international practices in migration field.



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and the European Union; facilitating the exchange of the best practices to comply with international standards. One of the major goals of the Panel is the reduction of irregular immigration flows, with prospects and initiatives related to asylum policies, which are still in embryo. According to the analysis of some observers, signals coming from recent migratory flows that mainly affect the Black Sea should not be underestimated (in this regard the following information might be useful <http://www.infomigrants.net/en/post/5314/migrant-routes-the-black-sea-is-more-dangerous-than-the-mediterranean>) which would indicate the opening of a new route, in response to the closure of the western Balkans and the one that has long interested Greece and Turkey.

The situation of uncertainty on the real dimensions of the phenomenon has, in any case, pushed the Panel, through a series of initiatives dedicated to this (e.g. recently conducted [expert meeting on preventing facilitation of irregular migration](#)), to encourage the exchange of the best experiences, aimed at preventing the phenomenon of irregular immigration and in particular the smuggling of migrants, not only with regard to policies and best practices but also with regard to the legislative framework of individual countries.

From the monitoring activities on the national regulatory framework on irregular immigration, and in particular on the facilitation of entry, transit and residence, carried out within the Panel, the first element that emerges, as to the conformity of the national legislation of Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine to the European and international obligations, is the fact that all the countries of the partnership, between 2000 and 2006, therefore with good timeliness, have signed and ratified both the [Palermo Convention against Transnational Organized Crime of and the Protocol attached to it dedicated to the fight against the smuggling of migrants](#). However, this element cannot lead to the conclusion that in this way a homogeneous and coherent framework has been created between the legislations adopted in each partner state on facilitating irregular entry and the rules laid down at the European Union level.



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Undoubtedly it contributes to a fragmentation of the legal framework the recent conclusion to which the European Commission has come to not proceed a reform of the Facilitators Package as widely illustrated in the "Staff working document refit evaluation of the EU legal framework against facilitation of unauthorized entry, transit and residence: the Facilitators Package - [Directive 2002/90/EC](#) and [Framework Decision 2002/946/JHA](#)", after having carried out consultations between Member States and how it had been announced in the Action Plan Against Migrant Smuggling 2015-2020. The decision not to change the legislation leaves unanswered some of the critical issues of the current discipline due to the different solutions that the European legislation and the one contained in the Protocol provide about some fundamental aspects for the definition of smuggling: the prediction of material benefit as a constitutive element of facilitation, the regime of aggravating circumstances and the humanitarian clause, among others. The lack of homogeneity also distinguishes the laws of the partnership countries that adopt different legislative solutions, as well as for the three aspects mentioned above, also for the definition of the crime of facilitation and the sanctions envisaged for it, with the negative effect to facilitate the smugglers' practices of *forum shopping* in governing the flows that are thus directed towards the countries with more favourable legislation. In relation to this the importance of cooperation with third countries in preventing irregular immigration is recognized both in the Commission documents, in particular in the mentioned Action Plan, and in those of the European Parliament.

Although the EaPPMA is a soft law cooperation tool, it allows to assess the impact that the reform proposals have on the immigration and asylum systems present in the EU Member States and the Eastern Partnership countries. While not yet candidate countries, some of the Partnership States have declared ambitions in this respect, first of all, Georgia, followed by Republic of Moldova and Ukraine, and therefore screening of their legislation in the sector could be conducted at any time on the basis of Copenhagen criteria. In fact, according to the European Parliament, the European Council should officially declare that these three States meet the requirements of Article 49 TEU and therefore are ready to become Member States of the European Union. From this perspective greater harmonization in the discipline seems even more necessary after the ruling of



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the Court of Justice, which has unequivocally established that criminal proceedings aimed at repressing the facilitation of illegal immigration and thus aiming to ensure the implementation of Directive 2002/90 and Framework Decision 2002/946, fall within the scope of the EU law.

The ruling of the Luxembourg courts seems to push towards a full harmonization of the sector as useful to avoid smugglers' practices to exploit the most favourable state legislation, while determining the application of the Charter of Fundamental Rights also to the facilitation of illegal immigration both in the European and in the national discipline. Thus, the choice to entrust the possibility of governing the phenomenon only to the good practices or support for operational cooperation, information exchange, or handbooks for stakeholders in specific sectors (Refit Evaluation, p.37) does not seem to be an effective response. Non-legislative measures not only favour the adoption of solutions by the non-homogeneous States, which are more easily subject to judicial review, also from the point of view of the protection of fundamental rights, but, as the Commission itself sees, they are typical expression of an "emergency" logic that cannot exhaust the EU's intervention tools. The necessary complementarity of the non-legislative instrument with the legislative one inevitably leads to an action to reform the Facilitators Package as an instrument that best contributes to "getting better and to countering the phenomenon in the long term" (Refit Evaluation, page 30).

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