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# The ENP in the light of the new “neighbourhood clause” (Article 8 TEU)

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### **The ENP in the light of the new “neighbourhood clause” (Article 8 TEU)**

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## The ENP in the light of the new “neighbourhood clause” (Article 8 TEU)

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This short contribution outlines the renewed constitutional framework in which the “European Neighbourhood Policy” (ENP) is to be integrated and further developed (1.) and briefly discusses its possible implications for the *finalité* of the neighbourhood relationship in general and of the ENP more specifically (2.). This constitutional perspective reveals three – already well-known – conceptual problems of the ENP (3.).<sup>1</sup>

### 1. The renewed constitutional framework

The fundamental treaties of the Union did not, until now, contain a clause specifically dedicated to the Union’s relationship with its neighbours. The Treaty of Lisbon inserted a new provision – Article 8<sup>2</sup> – into the TEU,<sup>3</sup> thus conferring a constitutional status on the Union’s relationship with its neighbours as of 1 December 2009.

#### 1.1. The new Article 8 TEU

The relevant “neighbourhood clause”, figuring prominently in Title I TEU, contains a number of indefinite legal concepts, leaving much scope for interpretation, in particular with regard to its geographical and substantive scope.

First, Article 8 TEU applies to “neighbouring countries”. Although a literal reading would suggest that it covers only countries sharing either a land border or a sea border with the

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<sup>1</sup> This text was written in January 2010. Please note that two substantial contributions on Article 8 TEU could only be considered for a limited revision (mainly of the footnotes) in May 2011: D. Thym, “Artikel 8 EUV”, in: E. Grabitz/M. Hilf/M. Nettesheim (eds.), *Das Recht der Europäischen Union: Kommentar* (Beck, Munich 2010) and P. Van Elsuwege/R. Petrov, “Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?” (forthcoming in *European Law Review* 2011).

<sup>2</sup> Article 8 TEU – which reproduces literally Article I-57 of the never ratified Treaty establishing a Constitution for Europe – reads as follows: “1. *The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.* 2. *For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.*”

<sup>3</sup> Treaty establishing European Union (TEU), lastly modified by the Treaty of Lisbon (entered into force on 1 December 2009), quoted according to the consolidated version published in the Official Journal of the European Union 2010, p. C 83/1 et seq.

Union, it can also be understood in a broader sense<sup>4</sup> as to include “neighbours of the immediate neighbours”. The Union practice has taken the latter view.<sup>5</sup>

Secondly, the substantive policy covered by the new “neighbourhood clause” seems to be similarly broad. Its objective is the establishment of an area of prosperity and good neighbourliness. The Union is thus encouraged to take potentially any political or economic measure suitable to achieve that aim. The term “special relationship”<sup>6</sup> suggests two things: on the one hand, it does not exclude – and seems indeed to tend to – “deep” forms of cooperation with neighbouring countries; on the other hand, no specific single “blueprint” model of cooperation is prescribed. “Differentiation” is already current practice in the Union’s relations with its neighbours – be it within or outside the ENP developed since 2003.

Thirdly, the area of prosperity and good neighbourliness is can<sup>7</sup> be achieved by means of “specific agreements”: Article 8 TEU therefore provides a new and specific legal basis empowering the Union to conclude neighbourhood agreements. It is modelled upon the wording of Article 217 TFEU<sup>8</sup> which constitutes since the very foundation of the Community the legal basis for the Union’s association agreements with third countries. One can, however, observe one difference: the new legal basis does not explicitly provide for “special procedures”, mentioning instead an obligation to monitor the implementation by means of “periodic consultation”. It is however recognised that the reference in Article 217 TFEU cannot be understood as a real enabling clause since special procedures are part of many agreements which do not qualify as association agreements. It aims thus at making clear that Union law does not allow the participation of third states in the Union’s institutions: so-called “internal association” is consequently excluded.<sup>9</sup>

The imposition of periodic consultations throughout the implementation of neighbourhood agreements by Article 8.2 TEU suggests therefore that this specific form of association agreements shall – or at least can – be subject to closer and frequent inspection.<sup>10</sup>

<sup>4</sup> Although “neighbouring” is generally associated to terms like next, bordering, surrounding, connecting or adjacent, it can also mean “nearby” (not far away). As a noun, “neighbourhood” can mean a nearby region or an area. See Collins English Dictionary, Complete and Unabridged 6th Edition (HarperCollins Publishers 2003).

<sup>5</sup> With the extension of the ENP’s geographical scope to the Caucasus: including since the 2007-enlargement of the Union to Romania and Bulgaria, the EU has no direct border with Armenia and Azerbaijan.

<sup>6</sup> Plural, compare e.g. with the French (“des relations privilégiées”) or German (“besondere Beziehungen”) versions. The term “special relationship” is however not further defined; the Treaty lacks also a definition of what could be considered as its opposite (“ordinary relationship”).

<sup>7</sup> The Union “may” conclude specific agreements, see Article 8.2. TEU. On the “optional character” of Article 8.2 TEU see also D. Thym (footnote 1) at 10-12.

<sup>8</sup> Ex-Article 310 TEC. The TEC has been modified and renamed into Treaty on the Functioning of the European Union (TFEU) by Treaty of Lisbon. The TFEU is cited according to the consolidated version published in the Official Journal of the European Union 2010, p. C 83/1 et seq.

<sup>9</sup> See Dominik Hanf/Pablo Dengler, “Accords d’Association”, in : *Commentaire Mégret* (Publications de l’Institut d’études européennes de l’Université Libre de Bruxelles, Bruxelles 2004), 293 et seq. providing further references.

<sup>10</sup> Waldemar Hummer, “Artikel I-57 EVV”, in: Christoph Vedder/Wolff Heintschel von Heinegg (eds.), *Europäischer Verfassungsvertrag. Kommentar* (Nomos, Baden-Baden 2007), p. 243 (at 21): “Manuduktionscharakter”.

## 1.2. Consequences for the conclusion of association agreements with neighbouring countries

On the procedural formal side, the recently reformed Treaty system provides a new – and more specific – instrument to be used by the Union when concluding association agreements with one or several of its neighbouring countries.<sup>11</sup> This – read together with Declaration No 3 annexed to the TEU<sup>12</sup> – implies that Article 8 TEU is not confined to countries included in the current ENP but applies to agreements to be concluded with any neighbouring state. Modifications of existing association agreements meeting the substantive criteria set out in Article 8 TEU already concluded with such countries – such as the EEA Agreement – would hence, at least in principle, need to be based on Article 8 TEU, too.<sup>13</sup>

This interpretation of Article 8 TEU as a new legal basis for concluding and adopting specific association agreements means that the latter will need to be adopted by the Council acting unanimously<sup>14</sup> after having obtained the Parliament's consent.<sup>15</sup>

On the substantive side, Article 8 TEU allows the Union to conclude neighbourhood agreements relating to any policy field falling within the realm of its powers. Such agreements could thus in principle range from mere coordination to very advanced – and institutionalised – forms of cooperation. The obvious question is hence whether or not this new model of specific neighbourhood agreements would not need to meet more demanding substantive criteria depending on the “deepness” of the relationship they intend to establish.

<sup>11</sup> Article 216.1 TFEU makes clear that a legal basis for concluding international agreements can also be found in the TEU (“where the treaties so provide”). It is true that Article 8.2 TEU, although based on the wording of Article 217 TFEU, does not explicitly refer to “association” and also uses a somewhat more cautious wording (“may contain ... as well as the possibility ...”). However, it allows for concluding “specific” agreements enabling thus the Union to fulfill its task (“shall develop”) of establishing “special relationship” (Article 8.1 TEU) with a selective circle of (“neighbouring”) countries. The significance of such agreements for the Union is further highlighted by the fact that Article 8 TEU figures prominently in the very first part of the TEU. Article 8.2 TEU can therefore be seen as the specific legal basis (*lex specialis* to Article 217 TFEU) for concluding association agreements with neighbouring countries.

<sup>12</sup> According to that Declaration on Article 8 TEU annexed to the Treaty of Lisbon, “the Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it”.

<sup>13</sup> Hummer (footnote 10) at 22 seems to suggest a different reading on that point. This is also the position of D. Thym (footnote 1) who considers – based on the general premise that the legal reach of Article 8 TEU should not be overstretched (at 6) – that the Union remains entirely free in the choice of legal instruments to be adopted in the pursuit of a comprehensive neighbourhood policy (at 12). Since the CJEU does consistently uphold the principle that the choice of a legal basis cannot be left to the discretion of the political institutions but needs to be established on objective criteria, this interpretation comes however close to denying Article 8 TEU a legal value of its own. Van Elsuwege/Petrov (footnote 1) suggest for such cases recourse to a “double legal basis” – a solution which would only be available if “neighbourhood agreements” were subjected to the same procedural requirements as “ordinary” association agreements (on this see next footnote).

<sup>14</sup> The unanimity requirement set by Article 218.8 TFEU for association agreements also applies to neighbourhood agreements. This follows from the fact that Article 8 TEU provides a *lex specialis* to Article 217 TFEU and from the constitutional significance of such far-reaching agreements – which the Member States recognized explicitly by placing Article 8 prominently in Title I of the TEU. The (somewhat unhistorical) alternative interpretation based on the purely textual argument that the term “association” is not mentioned *expressis verbis* at Article 8 TEU – and which would confine Article 8 TEU to a merely symbolic provision – is discussed by Van Elsuwege and Petrov (footnote 1). Although D. Thym (footnote 1, at 12 and 20) conceives of Article 8 TEU as a mere alternative to other legal bases (and in particular to Article 217 TFEU), he also considers that both the *genesis* and *ratio* of Article 8 TEU point to extending the unanimity requirement of Article 218.8 TFEU to neighbourhood agreements.

<sup>15</sup> Article 218.6 lit. a (i.) TFEU, which applies on the basis of the reasoning developed in the previous footnote. At any rate, an agreement based on Article 8 TEU will generally be “establishing a specific institutional framework by organising cooperation procedures” (Article 218.6 lit. a (iii.) TFEU), have important budgetary implications for the Union (Article 218.6 lit. a (iv.) TFEU) and concern matters falling under the EP’s co-decision powers (Article 218.6 lit. a (v.) TFEU). See also D. Thym (footnote 1) at 19.

On the one hand, the vagueness of the terms used in Article 8 TEU<sup>16</sup> does not allow one to infer precise qualitative criteria from the Treaty. A broad interpretation as to the potential content of the agreements would also be supported by the practice developed over the past decades with respect to Article 217 TFEU: association agreements frame and organise a great variety of relationships ranging from development cooperation and inter-regional economic cooperation to very advanced integration of non-Member States into core policies of the Union.<sup>17</sup>

On the other hand, the *genesis*<sup>18</sup> and also the wording<sup>19</sup> of Article 8 TEU would suggest that “neighbourhood agreements” should aim at more advanced forms of substantive cooperation along the lines of the most advanced forms of association the Union has already established with some European third countries. Such a reading is not *per se* excluded by the fact that the Treaty refrains from establishing itself – and thus mandates the institutions of the Union to define – the relevant substantive criteria. Since the neighbourhood clause was established against the backdrop of the existing models of advanced cooperation with third countries such as the EEA-Agreement, and is also subject to substantive conditions,<sup>20</sup> it could even be read as “constitutionalising” the concept of “integration without membership”.

In sum, Article 8 TEU can be understood as a purely programmatic provision. An alternative, non-compulsory, yet slightly more ambitious, interpretation would consider the neighbourhood clause as a new legal basis to be used by the Union for engaging with third countries by means of “advanced” agreements for “deep” forms of institutional and substantive cooperation. The politically responsible institutions of the Union would of course have a wide margin of discretion when assessing which degree of association which might be feasible and desirable with regard to the various third countries of the Union’s neighbourhood. This discretion would also extend to the question whether an association is worth being “crowned” by a specific neighbourhood agreement. However, it seems that the Union could use Article 8 TEU as a constitutional tool, and perhaps even recognise it as a duty, to formally distinguish between the “better” neighbours and the others, and to do so in an overall consistent manner.<sup>21</sup>

This implies that the Union is thus free – and having regard to its “cooperation and association taxonomy” perhaps even obliged – to impose e.g. economic conditions before “upgrading” an existing relationship with a given country by means of concluding a more ambitious neighbourhood agreement.

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<sup>16</sup> Neighbourhood agreements “may contain” reciprocal rights and obligations etc., see Article 8.2 TEU.

<sup>17</sup> For an account see Hanf/Dengler (footnote 9). Van Elsuwege/Petrov (footnote 1) stress rightly that the classification of the agreements concluded by the Union with third countries has hitherto remained to a large extent a matter of politics, not law.

<sup>18</sup> Although geopolitical aspects played of course an important role in the birth of the ENP and of the Convention’s predecessor of Article 8 TEU, it seems that the latter’s main rationale has been to establish a “constitutional” alternative to membership. See on this the text at sub-section 1.4.

<sup>19</sup> Article 8.1 TEU qualifies the relationship to be developed both geographically (neighbours) and with regard to intensity (“special”, “close”) and the specific agreements according to Article 8.2. TEU are to be concluded “for the purposes” of developing such twofold qualified engagements.

<sup>20</sup> See sub-section 1.3. below.

<sup>21</sup> In practice, this would be a demanding yet not necessarily unhealthy task – and, given the very nature of the exercise, subject to rather limited judicial review (procedure, motivation).

### 1.3. Possible limits: principle of cooperation and Union values

Article 8 TEU imposes two conditions to be respected by the Union when developing its ties with neighbouring countries: the special relationship needs to be “based on cooperation” and also to be “founded on the values of the Union”.

The cooperation principle seems to stress the obvious fact that the Union’s relationship with the neighbourhood can only be shaped with the consent of the third countries concerned. From a formal point of view, this is already inherent in the fact that international agreements need to be concluded by the Union, on the one hand, and a neighbouring state, on the other hand. In substance, one might ask whether forms of very advanced integration (as opposed to mere cooperation) should be ruled out of the scope of Article 8 TEU. This appears however to be inconsistent with both the programme set out in the neighbourhood clause and the Union’s consistent association practice. A sensible interpretation would thus consist in understanding the cooperation principle as an exclusion of “internal associations” – i.e. the formal participation of third countries in the decision-making of the Union institutions.<sup>22</sup>

More difficult to assess is the meaning and the scope of the condition according to which special relationship with neighbouring countries need to be “founded on” the values of the Union.<sup>23</sup> This wording<sup>24</sup> – which is borrowed from ex-Article 6.1 TEU<sup>25</sup> and refers clearly to the political criteria to be met by the Member States of the Union<sup>26</sup> - contrasts clearly with the softer “shall be guided” formula used in the general external action sections of the Treaty.<sup>27</sup>

A strict interpretation of this condition would signify that the Union could only enter into “special relations” with neighbouring countries which do respect democracy, the rule of law, and human rights in the same way as the Union and its Member States. A wider interpretation would accept the neighbours’ commitment to the Union’s values without actually requiring an equivalent level of protection and/or application for the time being. Wording and context of Article 8 TEU sustain the former, more demanding interpretation. Applying such a standard to neighbourhood relations could however appear to be somewhat overdrawn if one considers that deficiencies in the implementation of Union values can be considered as temporary phenomena and thus should not necessarily qualify as absolute obstacles to the recognition of third countries as candidates for accession to the Union.<sup>28</sup>

<sup>22</sup> In line with the common understanding of the reference to “special procedures” in Article 214 TFEU.

<sup>23</sup> These are set out in Article 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

<sup>24</sup> Inserted into the “neighbourhood clause” at the request of several members of the European Convention (see CONV 671/03, 14 April 2003).

<sup>25</sup> “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

<sup>26</sup> See Article 49 TEU for candidate states for accession to the EU and Article 7 TEU for Member States.

<sup>27</sup> Article 21 TEU (“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: ...”) and Article 205 TFEU (“The Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in...”).

<sup>28</sup> More recent examples provide the decisions of the Union to grant Turkey and Croatia the status of candidate countries.

Hence, one could argue that Article 8 TEU impedes the Union from entering into special relationship with neighbouring countries refusing to commit themselves to the values of the Union. The same would be the case for countries actively obstructing such a commitment. Finally, the limitation would arguably also apply in an unsatisfactory situation where no signs of improvement are shown over time. The conclusion of more advanced neighbourhood agreements would require a decent record – or at least a process of considerable improvement – in terms of human rights protection, the rule of law and democracy.

#### **1.4. The Neighbourhood Clause and Accession**

The roots of this new Treaty clause can be traced back to a rather early stage of the institutional reform process of the Union which lasted almost an entire decade.<sup>29</sup> There is nevertheless no clear evidence for the reasons which led to the “constitutionalisation” of the Union’s relations with its neighbouring countries.<sup>30</sup> Some suspected that the main purpose of the clause was to confine neighbouring states to a permanent non-member status.<sup>31</sup>

Closer analysis of the relevant Treaty articles does not confirm such fears. Qualifying under the neighbourhood clause does not entail in itself the disqualification of a third country from the accession: all “European” neighbours retain a right to apply for – but not necessarily to obtain<sup>32</sup> - Union membership (Article 49 TEU).<sup>33</sup> For these states, special neighbourhood relationship could in fact indeed constitute a preparation for accession.

Since non-European neighbours were never given the right to apply for membership, Article 8 TEU could not affect any right of these states with regard to accession.

#### **1.5. Result**

The new neighbourhood clause in the Treaty is essentially (but not exclusively) programmatic in nature. It stresses the importance of political and economic stability in the Union’s “near abroad” while highlighting the Union’s commitment to contribute to such stability by means of cooperation with the neighbouring states.

The clause remains vague as to the content and form of the Union’s neighbourhood policy, adding no substance to the existing constitutional provisos. As a result, the institutions of the Union continue to have a great margin of discretion as to policies, methods, instruments and

<sup>29</sup> The Praesidium of the Convention for the Future of Europe proposed to reflect about a clause “defining a privileged relationship between the Union and its neighbouring States” in its first preliminary draft of 22 October 2002 (see CONV 369/02, p. 16). A subsequent proposal was approved by the Convention without much debate (see the summary of the reactions, CONV 671/03, 14 April 2003) and has been only subject to minor editorial modifications in the subsequent IGCs. Note that a more sober version had been proposed in the so-called “Pénélope project”, an interesting yet largely ignored feasibility study worked out by senior Commission officials: “L’Union établit des relations privilégiées avec ses États voisins par des accords d’association.” (see Article 27, Relations avec les États voisins, in : F. Lamoureux e.a., Contribution à un avant-projet de Constitution de l’Union européenne, document de travail, Bruxelles, 4 December 2003, p.9).

<sup>30</sup> It seems that the President of the Convention made sure that the provision was maintained in the Draft Constitutional Treaty because he was personally convinced that EU-enlargement could not be pursued endlessly, see D. Thym (note 1) at 2 (with reference to Madallon, RTDE 2005, 493 at 516 et seq.).

<sup>31</sup> Originally, the clause constituted a specific section dedicated to “The Union and its Neighbours” neatly separated from the provisions on “Union Membership”.

<sup>32</sup> Article 49 TEU does not contain a right to accession but only imposes on the Union (i.e. chiefly the Council) to duly examine requests for membership.

<sup>33</sup> See also D. Thym (footnote 1) at 7 (and note 6).



institutional frameworks to be adopted with regard to individual or groups of neighbouring states. The hitherto single traditional limit remains intact: “internal association” – participation of third countries in Union institutions – is precluded. Furthermore, it is possible – yet not mandatory – to infer from Article 8 TEU a duty of the Union to reserve the new instrument of “neighbourhood agreements” only to particularly advanced forms of institutionalised and substantive relationship.

The new constitutional framework for shaping the Union’s neighbourhood relations does hence not appear to entail major consequences for the ENP as developed since 2003 with regard to the eastern and southern neighbouring countries (and recently somewhat “relaunched” by means of the so-called “Union for the Mediterranean” and “Eastern Partnership” respectively).

The new neighbourhood clause could however impact on the current ENP as far as it extends to third countries accounting for questionable records in terms of democracy, the rule of law and human rights since the “special relationship” needs to be founded on the values of the Union. Even if this limit were interpreted cautiously, the Treaty would oppose to the development of closer relations with those neighbours defying - or only paying lip services to - democracy, the rule of law, and human rights as understood by the Union. The Union would also need to make sure that enhancing its relationship with such states would at least need to go hand in glove with a steady improvement in the respect of these values.

In other words, the Treaty seems to impose since 1 December 2009 a constitutional duty on the Union to apply the concept of “conditionality” to the implementation of the ENP by ensuring the respect of its own values by neighbouring states.

## **2. The “finalité” of the ENP**

As already seen, the new neighbourhood clause of the TEU is not overly explicit on the precise form the “special relationship” between the Union and its neighbouring countries should take.

### **2.1. “Outer limits” and the EEA as an “ideal type” model**

The main “outer limits” of neighbourhood relationships are however well established: on the one hand, they can include – and should indeed aim at – very advanced and institutionalised forms of association covering potentially all policy fields of the Union, provided that the values of the Union are at least generally respected. On the other hand, the Treaty excludes sharing Union institutions (“internal association”) with neighbouring states, be they non-members due to the geographical condition set out in Article 49 TEU or due to an explicit or implicit political decision (“protected” by the same Treaty provision) to keep a European state outside the Union.<sup>34</sup>

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<sup>34</sup> This implies that the creation of a common supranational “EEA-Plus” integrating the EU and its neighbours – an interesting idea *de lege ferenda* mentioned by Peter Xuereb during the Workshop – would require a revision of the EU Treaty. See ECJ, Opinion 1/1991 (EEA I), ECR I-6079.

The association coming closest in practice to a true “area of prosperity and good neighbourliness” – and hence to the objective of the neighbourhood clause – is the Agreement on the European Economic Area (EEA). Like the ENP, it had originally been conceived as a far-reaching and consequently attractive alternative to Union membership.

One could thus argue that qualified neighbourhood relations should ideally aim at achieving a degree of substantive economic and political integration comparable to the one established by the EEA (or the set of bilateral treaties concluded between the Union and Switzerland).

## **2.2. Conditionality and “finalité”**

“Special” or “deep” relationships – which in particular in the context of economic integration entail rights and obligations granted to and imposed upon individuals - require the application of a common set of fundamental common principles.

As already observed, the new neighbourhood clause of the Treaty contains one new element: the obligation imposed on the Union to apply a value-based conditionality in neighbourhood relations - which is more demanding than the mere value-orientation generally to be observed in the context of the Union’s external action.

This would also support the reading that an advanced relationship such as that established by the EEA could be considered as a near ideal model for the programme set out in the neighbourhood clause of the Treaty.

## **2.3. Developing the neighbourhood area: the ENP as a transformation process**

If the “finalité” of Article 8 TEU is ultimately to be situated on the upper level of the so-called “Hallstein scale” (i.e. a substantive economic and political integration stopping short of a participation in the Union institutions), the “finalité” of ENP developed since 2003 is thus to organise the process which could one day lead to such result.

The ENP follows a gradual – and differentiated – approach, taking existing agreements as a starting point and aiming at progressively “upgrading” the bilateral and multilateral relations. As already observed, this is in line with the largely programmatic character of Article 8 TEU: the provision recognises the admissibility of a pragmatic step-by-step advancement and also underlines that the neighbourhood area should be characterised by relations “based on cooperation”.

However, the development of a “special relationship” is nevertheless to be subjected to increasing value-based – i.e. far-reaching political – conditionality.

Furthermore, since the ENP is in practice designed as a process which aims to progressively integrate the economically least developed neighbouring countries into a set of Union policies, it also requires that further progress be made conditional on the fulfilment of a set of economic conditions.

Although the ENP can only be based on cooperation between the Union and its neighbours, and also requires efforts and adjustments on the Union side,<sup>35</sup> its development will in practice (for both constitutional and economic reasons) imply in no small measure an alignment of the neighbouring countries to the Union standards and preferences. The *Union's* ENP is thus in the first place an instrument to encourage and sustain political and economic reforms in the neighbouring countries concerned. This is also recognised in the relevant key documents defining the ENP and translates into the use, by the Commission, of identical or only slightly modified instruments which had been previously developed within the framework of its pre-enlargement strategies.

### 3. Problems of the ENP

Measured against the objective set out in Article 8 TEU, the current ENP faces – even after its latest development following the version following the introduction of the “Union for the Mediterranean” and the “Eastern Partnership”<sup>36</sup> – (at least) three well-known fundamental conceptual problems.<sup>37</sup>

#### 3.1. Process, not Policy

Although “policy” is a relatively broad concept, the presentation of the current ENP as a “Union policy” suggests a kind of single and coherent framework applying to all neighbouring countries. This is in line with the overarching objective of the Union to progressively define its own geographical borders and at the same time to develop close economic and political ties with its neighbours as a means to safeguard its own security understood in the largest sense of the word.

In reality, the existing ties with the many different neighbouring countries as well as their interests and expectations with regard to the Union (and often also vice-versa) differ greatly. This means in practice that ENP has to be handled flexibly. Differentiation has thus become the key feature of the ENP – to such extent that one wonders whether its qualification as a “policy” is not misleading.

<sup>35</sup> Suffice to mention visa – and more generally immigration – policy, gradual opening the agricultural markets, technical and financial assistance.

<sup>36</sup> Most recent assessments by the Union institutions include the Commission's and High Representative's Joint Communications of 8 March 2011 (“A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean”, COM (2011) 200 final) and 25 May 2011 (“A new response to a changing neighbourhood”, COM (2011) 303), and the Commission's Communication of 12 May 2011 (“Taking stock of the ENP”, COM (2011) 207).

<sup>37</sup> On the ENP see e.g. M. Cremona/C. Hillion, “L'Union fait la force? Potential and Limitations of the ENP as an Integrated EU Foreign and Security Policy” (EUI Working Paper 2006/39, Florence 2006) ; M. Cremona/G. Meloni (eds.), *The ENP : A Framework for Modernisation ?* (EUI Working Paper 2007/21, Florence 2007) ; C. Hillion, “Mapping out the new contractual relations between the European Union and its neighbours”, 12 (2007) *European Foreign Affairs Review* 169-182 ; R. Petrov, “Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries”, 13 (2008) *European Foreign Affairs Review* 33-52 ; A. Albi, “The EU's ‘External Governance’ and Legislative Approximation by Neighbours”, 14 (2009) *European Foreign Affairs Review* 209-230 ; F. Maiani/R. Petrov/E. Mouliardova (eds.) *European Integration Without EU Membership: Models, Experiences, Perspectives* (EUI Working Paper MPW 2009, 10, Florence 2009) ; D. Kochenov, “The Eastern Partnership, the Union for the Mediterranean and the remaining need to do something with the ENP” (CRCEES Working Papers 2009/01) and the contributions to the present volume.

This is not just a matter of semantics. In the long run, misleading labelling – the rebranding of the Barcelona Process as a “Union” for the Mediterranean being the latest example – affects both the intelligibility and legitimacy of a policy regardless its potential or real achievements.

### **3.2. Incentives**

The ENP does not usually offer very strong incentives for neighbouring countries to undergo painful political and economic reforms which are generally needed in order to engage into close relationship with the Union.

The prospect of membership – which has proved to be a very powerful incentive – is explicitly excluded. This explains why European neighbours such as Ukraine have never really accepted the ENP. They merely use it as the tool which is currently available for their strategy to promote their real objective, which is to join the Union.

The prospects of an advanced economic integration have so far also remained vague (both in terms of objectives and instruments). To provide a real incentive, the ultimate objective of a deep substantive economic, and correspondingly political, integration – i.e. the extension of the Internal Market as operated by the EEA or the bilateral EU-Switzerland agreements – needs to be more clearly spelled out. This would arguably have to include explicitly aspects which the Union considers to be “too sensitive”, in particular free movement of persons, and a more generous use of “hard law” instruments.

This is not to say that the present framework does not already set some incentives, and some neighbouring countries appear in fact to discover and to progressively use the potential presently offered. However, in their present shape they do not provide an overly strong stimulus for third countries willing to integrate with the Union to accept and implement difficult compromises and adjustments. Moreover, depending on their current domestic political and economic structures, even the prospect of a full-blown economic and political integration might prove to be plainly unattractive for some of the neighbouring countries.

The flexible nature of the ENP (differentiation) is also problematic in this respect: it appears not to be the result of any Union policy concept or strategy but the simple consequence of the fact that the Union's offers do not seduce all neighbouring states to the same extent.

### **3.3. Conditionality**

The new Article 8 TEU imposes upon the Union the obligation to apply a value-based conditionality when engaging in neighbourhood relationships. As already seen, this condition can be considered as being satisfied – in particular as cooperation remains at less advanced stages – when a neighbouring country commits itself to the Union values and produces evidence that it also progressively implementing them in practice.

Putting this obligation into practice is indeed a demanding task. It raises a number of questions relating, on the one hand, to the precise criteria to be used at a given stage in the developing special relationship and, on the other hand, to the evaluation method to be

applied. This is especially true in respect of the non-European neighbouring states which are not bound by (and cannot adhere to) the European Convention of Human Rights.

Conditionality is likely to produce the expected results when it supports an existing domestic policy process driving towards the implementation of EU values. It is also likely to work “better” when the Union is able to sustain its support by setting incentives, including those – still suboptimal – incentives offered by the ENP.

Should the domestic conditions in a neighbouring state be unfavourable or outright opposed to the acceptance of EU values, the ENP and its limited incentives alone are unlikely to make conditionality “work”. As a result of the introduction of the conditionality condition into the Treaty, the Union would be formally impeded from engaging in advanced cooperation with such neighbours, and would be obliged to “downgrade” or even suspend existing relationships as it has been the case of Belarus and Syria.

As long as relationships with “problematic” neighbouring countries remain at a low level of intensity, the new explicit Treaty-based obligation to “export” the Union values into its vicinity is unlikely to entail major difficulties. Things are different when cooperation – and be it limited to selected sectors – intensifies and does not directly relate to supporting the development of democracy and the rule of law: even a generous interpretation of the “Union values condition” in Article 8 TEU sits uncomfortably with enhanced cooperation between the Union and a neighbouring state with a problematic human rights and rule of law record.

So far, this problem “only” constituted a credibility gap within the ENP as conceived by the Union institutions, of which many (in the Union) took notice only very recently as a consequence of the “Arab Spring”. After the entry into force of the Lisbon Treaty, the Union needs to decide whether Article 8 TEU will have the effect of “constitutionalising” that gap or whether it will give real substance to the hitherto rather shallow concepts of “shared values” and “joint ownership”.



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