



# THE OBSOLESCENCE OF THE EUROPEAN NEIGHBOURHOOD POLICY



STEVEN BLOCKMANS

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CEPS (Centre for European Policy Studies) is an independent and non-partisan think tank based in Brussels. Its mission is to produce sound policy research leading to constructive solutions to the challenges facing Europe.

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# **GLOSSARY OF TERMS & ABBREVIATIONS**

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|       |  |
|-------|--|
| AA    | Association Agreement  |
| ACAA  | Agreement on Conformity Assessment and Acceptance of Industrial Products |
| AFSJ  | The Area of Freedom, Security and Justice                                |
| CFSP  | Common Foreign and Security Policy                                       |
| CGEA  | Commissioners' Group on External Action                                  |
| CIB   | Comprehensive institution-building                                       |
| CJEU  | Court of Justice of the European Union                                   |
| CSDP  | Common Security and Defence Policy                                       |
| DCFTA | Deep and Comprehensive Free Trade Area                                   |
| EaEU  | Eurasian Economic Union  |
| EaP   | Eastern Partnership  |
| EBCG  | European Border and Coast Guard  |
| ECA   | European Court of Auditors   |
| ECT   | Energy Community Treaty  |
| EDA   | European Defence Agency  |
| EFTA  | European Free Trade Area   |
| EIB   | European Investment Bank   |
| EMAA  | Euro-Med Association Agreement   |
| ENI   | European Neighbourhood Instrument  |
| ENP   | European Neighbourhood Policy  |
| EUGS  | Global Strategy for the European Union's Foreign and Security Policy     |
| FTA   | Free Trade Agreement   |
| GNA   | Government of National Accord  |
| HR    | High Representative for Foreign and Security Policy                      |

|       |  |
|-------|--|
| IDP   | Internally Displaced Person  |
| IOM   | International Organisation for Migration                               |
| IPR   | Intellectual Property Rights   |
| MFN   | Most-Favoured Nation   |
| PCA   | Partnership and Cooperation Agreement                                  |
| SAA   | Stabilisation and Association Agreement                                |
| TBT   | Technical Barriers to Trade  |
| TEU   | Treaty on European Union   |
| TRIPS | Trade-Related Aspects of Intellectual Property Rights                  |
| UNHCR | UN High Commissioner for Refugees                                      |
| UfM   | Union for the Mediterranean  |
| VP    | Vice-President of the European Commission                              |
| VLAP  | Visa Liberalisation Action Plan  |
| WTO+  | Legally binding commitments that build upon those agreed to in the WTO |
| WTOx  | Issues that go beyond the current WTO mandate altogether               |

# 1. INTRODUCTION

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The European Neighbourhood Policy (ENP) is in a state of suspended animation. Caught between the Lisbon Treaty's high level of ambition to stabilise, democratisate and associate the countries in its neighbourhood, and the sombre realities in the outer periphery, the crisis-ridden EU has been hard-pressed to lift the ENP out of this state and revise its policy.

The 2015 Review infused the ENP with the promise of a more realistic vision, a more differentiated approach to relations with each of its neighbours and more functional frameworks for cooperation. Resilience has become the buzzword for the 'new' ENP. This reflects the European Union's desire for stability in the countries on its outer borders. By putting security first, the EU is trying to balance its interests and principles. But this pragmatic approach raises questions about the perceived demotion of fundamental rights in the external action of a Union that appears ill-equipped in matters of security. Moreover, the policy framework of the ENP does not offer the scope to seek concrete solutions to the daunting security challenges emanating from the EU's outer periphery.

It is in the sphere of enhancing economic resilience that the EU has traditionally been able to use its clout as a soft power. Driven by a desire to establish closer ties with neighbours that share its ideals, the EU has struck up a new generation of Association Agreements which, at their core, contain provisions to create Deep and Comprehensive Free Trade Areas (AA/DCFTAs). But for ENP partners who do not wish to pursue the preferred model of concluding and implementing an AA/DCFTA, the EU now offers lighter arrangements to move beyond the status quo. The ensuing fragmentation of EU neighbourhood relations casts a shadow over the multilateral dimension of the ENP.

A transactional approach thus seems to have taken hold of the ENP, akin to a more hard-nosed EU external action overall and

applied on a bilateral basis. If this assumption is correct, does it still make sense to talk about a separate policy for the neighbourhood when it applies the same rationale as that

*Does the ENP amount to something more than the geo-branding of 'traditional' foreign policy?*

prescribed by the EU's Global Strategy? Does the ENP amount to something more than the geo-branding of 'traditional' foreign policy? Or is it but a framework for an integrated approach to the neighbourhood and the promise

of a bit more funding for those countries that happen to border the EU?

By adopting an interdisciplinary approach, this book re-examines the purportedly unique features of the ENP. It will revisit the conceptual basis (chapter 2) and legal geography of Article 8 TEU (chapter 3), which obliges the Union to:

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.

The research will then assess the toolbox of contractual, economic, financial and security instruments at the EU's disposal to shape and implement the European Neighbourhood Policy (chapter 4). Central to this investigation is an innovative analysis of the flagship instruments intended to structure relations between the EU and its neighbours (section 4.1). The focus here will be on the eastern neighbours, benefiting from the fact that, at the time of writing, the Association Agreements with three of them had been (provisionally) applied for more than one year,<sup>1</sup> and are said to serve as a template for the EU to negotiate future contractual

<sup>1</sup> The AA/DCFTAs with Georgia and Moldova were provisionally applied between 1 September 2014 and 1 July 2016, when they entered into full force. That with Ukraine remained provisionally applied (the AA part since November 2014, the DCFTA part since 1 January 2016) until July 2017, when a solution was found to overcome the stalemate in the ratification process created by the negative outcome of a consultative referendum in the Netherlands on 6 April 2016.

arrangements with other neighbouring countries (e.g. Morocco and Tunisia). Comparing the breadth and depth of the ‘model’ Association Agreement with Ukraine to the Stabilisation and Association Agreement (SAA) with Serbia, the study finds that, in terms of scope, material substance and timeframes for implementation, the new generation of AA/DCFTAs is in many aspects more advanced than the SAAs entered into with the pre-accession states of the Western Balkans. Both in their political and trade-related parts and provisions, the Association Agreements reveal a higher level of ambition and commitment by the parties to ‘integrate’ Eastern Partnership countries into the internal market of the EU, even without the promise of fully fledged membership, as contained in the SAAs. But when ignoring preambular references to any type of *finalité*, one might well mistake the SAA for the less integrationist agreement, befitting a less intense type of relationship envisaged by the EU within the ENP. This qualitative difference is not simply a matter of the new generation of AAs having been negotiated more recently, thus reflecting an EU bestowed with a host of new competences by the Treaty of Lisbon. It is very much the consequence of a political desire expressed earlier this decade to associate Ukraine and the other able and willing countries of the Eastern Partnership as closely as possible to the EU. This would allow them to escape the clutches of an autocratic and predatory Russia, which fails to modernise its own economy.

Second, the use of ENP conditionality will also be more closely analysed (section 4.2). Here, the focus will be on the application of the principle towards the southern neighbours, since the so-called ‘more for more, less for less’ philosophy mobilised through the ENP was adopted as a response to the outbreak of the ‘Arab Spring’. The incentive-based ('more for more') approach to conditionality continues to be relevant, as its inclusion in the 2015 Review of the ENP shows.<sup>2</sup> Thirdly, a particular and supposedly

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<sup>2</sup> Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Review of the European Neighbourhood Policy”, JOIN(2015) 50 final, Brussels, 18 November 2015, at 5.

successful application of ENP conditionality will be analysed: visa liberalisation (section 4.3). To complete the assessment of the EU's toolbox for the ENP, the practice of crisis response and security sector reform is examined in an effort to discern the alleged nexus between the ENP and the Common Security and Defence Policy (section 4.4). The question here is which of the policy frameworks takes precedence.

Next we consider the question of which institutional arrangements best befit efforts to enhance coherence in ENP policymaking and visibility through representation (chapter 5). Finally, the concluding observations will be reserved for an overall assessment of the nature and functioning of the 'new' ENP (chapter 6).

## **2. THE ENP IS DEAD. LONG LIVE THE ENP?**

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### **2.1 The tyranny of geography**

In international relations, political and socio-economic ties are largely sorted and regulated by the happenstance of geographical location. While more exposure increases the likelihood of better relations, proximity does not automatically translate into friendship. Dissimilarities in topographic, demographic, economic and political factors may impede friendly relations. Such factors inform our understanding of the ‘tyranny of geography’.<sup>3</sup> This notion refers to how the environment has both encouraged and prohibited the development of systems of cooperation throughout history.

In geographical terms, Europe is a continent hard to define. To the north, south and west, this is relatively easy. The Arctic Ocean, the Mediterranean Sea and the Atlantic Ocean form Europe’s natural borders. Most of the non-EU countries on these peripheries are considered to belong to the ‘neighbourhood’, even if not all of them are covered by the EU policy that goes by that name. Iceland and Norway – and, if Brexit materialises, the United Kingdom – are cases in point. Europe’s eastern frontier is more difficult to discern because Europe and Asia form one single landmass. Whereas normative history has somehow accepted that Russia – with its Indo-European, Slavic and orthodox roots – is historically anchored to Europe, the country is kept at arm’s length due to its expansionist tendencies during the last century. Conversely, while the legacy of four centuries of bloody rule has

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<sup>3</sup> See Robert D. Kaplan (2012), *The Revenge of Geography*, New York: Random House.

shaped a widely held ‘European’ point of view that denies the legitimacy of the Ottoman past, nominally secular but overwhelmingly Muslim Turkey has been engaged in accession negotiations with the EU for years. While increasingly autocratic Turkey is too close for comfort for many, strategic reasons dictate that Brussels and Ankara continue their cooperation. The turmoil that now afflicts so much of the western half of Eurasia can make it hard to see where the EU ends and the neighbourhood begins.<sup>4</sup>

Any typology of the European Union’s neighbours is therefore determined not just by geography but also by political, cultural, socio-economic and security factors and the extent to which values are shared. Tellingly, the line “[e]ven in an era of globalisation, geography is still important”<sup>5</sup> from the 2003 European Security Strategy was not recycled in the more comprehensive 2016 version of the strategy. The EU Global Strategy has for the first time formulated the Union’s interests in

*Tellingly, the line “[e]ven in an era of globalisation, geography is still important” from the 2003 European Security Strategy was not recycled in the more comprehensive 2016 version of the strategy.*

the world, thereby incorporating the values that have inspired its own creation, enlargement and development, and promoting the security of the EU and its citizens. This has resulted in the adoption of a new *leitmotiv* for EU external action: ‘principled pragmatism’,<sup>6</sup> whereby the value-based transformative

agenda of the EU’s external policies, in particular towards the neighbourhood, has been replaced by a more hard-nosed

<sup>4</sup> See S. Blockmans and A. Łazowski, “The European Union and its neighbours: questioning identity and relationships”, in S. Blockmans and A. Łazowski (eds), *The European Union and Its Neighbours: A Legal Appraisal of the EU’s Policies of Stabilisation, Partnership and Integration*, The Hague: Auser Press, 2006, pp. 5-6.

<sup>5</sup> See “A Secure Europe in a Better World. European Security Strategy”, 12 December 2003, at 7.

<sup>6</sup> See “Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union’s Foreign and Security Policy”, presented to the European Council on 28 June 2016, at 8 and 16.

*Realpolitik* approach that envisages building the ‘resilience’ of third countries (i.e. states’ institutions and, in a second instance, their societies).<sup>7</sup>

Adding to the terminological inflation from which the realm of EU foreign policy suffers, the concept is translated in at least five ways.<sup>8</sup> First, more focus on cooperation in security sector reform, mainly in areas of conflict prevention, border protection/management, counter-terrorism and anti-radicalisation policies. Second, greater efforts to support inclusive economic and social development, with the creation of job opportunities for young people being among the key objectives of economic resilience. Third, greater crisis-response capacities by deploying the available financial resources in a more flexible manner. Fourth, safe and legal mobility on the one hand, and tackling irregular migration, human trafficking and smuggling on the other. And finally, greater attention to working with partners on energy security and climate action.

*‘Principled pragmatism’ replaces the value-based transformative agenda with a more hard-nosed Realpolitik approach.*

Resilience is thus a more malleable concept that allows the Union to ‘pragmatically’ balance its interests and principles. It characterises the pivot towards a more defensive global strategy. That change is explained by the weakened position of the crisis-ridden EU in the world: it is in the European Union’s primordial interest that countries on its borders are stable and prevent the influx of refugees and economic migrants, the (re-)importation of terrorism and organised crime, the fall-out of environmental disasters, etc.<sup>9</sup> In the words of the EU Global Strategy:

<sup>7</sup> Joint Communication from the European Commission and the High Representative to the European Parliament and Council, “A Strategic Approach to Resilience in the EU’s external Action”, JOIN(2017) 21 final, 7 June 2017.

<sup>8</sup> JOIN(2017) 21 final.

<sup>9</sup> For a first-hand background analysis of the EUGS, see N. Tocci, *Framing the EU Global Strategy: A Stronger Europe in a Fragile World*, Basingstoke: Palgrave, 2017.

My neighbour's and my partner's weaknesses are my own weaknesses. (...) Internal and external security are ever more intertwined: our security at home entails a parallel interest in peace in our neighbouring and surrounding regions. It implies a broader interest in preventing conflict, promoting human security, addressing the root causes of instability and working towards a safer world.<sup>10</sup>

Security comes first. Hence the need for the EU to become a more proactive security provider. But prevention is better than cure. Extending reform to a Europe wider than that represented by the member states of the EU and its candidate countries is the best means of strengthening the European order, *inter alia* because it prevents the emergence of new dividing lines in Europe after each new enlargement. The emphasis here is on spreading good (not just stable) governance, dealing with corruption and the abuse of power, supporting economic reform, boosting trade, establishing the rule of law and protecting human rights in the neighbouring countries. Hence the European Union's self-assigned<sup>11</sup> task to promote a "ring of friends",<sup>12</sup> a circle of well-governed neighbouring countries to the East and on the borders of the Mediterranean with whom the EU can enjoy close and cooperative relations.

Sadly though, the ENP<sup>13</sup> has been characterised by half-hearted promises since its inception in 2003, by weak institutional

<sup>10</sup> Ibid., at 7 and 17.

<sup>11</sup> This was also expected by the US, which would like to see a stronger EU capable of dealing with its 'back yard', allowing Washington to 'rebalance' its relations with Asia Pacific.

<sup>12</sup> The term was coined by Romano Prodi, President of the European Commission, in a speech to the Sixth ECSA-World Conference, "A Wider Europe - A Proximity Policy as the key to Stability", SPEECH/02/619, 6 December 2002. The term "ring of friends" is repeated in the 2003 European Security Strategy, at 8.

<sup>13</sup> The ENP was launched in 2003 with the publication of the Communication from the Commission to the Council and the European Parliament, "Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", COM (2003) 104

and legal frameworks; sums for aid and technical assistance too small to affect real transformation; restrictive measures too soft to coerce political change; and competing visions oscillating between a ‘one-size-fits-all’, an ‘East vs. South’ and an ‘own merits’-based approach.<sup>14</sup> The weaknesses of the ENP have been recognised by the EU itself in several of its annual strategy papers, published both before and after the entry into force of the Treaty of Lisbon.<sup>15</sup>

final. The framework was formalised in 2004 by the Communication from the Commission, “European Neighbourhood Policy, Strategy Paper”, COM (2004) 373 final. For a list of ENP reference documents, see [http://eeas.europa.eu/enp/index\\_en.htm](http://eeas.europa.eu/enp/index_en.htm). The ENP covers Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Occupied Palestinian Territories, Syria, Tunisia and Ukraine.

<sup>14</sup> The literature on the ENP is vast in several disciplines. For a systematic overview since 2011, see H. Kostanyan (ed.), *Assessing European Neighbourhood Policy: Perspectives from the literature*, Brussels: CEPS and London: Rowman and Littlefield, 2017. For earlier assessments, see M. Emerson, “The European Neighbourhood Policy: Strategy or Placebo?”, CEPS Working Document No. 215, Brussels, 2004; J. Kelley, “New Wine in Old Wineskins: Policy Adaptation in the European Neighbourhood Policy”, *Journal of Common Market Studies* 44:29-55, 2006; M. Cremona and C. Hillion, “L’Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy”, EUI Working Papers in LAW No. 39, European University Institute, Florence, 2006; Blockmans and Łazowski (eds), op. cit.; R. Balfour and A. Missiroli, “Reassessing the European Neighbourhood Policy”, EPC Issue Paper No. 54, European Policy Centre, Brussels, June 2007; M. Cremona, “The European Neighbourhood Policy: More Than a Partnership?”, in M. Cremona (ed.), *Developments in EU External Relations Law*, Oxford: Oxford University Press, 2008, pp. 244-299; G. Edwards, “The Construction of Ambiguity and the Limits of Attraction: Europe and its Neighbourhood Policy”, *Journal of European Integration* 30:45-62, 2008.

<sup>15</sup> Before Lisbon: see, e.g., the communications from the Commission to the Council and the European Parliament, “On strengthening the European Neighbourhood Policy”, COM (2006) 726 final; “A Strong European Neighbourhood Policy”, COM (2007) 774 final, at 2: “(...) a great deal remains to be done.” In May 2010, the Commission published a rather sobering evaluation of ambitions and activities during the first five

*The weaknesses of the ENP have been recognised by the EU itself in several of its annual strategy papers.*

Efforts to establish closer ties at the regional level have not lived up to expectations either. The Union for the Mediterranean (UfM),<sup>16</sup> which has been troubled by controversy since it followed on from the Barcelona Process

in 2008, was dealt a severe blow by the (inaptly called) Arab Spring of early 2011 and is still struggling to recover.<sup>17</sup> The Eastern Partnership (EaP) has fared only marginally better since its creation in 2009.<sup>18</sup> It suffered an equally hard shock when Russia –

years of the ENP in its report “Taking stock of the European Neighbourhood Policy”, COM (2010) 207 final. Since Lisbon: see, e.g., the joint communications of the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A new response to a changing Neighbourhood”, COM(2011) 303 final; and “Neighbourhood at the Crossroads: Implementation of the European Neighbourhood Policy in 2013”, JOIN(2014) 12 final. The 2015 ENP Review will be discussed later in extenso.

<sup>16</sup> See the Joint Declaration of the Paris Summit for the Mediterranean, adopted under the co-presidency of the President of the French Republic and the President of the Arab Republic of Egypt, in the presence of, *inter alia*, the EU, the UN, the Gulf Cooperation Council, the Arab League, the African Union, the Arab Maghreb Union, the Organisation of the Islamic Conference, and the World Bank, Paris, 13 July 2008. The Joint declaration is based on the Communication from the Commission to the European Parliament and the Council, “Barcelona Process: Union for the Mediterranean”, COM (2008) 319 final.

<sup>17</sup> See A. Willis, “Mediterranean Union chief resigns as Egypt unrest continues”, *EU Observer*, 27 January 2011. Efforts to resuscitate the UfM have not yet proven successful, in spite of the lofty “Declaration adopted by the Speakers of the Parliaments of the Union for the Mediterranean in Marseille”, EP Press Release, 7 April 2013. See K. Kausch, “The End of the (Southern) Neighbourhood”, EuroMeSCo Paper No. 18, April 2013.

<sup>18</sup> The EaP was launched at the Prague Summit in 2009 and is based on the Communication from the Commission to the European Parliament and the Council, “Eastern Partnership”, COM (2008) 823/4 final and the accompanying Commission Staff Working Document, SEC (2008) 2974/3,

the Union's biggest and (militarily) most powerful neighbour that chose to remain outside the ENP<sup>19</sup> – forced Ukrainian President Viktor Yanukovych to follow the example of his Armenian homologue by rescinding the negotiations of an Association Agreement with the EU in November 2013, and used the ensuing pro-European revolt as an excuse to annex Crimea and invade Donbas.<sup>20</sup> Whether or not one attributes conflict-triggering characteristics to the Eastern Partnership, the fact remains that this episode has exposed shortcomings in the EU's awareness of the strategic nature of the ENP, in whole and in part.<sup>21</sup>

*Whether or not one attributes conflict-triggering characteristics to the Eastern Partnership, shortcomings have been exposed in the EU's awareness of the strategic nature of the ENP.*

## 2.2 There goes the neighbourhood

In their 2011 strategy paper on the European Neighbourhood Policy, the Commission and the High Representative seemed intent on seizing the revolutionary momentum in the south to reinforce the ENP and to recalibrate relations with the EU's neighbours:

Brussels, 3 December 2008. For an analysis of relations prior to the creation of the EaP, see C. Hillion, "The EU's Neighbourhood Policy towards Eastern Europe", in A. Dashwood and M. Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, 2008, pp. 309–333.

<sup>19</sup> See S. Blockmans, "EU-Russia Relations through the Prism of the European Neighbourhood and Partnership Instrument", *European Foreign Affairs Review*, 13:167–187, 2008.

<sup>20</sup> The same logic applies to the Black Sea Synergy, prompted by the accession of Bulgaria and Romania to the EU in 2007. See Communication from the Commission "Black Sea Synergy - A new regional cooperation initiative", COM(2007) 160 final; and K. Henderson and C. Weaver, *The Black Sea Region and EU policy*, New York: Ashgate, 2010.

<sup>21</sup> See U. Speck, "How the EU Sleepwalked into a Conflict With Russia", Carnegie Europe, 10 July 2014.

The Lisbon Treaty has allowed the EU to strengthen the delivery of its foreign policy: co-operation with neighbouring countries can now be broadened to cover the full range of issues in an integrated and more effective manner. This was a key driver for initiating a review, in consultation with partner countries and other stakeholders, of the European Neighbourhood Policy (ENP) in summer 2010. Recent events throughout the Southern Mediterranean have made the case for this review even more compelling. The EU needs to rise to the historical challenges in our neighbourhood.<sup>22</sup>

Many illusions about the EU's ability to play the role of benevolent hegemon in the southern neighbourhood have been shed since.<sup>23</sup> The Arab Spring has turned into a long winter of discontent.<sup>24</sup> While early popular uprisings have so far been largely contained by a constitutional reform process and government participation of the Islamist party in Morocco, the rest of the southern Mediterranean rim has seen varying degrees of unrest.

Algeria has bucked the trend triggered by the Arab Spring but the risk of violent implosion is real. The country already saw violence in April 2014 ahead of the re-election of Abdelaziz Bouteflika, who after three consecutive terms in office and in spite of frail health continues to preside over the country. In the wake of constitutional reforms in 2016, and although there has been little significant change in the respect for basic civil liberties, the EU and Algeria 're-dynamised' their relationship by adopting "shared"

<sup>22</sup> COM (2011) 303 final.

<sup>23</sup> See, e.g., R. Whitman and A. Juncos, "The Arab Spring, the Eurozone Crisis and the Neighbourhood: A Region in Flux", 50 *JCMS* (2012), pp. 147- 161; A. Juncos and R. Whitman, "Europe as a Regional Actor: Neighbourhood lost?", 53 *JCMS* (2015), p. 212; and K. Pomorska and G. Noutcheva, "Europe as a Regional Actor: Waning influence in an unstable and authoritarian neighbourhood", 55 *JCMS* (2017), OI: 10.1111/jcms.12612.

<sup>24</sup> See S. Biscop, "The 'Arab Spring': winter of our discontent?", *European Geostrategy*, 19 August 2013.

Partnership Priorities at the Association Council of March 2017.<sup>25</sup> As such, cooperation on security (i.e. in fighting traffickers and jihadist fanatics that continue their activities on the porous borders in the south) and energy prevailed over pressure on the government to improve its track record on human rights protection.<sup>26</sup>

Tunisia has been hailed as the Arab Spring's poster child, a pocket of relative normality and a beacon of hope in an otherwise depressed and dangerous neighbourhood.<sup>27</sup> Despite the country's fragile economy and periodic loss of life in terrorist attacks, the adoption of the new constitution in January 2014 enshrines the equal rights of men and women and the rule of law – a rare example in the Arab world. After three turbulent years the country appears to have ushered in a period of progress and better government since the revolt brought down the dictatorship of President Ben Ali. The challenge now is to turn hope into delivery, while fending off attacks by terrorists intent on destabilising the country.<sup>28</sup>

*Many illusions about the EU's ability to play the role of benevolent hegemon in the southern neighbourhood have been shed since the Arab Spring.*

<sup>25</sup> "Priorités communes de Partenariat entre la République Algérienne Démocratique et Populaire (Algérie) et l'Union européenne (UE) au titre de la Politique européenne de voisinage révisée", UE-AL 3101/17 ADD 1, 07.03.2017.

<sup>26</sup> See F. Ghilès, "How Will Algeria Reinvent Itself?", *Notes internacionals* CIDOB No. 74, September 2013; and J. Solana, "Peril and Promise in Algeria", *Project Syndicate*, 25 February 2016.

<sup>27</sup> The 2015 Nobel Peace Prize was awarded to the National Dialogue Quartet "for its decisive contribution to the building of a pluralistic democracy in Tunisia in the wake of the Jasmine Revolution of 2011". See [www.nobelprize.org/nobel\\_prizes/peace/laureates/2015/press.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2015/press.html).

<sup>28</sup> See, e.g., K. Kausch, "Tunisia's Blessed Scarcity", FRIDE Commentary No. 19, Madrid, October 2014; W. Mühlberger (ed.), "Transformation in Tunisia: The First Five Years", EuroMeSCo Joint Policy Study No. 5, January 2017; and G. Faleg, "Fragility in Tunisia: A Test Case for Integrated Security and Development Assistance", EuroMesCo Policy Brief No. 72, 12 March 2017.

Libya, on the other hand, is still teetering on the brink of collapse. In the wake of the 2011 civil war which toppled the self-proclaimed revolutionary ‘Brother Leader’ Muammar Gaddafi, the Benghazi region *de facto* seceded, with huge consequences for oil production and thus the fiscal situation of Libya. The lack of effective security institutions saw Libya become “the main transit country in the Mediterranean for economic migrants, refugees and asylum seekers (mainly from Africa and more recently also from the Middle East) *en route* to Europe”<sup>29</sup> – a tide which the EU Border Assistance Mission and EU Naval Force ‘Sophia’ have been unable to turn.<sup>30</sup> As the security situation deteriorated and the self-proclaimed Islamic State was pushed back in Iraq and Syria, Daesh formed an offshoot in Libya in November 2014, triggering bombing raids by Egypt and the UAE. International diplomatic efforts to bring the main competing centres of power (in Tripoli and Tobruk) and their backers together in a Government of National Accord (GNA) led to the conclusion of a UN-brokered Libyan Political Agreement on 16 December 2015. Yet, “tribal and local skirmishes continue, politically instigated violence is a daily reality and clashes between military brigades outside of the control of the state are a frequent occurrence”.<sup>31</sup>

Egypt has seen a remarkable display of revolution and counterrevolution over the past few years. But numerous events have thrown the country back to its darkest days under former President Hosni Mubarak, who was released from detention six

<sup>29</sup> European Commission, “ENP Package – Libya”, MEMO/14/228, 27 March 2014.

<sup>30</sup> See S. Blockmans, “New Thrust for the CSDP from the Refugee and Migrant Crisis”, CEPS Special Report No. 142, Brussels, July 2016.

<sup>31</sup> European Commission, “ENP Package – Libya”, MEMO/14/228, 27 March 2014. Unfortunately, this assessment is as valid in 2017 as it was in 2014. See in this respect also the Joint Communiqué on Libya adopted by Algeria, Canada, Chad, China, Egypt, France, Germany, Jordan, Italy, Malta, Morocco, Niger, Qatar, Russia, Saudi Arabia, Spain, Sudan, Tunisia, Turkey, the United Arab Emirates, the United Kingdom, the United States, the European Union, United Nations, the League of Arab States, and the African Union in the context of the UN General Assembly, 22 September 2016, UNIQUE ID: 160922\_11.

years after being overthrown.<sup>32</sup> Events such as the army's *coup d'état* in June 2013; its removal of the country's first-ever democratically elected president; the killing of over 1,000 of his Muslim Brotherhood protesters and the sentencing to death of hundreds more of them; and its constitutional reform and subsequent electoral process, accompanied by the crackdown on civil society and media. The EU's approach to Egypt is back to where it was before, in support of the law of the ruler.

Moving on to the Middle East, the Israeli government derailed US Secretary of State John Kerry's peace negotiations,<sup>33</sup> waged a dirty war on the isolated Gaza strip in the summer of 2014 and continues to violate international law and UN Security Council resolutions with its unchecked settlement building and impunity for settler violence against Palestinians.<sup>34</sup> The Palestinians themselves are hopelessly divided, with the Fatah-government of Prime Minister Abbas engaged in a bitter struggle for power with the anti-Israel radicals of Hamas, which control Gaza. A solution to the generations-old 'Middle East' conflict is nowhere in sight. Although the Quartet of international mediators (which includes the EU) agreed in 2016 on an analysis of the situation and recommendations on the way forward to turn the two-state solution into reality,<sup>35</sup> the new US-administration of President Trump may derail that effort.

<sup>32</sup> See S. Blockmans, "Egypt Five Years since Tahrir: Back to Square One", *CEPS Neighbourhood Watch* No. 123, February 2016.

<sup>33</sup> See M. Lander, "Mideast Frustration, the Sequel", *New York Times*, 8 April 2014.

<sup>34</sup> See, *inter alia*, the findings of the final session of the Russell Tribunal on Palestine, Brussels, 16–17 March 2013 ([www.russelltribunalonpalestine.com/en/full-findings-of-the-final-session-en](http://www.russelltribunalonpalestine.com/en/full-findings-of-the-final-session-en)); S. Blockmans, "War Crimes and Shifting Borders in the Middle East", *CEPS Essay* No. 14, Brussels, 11 September 2014; and B. Herremans, "The EU's Aid to the OPT: Reviewing 20 years of state building", *CEPS Policy Brief* No. 343, Brussels, April 2016.

<sup>35</sup> EEAS, Report of the Middle East Quartet, doc. no. 160701\_03\_en, 1 July 2016.

Meanwhile, the civil war in Syria has been bleeding out into Jordan and Lebanon, which are struggling to cope with a steady and continuous wave of refugees.<sup>36</sup> The sectarian divisions that triggered the civil war in Lebanon (1975-1990) are now as deep as ever and deadly attacks across the Sunni-Shia divide are on the increase.<sup>37</sup> After years of fruitless diplomatic efforts, the agreement with Iran over its disputed nuclear programme spurred a new 'Geneva' peace process for Syria.<sup>38</sup> Two cessations of hostilities were agreed in 2016 but broke down again when the Assad regime – with Russian air support – launched new assaults on Aleppo and flattened and captured the city. It is now widely accepted that the only way to reach lasting conflict resolution between the warring

parties requires external actors reconciling interests that go far beyond the Syrian conflict.<sup>39</sup>

*... the only way to reach lasting conflict resolution requires external actors to reconcile interests that go far beyond the Syrian conflict.*

The neighbourhood to the east presents a similar, albeit less blood-stained, mosaic. The Eastern Partnership policy has led to a "step change" in the EU's relations with only half of its post-Soviet neighbours,<sup>40</sup> and has revealed a bottomless chasm in relations

<sup>36</sup> See L. Achilli, N. Yassin and M. Erdogan, "Neighbouring Host-Countries' Policies for Syrian Refugees: The Cases of Jordan, Lebanon, and Turkey", IEMed Papers No. 19, January 2017.

<sup>37</sup> See A. Henley, "Religious Authority and Sectarianism in Lebanon", Carnegie Middle East Paper, December 2016.

<sup>38</sup> See S. Blockmans, "Syria: An End to the Hands-off Policy", CEPS Commentary, Brussels, 31 August 2015; and "Can the EU Help Prevent Further Conflict in Iraq and Syria?", CEPS Commentary, Brussels, 25 November 2016.

<sup>39</sup> See V. Perthes, "No Order, No Hegemon. The Middle East in Flux", *The Security Times*, February 2017, at 17; and S. Blockmans, "In Search of a Role to Play: the EU and the War in Syria", *European Papers*, Vol. 2, 2017, No. 1, pp. 9-13.

<sup>40</sup> See the High Representative's "Report on the Implementation of the European Security Strategy – Providing Security in a Changing World", doc. 17104/08 (S407/08), 11 December 2008, at 10. See also European Commissioner for Enlargement and Neighbourhood Policy Štefan Füle,

with Russia. The EU's push to upgrade political, security and economic relations with the states on its eastern borders and the violent reaction thereto by Russia has come at a high price for the countries in-between.<sup>41</sup> The result is a region that is more fractured than ever before. And yet, the Kremlin's past and present actions to punish and partition Georgia (Abkhazia and South Ossetia),<sup>42</sup> Moldova (Transnistria)<sup>43</sup> and Ukraine (Crimea and the eastern oblasts of Donetsk and Luhansk)<sup>44</sup> have not deterred the governments in Tbilisi, Chisinau and Kyiv from their strategic goal of moving closer to the EU. Each has signed up to its respective Association Agreement (AA) - complete with a Deep and Comprehensive Free Trade Area (DCFTA).<sup>45</sup> The signing of these

"European Neighbourhood Policy - Priorities and Directions for Change", Speech at Annual Conference of Polish Ambassadors, Warsaw, 25 July 2013: "In the East, the priority is a successful Eastern Partnership Summit in Vilnius, which would mark a milestone and a 'point of no return' in anchoring our Eastern European partners to the European Union."

<sup>41</sup> See L. Delcour and H. Kostanyan, "Towards a Fragmented Neighbourhood: Policies of the EU and Russia and their consequences for the area that lies in between", CEPS Essay No. 17, Brussels, 17 October 2014.

<sup>42</sup> See T. Dolidze, "Abkhazia Chooses Russia 'à la carte'", CEPS Blogpost, Brussels, 2 December 2014; and T. Dolidze, "Deliberately Integrated: South Ossetia headed for and into Russia", CEPS Blogpost, Brussels, 23 March 2015.

<sup>43</sup> See B. Coppieters and M. Emerson, "Conflict Resolution for Moldova and Transnistria through Federalisation?", CEPS Policy Brief No. 25, Brussels, August 2002.

<sup>44</sup> See S. Blockmans, "Ukraine, Russia and the Need for More Flexibility in EU Foreign Policy-making", CEPS Policy Brief No. 320, Brussels, 25 July 2014; H. Kostanyan and S. Meister, "Ukraine, Russia and the EU: Breaking the deadlock in the Minsk process", CEPS Working Document No. 423, Brussels, June 2016; and H. Kostanyan and A. Remizov, "The Donbas Blockade: Another blow to the Minsk peace process", CEPS Working Document No. 2017/08, Brussels, 2 June 2017.

<sup>45</sup> On the AA/DCFTAs with Georgia, Moldova and Ukraine, see M. Emerson and V. Movchan (eds), *Deepening EU-Ukrainian Relations. What, Why and How?*, Brussels/Kyiv/London: CEPS/IER/Rowman and

agreements in Brussels on 27 June 2014 offered a *revanche* for the flop of the Eastern Partnership Summit at Vilnius in November of the year before.<sup>46</sup>

The other three EaP countries, however, remain within Moscow's geostrategic orbit. In September 2013, the Armenian president pulled his country away from the AA/DCFTA negotiating process due to Russian threats, including the withdrawal of security guarantees to Armenia in its territorial conflict with Azerbaijan over Nagorno-Karabakh.<sup>47</sup> Instead, Armenia has half-heartedly opted to join Belarus, Kazakhstan and Russia in the Eurasian Economic Union (EaEU)<sup>48</sup> and negotiated a so-called 'Comprehensive and Enhanced Cooperation Agreement' with the EU, a 'third way' type of accord that does not reach the threshold of the AA/DCFTA but goes further than the Enhanced Partnership and Cooperation Agreement that the EU signed with EaEU fellow Kazakhstan in December 2015.<sup>49</sup>

Littlefield, 2016; M. Emerson and T. Kovziridze (eds), *Deepening EU-Georgian Relations. What, Why and How?*, Brussels/Tbilisi/London: CEPS/Reformatics/Rowman and Littlefield, 2016; and M. Emerson and D. Cenusu (eds), *Deepening EU-Moldovan Relations. What, Why and How?*, Brussels/Chisinau/London: CEPS/ExpertGrup/Rowman and Littlefield, 2016. More information at <http://www.3dcftas.eu>.

<sup>46</sup> See S. Blockmans and H. Kostanyan, "A Post-Mortem of the Vilnius Summit", CEPS Commentary, Brussels, 3 December 2013; and European Council, "Statement at the signing ceremony of the Association Agreements with Georgia, Republic of Moldova and Ukraine", Brussels, 27 June 2014, EUCO 137/14.

<sup>47</sup> See M. Emerson and H. Kostanyan, "Putin's Grand Design to Destroy the EU's Eastern Partnership and Replace it with a Disastrous Neighbourhood Policy of his Own", CEPS Commentary, Brussels, 17 September 2013.

<sup>48</sup> Yerevan requested more than 800 exemptions from the common external tariff, the granting of which would render its inclusion in the customs union technically implausible. See M. Emerson, "Trade Policy Issues in the Wider Europe - that led to war and not yet to peace", CEPS Working Document No. 398, Brussels, 16 July 2014.

<sup>49</sup> See H. Kostanyan, "The Rocky Road to an EU-Armenia Agreement: From U-turn to detour", CEPS Commentary, Brussels, 3 February 2015;

The EaEU, which was officially launched on 1 January 2015, has been pitched by Russian President Vladimir Putin as an attractive alternative to the integration model offered by the EU to the countries in the shared neighbourhood.<sup>50</sup> The revolution in Ukraine and Moscow's intentions vis-à-vis Belarus, beyond the latter's integration into the EaEU, has caused nervousness in Minsk about the potential of a *Belorusskiy Euromaidan* movement.<sup>51</sup> The release of all political prisoners in August 2015, followed by presidential elections in an environment free from violence, led the Council of the EU to de-list all but four persons from its restrictive measures against Belarus.<sup>52</sup> There is now an opportunity for bilateral relations to develop on a more positive agenda, possibly along the 'third way' charted by Armenia.

Autocratically led Azerbaijan, however, remains in a double bind. On the one hand, its one-dimensional relationship with the energy-thirsty EU cannot be broadened without deep reforms that improve its track record on the rule of law and democracy.<sup>53</sup> On the other hand, Azerbaijan remains bound by the security

and H. Kostanyan and R. Giragosian, "EU-Armenia Relations: Seizing the second chance", CEPS Commentary, Brussels, 31 October 2016. The new accord was initialled on 22 March 2017.

<sup>50</sup> The Presidents of Belarus, Kazakhstan and Russia signed a Treaty on the Eurasian Economic Union in Astana on 29 May 2014. See <http://www.eurasiancommission.org/en/nae/news/Pages/29-05-2014-1.aspx>. On the (in)viability of Putin's project, see S. Blockmans, H. Kostanyan and I. Vorobiov, "Towards a Eurasian Economic Union: The challenge of integration and unity", CEPS Special Report No. 75, Brussels, 14 December 2012.

<sup>51</sup> See C. Grant, "Can the EU Help Belarus to Guard its Independence?", CER Commentary, London, 3 April 2014.

<sup>52</sup> Council of the EU, "Belarus sanctions: EU delists 170 people, 3 companies; prolongs arms embargo", Press release 83/16, 25 February 2016. The legal acts were published in OJ L 52, 27 February 2016 and prolonged for a year in February 2017.

<sup>53</sup> See J. Kobzova and L. Alieva, "The EU and Azerbaijan: Beyond Oil", ECFR Policy Memo No. 57, London, May 2012.

conundrum it faces in its problematic triangular relationship with Armenia and Russia.<sup>54</sup>

Apart from the security threats that impose an air of permanent instability on the borders of the EU, all EaP countries suffer from deficient state institutions, rampant corruption, low levels of productivity and meagre rates of investment. This makes the majority of them economically uncompetitive.<sup>55</sup> Furthermore, the democratic governance and human rights situation in most countries remains worrisome, especially in Azerbaijan and Belarus.<sup>56</sup> Even Georgia, currently the best hope for the EU to advance its Eastern Partnership doctrine, has been repeatedly warned to “ensure that criminal prosecutions are conducted in a transparent and impartial manner, free of political motivation, in order to avoid any perception of politically motivated justice”<sup>57</sup> and that “a continued commitment to political pluralism and freedom of the media is fundamental for the preservation and consolidation of democracy”.<sup>58</sup>

<sup>54</sup> See G. Merabishvili, “The EU and Azerbaijan: Game on for a more normative policy?”, CEPS Policy Brief No. 329, Brussels, March 2015. See also R. Giragosian, “The Nagorno Karabakh Conflict: Ceasing fire is not a ceasefire”, LSE Europicblog, London, 11 April 2016.

<sup>55</sup> For data and a more nuanced picture, see F. Gaub and N. Popescu, “The EU Neighbours 1995-2015: Shades of Grey”, Chaillot Paper No. 136, EU Institute for Security Studies, Paris, December 2015.

<sup>56</sup> See A. Austers, I. Bruge and A. Spruds (eds), *Dilemmas of Europeanisation: Political Choices and Economic Transformations in the Eastern Partnership Countries*, Riga: LIIA, 2016. On Moldova, see H. Kostanyan, “Why Moldova’s European Integration is Failing”, CEPS Commentary, Brussels, 3 March 2016; and M. Emerson and D. Cenusă, “President Dodon’s visit to Brussels - Contemplating economic suicide”, CEPS Policy Insights No. 2017-02, Brussels, 3 February 2017.

<sup>57</sup> See, e.g., European Commission, “ENP Package – Georgia”, MEMO/14/224, 27 March 2014.

<sup>58</sup> Statement by the Spokesperson on the decision of the European Court of Human Rights on the Rustavi 2 case, EEAS Press release 170309\_11, 8 March 2017.

From this *tour d'horizon* of the European Union's outer periphery, south and east, it becomes clear that most of the geographical neighbourhood has seen a steady decline in security and stability, good governance and economic performance. Instead of the proverbial "ring of friends" envisaged by the European Commission in 2003,<sup>59</sup> the neighbourhood has turned into a "ring of fire".<sup>60</sup>

*... most of the neighbourhood has seen a decline in security, stability, good governance and economic performance.*

The disappointing reality has forced European policymakers to take a fresh look at how the EU should deal with its neighbourhood. Even after the 2015 Review of the ENP, the following questions remain: can a convincing strategic narrative be developed for the ENP? Does it make sense to put these vastly different countries into one or two groups? Has the Eastern Partnership been too closely modelled on the Union's enlargement process? Are the EaP's goals achievable without the prospect of EU membership? Can the ENP's value-base be ignored to avoid acute instability in autocratically ruled neighbouring countries? How does the EU approach political Islam in the neighbourhood, and indeed further afield? How can the ENP take account of the geopolitical interests of the neighbours of its neighbours? If the EU is serious about pursuing its European Neighbourhood Policy, then it should find clear and convincing answers to these and other questions. To date, it has not.

## 2.3 Conceptual flaws

The Arab Spring forced the first major re-think of the ENP. It did not, however, produce much change in the Eurocentric conception of the policy, which constituted an early flaw in the ENP that has

<sup>59</sup> COM (2003) 104 final, at 4.

<sup>60</sup> Charlemagne, "Europe's Ring of Fire: The European Union's neighbourhood is more troubled than ever", *The Economist*, 20 September 2014.

persisted since.<sup>61</sup> While recognising that the EU alone cannot shape events in its neighbourhood, that many other (f)actors are at play and that, ultimately, it is up to the neighbours themselves to make choices and exercise political will for reform, the Eurocentric ENP does not incorporate the strategic interests of the neighbouring countries, let alone those of the neighbours of the EU's neighbours

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(i.e. Russia, Turkey, the Gulf states, and the countries of the Sahel).<sup>62</sup> It is very much an own-interest policy driven by the EU's institutional core. This was emphatically confirmed in the approach adopted by the European

Commissioner for Enlargement and Neighbourhood Policy in a speech delivered as late as in July 2013, i.e. two months before the preparations for the Eastern Partnership Summit in Vilnius started to unravel. While stressing the need

to define a vision for the coexistence and mutual enrichment of the regional projects so as not to end up with two different sets of rules in the European Union economic space and in the [Eurasian] Customs Union

<sup>61</sup> The 2011 ENP Strategy Paper (COM(2011) 303 final) did pay ample lip-service to the "common interests", "common challenges", "mutual benefit[t]", "shared objectives", "shared commitment" and "mutual accountability" of the EU and ENP countries, but did not give substance to these lofty concepts.

<sup>62</sup> Ibid. The Strategy Paper merely noted the possibility ("can") to improve coordination with "main international partners", for instance with Russia, Turkey and other third countries in the so-called 'Eastern Partnership Information and Co-ordination Group'. Making the case for a more strategic approach to the conception of the ENP, see G. Grevi and D. Keohane (eds), *Challenges for European Foreign Policy in 2014: The EU's Extended Neighbourhood*, Madrid: FRIDE, 2014; S. Lehne, "Time to Reset the European Neighborhood Policy", Carnegie Europe, February 2014; and N. Tocci, "The Neighbourhood Policy is Dead. What's Next for European Foreign Policy Along its Arc of Instability?", IAI Working Paper No. 14, Rome, 16 November 2014.

Commissioner Štefan Füle nevertheless proceeded along the classic route of framing the overall policy framework of the ENP in a Eurocentric way:

First, the ENP is a strategic policy – very much in the European Union's own interest.

Second, the ENP is a prime example of the European Union's comprehensive approach to foreign policy – using all instruments in a coherent way under the umbrella of the ENP – from Common Foreign and Security Policy, to political cooperation, trade policy, and also sectoral policies such as transport and energy.

Third, ENP support for reform is based on the differentiation of the 'more for more' principles; we tailor our response to each partner's needs and ambition and we offer a stronger relationship with the European Union for those partners that make more progress towards reform.<sup>63</sup>

The latter point reveals a second conceptual flaw in the ENP. 'More for more' conditionality was hailed by the EU institutions as a major innovation of the ENP in 2011. Against all odds, the phrase was recycled in the 2015 Review.<sup>64</sup> Thereby, the implementation of the ENP has been firmly – but falsely – based on methodology drawn from the enlargement policy context. From the outset, the ENP was designed to off-set the potentially negative impact of the 2004 'big bang' enlargement of the European Union, i.e. "to prevent the emergence of new dividing lines between the enlarged EU and

*The implementation of the ENP has been firmly – but falsely – based on methodology drawn from the enlargement policy context.*

<sup>63</sup> Štefan Füle, "European Neighbourhood Policy – Priorities and Directions for Change", Annual Conference of Polish Ambassadors, Warsaw, 25 July 2013.

<sup>64</sup> Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Review of the European Neighbourhood Policy", JOIN(2015) 50 final, Brussels, 18 November 2015, at 5.

its neighbours”<sup>65</sup> by “sharing everything *but* the institutions”.<sup>66</sup> The latter phrase encapsulates the original sin of the ENP: latching on to the methodology of EU enlargement while denying an accession prospect, in particular to those ‘European’ states of the Eastern Partnership that could theoretically fulfil all criteria mentioned in the EU membership clause.<sup>67</sup> The inability of the European Union to create an independent vision for ENP countries, an alternative to membership attractive enough to successfully translate objectives and instruments into action, continued to hamper the effectiveness of conditionality – the main tool to promote convergence in a toolbox mainly composed of soft coordination instruments to persuade the partners of the “appropriateness” of the solutions provided by the Union.<sup>68</sup> More

<sup>65</sup> COM (2004) 373 final, at 3. See already, Tweede Kamer, “De Staat van de Europese Unie”, vergaderjaar 2001–2002, 28 005, nr. 1, at 7-26: “Van Marrakech tot Moermansk”.

<sup>66</sup> R. Prodi, “A Wider Europe - A Proximity Policy as the Key to Stability”, SPEECH/02/619, Sixth ECSA World Conference, Brussels, 5-6 December 2002. Emphasis added.

<sup>67</sup> Cf. Article 49 TEU for the Lisbon Treaty version of the clause. See F. Hoffmeister, “Changing Requirements for Membership”, in A. Ott and K. Inglis (eds), *Handbook on European Enlargement – A Commentary on the Enlargement Process*, The Hague: Asser Press, 2002, pp. 90-102; K. Smith, “The Evolution and Application of EU Membership Conditionality”, in M. Cremona (ed.), *The Enlargement of the European Union*, Oxford: Oxford University Press, 2003, pp. 105-139; C. Hillion, “The Copenhagen Criteria and their Progeny”, in C. Hillion (ed.), *EU Enlargement: A Legal Approach*, Oxford: Hart Publishing, 2004, pp. 1-22; S. Blockmans, “Raising the Threshold for Further EU Enlargement: Process, Problems and Prospects”, in A. Ott and E. Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives*, The Hague: Asser Press, 2009, pp. 203-220; C. Hillion, “EU Enlargement”, in P. Craig and G. De Búrca (eds), *The Evolution of EU Law*, 2<sup>nd</sup> ed., Oxford: Oxford University Press, 2011, pp. 187-216; and S. Blockmans and H. Kostanyan, “A post-mortem of the Vilnius Summit: Not yet a ‘Thessaloniki moment’ for the Eastern Partnership”, CEPS Commentary, Brussels, 3 December 2013.

<sup>68</sup> See G. Meloni, “Is the same toolkit used during enlargement still applicable to the Countries of the New Neighbourhood? A problem of mismatching between objectives and instruments”, in M. Cremona and G.

worryingly, the coercive element which is implicit in the application of negative conditionality ('less for less') seriously undermined the ability of the EU to promote a sense of joint ownership of the ENP project.<sup>69</sup> In short, the "enlargement lite"<sup>70</sup> approach does not work for countries that do not want or are pushed to abandon close association with the EU, or indeed for those that are frustrated by the absence of the proverbial carrot of future membership.

The dichotomy in the EU's approach to eastern 'European' states, on the one hand, and countries on the southern rim of the Mediterranean, on the other, speaks to the third flaw in the conception of the ENP, namely that of the artificial clustering of neighbouring countries that have little more in common than a geographic proximity to the European Union. Arguably, these groupings have been assembled to suit political and bureaucratic desires, bypassing individual differences as well as sub-regional commonalities (the Maghreb, Mashreq, Middle East, Southern Caucasus and Eastern Europe). The search for a strong common agenda between the six states of the Eastern Partnership is hard enough, let alone between the ten southern Mediterranean or, indeed, the 16 ENP countries. As with the one-size-fits-all approach, the regional approach to the ENP has clearly met with limited results. Rather than structuring relations in a static and purely geographical sense, economies of scale could be better achieved by following a more dynamic, functionalist, sectoral approach – akin to that which lay at the basis of the success of the European integration process itself.<sup>71</sup>

*... artificial clusters of countries have been created that have little more in common than a geographic proximity to the EU.*

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Meloni (eds), "The European Neighbourhood Policy: A Framework for Modernisation?", EUI Working Papers LAW No. 2007/21.

<sup>69</sup> See Section 4.2.

<sup>70</sup> See N. Popescu and A. Wilson, "The Limits of Enlargement-lite: European and Russian Power in the Troubled Neighbourhood", ECFR Policy Report, London, June 2009.

<sup>71</sup> For ideas in the respect, see S. Blockmans and B. Van Vooren, "Revitalizing the European 'Neighbourhood Economic Community': The

A fourth and final conceptual flaw of the ENP is that it was designed for fair weather, i.e. long-term engagement in a stable environment. The ENP's principal contribution to peace and security has been through the promotion of local democracy and socio-economic progress, which can only indirectly contribute to a more positive climate for peaceful dispute settlement. As we will

*The ENP's instruments are ill-suited to the rapid and violent changes that have characterised much of the EU's neighbourhood.*

see later in this study,<sup>72</sup> the ENP's instruments are ill-suited to the rapid and violent changes that have characterised much of the EU's neighbourhood since the conflict in Lebanon in 2007 and the Russo-Georgian war of August 2008. Indeed, the Union's

track record in preventing 'frozen' conflicts in the eastern neighbourhood from heating up and boiling over, let alone resolving them, is mixed at best.<sup>73</sup> European security responses to the revolutionary upheavals in the southern neighbourhood have not been exemplary either.<sup>74</sup> Whereas the ENP is "not in itself a conflict prevention or settlement mechanism"<sup>75</sup> that can be blamed for the endogenous and dramatic transformations in some of the neighbouring countries, it is nonetheless a policy that is premised on a more direct contribution to stability in the EU's neighbourhood. Yet, in spite of lofty objectives laid down in ample

case for legally binding sectoral multilateralism", *European Foreign Affairs Review* 17, 2012, pp. 577-604.

<sup>72</sup> See below, Section 4.4.

<sup>73</sup> See S. Blockmans, *The EU as a Global Peacemaker*, University of Amsterdam Press, 2014 ([http://www.oratiereeks.nl/upload/pdf/PDF-2024weboratie\\_Blockmans\\_-\\_DEF.pdf](http://www.oratiereeks.nl/upload/pdf/PDF-2024weboratie_Blockmans_-_DEF.pdf)).

<sup>74</sup> See, e.g., J. Howorth, "CSDP and NATO Post-Libya: Towards the Rubicon?", Egmont Security Policy Brief No. 35, Brussels, July 2012.

<sup>75</sup> See B. Ferrero-Waldner, "Political reform and sustainable development in the South Caucasus: the EU's approach", Speech at the Bled Strategic Forum 'Caspian Outlook 2008', SPEECH/06/477, 28 August 2006; and, more generally, B. Ferrero-Waldner, "The European Neighbourhood Policy: The EU's Newest Foreign Policy Instrument", *European Foreign Affairs Review* 11, 2006, pp. 139-142.

speeches and official documents, and notwithstanding the actions undertaken by the EU to support the security of ENP partners by way of border assistance, rule of law, security sector reform and military training missions, the changing realities on the ground have shown that, so far, the European Union has not really been able to prevent and counter security threats in its neighbourhood,<sup>76</sup> let alone turn vicious circles into virtuous ones.

## 2.4 Vision impossible?

In order to overcome the four conceptual flaws of the ENP, a new re-think of the policy is called for. This is not to say that the ENP has failed altogether. The standards, instruments and procedures that have been put to use in the past could of course be employed in an effort to shape relations between the EU and individual neighbours in the future. As the Commission and the High Representative stated in their 2014 Joint Communication:

The ENP is a policy of continuous engagement. The value of the policy does not lie only in the achievements of its individual components (e.g. political reform/democratisation, market integration, better mobility and people-to-people contacts, and sector cooperation). It also anchors countries/societies in transition, and even in crisis situations, to the EU, by proposing a set of values and standards to guide their reform efforts, and generally through the creation of networks linking them to the EU and beyond to other partners. It is a framework – to work towards, and safeguard, democracy, freedom, prosperity and security for both the EU and its partners. While this may require continuous scrutiny of the appropriateness and suitability of the policy and its instruments, there are

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<sup>76</sup> See M. Smith and M. Webber, "Political Dialogue and Security in the European Neighbourhood: The Virtues and Limits of 'New Partnership Perspectives'", *European Foreign Affairs Review* 13, 2008, pp. 73-95.

compelling reasons for it to remain the framework for the EU's relations with its neighbours for the years to come.<sup>77</sup>

Beyond this optimistic self-assessment nevertheless lies the twofold question of how the ENP has to be refitted to operate in the face of both longstanding and new and acute challenges; and whether it still makes sense to talk about a separate policy for the neighbourhood if it were to apply the same comprehensive approach to the EU's toolbox as professed for external action in the wider sense.

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<sup>77</sup> JOIN(2014) 12 final, at 17-18.

### **3. ARTICLE 8 OF THE EU TREATY**

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#### **3.1 Legal geography**

Unlike trade, development cooperation, the Common Foreign and Security Policy (CFSP) and other strands of the EU external action portfolio, neighbourhood relations did not rest on a specific basis in EU primary law prior to the entry into force of the Lisbon Treaty. Different instruments from across all three Union pillars (Association Agreements, tools pertaining to visa and asylum, financial and technical instruments, CFSP measures) were brought together in an attempt to develop an integrated structure for broad ENP objectives.<sup>78</sup> By recycling Article I-57 of the rejected Treaty establishing a Constitution for Europe, the Treaty of Lisbon introduced a specific provision on relations between the EU and its neighbours. Article 8 TEU stipulates the following:

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

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<sup>78</sup> See, e.g., M. Cremona, "The European Neighbourhood Policy: More Than a Partnership?", in M. Cremona (ed.), *Developments in EU External Relations Law*, Oxford: Oxford University Press, 2008, pp. 244-299; and B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence*, Abingdon: Routledge, 2012.

undertaking activities jointly. Their implementation shall be the subject of periodic consultation.<sup>79</sup>

The first striking characteristic of the neighbourhood clause is the prominent place it occupies in the treaties: Article 8 sits among the Common Provisions in Title I of the Treaty on European Union, among the values and objectives of the Union, which “colour the meaning of the competence it encapsulates, the nature of the policy it envisages, as well as its function.”<sup>80</sup> The position of Article 8 TEU suggests that the neighbourhood competence transcends the legal dichotomy between the CFSP (embedded within the TEU) and non-CFSP powers (enshrined in the TFEU),<sup>81</sup> and has the potential to strengthen the Union’s ability to shape its neighbourhood policy in a holistic fashion, joining up internal and external policy aspects into a comprehensive approach towards neighbouring countries. Moreover, it could be argued that, because of its inclusion in Title I of the TEU and its nature as a *lex specialis* that supports the general mandate of the Union to build partnerships with third countries that share its principles and values (Art. 21(1) TEU), Article 8 TEU indirectly imposes an obligation of intent on the EU institutions “to take account of the neighbourhood policy’s objectives when exercising Union competences, for instance in elaborating the EU’s transport,

<sup>79</sup> In a separate Declaration on Article 8 TEU, the EU makes it clear that it is willing to take account of “the particular situation of the small-sized countries which maintain specific relations of proximity”. See M. Maresceau, “The Relations between the EU and Andorra, San Marino and Monaco”, in Dashwood and Maresceau (eds), *op. cit.*, at 270-308.

<sup>80</sup> See C. Hillion, “The EU Neighbourhood Competence under Article 8 TEU”, *SIEPS European Policy Analysis* 2013:3, p. 2.

<sup>81</sup> Cf. Article 40 TEU, commented upon by, e.g., P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford: Oxford University Press, 2011, pp. 168-170. Article 40 TEU is the object of a new body of case-law. See Case C-130/10, *European Parliament v Council of the European Union*, ECLI:EU:C:2012:472, paras. 42-82; Case C-658/11 *Parliament v Council* (EU agreement with Mauritius), ECLI:EU:C:2014:2025; Case C-263/14, *Parliament v Council* (Tanzania) ECLI:EU:C:2016:435; and Case C-455/14 *P, H v. Council*, ECLI:EU:C:2016:569.

energy, environment policies, in the development of the internal market and, naturally, in the enlargement process.”<sup>82</sup>

That said, the legal geography of Article 8 TEU is rather odd when considering best practices of treaty drafting. It is disconnected from the ordinary decision-making procedures and instruments that belong to the supranational realm of external action provided by Part V of the TFEU; namely those that also characterise the ENP’s adjacent EU enlargement policy. Seen from that perspective, the neighbourhood article seems to be in the ‘wrong’ treaty to make a real splash. In the TEU too, the link which previously existed with the EU membership clause in the Final Provisions of the TEU (Art. 49) has been severed. Moreover, the neighbourhood clause is divorced from the specific procedures and instruments under Title V on the CFSP. Yet, when looking at it through the prism of the development of a comprehensive neighbourhood policy, these arguments do not seem to outweigh the benefits garnered by superimposing the neighbourhood clause over the cracks between the treaties. The *prima facie* constitutional isolation of Article 8 TEU in Title I of the TEU might thus have positive practical implications for mainstreaming a policy that was and remains cross-pillar in nature. However, too much constitutional law might also lead to a power struggle over the ENP<sup>83</sup> between the institutions. Indeed, the implementation of the new obligation towards the neighbourhood might add structural and procedural “constraints on the development of a policy which, thus far, had been incremental and flexible, thanks notably to the fact that it was

*The legal geography of Article 8 TEU is rather odd when considering best practices of treaty drafting.*

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<sup>82</sup> See Hillion “The EU Neighbourhood Competence under Article 8 TEU”, op. cit., p. 2.

<sup>83</sup> Cf. B. de Witte, “Too Much Constitutional Law in the European Union’s Foreign Relations?”, in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart Publishing, 2008, pp. 3-15.

forged outside the Treaty framework, on the basis of soft law instruments.”<sup>84</sup>

The second peculiarity about the neighbourhood article is its sketchy wording concerning the result to be achieved in the application of the obligation resting upon the EU’s shoulders. The

*The neighbourhood article is sketchy in its wording.*

*langue de bois* of political and diplomatic rhetoric resonates in the references to the creation of “an area of prosperity and good neighbourliness”, an amalgam of

fuzzy concepts that are hard to pin down. A clear definition of the term “neighbouring countries” is missing from the article. It is only by reasoning *a contrario*, i.e. by reading both Article 3(5) TEU on the Union’s relations with what is called the “wider world” and the membership clause of Article 49 TEU that one can deduce that Article 8 TEU envisages a relationship with countries on or in the vicinity of the European continent that do not wish to or cannot by definition become a member of the Union. As such, Article 8 TEU lumps a micro-state like Andorra, an EFTA country like Switzerland, an EEA member like Norway, a strategic power like Russia, an EaP country like Armenia, and an UfM member like Lebanon together in the same group, despite the substantial differences in (contractual) relations between the EU and each of these (clusters of) countries.<sup>85</sup> Article 8 TEU is therefore *not* a legal basis exclusive to the European Neighbourhood Policy.

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<sup>84</sup> Ibid., at 3: “(...) inaction on the part of the Union could lead to possible proceedings before the European Court of Justice, the way failures to develop common policies were in the past sanctioned by the Court. Moreover, the exercise of the EU neighbourhood competence requires from both institutions and Member States a higher degree of compliance with the measures thereby adopted, and a mutual duty of cooperation to ensure the fulfilment of the Union objectives thereof.” Other constraints could consist of an application of the principles of conferral, subsidiarity, proportionality, and consistency.

<sup>85</sup> See section 4.1.

### 3.2 Friends or foes?

Paragraph 1 of Article 8 prescribes that “the Union shall develop a special relationship with neighbouring countries”.<sup>86</sup> Arguably, this mandatory treaty language sets EU relations with neighbouring countries apart from relations between the EU and like-minded and similarly principled countries farther afield, which the EU is merely under the obligation to “seek to develop”, however strategic such alliances may be (cf. Art. 21(1) TEU). As such, the Treaty of Lisbon sends a strong signal to countries with which the EU shares its external borders. The Union is obliged to (“shall”) develop a special relationship with its neighbours. The use of the singular “relationship” in the treaty provision could – *a contrario* – be interpreted to mean that the EU is not automatically obliged to develop special “relations” with all its neighbours. From this subtle nuance in terminology flow the pre-conditions for the directly applicable obligation of Article 8. The notion of a “special relationship” relates to i) the establishment of “an area of prosperity and good neighbourliness”, ii) “founded on the values of the Union”, iii) “characterised by close and peaceful relations based on cooperation”. In other words, the Union is not obliged to construct a peaceful and prosperous neighbourhood with those countries that do not share its values.<sup>87</sup>

*The EU is bound to engage with all neighbouring countries; if not with the governments because of their poor record in, e.g., fundamental rights protection, then at least with civil society organisations in (or outside of) those countries.*

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<sup>86</sup> This section draws on S. Blockmans, “Friend or Foe? Reviewing EU Relations with its Neighbours Post Lisbon”, in P. Koutrakos (ed.), *The European Union’s External Relations A Year After Lisbon*, CLEER Working Paper No. 2011/3, pp. 113-124.

<sup>87</sup> Others have argued that the provision “impedes the Union from entering into a special relationship with neighbouring countries refusing to commit themselves to the values of the Union”. See D. Hanf, “The ENP in the light of the new ‘neighbourhood clause’ (Article 8 TEU)”, College of Europe, Research Paper in Law - Cahiers juridiques No. 2/2011. See also P. Van Elsuwege and R. Petrov, “Article 8 TEU: Towards a New

But on the basis of the first sentence of Article 8(1) TEU, one could argue that the EU is bound to engage with all neighbouring countries; if not with the governments because of their poor record in, for instance, fundamental rights protection, then at least with civil society organisations in (or outside of) those countries, "precisely with a view to asserting [the Union's] own values".<sup>88</sup>

Like the creation of a "ring of friends", the establishment of a single ("an") area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation sounds somewhat utopian and certainly unrealistic in the short- to mid-term future. After all, the Union's neighbourhood is littered with actual and potential flash points for conflict between, e.g. (*de jure*) states and secessionist entities and/or *de facto* states,<sup>89</sup> governments and terrorist groupings, and (large parts of countries') populations and the undemocratic and repressive regimes that govern them. These realities and external pressures (e.g. those emerging from countries and regions that lie beyond the ring of neighbours) continue to negatively influence bilateral relations between the EU and some of its neighbouring states, as indeed among neighbouring countries themselves, and impede the

*The ENP is suspended between the finalité of EU-neighbours relations as prescribed in Article 8 TEU and the (geo)political and socio-economic realities that define such relations.*

creation of the single area of peace, harmony and understanding that the Treaty calls for. It should therefore come as no surprise that the ENP is - and will continue to be for a considerable period- suspended between the fuzzy

Generation of Agreements with the Countries of the European Union?", *European Law Review* 36, 2011, pp. 688-703.

<sup>88</sup> See Hillion, "The EU Neighbourhood Competence under Article 8 TEU", op. cit., pp. 3-4, who argues that "Article 8 TEU is a *neighbouring state-building policy*, involving the whole array of EU instruments."

<sup>89</sup> See S. Blockmans and R.A. Wessel, "The European Union and Peaceful Settlement of Disputes in its Neighbourhood: The Emergence of A New Regional Security Actor?", in A. Antoniadis, R. Schütze and E. Spaventa (eds), *The European Union and Global Emergencies: Law and Policy Aspects*, Oxford: Hart Publishing, 2011, pp. 73-103.

*finalité* of EU-neighbours relations as prescribed in Article 8 TEU and the (geo)political and socio-economic realities that define such relations.

Of more practical relevance is the reference in Article 8(1) to the values of the Union, reflecting Article 2 TEU, which states that the Union “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”. These are the previously called “shared values” listed in the Council Conclusions of June 2003;<sup>90</sup> the ones on which Article 49 TEU is also based. By dropping the pretence of the values being shared by all neighbouring countries, and insisting instead that the EU projects its own normative power in the neighbourhood, the Lisbon Treaty has brought the objective of Article 8 into line with the promotion of the EU’s own interests and worldview as professed in Articles 3(5) and 21 TEU.<sup>91</sup> The revised political conditionality that carries the Treaty’s aim of establishing a special relationship with neighbouring countries reflects a further shift of emphasis away from “shared values” towards a “shared commitment to universal values”:

The new approach must be based on mutual accountability and a shared commitment to the universal values of human rights, democracy and the rule of law.<sup>92</sup>

This raises the question of to what extent “the principles which have inspired [the Union’s] own creation, development and enlargement, and which [the EU] seeks to advance in the wider world” (Art. 21(1) TEU; cf. Art. 2 TEU) are universal in nature. Leaving discussions about cultural relativism aside, the fact is that – in theory – the EU expects partner countries to embrace international norms and standards, notably by signing up to both

<sup>90</sup> GAERC Conclusions, 16 June 2003, para. 2. See also GAERC Conclusions of 14 June 2004, para. 4.

<sup>91</sup> See J. Larik, “Entrenching Global Governance: The EU’s Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality”, in B. Van Vooren, S. Blockmans and J. Wouters (eds), *The EU’s Role in Global Governance: The Legal Dimension*, Oxford: Oxford University Press, 2013, pp. 7-22.

<sup>92</sup> COM (2011) 303 final, at 2 and 3.

international and regional human rights agreements.<sup>93</sup> This approach aims to provide greater support to partners engaged in building what the EU rather pompously called “deep democracy – the kind that lasts”.<sup>94</sup> Whereas this phrase seems to have been coined to obscure the fact that the EU did not have any qualms in dealing with less than democratic regimes prior to the so-called Arab Spring, and suggests that the Union has since stepped up its efforts in this

*The EU expects partner countries to embrace international norms and standards, notably by signing up to both international and regional human rights agreements.*

respect, the Commission and High Representative have been keen to emphasise that the EU

does not seek to impose a model or a ready-made recipe for political reform, but [that] it will insist that each partner country’s reform process reflect a clear commitment to universal values that form the basis of [the] renewed approach [to the ENP].<sup>95</sup>

And while the intention was to strengthen the two regional dimensions of the policy (EaP and UfM) “so that the EU can work out consistent regional initiatives in areas such as trade, energy, transport or migration and mobility”,<sup>96</sup> the Commission and the High Representative, supported by the EEAS, have in fact pushed more towards an own merits-based approach whereby it is easier to distinguish friends from foes. EU support, in the form of preferential commitments, is tailored and conditioned accordingly:

Some partners may want to move further in their integration effort, which will entail a greater degree of alignment with EU policies and rules leading

<sup>93</sup> Ibid., at 5: “Commitment to human rights and fundamental freedoms through multilateral treaties and bilateral agreements is essential. But these commitments are not always matched by action. Ratification of all the relevant international and regional instruments and full compliance with their provisions, should underpin our partnership.”

<sup>94</sup> Ibid., at 2.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

progressively to economic integration in the EU Internal Market.<sup>97</sup>

For countries where reform has not taken place, the EU would normally reconsider or even reduce funding.<sup>98</sup>

In practice therefore, the Commission and the High Representative abandoned the Treaty's conceptualisation of a single, peaceful and prosperous neighbourhood area already in 2011 and replaced it with a variable geometric model based on a set of differentiated relationships largely defined by home-grown reform in neighbouring countries. More so than before the entry into force of the Treaty of Lisbon, the Union thereby relied on its power of attraction, akin to the soft power that inspires candidate countries to adhere to the conditions of EU membership. It is unlikely though that the Union's 'softer' power in the neighbourhood – one that is premised on a stake in the internal market but not in the institutions – is enough to inspire the reforms that are needed to underpin the kind of cooperation on which a single area of prosperity and good neighbourliness could be established.

*... the Commission and the High Representative abandoned the Treaty's conceptualisation of a single, peaceful and prosperous neighbourhood area in 2011 and replaced it with a variable geometric model largely defined by home-grown reform in neighbouring countries.*

One way explicitly prescribed by the Lisbon Treaty to 'give hands and feet' to its grand objective of creating that special kind of relationship between the EU and its neighbours is through the conclusion of "specific agreements" (Art. 8(2) TEU), another fuzzy term, which "may [i.e. must not] contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly". The formulation reveals the possibility of differentiation in relations with neighbouring countries. While differentiation in itself is a good thing, it does have the potential to undermine the *finalité* projected by Article 8(1) TEU: the best pupils in class will

<sup>97</sup> Ibid., at 3.

<sup>98</sup> See further section 4.2.

*The neighbourhood clause itself suffers from a tension between a multilateral and a bilateral approach.*

acquire a different status in their relations with the Union, thereby increasing rather than reducing the disparities within the region. The neighbourhood clause itself thus seems to suffer from a structural dichotomy,

ingraining the tension between a multilateral and a bilateral (i.e. own merits-based) approach.

With respect to Article 8(2) TEU, for the first time the Lisbon Treaty establishes a specific legal basis to develop contractual relations with neighbouring countries. However, this does not do away entirely with the complexities of the pre-Lisbon search for an appropriate legal base for agreements with individual ENP countries.<sup>99</sup> After all, the specific agreements which the EU envisages for Eastern Partnership states and “selected” countries from the southern Mediterranean are Association Agreements (AAs) built around the establishment of a Deep and Comprehensive Free Trade Area (DCFTA).<sup>100</sup> The agreements are intended to replace the outdated Partnership and Cooperation Agreements (PCAs), and update and upgrade some of the existing Euro-Med Association Agreements (EMAAAs).<sup>101</sup> Article 217 TFEU provides the specific legal basis for concluding association agreements, albeit with third countries belonging to a wider group of partners than just the EU’s geographical neighbours. The difference between Article 8(2) TEU and Article 217 TFEU is that the latter prescribes – in line with the Court’s *Demirel* judgment – that associations established by such agreements involve reciprocal rights and obligations, common action and special

<sup>99</sup> See M. Maresceau, “A Typology of Mixed Bilateral Agreements”, in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited: the EU and its Member States in the World*, Oxford: Hart Publishing, 2010, pp. 11-29, at 19.

<sup>100</sup> Contractual relations with the ENP countries for which DCFTAs are too ambitious may be structured in Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAAs). See section 4.2.2.

<sup>101</sup> See section 4.1.

procedures (cf. Article 218 TFEU).<sup>102</sup> Meanwhile, partnership agreements are concluded on the basis of Article 212 TFEU, which states that such agreements pursue the objectives of economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries (e.g. Russia, Kazakhstan). In short, depending on the interpretation of the scope of objectives, the depth of political and economic cooperation, the possibility of establishing a visa-free regime, and the extent to which national legislation will be harmonised with the EU *acquis*, one may argue over the choice of the legal basis and the procedure of adoption of future generation bilateral agreements between the EU and the ENP countries. Fortunately, the CJEU now has jurisdiction to adjudicate in disputes between the institutions involved in establishing specific agreements with neighbouring countries based on Article 8(2) TEU. Compared to the pre-Lisbon regime, this represents a legal leap forward.

In view of the legal geography of EU-neighbourhood relations and the room for a dynamic interpretation of Article 8(1) TEU to accommodate a strategic recalibration of the ENP with the end goal envisaged by the Treaty, attention will now turn to the “specific agreements” mentioned in Article 8(2) TEU, and indeed the other instruments in the EU’s ample toolbox to shape future relations with countries on its borders. As noted above,<sup>103</sup> the focus will be on the eastern neighbours insofar as the analysis of the Association Agreements is concerned, whereas the use of ENP conditionality will be examined mostly through the prism of relations with the southern neighbours.

*It is unlikely that the Union’s ‘softer’ power in the neighbourhood is enough to inspire the reforms that are needed to underpin a single area of prosperity and good neighbourliness.*

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<sup>102</sup> Case 12/86, Demirel, ECLI:EU:C:1987:400.

<sup>103</sup> See section 2.4.



## 4. THE ENP TOOLBOX

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### 4.1 Association Agreements

#### 4.1.1 *Europe Agreements for Eastern Partnership countries?*

Following the collapse of the Soviet Union, the EU forged relations with its neighbours in the east on the basis of Partnership and Cooperation Agreements. All of the PCAs (except the one with Belarus) entered into force in the second half of the 1990s for a period of ten years and were automatically renewed each year after the expiry of their first period of validity. The southern neighbours concluded Euro-Mediterranean Association Agreements, designed, *inter alia*, to lead to the establishment of a Euro-Med free trade area of goods, services and capital.<sup>104</sup> Attaining the latter goal seems more elusive now than ever before. In 2004, the PCAs and EMAAs were enveloped into the wider European Neighbourhood Policy and accompanied by bilateral ENP Action Plans, developed jointly by the EU and each of the neighbouring states.

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<sup>104</sup> The EU and its member states signed an EMAA with Tunisia in July 1995 (entry into force on 1 March 1998). Between 1996 and 2002 EMAAs were signed in the framework of the Barcelona process: with Morocco (into force on 1 March 2000), Israel (1 June 2000), with Jordan (1 May 2002), with Egypt (1 June 2004), with Algeria (1 September 2005), and with Lebanon (1 April 2006). An Interim Association Agreement on trade and trade-related matters between the EU and the Palestinian Authority has been in force since 1 July 1997. At the end of 2004, the text of an EMAA with Syria was submitted to the political authorities on both sides, but it failed to get final approval and signature on the side of the EU. See K. Pieters, *The Mediterranean Neighbours and the EU Internal Market: A Legal Perspective*, The Hague: Asser Press, 2010.

Whereas the policy developed to match new realities, the static contractual arrangements gradually expired. The 2006 ENP Strategy therefore envisaged the updating and upgrading of the bilateral agreements.<sup>105</sup> The EU expedited its work following the inaugural EaP Summit in May 2009 and the entry into force of the Lisbon Treaty later that year. For the eastern neighbours, the flagship document underpinning each newly defined bilateral relationship would be the Association Agreement containing DCFTA provisions.<sup>106</sup> For the southern neighbours, new DCFTAs were intended to update and upgrade the hard core of the existing EMAs.<sup>107</sup>

After more than three years of negotiations, Moldova and Georgia initialled their respective AAs/DCFTAs with the EU at the EaP summit in Vilnius in November 2013. Prior to the summit, the Armenian and Ukrainian Presidents, both under intense pressure from Russia,<sup>108</sup> had unilaterally withdrawn their intention to sign similar accords. In response, the Commission and the EEAS – allegedly pushed by certain member states – watered down the

<sup>105</sup> COM (2006) 726 final, at 4-5.

<sup>106</sup> Negotiations with Ukraine were initiated under the pre-Lisbon regime. Negotiation mandates for Armenia, Azerbaijan, Georgia and Moldova were hammered out when the dust of the Lisbon Treaty was still settling, a difficult exercise altogether. For assessments of the scoping exercises vis-à-vis Ukraine, see C. Hillion, "Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine 'Enhanced Agreement'", *European Foreign Affairs Review* 12, 2007, pp. 169-182; and R. Petrov, "Legal Basis and Scope of the New EU-Ukraine Enhanced Agreement: is there any room for further speculation?", EUI Working Papers MWP 2008/17.

<sup>107</sup> On 14 December 2011, the Foreign Affairs Council authorised the Commission to open trade negotiations with Egypt, Jordan, Morocco and Tunisia as soon as the necessary preparatory processes were completed. See G. Van der Loo, "Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco", EuroMeSCo Paper No. 28, March 2016.

<sup>108</sup> See M. Emerson and H. Kostanyan, "Putin's Grand Design to Destroy the EU's Eastern Partnership and Replace it with a Disastrous Neighbourhood Policy of his Own", CEPS Commentary, Brussels, 17 September 2013.

final declaration of the summit. Whereas an early draft declaration acknowledged the sovereign right of each of the six Eastern Partnership states to choose the scope of its ambitions and the final goal of its relations with the European Union and to decide “whether to remain partners in accordance with Article 8 of the Treaty of the European Union [TEU] or follow its European aspirations in accordance with Article 49 thereof”,<sup>109</sup> the EU removed the reference to Article 49 from the final version. Whatever there may be of this, the Vilnius summit fell far short of being a rite of passage towards full integration with the EU, certainly not creating a ‘Thessaloniki moment’ akin to the 2003 summit where the Western Balkans were offered an EU membership prospect.<sup>110</sup>

To be sure, the fact that some member states succeeded in eliminating Article 49 from the Vilnius summit’s declaration need not mean an end to the membership dream of some of the eastern neighbours.<sup>111</sup> Indeed, the language employed in the joint declaration is malleable enough to allow EaP countries to find support from the EU to realise their desire to move beyond neighbourhood status: “The participants reaffirm the particular role for the Partnership to support those who seek an ever closer relationship with the EU. The Association Agreements, including

<sup>109</sup> See R. Jozwiak, “Draft EU Summit Text Acknowledges ‘Aspirations’ Of Eastern Neighbors”, Radio Free Europe, 31 October 2013 (<http://www.rferl.org/content/eu-neighbors-eastern-statement/25153908.html>). This would have been in line with the wish expressed on a number of occasions by the European Commissioner for Enlargement and ENP. See, e.g., R. Sadowski, “Commissioner Fule wants prospective EU membership to be offered to Eastern European countries”, *Eastweek*, 7 November 2012.

<sup>110</sup> See S. Blockmans and H. Kostanyan, “A Post-mortem of the Vilnius Summit: Not yet a ‘Thessaloniki moment’ for the Eastern Partnership”, CEPS Commentary, Brussels, 3 December 2013.

<sup>111</sup> A stronger EU membership perspective was contested by several member states such as France and the Netherlands. See A. Rettman, “EU gives Ukraine enlargement hint”, *EU Observer*, 10 February 2014.

DCFTAs, are a substantial step in this direction".<sup>112</sup> Arguably, the phrase "ever closer relationship" can be read in the Thessaloniki spirit, in the sense that the Eastern Partnership provides the framework for the "European course of the [EaP] countries, all the way to their future accession".<sup>113</sup>

Three additional arguments can be made to support this claim. Firstly, the statement by Herman Van Rompuy, President of the European Council, at the signing ceremony of the AAs/DCFTAs with Ukraine, Moldova and Georgia in Brussels on 27 June 2014 that "these agreements are not the final stage of our cooperation"<sup>114</sup> was a confirmation of earlier statements by the Foreign Affairs Council<sup>115</sup> and a careful attempt to say that those killed during the *Maidan* protests, a pro-EU integration movement like one the Union had not seen in decades, had not died in vain. Yet, the ultimate aim of the Association Agreements was played down in the European Council conclusions of December 2016 to overcome the hurdle erected in April 2016 by a majority of the 32% of Dutch voters who, in a *consultative* referendum, rejected the ratification of the AA/DCFTA with Ukraine.<sup>116</sup> In a "legally

<sup>112</sup> Joint Declaration of the Eastern Partnership Summit, "Eastern Partnership: the way ahead", Council Press release 17130/13 (Presse 516), Vilnius, 29 November 2013.

<sup>113</sup> EU-Western Balkans Summit Thessaloniki, Declaration, Council Press release 10229/03 (Presse 163), Thessaloniki, 21 June 2003.

<sup>114</sup> European Council, "Statement at the signing ceremony of the Association Agreements with Georgia, Republic of Moldova and Ukraine", Brussels, 27 June 2014, EUCO 137/14.

<sup>115</sup> See Council of the EU, "Council Conclusions on Ukraine", 10 February 2014.

<sup>116</sup> European Council conclusions on Ukraine, 15 December 2016: "[T]he aim of association agreements is to support partner countries on their path to becoming stable and prosperous democracies, and to reflect the strategic and geopolitical importance the European Union attaches to the regional context." For backgrounds and analysis on the Dutch referendum, see G. Van der Loo, "The Dutch Referendum on the EU-Ukraine Association Agreement: Legal options for navigating a tricky and awkward situation", CEPs Commentary, Brussels, 8 April 2016.

binding” Decision,<sup>117</sup> the Heads of State or Government of the 28 member states, meeting within the European Council, addressed the Dutch concerns “in full conformity with the Association Agreement and the EU treaties” and stated that:

While aiming to establish a close and lasting relationship between the parties to the Agreement based on common values, the Agreement does not confer on Ukraine the status of a candidate country for accession to the Union, nor does it constitute a commitment to confer such status to Ukraine in the future.<sup>118</sup>

In essence, the Decision merely states the obvious, namely that there is no automatic link between the AA and candidate country status.<sup>119</sup> But neither does the Decision exclude Ukraine’s right to apply for membership under Article 49 TEU, nor does it frame the

<sup>117</sup> The Decision, annexed to the European Council conclusions, would only take effect once the Kingdom of the Netherlands had ratified the AA/DCFTA and the Union had concluded it, which happened on 30 May and 11 July 2017, respectively. See Council Decision (EU) 2017/1248 of 11 July 2017 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party, OJ 2017 L 181/4.

<sup>118</sup> European Council conclusions, EUCO 34/16, 15 December 2016. Much to the chagrin of Ukraine, the Netherlands blocked the aspirational text of the final communiqué of the bilateral summit of 12-13 July 2017. In his remarks to the press after the summit, European Council President remedied that flaw by saying: “[F]or me the key sentence of the Association Agreement still is that, and I quote, ‘the European Union acknowledges the European aspirations of Ukraine and welcomes its European choice’.”

<sup>119</sup> On the legal character of the intergovernmental Decision and an analysis of its substance, see P. Van Elsuwege, “Towards a Solution for the Ratification Conundrum of the EU-Ukraine Association Agreement?”, Verfassungsblog, 16 December 2016. On the attachment of Ukraine to its European identity and the aim to establish closer association with the EU, see below, sub-section 4.1.2.

EU's position in that context. The Decision simply does not affect such a scenario.

Secondly, the references in the Vilnius Declaration, the European Council statement and the legally binding AA/DCFTA with Georgia are to "Eastern European countries".<sup>120</sup> Whereas diplomats have stressed the difference in language employed in Article 49 TEU, which allows "any European state" to apply for EU membership, in an attempt to deny EaP countries any promise of future membership, the emphasis in the EU Treaty is squarely on the "European" character of the applicant,<sup>121</sup> rather than the regional specificity thereof (northern, eastern, southern, western). The qualifier "any" in Article 49 underscores this point. Similarly, the reference to statehood in Article 49 TEU is not to disqualify "countries" from EU membership but to underline that the EU will only take in entities that meet the basic conditions of effective control of a government over a territory and the people living

<sup>120</sup> Van der Loo, Van Elsuwege and Petrov point to the obvious parallels between the EU-Ukraine AA and the first sentence of Article 49 TEU when "the preamble states that 'this Agreement shall not prejudice and leaves open future developments in EU-Ukraine relations'. In addition, the parties explicitly recognise that 'Ukraine as a European country shares a common history and common values with the Member States of the EU and is committed to promoting those values'. (...) Moreover, it is noteworthy that several provisions reflect the formulation of the Copenhagen pre-accession criteria. Political criteria such as stability of institutions guaranteeing democracy, the rule of law, human rights and fundamental freedoms are not only defined as 'essential elements' of the AA, they are also an integral part of the established political dialogue and cooperation in the area of freedom, security and justice. At the economic level, the establishment of a DCFTA is regarded as an instrument 'to complete [Ukraine's] transition into a functioning market economy'. Last but not least, the entire agreement is based on Ukraine's commitment to achieve 'convergence with the EU in political, economic and legal areas'. See G. Van der Loo, P. Van Elsuwege and R. Petrov, "The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument", EUI Working Papers LAW 2014/09, at 10.

<sup>121</sup> See the European Commission's rejection of the membership application of Morocco in 1987 for not fulfilling the geographical condition.

thereon, and the recognition by the member states of such entities' independence and sovereignty under Articles 1 and 3 of the 1933 Montevideo Convention.

Finally, close inspection and comparison of the AAs with the Stabilisation and Association Agreements (SAAs), the main contractual arrangement for the countries of the Western Balkans, in the following sub-sections reveals that although the preamble and the political part of the agreements are substantially different, the material substance of the DCFTAs and the sectoral cooperation exhibit a large number of legally binding commitments. These are, for example, rights and obligations; timeframes for the reduction of duties; and the uniform application of standards and the approximation of legislation, which in parts even exceed those in the SAAs, both in scope of coverage and level of enforcement. The result is a blurring of the boundaries between the material scope of the most prestigious instruments to define the relationship between the EU and the pre-accession states, on the one hand, and relations between the EU and EaP countries, on the other. This finding, in itself, raises questions about the levels of association the Union offers to European states that aspire to membership. If, indeed, the material differences between the newest generation of AAs and SAAs are marginal, can the EU and its member states legitimately maintain the political schism between 'enlargement' and 'enlargement lite' policies towards those neighbouring countries that could theoretically meet all EU membership conditions?

*If the material differences between the newest generation of AAs and SAAs are marginal, can the EU and its member states maintain the political schism between 'enlargement' and 'enlargement lite' policies towards neighbouring countries that could meet all EU membership conditions?*

#### 4.1.1.1 *Prelude to a comparative analysis*

Rather than sift through each of the three existing AAs/DCFTAs,<sup>122</sup> the analysis in the following sub-sections will focus on the EU-Ukraine AA/DCFTA.<sup>123</sup> As mentioned before, this agreement not only formed the template for the other two AAs, its DCFTA was also the object of intense scrutiny in trilateral negotiations with Russia.<sup>124</sup> Instead of re-hashing the in-depth research already conducted on the EU-Ukraine AA/DCFTA with

*This study reveals the unique and innovative features of the AAs and presents evidence to counter the claim that, as neighbouring states, the EaP countries cannot have an EU membership perspective.*

the aim of placing them in the context of the EU's external relations accords,<sup>125</sup> this study tries to assess the breadth and depth of the agreement in a comparative analysis with the EU-Serbia SAA.<sup>126</sup> As such, this study not only reveals the unique

<sup>122</sup> For textual commentaries and contextual analysis of each of the agreements, see M. Emerson and V. Movchan (eds), *Deepening EU-Ukrainian Relations. What, Why and How?*, Brussels/Kyiv/London: CEPS/IER/Rowman and Littlefield, 2016, M. Emerson and T. Kovziridze (eds), *Deepening EU-Georgian Relations. What, Why and How?*, Brussels/Tbilisi/London: CEPS/Reformatics/Rowman and Littlefield, 2016, and M. Emerson and D. Cenusu (eds), *Deepening EU-Moldovan Relations. What, Why and How?*, Brussels/Chisinau/London: CEPS/ExpertGrup/Rowman and Littlefield, 2016. For deeper analyses into contentious issue areas covered by the AA/DCFTAs, see the policy papers produced in the context of the "3DCFTAs" project at <http://www.3dcftas.eu>.

<sup>123</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part, OJ 2014 L 161.

<sup>124</sup> See M. Emerson, "2016 Already Puts its Mark on the Economic Map of Europe", CEPS Essay No. 22, Brussels, 8 January 2016, at 4.

<sup>125</sup> See G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration Without Membership*, Leiden: Brill, 2016.

<sup>126</sup> Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, OJ 2013 L 278/16.

and innovative features of the AAs but also presents empirical evidence that counters the political claim that, as neighbouring states, the EaP countries cannot have an EU membership perspective.

The case selection central to this part of the study is motivated by a range of factors that make the comparison of the EU-Ukraine AA with the EU-Serbia SAA more suitable than that concluded with any other (potential) candidate country. Firstly, negotiations of the agreements were launched in the same geopolitical and economic timeframe: talks with Serbia commenced in October 2005, and those with Ukraine barely 1.5 years later in March 2007.<sup>127</sup> The leaderships of both countries share the desire to see their countries accede to the European Union.<sup>128</sup> Secondly, like Ukraine, Serbia is a strategically located country with a major impact on regional stability and cooperation. It experienced a similarly bumpy trajectory of territorial instability and political development in its transition from authoritarianism to democracy. Thirdly, both countries have small economies,<sup>129</sup>

<sup>127</sup> Macedonia negotiated and signed its SAAs much earlier (2000 resp. 2001) and progress on its pre-accession track has been seriously hampered by, inter alia, the name dispute with Greece. Albania (SAA 2003-06) and Montenegro (SAA 2005-07) are small states with very differently structured economies. Bosnia and Herzegovina (SAA 2005-08) is not a functioning state. Kosovo (SAA 2013-15) is not recognised as a sovereign state by five EU member states. Turkey has been associated to the EU since 1963, has a customs union with it since 1995 and started accession negotiations in 2005, which have not led anywhere.

<sup>128</sup> Serbia has been granted candidate country status in 2012. Both President Poroshenko and Prime Ministers Yatsenyuk and Groysman have said that they would like Ukraine to join the EU. See, e.g., R. Balmforth and N. Zinets, "Ukraine president sets 2020 as EU target date, defends peace plan", *Reuters*, 25 September 2014; "Groysman: Ukraine will join EU within 10 years", *Euractiv*, 1 July 2016.

<sup>129</sup> In 2014, the GDP value of Serbia represented 0.07% of the world economy; that of Ukraine 0.21%; that of Belgium 0.86%; and Poland 0.88%. Data available at <http://www.tradingeconomics.com>.

comparably low levels of economic and social development<sup>130</sup> and rule of law.<sup>131</sup> Fourthly, Ukraine and Serbia participate in regional institutional arrangements that influence their sectoral cooperation with the EU. For instance, both Serbia and Ukraine are parties to the European Energy Community Treaty (since 2005 and 2011, respectively) and the Danube River Protection Convention (since 2003 and 1994, respectively).

Of course, there are also differences to consider. Firstly, whereas the EU-Serbia SAA was signed in April 2008 – i.e. before the outbreak of the financial and economic crisis, the Russo-Georgian war of August 2008 and the entry into force of the Lisbon Treaty dragged out talks with Ukraine until June 2014. One should, therefore, expect these differences to have impacted on the form and substance of the agreements. Secondly, there is the asymmetrical status to be considered in the area of trade. Ukraine has been a member of the World Trade Organization (WTO) since 16 May 2008, whereas membership negotiations with Serbia are still underway. Conversely, the trade part of the EU-Serbia SAA, which has been provisionally applied since 1 February 2010 by way of an Interim Agreement, envisages the creation of an FTA within a period of six years after the entry into force of the SAA, i.e. by 1 September 2019. The DCFTA part of the EU-Ukraine AA, on the other hand, has been provisionally applied since 1 January 2016 and will be gradually implemented over a transitional period of ten years after the entry into force of the AA on 1 September 2017. Thirdly, the countries differ in size: Ukraine's territory is

<sup>130</sup> Data for 2014 are available at <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>: GDP per capita at nominal values: Serbia - \$6,152, Ukraine - \$3,082. The average GDP per capita for the EU was \$30,240, with Bulgaria closing the ranks at \$ 7,712.

<sup>131</sup> Data for 2014 are available at <http://worldjusticeproject.org/rule-of-law-index>: Serbia ranked 60th out of 102 countries with a score of 0.50; Ukraine ranked 70th with a score of 0.48. Bulgaria ranked 45th with 0.55. Ukraine scores worse in terms of perceptions of corruption. Data are available at <https://www.transparency.org/cpi2014>: Serbia ranked 78th out of 175 countries with a score of 41; Ukraine ranked 142th with a score of 26 (0: highly corrupt; 100: clean). Bulgaria and Romania both ranked 69<sup>th</sup>, with a score of 43.

seven times bigger than Serbia's and the former's population exceeds the latter's by more than six times.

Despite the differences there are good grounds for a comparative study between the EU's agreements with Ukraine and Serbia. The similarities in the countries' aspirations vis-à-vis the EU and their comparable socio-economic indicators outweigh the differences in absolute terms, especially for the limited analytical purposes outlined above. The comparison will start with an analysis of the objectives, general principles and institutional provisions of the agreements, including matters of political dialogue, dispute settlement and enforcement mechanisms, i.e. the areas where the AAs and SAAs diverge the most (section 4.1.2). What follows is a comparative study of the socio-economic core of the agreements (section 4.1.3), including an analysis of the trade-related commitments, the clauses concerning investment and competition policy, and the expected levels of sectoral cooperation.

#### ***4.1.2 Objectives, general principles and institutional arrangements***

##### ***4.1.2.1 Objectives***

The main objectives of the EU-Ukraine AA and the EU-Serbia SAA are comprehensive and very similar in nature. Both types of agreements establish an association (Articles 1(1)) whose aim it is to, *inter alia*, provide a framework for political dialogue to enhance bilateral relations and create stability in the region (Articles 1(2)). Both agreements also aim to strengthen the rule of law; enhance cooperation in the area of justice, freedom and security (including democracy, human rights, minority rights, and fundamental freedoms); and contribute to the political, economic and institutional stability of each partner country. The latter is envisaged by supporting efforts to complete the transition of Ukraine and Serbia into a functioning market economy and developing a free trade area by means of progressive approximation of their legislation to that of the European Union.

*Both types of agreements establish an association that aims to provide a framework for political dialogue to enhance bilateral relations and create stability in the region.*

Whereas the substance of the main objectives of the agreements is largely the same, the tone in which they are expressed is fundamentally different. The EU-Ukraine AA lists the aims in a spirit of a mutually beneficial association. The EU-Serbia SAA, however, presents the association's objectives in a much more directive manner, i.e. as serving Serbia to up its game in all of the abovementioned areas. The differences in approach flow from the ultimate declarations of intent laid down in the preamble of each of the agreements. The preamble of the SAA with Serbia explicitly confirms

the European Union's readiness to integrate Serbia to the fullest possible extent into the political and economic mainstream of Europe and its status as a potential candidate for EU membership

when the criteria are fulfilled.<sup>132</sup> The preamble of the EU-Ukraine AA, on the other hand, merely notes "the importance Ukraine attaches to its European identity" and "welcomes its European choice". The extent of its political association and economic integration with the EU, however, is said to be dependent on the implementation of the commitments outlined in the agreement.

#### 4.1.2.2 General principles

After the objectives, the general principles of the agreements are laid down. The Agreement with Serbia stresses that respect for democratic principles, human rights, the rule of law, and the fight against the proliferation of weapons of mass destruction constitute the basis and "essential elements" of the cooperation with the EU (Preamble, Articles 2 and 3), the violation of which can provide sufficient ground for the suspension of the SAA by either of the parties (Article 133). Here too, the Association Agreement with Ukraine goes further by stating that "*the common values on which the European Union is built – namely democracy, respect for human rights and fundamental freedoms, and the rule of law – are (...) essential elements of this Agreement,*"<sup>133</sup> as are the "[p]romotion of

<sup>132</sup> See also Art. 17 SAA: "Cooperation with *other* countries candidate for EU accession (...)" . Emphasis added.

<sup>133</sup> Preamble. Emphasis added.

respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery (...)" (Article 2)<sup>134</sup>, the violation of which can lead to the suspension of the agreement (Article 478).

The insistence in the EU-Ukraine AA on the principles of sovereignty, territorial integrity, inviolability of borders and independence is backed up by, *inter alia*, Article 483 which envisages the application of the Agreement on the entire territory of Ukraine. The EU and its member states thus stand united with Ukraine in the rejection of Russia's illegal annexation of Crimea and Moscow's support for the breakaway regions in the Donbas.<sup>135</sup> Conversely, the territorial application of the EU-Serbia SAA does not extend to Kosovo (Article 135, second paragraph). While the secession of Kosovo was the result of years of internal colonisation and ultimately the war inflicted upon it by Serbia, as well as a decade

*Article 483 envisages the application of the Agreement on the entire territory of Ukraine. The EU and its member states thus stand united with Ukraine in the rejection of Russia's illegal annexation of Crimea and Moscow's support for the breakaway regions in the Donbas.*

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<sup>134</sup> Articles 2 AA and SAA both confirm the commitment of the parties to the respect for democratic principles, human rights and fundamental freedoms as defined in the 1975 Helsinki Final Act and the Charter of Paris for a New Europe, as well as the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The SAA also mentions the Stability Pact for Southeastern Europe in its preamble and cooperation with the International Tribunal for the former Yugoslavia (ICTY). The AA refers in Article 8 to cooperation with the International Criminal Court (ICC).

<sup>135</sup> It remains to be seen, however, if, when and how the AA's legal fiction of full territorial application will be turned into reality. Perhaps the gradual application of the EU-Moldova DCFTA over the territory of Transnistria gives rise to hope. See D. Cenusu, "European integration of Moldova in 2015: Top five failures and five hopes", *IPN*, 28 December 2015 (<http://ipn.md/en/integrale-europeana/73828>).

of international governance by the United Nations,<sup>136</sup> it is striking that Belgrade agreed to this territorial exclusion prior to the International Court of Justice's opinion on the legality under international law of Kosovo's unilateral declaration of independence.<sup>137</sup>

Another asymmetry in this regard is that the SAA confirms the right of return for refugees and internally displaced persons (IDPs) and the protection of their property rights (Preamble and Article 82), but the AA only refers to the protection of refugees under international law in the context of bilateral dialogue on asylum issues (Article 16(2)c) and the cooperation in combating terrorism (Articles 13 and 23).<sup>138</sup> While the legacy of the Balkan wars of the 1990s explains the heightened insistence of the EU to commit Serbia to resolve refugee and IDP issues,<sup>139</sup> it is noteworthy that such references in the EU-Ukraine AA were not sharpened up in the wake of the Russian annexation of Crimea and the destabilisation of parts of the Donbas in the spring of 2014.<sup>140</sup> This was primarily due to the EU's fear that re-opening negotiations to reflect post-Maidan developments might have brought back Ukraine's claim for an EU membership prospect

<sup>136</sup> The SAA refers to "Kosovo under United Nations Security Council Resolution 1244".

<sup>137</sup> See ICJ, "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo", Advisory Opinion, 22 July 2010, *I.C.J. Reports* 2010, at 403.

<sup>138</sup> The Preamble and Articles 7, 84 and 87 of the EU-Serbia SAA do not create that nexus between combating terrorism and the respect for international refugee law.

<sup>139</sup> In the same vein, Articles 5 and 6 SAA stress the need for Serbia to engage in good neighbourly relations. See also the discussion on Title III, below.

<sup>140</sup> Ukraine-EU Summit, 19 December 2011, Joint Statement, 18835/11 (Presse 513): "a common understanding on the full text of the Association Agreement was reached". Legal scrubbing of the political part of the AA part was closed with its initialling until 30 March 2012, while the scrubbing of the more technical DCFTA part of the agreement continued until 19 July 2012, when it was initialled.

with a vengeance.<sup>141</sup> Then again, on the specific point of the protection of rights of IDPs, the negotiators may have considered it sufficient that respect for international refugee law was made conditional in light of the consequences of the fight against the ‘terrorist’ separatists in Crimea and Donbas.

#### *4.1.2.3 Political dialogue*

Both agreements do, however, testify to the ambition to hold further regular political dialogue on international issues, taking account of the CFSP. But the EU-Ukraine AA again goes further when it speaks of “gradual” (Article 7) and “ever-closer convergence of bilateral, regional and international positions of mutual interest” (Preamble), taking account of the CFSP – “including the Common Security and Defence Policy (CSDP)”, a policy not mentioned in the SAA with (then potential) candidate country Serbia.

Titles II of the AA and the SAA provide the legal bases for fora to conduct political dialogue at the ministerial, parliamentary and senior official levels. Article 5 of the AA codifies the practice of organising a bilateral presidential summit between the EU and Ukraine. Such political dialogue not only aims to facilitate the alignment of Ukraine’s and Serbia’s foreign and security policies with the CFSP.<sup>142</sup> Contrary to the agreement with Serbia, Article 6 of the EU-Ukraine AA also extends political dialogue to the obligation which rests on both parties to

cooperate in order to ensure that their internal policies are based on principles common to the Parties, in

<sup>141</sup> Van der Loo alludes to the EU’s fear of ‘losing’ the agreement altogether; hence the insistence of the Foreign Affairs Councils of 10 and 20 February 2014, i.e. before President Yanukovych fled the country, on signing the agreement “as soon as Ukraine [was] ready”. See G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration Without Membership*, Leiden: Brill, 2016, pp. 116-7.

<sup>142</sup> And not just on a bilateral basis: the agreements also oblige the parties to use the contacts through the diplomatic channel in third countries and multilateral organisations (UN, OSCE, Council of Europe).

particular stability and effectiveness of democratic institutions and the rule of law, and on respect for human rights and fundamental freedoms, in particular as referred to in Article 14 of this Agreement.

As such, Title II of the AA makes inroads in Title III on Justice, Freedom and Security, and foresees bilateral political dialogue on Ukrainian institutional reform “at all levels in the areas of administration in general and law enforcement and the administration of justice in particular.” This includes reforms aimed at “strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption” (Article 14), discussed below.

Besides rapprochement to the EU, the political dialogue with Serbia is largely focused on encouraging regional integration and geared towards meeting the goals identified in the Thessaloniki agenda, which guides the countries of the Western Balkans all the way to future accession (Article 11(c)).<sup>143</sup> In this respect, Title II of the SAA flows into Title III on Regional Cooperation. Under this heading, the EU commits itself to support cross-border projects while Serbia agrees to promote good neighbourly relations and fully implement the Central European Free Trade Agreement (CEFTA). In this respect, Serbian regional integration has three main dimensions. Firstly, Serbia must sign bilateral conventions on regional political, economic and justice cooperation with the other countries that signed an SAA (Article 15). Secondly, Serbia has to pursue cooperation in other fields with the states that are subject to the Stabilisation and Association Process (Article 16). And thirdly, Serbia commits to conclude conventions with non-SAA candidate countries such as Turkey (Article 17). As such, the SAA contains a strong emphasis on all-encompassing forms of regional cooperation. By linking Serbia up to its neighbours in southeast Europe, the agreement aims to create an indissoluble web of connections that render borders less important and that will allow the Western Balkans to more easily integrate into the EU.

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<sup>143</sup> Another forum for such dialogue is the EU-Western Balkans Summit (Article 13 SAA).

By contrast, the EU-Ukraine AA lacks a true comprehensive regional character and only focuses on cross-border conflict resolution.<sup>144</sup>

*The AA lacks a truly regional character and only focuses on cross-border conflict resolution.*

#### 4.1.2.4 Justice, Freedom and Security

As noted above, Title III of the EU-Ukraine AA deals with Justice, Freedom and Security. In terms of structure and content, it is very similar to Title VII of the EU-Serbia SAA. Both titles cover a broad spectrum of issues, including cooperation on migration, asylum and border management, movement of persons, the fight against terrorism, organised crime and corruption. The Agreement with Ukraine also covers judicial cooperation in civil and criminal matters (Article 24 AA).

The wording of the provisions on the consolidation of the rule of law, respect for human rights, fundamental freedoms and reinforcement of institutions, such as judiciary, are almost identical, with the difference that the EU-Ukraine AA also specifically calls for improvements to the functioning of the police. Both agreements address the issue of protection of personal data and require Serbia and Ukraine to adopt European and international standards.

Although the AA with Ukraine deals with “mobility” (not “movement”, as in the SAA) of workers (Article 18), the details are left for Ukraine and the individual EU member states to be developed by way of bilateral agreements.<sup>145</sup> Under the heading “movement of persons” (Article 19), the AA speaks of “mobility” in relation to short-term movement (visas) in the context of the parties’ commitment to fully implement the visa facilitation and

<sup>144</sup> Under the heading ‘Regional Stability’, Article 9(1) AA states that “[T]he Parties shall intensify their joint efforts to promote stability, security and democratic development in their common neighbourhood, and in particular to work together for the peaceful settlement of regional conflicts.”

<sup>145</sup> Arguably, the term ‘movement of workers’ was avoided in the AA as it might have too integrationist a connotation.

readmission agreements and take gradual steps on the road to visa liberalisation. Whereas issues of border management, legal migration, control of illegal migration and development of return policies are slightly more detailed in the AA with Ukraine (compare Article 16 AA with Article 82 SAA), most of these provisions in both the agreements deal with these matters in summary and declaratory terms. In essence, they rely on association agendas, visa liberalisation action plans and anti-corruption strategies to give ‘hands and feet’ to the treaty commitments.

That said, several of the agreements’ other chapters have a direct bearing on the above-mentioned issues. Combating corruption is a case in point.<sup>146</sup> Not only is it emphasised in the bilateral cooperation in the management of public finances and the fight against fraud;<sup>147</sup> the fight against corruption is also mainstreamed in the trade-related parts of the agreements. Both

*Combating fraud and corruption is emphasised in the management of public finances. It is also mainstreamed in the trade-related parts of the agreements.*

Ukraine and Serbia are obliged to gradually approximate their legislation to the EU rules on competition, state aid and public procurement, and are bound to introduce institutional arrangements that bring their

domestic licensing systems in sectoral areas of cooperation such as transport and veterinary, sanitary and phytosanitary inspections, in line with EU standards and thus make it harder for them to be captured by narrow, private and criminal interests.<sup>148</sup>

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<sup>146</sup> Cf. Articles 20 and 22 AA; and Articles 84 and 86 SAA.

<sup>147</sup> Here too, the AA is more developed. Compare Chapter III of Title V and Title VI AA with Articles 46 and 100 SAA.

<sup>148</sup> Also, anticorruption measures form a cornerstone of the VLAP and effective implementation of anti-corruption measures is a mandatory precondition for the provision of the EU assistance under macro-financial assistance programmes.

#### 4.1.2.5 Institutional arrangements

In line with standard practice in the association agreements concluded by the EU with third states, the AA and the SAA establish an Association Council and a Stabilisation and Association Council, respectively, composed on the basis of parity. These councils have the role of supervising and monitoring the implementation of the agreements and are endowed with the power to make binding decisions (Articles 463 AA and 121 SAA).<sup>149</sup> Where appropriate, the parties may invite other bodies to join. The SAA, for instance, mentions the European Investment Bank (Article 120).

Both councils establish committees and bodies to assist them, and meet in different configurations (Articles 464 AA and 122, SAA), for instance that of trade. Both agreements include a similar provision on the establishment of Parliamentary Committees (Articles 467 AA and 125 SAA). However, the AA is more detailed on the role of this Committee, stating that it may request relevant information from the Association Council and make recommendations to it. The Association Council is also obliged to inform the Parliamentary Committee of relevant decisions and recommendations (cf. Article 468 AA).

One of the major differences in the institutional set-up relates to the involvement of civil society: this is set out in the EU-Ukraine AA whereas the EU-Serbia SAA remains silent on the issue. The AA obliges the parties to promote regular meetings with representatives of civil society to inform them and to collect their input through establishing a Civil Society Platform consisting of the members of the European Economic and Social Committee and representatives of Ukraine's civil society (Articles 469-470).

*The AA obliges the parties to promote meetings with civil society representatives to collect their input.*

Another striking difference between the two types of agreement is the inclusion in the AA of a monitoring clause

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<sup>149</sup> The AA also empowers the Association Council to update or amend Annexes to the agreement.

(Article 473), again absent from the SAA. The provision prescribes sophisticated mechanisms (e.g. reporting, on-the-spot missions) to monitor the implementation of the AA.

The agreements' provisions on access to courts and administrative organs, measures related to essential security interests and non-discrimination are almost identical. The articles on fulfilment of the obligations, dispute settlement and the appropriate measures in case of non-fulfilment are also remarkably similar. Essentially, both agreements prescribe a classic quasi-judicial system of dispute settlement, based on consultations within the (Stabilisation and) Association Council (Articles 477 AA and 130 SAA). By way of derogation of this procedure, disputes concerning the interpretation, implementation, or good faith application of trade and trade-related matters of the AA are exclusively governed by Chapter 14 of Title IV of the AA. In case consultations in the Trade Committee fail, then this Title either prescribes an arbitration procedure (Article 306-326) or settlement by way of a mediation mechanism (Articles 327-336), depending on the matters at hand.<sup>150</sup> Protocol 7 to the SAA also provides for an arbitration procedure in the case of failure of the Stabilisation and Association Council to resolve disputes on trade-related matters, but does not envisage a mediation mechanism.

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<sup>150</sup> Cf. Article 304: "The provisions of this Chapter apply in respect to any dispute concerning the interpretation and application of the provisions of Title IV of this Agreement except as otherwise expressly provided." Article 327(2): "This Chapter shall apply to any measure falling under the scope of Chapter 1 of Title IV of this Agreement (National Treatment and Market Access for Goods) adversely affecting trade between the Parties." Article 327(3): "This Chapter shall not apply to measures falling under Chapter 6 (Establishment, Trade in Services and Electronic Commerce), Chapter 7 (Current Payments and Movement of Capital), Chapter 8 (Public Procurement), Chapter 9 (Intellectual Property) and Chapter 13 (Trade and Sustainable Development) of this Agreement. The Trade Committee may, after due consideration, decide that this mechanism should apply to any of these sectors."

It is clear from the comparative analysis above that in many aspects the EU-Ukraine AA is in fact more advanced than the EU-Serbia SAA, despite the absence of the former's professed end goal, i.e. full integration into the EU. But when ignoring preambular references to any type of *finalité*, as well as acronyms and place names related to the Western Balkan region, one might well have designated the SAA as the less integrationist agreement befitting a less intense type of relationship envisaged by the EU within the ENP. This qualitative difference in the political part of the agreements is not simply a matter of the new AAs having been negotiated more recently, thus reflecting an EU endowed with a host of new competences in a post-Lisbon context. As we will see from the following investigation into the trade-related aspects of the agreements, the material substance of the AA also reveals a higher level of ambition by the parties to integrate Ukraine faster into the internal market of the EU.

#### **4.1.3 Trade and trade-related aspects**

##### **4.1.3.1 Introduction**

The hard core of the (Stabilisation and) Association Agreements is formed by the trade and trade-related provisions. Based on previous research of preferential trade agreements,<sup>151</sup> this study makes a threefold distinction between sets of policy areas and matching provisions in the EU-Ukraine AA and the EU-Serbia SAA. Firstly, it identifies a number of policy areas covered by the agreements that are suitable for comparison. In total, one can identify 45 policy areas that are explicitly mentioned in either of

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<sup>151</sup> See H. Horn, P. Mavroidis and A. Sapir, "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements", *The World Economy* 33, 2010, pp. 1565-1588. The author is particularly grateful to Ievgen Vorobiov for his research assistance on this part of the study.

the agreements, although they might not always be shared. For instance, a chapter on cooperation on the Danube River was included in the EU-Ukraine AA but not in the EU-Serbia SAA, even if a much larger stretch of the Danube crosses Serbia. For ease of reference, provisions in the same policy area have been merged when they did not have the same wording but conveyed the same meaning (cf., “safeguard clauses” in the SAA and “safeguard measures” in the AA). As Serbia is expected to become a WTO member soon, one can adhere to the existing members’ commitments under WTO agreements to distinguish policy areas in which legally binding commitments build upon those already agreed to at the multilateral level (‘WTO+’) and those which deal with issues that go beyond the current WTO mandate altogether (i.e. ‘WTOx’). One could also operationalise this variable by counting the number of EU legislative acts to be implemented by a partner country in a particular policy area within a certain period of time. As we will see, the details on implementation vary between the two agreements, although not always in the way one would expect.

Secondly, the ‘depth’ of the obligations undertaken by the EU’s partner countries in legally binding provisions is examined. A distinction is made between legal obligations, soft law and non-legally binding commitments. For instance, wording akin to “the Parties shall” denotes the highest form of the legally binding nature of provisions, while the phrase “agree to cooperate” does not possess this quality.

Thirdly, the study determines the legal enforceability of the provisions in the identified policy areas of the agreements. Considering the limitations of academic literature in operationalising this concept, it is necessary to introduce a rule of thumb similar to that used by the authors of, e.g., the 2011 World Trade Report:<sup>152</sup> if a commitment is subject to arbitration, i.e. the most ‘judicial’ of the dispute settlement mechanisms outlined by the respective agreement, then it will be deemed legally enforceable. This criterion serves as an enabler to distinguish

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<sup>152</sup> The report is available at [https://www.wto.org/English/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report11\\_e.pdf](https://www.wto.org/English/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf).

between ‘harder’ and ‘softer’ commitments within the broader category of legally binding provisions.

#### *4.1.3.2 WTO+ obligations*

In seven policy domains WTO+ commitments are the hallmark of both the EU-Ukraine AA and the EU-Serbia SAA: industrial goods, agricultural goods, customs administration, trade-related aspects of intellectual property rights (TRIPS), export taxes, state aid and safeguard mechanisms. As mentioned above, the arrangements for implementation of the commitments in these seven fields vary between the agreements.

First of all, the introduction of a full free trade regime in industrial goods with Serbia was agreed to take place within a period of six years after the entry into force of the SAA, while Ukraine’s schedule for reducing or eliminating the bound import tariffs is stretched over a period of ten years (Annex 1). Both agreements contain standstill provisions that prohibit the increase of import duties by either of the parties, except for cases authorised under the dispute settlement mechanism.

Second, we observe a different approach in the regulation of trade in agricultural products. Under the EU-Serbia SAA, the FTA in agricultural goods is established by a gradual decrease in the country’s tariff rates over a six-year period in return for the EU abolishing all quantitative restrictions and eliminating import tariff rates on all agricultural products upon entry into force of the agreement, except under several headings (“EU concessions”). The EU-Ukraine AA, however, is more restrictive: a number of crucial agricultural imports to the EU are subject to tariff rate quotas, which provide for tariff rate increases for the volumes of Ukraine’s agricultural exports exceeding specified quotas.

Third, commitments on customs administration cooperation exhibit different levels of depth: while Serbia and the EU are free to decide on all practical measures and arrangements necessary for the application of Protocol 6 on mutual administrative assistance in customs matters (Article 13 of the Protocol), Ukraine is bound by strict commitments to implement the EU Customs Code and partially approximate its legislation to three other relevant regulations within three years of entry into force of the agreement (Annex XV).

Fourth, and in line with the previous point, the legally binding commitments stemming from the TRIPS Agreement have broader scope and greater depth in the EU-Ukraine AA. In accordance with TRIPS, the EU-Serbia SAA establishes the most-favoured nation (MFN) regime in intellectual property rights (IPR) protection (Article 75(2)). In effect, the SAA charges Serbia with the enforcement of TRIPS provisions, despite the fact that the country is not a party to TRIPS: "Serbia shall take the necessary measures in order to guarantee no later than five years after entry into force of this Agreement a level of protection of intellectual, industrial and commercial property rights similar to that existing in the Community, including effective means of enforcing such rights" (Article 75(3)). Also, the SAA introduces some TRIPS provisions in the relevant FTA chapters. For instance, Article 33 invokes the protection of geographical indications for EU agricultural products and foodstuffs (compare Article 22 TRIPS), with detailed lists in the Protocols to the SAA.

In a separate chapter, the EU-Ukraine AA 'gold-plates' TRIPS provisions: "The provisions of [Chapter 9] shall complement and further specify the rights and obligations between the Parties under the TRIPS Agreement and other international treaties in the field of intellectual property" (Article 158(1)). As such, certain TRIPS commitments are beefed up in the AA: for instance, the minimum duration of trademark protection under TRIPS (seven years) has been increased to ten years in the AA (Article 200). Also, Ukraine takes on commitments to enforce IPR within strict time limits: for instance, its authorities are supposed to prevent counterfeit goods from being released to the market within three years of the agreement's entry into force. Unlike the EU-Serbia SAA, market access for goods comes with more IPR strings attached, as the AA fully covers such TRIPS sections as computer programmes, trademark registration, geographical indications, industrial designs and patents. Moreover, institutional arrangements are set up in the AA to ensure compliance with these binding provisions (cf. Article 211 on the Sub-Committee on Geographical Indications).

Fifth, several legally binding commitments aim to limit competition-distorting practices in bilateral trade. Export duties and taxes are explicitly prohibited by both Agreements. Similarly,

state aid is prohibited in cases where it distorts or threatens to distort competition by favouring certain firms or goods from either of the parties. An inventory of aid schemes has to be submitted by both partners: within four years for Serbia and within five years for Ukraine. Provisions permitting state aid for restructuring its steel industry are included in the SAA (Protocol 5) but not in the AA.

Sixth, precautionary mechanisms are introduced in compliance with the WTO Agreement on Safeguards, even for Serbia, which is not (yet) a member. The implementation of safeguard measures is regulated by institutional arrangements set out in detail in both agreements: such measures have to be notified to the (Stabilisation and) Association Council or, as the case may be, to the Trade Committee. Two specific exemptions are granted to Ukraine, not to Serbia: firstly, Ukraine is excluded from the EU's application of safeguard measures as long as it meets the definition of a "developing country" in the WTO Agreement; secondly, Kyiv is allowed to apply safeguard measures to imports of passenger cars during a 15-year period after the AA's entry into force, but not in parallel to the use of measures under the WTO Agreement.

In sum, whereas the scope of FTA coverage appears to be broader in the EU-Serbia SAA (notably, with regard to trade in agricultural goods), the EU-Ukraine AA contains legally enforceable provisions on domestic reforms in major trade-related policy areas (particularly in customs administration and IPR) which go significantly beyond those negotiated by the EU with Serbia in the framework of the SAA.

*Whereas the scope of FTA coverage appears to be broader in the EU-Serbia SAA, the EU-Ukraine AA contains legally enforceable provisions on domestic reforms in major trade-related policy areas that go beyond those negotiated by the EU with Serbia.*

Analysis of another group of WTO+ policy areas such as technical barriers to trade (TBT), trade in services and access to public procurement reveals the existence of non-binding provisions for Serbia yet legally binding provisions for Ukraine. Technical barriers to trade are illustrative in this regard. While the SAA only contains a general obligation for Serbia to bring its legislation into conformity with EU standards within a period of

six years (Article 77), Annex III to the EU-Ukraine AA contains a schedule for achieving conformity with 31 technical regulations within a period of five years after the entry into force of the agreement. Horizontal legislation has to be transposed within the first year and the bulk of sectoral regulations for specific categories of products within two to three years after entry into force.

Furthermore, apart from the duty to gradually develop cooperation in the sanitary and phytosanitary (SPS) domain (Article 97), concrete measures are not listed in the SAA. The AA, on the other hand, enters into great detail on the bilateral cooperation in this field. It provides for the approximation of Ukraine's SPS rules and standards to a host of EU acts within fixed timeframes (Article 56 and Annex III), after which the SPS Sub-Committee is supposed to declare the "recognition of equivalence". The AA establishes a verification process and defines the principles of certification for plants and animals. Overall, the SPS provisions are much more *dirigiste* in the AA with Ukraine than in Serbia's SAA.

The liberalisation of trade in services represents a significant part in both agreements, yet with differing sectoral scope and legal depth. On the one hand, the SAA proclaims consistency with Article V of the General Agreement on Trade in Services (GATS), thereby establishing conditions for liberalising trade in services. But, apart from the regime in establishing subsidiaries, the SAA lacks legally binding provisions conducive to liberalisation going beyond the provisions of the GATS. The AA with Ukraine, on the other hand, provides mechanisms for granting mutual access in service markets, on the condition of compliance with a range of legally binding EU provisions for different sectors of the services industry.

This WTO+ policy area (liberalisation of trade in services) merits more detailed analysis. Firstly, both agreements provide for the choice between the MFN regime or the national treatment in the establishment of subsidiaries and branches, depending on whichever is better for the parties. Both agreements contain a number of reservations, however, such as special terms for providing financial services in Serbia (Annex VI), or the prohibition of land sale to foreign firms in Ukraine (Annex XVI-A).

Secondly, the agreements' provisions on the supply of services differ in their degree of implementation. The SAA declares a progressive liberalisation in service supply between Serbia and the EU (Article 59), yet falls short of explicitly linking market access to the approximation of legislation (no conditionality). Also, special terms are drawn up for trade in transport services. Conversely, national treatment in supply of services in the AA with Ukraine includes a number of exemptions such as business services, financial services, communication, education, construction and engineering. Importantly, the EU-Ukraine AA establishes a sophisticated framework for granting access to service markets, *conditional* on the implementation of the EU *acquis*. After Ukraine submits a roadmap, the European Commission carries out an assessment and adopts a decision within the AA's Trade Committee on granting Ukrainian service suppliers EU market access. As such, Ukraine would, for instance, have to implement 58 EU regulations for financial services within eight years of the AA's entry into force, with the bulk of them due in the first four years, before gaining access to the EU's financial service market.

*National treatment in supply of services in the AA with Ukraine includes exemptions such as business services, financial services, communication, education, construction and engineering.*

Finally, access to public procurement markets is covered by both agreements, yet again with different degrees of legal enforceability. The SAA grants Serbian companies access to contract award procedures in the EU on the same conditions as for EU companies (Article 74), and does not outline the scope and schedule for adopting the EU's legislation regulating procurement in the utilities sector. The AA, however, presents a more sophisticated and concrete approach altogether: Ukraine's access to specific types of public procurement contracts in the EU hinges entirely on Kyiv's phased approximation of legislation to certain EU directives or parts thereof: for instance, in order to supply goods to local authorities, Ukraine is expected to first implement the basic elements of two directives specified in the Annex of the AA. The break-down of the five phases within eight years appears in Table 1 below.

*Table 1. Phases of Ukraine's legislative approximation to EU *acquis* on public procurement*

| Timetable, after AA enters into force | Directives to be implemented by Ukraine | Which provisions                         | 'Rewards' for Ukraine  |
|---------------------------------------|---|--|--|
| 6 months                              | N/A                                     | Compliance with "basic standards"        | Supplies to central government   |
| 3 years                               | 2004/18/EC; 89/665/EEC                  | Only "basic elements" (Annexes XXI-B, C) | Supplies to state, regional and local authorities governed by public law |
| 4 years                               | 2004/17/EC; 92/13/EEC                   | Only "basic elements"                    | Supplies for all "contracting entities"                                  |
| 6 years                               | 2004/18/EC                              | Remaining ones                           | Service & works for all contracting authorities                          |
| 8 years                               | 2004/17/EC                              | Remaining ones                           | Service & works for all entities in the utilities sector                 |

Source: Annex XVII to the EU-Ukraine Association Agreement.

Typically, a two-tier control mechanism is provided for in Article 152 AA. At first, Ukraine publishes a 'Roadmap for approximation', which is reviewed by the AA's Trade Committee to ascertain compliance with the *acquis*. If the Roadmap is approved, then Ukraine may proceed with implementation and only then gain access to public procurement markets in the EU.

#### 4.1.3.3 WTOx commitments

Both agreements contain legally binding commitments dealing with issues that go beyond the current WTO mandate altogether (i.e. 'WTOx'), in particular in investment protection and

competition policy. These will be discussed first. A longer checklist of WTOx commitments will then follow.

The short articles on investment in the SAA and AA are almost identical, as the parties take on a binding commitment to “ensure the free movement of capital relating to direct investments made in companies” abroad and “the liquidation or repatriation of these [investments] and of any profit stemming there from” (Articles 63 SAA and 145 AA). Hence, the agreements provide for a basic level of investment protection in both Serbia and Ukraine, one that goes beyond the provisions of the Trade-Related Investment Measures (TRIMs).

As the basis for EU norm promotion in competition policy, the SAA and AA share the explicit prohibition of two practices deemed incompatible with the terms of the agreements: i) the prevention, restriction and distortion of competition by undertakings; and ii) abuse of a dominant position by undertakings. The AA adds a third prohibition to this list: “concentrations between undertakings, which result in monopolization or a substantial restriction of competition in the market (...) of either Party” (Article 254), particularly salient in Ukrainian industries dominated by oligarchs.

The requirement to establish an independent competition authority is included in both agreements. While Serbia is required to “establish an operationally independent authority” (Article 73), Ukraine is expected to “maintain authorities responsible for and appropriately equipped for the effective enforcement of the above-mentioned competition laws” (Article 255). Again, Ukraine’s commitments to institution-building are more specific than Serbia’s, in particular with regard to the procedures to be applied by a competition authority. Similarly, both agreements mention the approximation of laws and enforcement practices to those of the EU, yet with varying degrees of specificity. The SAA does not contain explicit schedules and only stipulates that the “approximation [...] shall gradually extend to all the elements of the Community *acquis* referred to in this Agreement by the end of the transitional period” (Article 72). The AA, however, is more prescriptive in terms of the number of regulations and is stricter in the time limits (three years) within which Ukraine is expected to approximate its competition laws and enforcement practices

(Article 256). Hence, Ukraine has to fully comply with the core EU *acquis* on competition within a time period half that allocated to Serbia, in spite of Kyiv's poorer administrative capacities and possibly bigger problem of veto holders' resistance to change in this policy area.

Further, both the SAA and AA stipulate that Serbia and Ukraine have to "adjust" state monopolies of a commercial character in order to prevent discriminatory measures "regarding the conditions under which goods are procured and marketed" in the EU and its partners (Articles 43 SAA and 258 AA). The timetables for such adjustment vary: within three years for Serbia and within five years for Ukraine, possibly because such commercial state monopolies (in, e.g., telecoms and rail transport) are significantly larger in Ukraine.

Finally, provisions in this WTOx policy area bear a particularly high degree of enforceability. Except for the duty on the approximation of law (Article 256), all of the provisions of the EU-Ukraine are eligible for parties' recourse to the agreement's dispute settlement mechanism (incl. arbitration). The SAA contains no explicit mention of either a dispute settlement mechanism in this policy area, or any exemptions from it.<sup>153</sup>

A comparative analysis of the agreements reveals that 12 WTOx provisions are legally binding for Ukraine under the AA but not binding for Serbia or are omitted in the SAA. These provisions are mostly concentrated in sectoral policy areas, most notably movement of capital, energy, transport and environment. Each is discussed in turn.

The AA chapter on movement of capital prohibits restrictions of current account payments between the EU and Ukraine. The chapter requires Ukraine to approximate its law to six provisions of the TFEU on the movement of capital (Articles 63-

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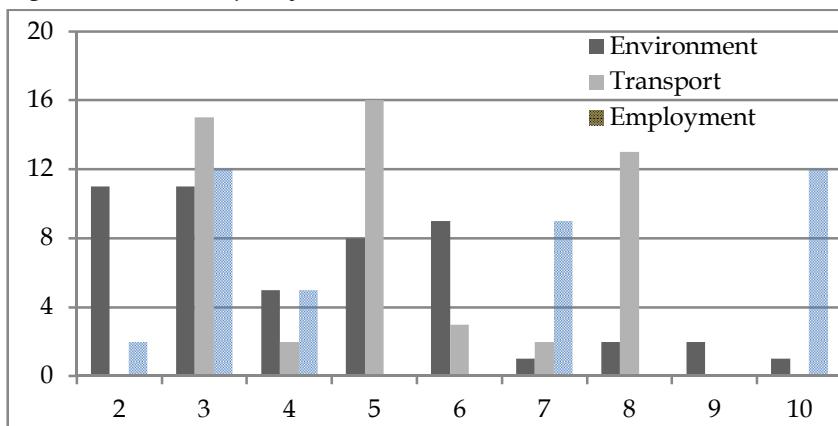
<sup>153</sup> Given that the EU cannot use the WTO's DSM vis-à-vis Serbia, one would assume that the use of the general dispute settlement mechanism under the SAA (i.e. via the quasi-judicial Stabilisation and Association Council) in competition-related matters would not be a particularly efficient vehicle for the EU to determine trade-related issues after the entry into force of the free trade area.

66) and the Area of Freedom, Security and Justice (Article 75) within a period of four years. The review mechanism by the Trade Committee is enshrined in Article 147.

Energy issues are covered in a separate chapter of the AA, whereas both the SAA and the AA refer to compliance with the Energy Community Treaty (ECT), to which Serbia and Ukraine are signatories. The AA goes much further, though, and reiterates that Ukraine has to approximate its law to the EU's *acquis* on electricity, gas, oil, energy efficiency and nuclear energy (see Figure 1 below). A number of practices, such as dual pricing, customs duties and quantitative restrictions on energy sources are banned by the AA. Importantly, energy is subject to the dispute settlement mechanism of the AA, which strengthens the legal enforceability of these provisions. Yet it is useful to bear in mind that, according to Article 278 AA, the provisions of the ECT prevail in case of conflict with the AA.

Unlike the declaratory statements on "cooperation in the environmental field" in the SAA, the AA requires Ukraine to implement 50 EU regulations on environment within a period of ten years, most of them to be adopted within the first six years of the Agreement's entry into force. A similar pattern is observed in the provisions on transport: while the SAA is limited to a general declaration, the AA provides for Ukraine's approximation of legislation to 51 EU regulations within the first eight years of the Agreement's entry into force (see Figure 1 below).

*Figure 1. Expected dynamics of Ukraine's approximation to EU regulations in three policy areas*



Note: The horizontal axis stands for years after entry into force, the vertical one measures the number of regulations to be implemented.

Source: CEPS.

In other WTOx areas, the AA focuses heavily on Ukraine's reforms to improve the regulatory environment for business undertakings. Firstly, the AA's provisions on employment and social policy aim at the systematic alignment of Ukraine's labour legislation to the existing EU regulations. This stands in contrast to the SAA, which only invokes an intention to "progressively harmonise" Serbia's law with EU regulations on working conditions. The AA, however, explicitly requires Ukraine to approximate its law to EU standards and practices set out in 40 regulations, within a period of ten years of the AA's entry into force, with regulatory acts on labour law and anti-discrimination due in the first four years (see Table 2 below).<sup>154</sup> Further, the AA Chapter on 'Company Law and Corporate Governance' provides for Ukraine's implementation of 14 EU regulations within four years of its entry into force. By

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<sup>154</sup> Then again, the provisions on Ukraine's intention to implement standards of International Labour Organization (ILO) conventions appear non-binding, as they lack concrete schedules and enforcement mechanisms.

comparison, the EU-Serbia SAA contains no legally binding provisions in this policy area. Similarly, the AA provision on “gradual approximation to the [EU] taxation structure” is translated into Ukraine’s commitment to implement six Council directives on indirect taxation within a two-to-five year period of the AA’s entry into force.

The remaining WTOx policy areas contain fewer legally binding provisions for Ukraine. Then again, they are barely covered by the SAA at all. The AA requires Ukraine to implement 15 EU regulations on consumer protection and nine regulations concerning public health within three years of the AA’s entry into force, as well as one audiovisual policy directive. In terms of anti-corruption measures, the AA sections on financial cooperation contain Ukraine’s commitment to implement the anti-fraud provisions of the 1995 EU Convention on Protection of EC financial interests and its two protocols within five years. By contrast, the SAA contains only declaratory statements on Serbia’s alignment with EU standards on consumer protection and has no provisions whatsoever on public health or the fight against corruption.

*Table 2. Comparison of SAA and AA provisions on law approximation in the 11 WTOx areas*

| Policy Area         | SAA, Serbia  | AA, Ukraine  |
|---------------------|--|--|
| Movement of Capital | Serbia to <i>adjust</i> “its legislation concerning the acquisition of real estate” (Art. 63.3) within 4 years | Ukraine to <i>approximate</i> law to TFEU Articles on capital flow freedom to be applied within 4 years (Art. 147) |
| Energy              | None: Art. 109: “cooperation” on integrating Serbia into EU energy markets                                     | Approximation to EU regulations on electricity, gas, oil, energy efficiency and nuclear in a 2-step process.       |
| Environment         | The Parties vouch to “develop and strengthen their cooperation in the [...] field” (Art. 111)                  | Approximate Ukraine’s legislation to 50 EU regulations within 10 years   |

|  |  |   |
|--|--|---|
| Transport  | Cooperation to focus on “priority areas related to the Community <i>acquis</i> in the field of transport” and aim at supporting “multi-modal infrastructures in connection with the main Trans-European networks” (Art. 108) | Approximation to the EU <i>acquis</i> , including on: <ul style="list-style-type: none"> <li>▪ Road transport: 13 regulations within 3-7 years;</li> <li>▪ Railway: 13 regulations within 8 years;</li> <li>▪ Maritime transport: 20 regulations within 3-7 yrs.</li> </ul> |
| Employment and Social Policy                               | Serbia to “progressively harmonise its legislation to that of the Community in the fields of working conditions, notably on health and safety at work, and equal opportunities.” (Art. 79)                                   | Ukraine to implement EU standards and practices on: <ul style="list-style-type: none"> <li>▪ Labour law: 7 regulations within 3-4 years;</li> <li>▪ Anti-discrimination: 6 regulations within 3-4 years</li> <li>▪ Safety: 29 regulations within 2-10 years.</li> </ul>     |
| Company Law, Corporate Governance, Accounting and Auditing | Internal Control and External Audit to focus on <i>acquis</i> (Art. 92)  | <ul style="list-style-type: none"> <li>▪ 10 EU regulations on company law &amp; governance;</li> <li>▪ 4 regulations on annual and consolidated accounts of companies.</li> </ul>   |
| Taxation   | Reform of Serbia’s fiscal system declared (Art 100)  | 6 Council Directives on indirect taxation to be implemented within 2-5 years  |
| Consumer Protection  | Parties “shall cooperate in order to align the standards of consumer protection in Serbia” (Art 78)  | Approximation to 15 EU regulations within 3 years, while avoiding “trade barriers”  |
| Public Health  | None   | 9 EU regulations within 3 years   |
| Audio-Visual Policy  | Declare to “cooperate” (Art. 104)  | 1 directive within 2 years  |
| Anti-Corruption  | None   | Provisions of the 1995 EU Convention on protection of EC financial interests and its 2 protocols within 5 years   |

Source: CEPS.

Provisions on agriculture and rural development are rather shallow in both agreements. The SAA prescribes agricultural cooperation between the EU and Serbia in general and soft legal terms (Article 97).<sup>155</sup> The AA with Ukraine contains an indicative list of 59 regulations on quality policy and marketing standards for plants and animal products, but does not prescribe specific schedules for implementing them. The legal enforceability of these AA commitments thus remains rather weak.

In a typical example of ‘legal inflation’ of the preferential trade agreements,<sup>156</sup> the AA and SAA contain a number of WTOx policy areas with non-legally binding provisions. These 19 areas mostly cover sectoral policies based on shared or supporting competences for which there is less EU-wide regulation: macro-economic cooperation; public finances; industrial and enterprise policies; fisheries; science and technology; information society; statistics; personal data protection; space; mining and metals; tourism; civil society cooperation; regional policies; education; training and youth; culture sports and the Danube River. Provisions in these policy areas are limited to declaratory statements on “cooperation” with no approximation of legislation or recourse to the dispute settlement mechanism to enforce their implementation.

Overall, WTOx provisions in the AA have a distinct twofold quality: while each of the policy areas establishes (often numerous) legally binding commitments for Ukraine, only some domains (competition, energy) are covered by the sophisticated dispute settlement mechanism in the EU-Ukraine AA to embolden their legal enforceability, whereas other areas might suffer from insufficient enforcement, because for many provisions the EU’s recourse to the dispute settlement mechanism appears rather limited.

<sup>155</sup> The 2011 World Trade Report also ascribes a legally binding nature to this provision in the SAA.

<sup>156</sup> See H. Horn, P. Mavroidis and A. Sapir, “Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements”, *The World Economy* 33, 2010, pp. 1565-1588.

#### **4.1.4 Similar agreements, different rewards**

The comparative analysis of the EU-Ukraine AA with the EU-Serbia AA has revealed a more nuanced picture than what is commonly believed. Whereas the EU's political discourse is carefully directed towards a denial of a membership perspective for EaP countries, the breadth and depth of Ukraine's 'model' Association Agreement, both in its political part (cf. section 4.1.2) and its provisions regulating the Deep and Comprehensive Free Trade Area (cf. section 4.1.3), indicate that the contractual relationship offered by the EU to an EaP member like Ukraine is in fact largely similar to – and in many parts more advanced than – that provided for in the Stabilisation and Association Agreement with a candidate country like Serbia.

The EU uses a template with the same legal basis, a similar structure and comparable substance to shape its relations with candidates and three Eastern Partnership countries (Ukraine,

*WTOx provisions in the AA have a twofold quality: while each policy area establishes legally binding commitments, only some domains (competition, energy) are covered by the sophisticated dispute settlement mechanism to embolden their legal enforceability.*

Moldova and Georgia). The main political goal of the association to the EU is to seek alignment with the Union's foreign and security policies. The main difference is that the SAA pushes regional cooperation much more than the AA does. The commitments vis-à-vis justice, freedom and

security are similar, sometimes even identical in structure and substance. The EU uses the same template for the chapters on the rule of law and respect for human rights and fundamental freedoms; protection of personal data; border management, asylum and migration; money laundering and terrorism financing; cooperation in the fight against illegal drugs, the fight against crime and corruption; and cooperation in combating terrorism. However, on the issue of migration the AA with Ukraine is both more restrictive and 'modern'. It details, among other things, preventive measures.

The DCFTA and the sectoral cooperation provided for in the AA with Ukraine exhibit a number of legally binding commitments that exceed those in the SAA with Serbia in terms of

scope, speed of legal approximation and level of enforcement. Ukraine's commitments in most WTO+ policy areas (TBT, customs administration, IPR and trade in services) outweigh those enshrined in the SAA for Serbia, which is (at least in theory) reciprocated by wider and faster access to the EU market in industrial goods. Importantly, some WTOx policy areas (competition, energy) are covered by the sophisticated dispute settlement mechanism in the EU-Ukraine AA to embolden their legal enforceability, whereas such arrangements are missing in the SAA. Other provisions of WTOx policy areas (environment, transport, employment, etc.) prescribe the transposition of the EU's *acquis* into Ukraine's legislation according to strict schedules set out in the AA's annexes.

The EU-Ukraine AA has been said to represent an innovative legal instrument in shaping the EU's relations with third countries that do not have or do not seek a membership prospect, different from the Swiss model, the European Economic Area (EEA) or CEFTA.<sup>157</sup> Yet, an in-depth legal comparison between the AA and the SAA reveals that – *au fond* – Ukraine has reason to believe that it is more than just a neighbour of the EU, even if it currently does not have an EU membership perspective.

*An in-depth legal comparison between the AA and the SAA reveals that Ukraine has reason to believe that it is more than just a neighbour of the EU, even if it currently does not have an EU membership perspective.*

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<sup>157</sup> See G. Van der Loo, P. Van Elsuwege and R. Petrov, "The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument", EUI Working Paper LAW 2014/09. The AA/DCFTA model even serves as a source of inspiration for the future framework agreement between the EU and the UK post-Brexit. See M. Emerson, "After the UK's Brexit White Paper: What's the next move towards a CFTA?", CEPS Policy Insights No. 2017/07, Brussels, 27 February 2017.

## 4.2 EU conditionality: Plus ça change...

### 4.2.1 ... plus c'est la même chose?

As mentioned before, the revolutionary upheaval in the southern Mediterranean, and the disparate reforms in the Eastern Partnership countries, pushed the EU to revise its approach to the European Neighbourhood Policy in 2011.<sup>158</sup> While EU institutions and member states were caught completely by surprise by the outbreak of the Arab Spring in December 2010, a comprehensive discussion on the future of the ENP by the Council had – coincidentally – already been planned for the first half of 2011.<sup>159</sup> In March, the European Commission and the High Representative presented some ideas on a new “partnership for democracy and shared prosperity” with the southern Mediterranean.<sup>160</sup> In May 2011, they published a full review of the ENP.<sup>161</sup> Presented as a strategic response to the sea change brought about by the revolts in the southern neighbourhood, the joint communication declared that:

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<sup>158</sup> This section builds on S. Blockmans, “The ENP and ‘More for More’ Conditionality: plus que ça change...”, in G. Fernandez Arribas, K. Pieters and T. Takács, (eds), *The European Union’s relations with the Southern-Mediterranean in the Aftermath of the Arab Spring*, CLEER Working Paper No. 2013/3, 53-60.

<sup>159</sup> See Foreign Affairs Council conclusions, 27 July 2010, para 1.

<sup>160</sup> Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean”, COM(2011) 200 final, 8 March 2011, Brussels.

<sup>161</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A New Response to a Changing Neighbourhood”, COM(2011) 303 final, 25 May 2011, Brussels.

The new approach must be based on mutual accountability and a shared commitment to the universal values of human rights, democracy and the rule of law.<sup>162</sup>

Apart from the emphasis on the shared commitment to "universal"- i.e. not just EU - values, the 'new approach' to the ENP reiterated the priority areas of democracy promotion, reinforcing the rule of law, improving the respect of human rights, judicial reform, administrative capacity-building, fighting corruption and economic modernisation, but placed them more firmly on the footing provided for by the principle of conditionality: the *more* (and faster) neighbouring countries progress in implementing internal reforms, the *more* (and faster) support they receive from the EU. The main tool to apply this '*more for more*' principle would be the new European Neighbourhood Instrument (ENI),<sup>163</sup> "increasingly policy-driven and provid[ing] for increased differentiation, more flexibility, stricter conditionality and incentives for best performers, reflecting the ambition of each partnership".<sup>164</sup> On top of this, "enhanced support [was projected] in various forms, including increased funding for social and economic development, larger programmes for comprehensive institution-building (CIB),<sup>165</sup> greater market access, increased EIB financing in support of investments; and greater facilitation of mobility."<sup>166</sup> The revised ENP also foresaw

<sup>162</sup> COM (2011) 303 final, at 2 and 3. Note the stress on the universality of the values (to be) adhered to, i.e. not the EU character thereof as prescribed by Article 8 TEU.

<sup>163</sup> Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, OJ 2014 L 77/27.

<sup>164</sup> COM (2011) 303 final, at 20.

<sup>165</sup> A new Comprehensive Institution Building Programme aimed to fast-track institution-building and reform in a limited number of key areas linked to the envisaged AAs and DCFTAs. Funded through the ENPI budget (2011-2013), €167 million was earmarked for this instrument.

<sup>166</sup> It has rightly been argued that, for all the welcome focus on democratic reform, the 'more for more' principle would make life more difficult for the governments of post-revolutionary countries like Tunisia. After all, the EU declared its intention to use more conditionality on the transitional

that these preferential commitments would be tailored to the needs of each country and to the regional context.<sup>167</sup>

After the proclamation of the new approach to the ENP in reaction to the Arab uprisings, the Union allocated hundreds of millions of euro in new grants for the southern neighbourhood, in particular through the SPRING programme (Support for

*The sums of money mustered on top of the ENI are too small an incentive to secure a successful transition from authoritarianism to democratic rule in the southern Mediterranean.*

Partnership, Reform and Inclusive Growth) which provided additional funding to southern countries showing commitment to reform.<sup>168</sup> Under the multiannual financial framework for 2014-20, the SPRING programme was replaced by the 'Umbrella'

programme, which falls under the ENI.<sup>169</sup> Yet the sums of money mustered on top of the ENI (and its predecessor)<sup>170</sup> have proved to

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governments than on the dictators who preceded them. See R. Balfour, cited in T. Vogel, "A reflection on old, failed neighbourhood policies", *European Voice*, 26 May 2011. See also K. Raik, "Between Conditionality and Engagement: Revisiting the EU's Democracy Promotion in the Eastern Neighbourhood", FIIA Briefing Paper No. 80, April 2011.

<sup>167</sup> See, e.g., Joint Staff Working Document, "Implementation of the European Neighbourhood Policy in 2012 Regional Report: Eastern Partnership", SWD(2013) 85 final, 20 March 2013.

<sup>168</sup> Tunisia was the first beneficiary, with €20 million allocated to it in 2011, €80 million in 2012 and €55 million in 2013. See [http://ec.europa.eu/enlargement/neighbourhood/countries/tunisia/index\\_en.htm](http://ec.europa.eu/enlargement/neighbourhood/countries/tunisia/index_en.htm). Other countries too received funding, e.g., €90 million for President Mursi's Egypt to support the government's socio-economic reform programme; €70 million to Jordan (to support the electoral process, to assist in reforming the justice system, to support efforts targeting public finance management, education and social security, and to help develop the private sector and foster job creation), in tranches of 30 and 40 million, with the second tranche linked to progress achieved in terms of democratic reform. For these and other details, see "EU's response to the 'Arab Spring': The State-of-Play after Two Years", Press release A 70/13, Brussels, 8 February 2013.

<sup>169</sup> All ENI programming documents can be found at <http://eeas.europa.eu/enp/documents/financing-the->

be too small an incentive to bolster the change needed to secure a successful transition from authoritarianism to democratic rule in the southern Mediterranean.<sup>171</sup> Evidence has been provided by the European Court of Auditors (ECA) in a number of country-specific and thematic reports on EU spending in ENP, either partly or wholly funded via the ENI.<sup>172</sup>

Re-branding the ENP's incentive-based principle of conditionality as 'more for more' could not disguise the fact that

enp/index\_en.htm. Again, Tunisia was the first recipient, with €50 million in 2014 and €71.8 million in 2015.

<sup>170</sup> The ENI is worth €15.4 billion from 2014-20. The overall allocation for its predecessor, the European Neighbourhood and Partnership Instrument (ENPI), amounted to almost €12 billion for 2007-13. This represented an increase of 32%, in real terms, compared with the amount available over the period 2000-06 for its predecessors, the MEDA and TACIS programmes.

<sup>171</sup> This observation takes account of the sums generated through the EU-induced Task Forces for Tunisia, Jordan and Egypt, preferential loans granted by the EIB, and other collateral funding mechanisms.

<sup>172</sup> In June 2013, in a special report on EU Cooperation with Egypt in the Field of Governance, the ECA wrote that the new approach to the ENP had not yet been applied. See [http://www.eca.europa.eu/Lists/ECADocuments/SR13\\_04/SR13\\_04\\_EN.PDF](http://www.eca.europa.eu/Lists/ECADocuments/SR13_04/SR13_04_EN.PDF). In December 2013, in its Special Report on EU financial support for the Palestinian Authority, the ECA noted that the Commission had pledged to tie funding to recipient countries' progress on reforms ('more for more') but had not yet applied this to the occupied Palestinian territories. See <http://www.eca.europa.eu/en/Pages/NewsItem.aspx?nid=4383>. An ECA special report published in March 2016 assessed EU external migration spending in neighbourhood countries until 2014 and found that project objectives were often set in general terms, which made it difficult to assess results. Of 23 migrant readmission and return projects assessed by the Court, five relating to readmission were assessed as "rather small and [...] limited in their results and effectiveness". See <http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=35674>. An ECA special report published in September 2016 on EU assistance for strengthening public administration in Moldova concluded that EU funds had had limited impact. See <http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=37235>.

the EU aligned the ENP's main steering mechanism with that employed in the enlargement context. Yet, unlike the pre-accession strategy for aspirant members, the 2011 review of the ENP did not set out which precise cooperation and association prospects the EU might provide to the agents of reform in return for a cleaner human rights record, legal approximation, administrative shake-ups and tightening belts. The EU essentially promised more of the same, thus reincarnating a weak pledge that – barring a few exceptions – has not been reciprocated by commitments of the region's leaders to democracy, the rule of law or political reforms.<sup>173</sup>

That said, the revised ENP did offer one major innovation by indicating more clearly than ever before that the EU would make use of "targeted sanctions and other policy measures" (e.g. restructure or even reduce financial aid and sectoral support) for those governments of neighbouring countries engaged in violations of human rights and democracy standards, or which delay, impede or abandon reform plans.<sup>174</sup> With the development of the principle of 'less for less', the EU implicitly declared an end to the days that it would simply acquiesce to a retreat on reforms by ENP partners. However, six years after its introduction, the EU has precious little impact to show in terms of implementing the

<sup>173</sup> See T. Schumacher, "The European Union and Democracy Promotion: Readjusting to the Arab Spring", in L. Saki (ed.), *Routledge Handbook of the Arab Spring: Rethinking Democracy*, London: Routledge, 2015, pp. 559-573. For a practical illustration, see P. Pawlak and X. Kurowska, "EU foreign policy: more for more, or more of the same?", *EU Observer*, 5 October 2011: "Rather than paying respect to 'more for more' the EU has again turned a blind eye to lack of reform in the region by promising more financial support and deeper political cooperation. The EU's \$9 billion offer to Belarusian President, Alexander Lukashenko, in exchange for freeing political prisoners and holding free and fair elections (which do not require him to step down) is surprising, to say the least, and is an unfortunate reminder of the mistakes the EU has made in the southern Mediterranean. This suggests that the EU has not learnt from the Arab Spring and will continue to repeat the same mistakes it has made in the past."

<sup>174</sup> COM (2011) 303 final, at 3.

ENP's variant of negative conditionality, either in the eastern neighbourhood (e.g. Belarus, Azerbaijan),<sup>175</sup> or in the southern Mediterranean (e.g. Algeria, Egypt).<sup>176</sup> One cannot be sure that the recent changes in Belarus are a direct result of the EU's policy of conditionality.<sup>177</sup> In its application, the so-called 'new approach' to the ENP of 2011 was rather a continuation of the EU's inability and – in some cases – lack of political will to exert effective influence on (quasi-)authoritarian regimes to establish and maintain democratic reforms.<sup>178</sup>

*Six years after its introduction, the EU has precious little impact to show in terms of implementing the ENP's variant of negative conditionality.*

Politics aside, design is partly to blame for this. Both the Joint Communication of 8 March 2011 and the May 2011 strategy paper read more "like blueprints for an assistance programme"<sup>179</sup>

<sup>175</sup> Whereas the EU has upheld and strengthened its support to civil society organisations operating in or outside of these countries (cf. the launch of the European Dialogue on Modernisation, JOIN (2012) 14 final, 15 May 2012, at 4), it has also been said to apply double standards in its negative conditionality. Whereas the Belarusian regime has been the subject of a whole raft of EU sanctions, Azerbaijan's authoritarian leadership has felt little negative impact from the EU's approach. The Union's main interest in the region continues to be stability of energy supplies and security. The Aliyev regime has allowed European energy companies to explore its hydrocarbon riches and supported Baku-Tbilisi-Ceyhan transit projects, thus bypassing Russia.

<sup>176</sup> There was a total absence of references to 'less for less' in the Commission's 'EU's response to the "Arab Spring": The State-of-Play after Two Years', Press release A 70/13, Brussels, 8 February 2013.

<sup>177</sup> Cf. section 2.2.

<sup>178</sup> See, more generally, J. Teorell, *Determinants of Democratization: Explaining Regime Change in the World, 1972-2006*, Cambridge: Cambridge University Press, 2010.

<sup>179</sup> See T. Schumacher, "New Neighbors, Old Formulas? The ENP One Year After the Start of the Arab Spring", in A. Garcia Schmidt and J. Fritz-Varnahme (eds), *The Arab Spring: One Year After Transformation Dynamics, Prospects for Democratization and the Future of Arab-European Cooperation*, Gütersloh: Bertelsmann Stiftung, 2012, pp. 87-104, at 90.

than strategic documents that offer a coherent approach to a clearly defined reform agenda designed to foster “deep democracy” – yet another new label to distinguish the supposedly novel approach from the EU’s hapless efforts to promote democracy prior to the Arab revolts.<sup>180</sup> Going by its path dependency in the formulation of external relations,<sup>181</sup> it is hardly surprising that, in the revised ENP, the Union again proceeded from the assumption that governments in the southern Mediterranean were ready to embark on a path of reform accompanied by EU assistance.<sup>182</sup> The 2011 approach to the ENP failed to acknowledge the complexity of the transition processes in the Arab Mediterranean, the impact of the simmering conflicts between secular and religious movements, or the wide variety of other drivers for change in each of the countries concerned.<sup>183</sup> This lesson took a while to sink in. Whereas the 2011 strategy paper still contained an unjustified assumption that the Tunisian

<sup>180</sup> According to the May 2011 Joint Communication, the notion of ‘deep democracy’ includes “free and fair elections; freedom of association, expression and assembly and a free press and media; the rule of law administered by an independent judiciary and right to a fair trial; fighting against corruption; security and law enforcement sector reform (including the police) and the establishment of democratic control over armed and security forces”. In February 2012, High Representative Ashton and European Commissioner Füle sent an unpublished letter to EU Foreign Ministers on the operation of conditionality that added “the respect of other human rights” to this shopping list. In subsequent documents supporting the ENP, the concept of ‘deep democracy’ was used interchangeably with concepts such as democratisation, democratic transformation, and transition.

<sup>181</sup> See, e.g., T. Risse, S. Ropp and K. Sikkink (eds), *The Power of Human Rights. International Norms and Domestic Change*, Cambridge: Cambridge University Press, 1999.

<sup>182</sup> See Schumacher, op. cit.; and E. Adler and B. Crawford, “Normative Power: The European Practice of Region Building and the Case of the Euro-Mediterranean Partnership”, in E. Adler, F. Bicchi, B. Crawford and R. Del Sarto (eds), *The Convergence of Civilizations; Constructing the Mediterranean Region*, Toronto: University of Toronto Press, 2006.

<sup>183</sup> See Schumacher (2012), op. cit., at 91.

development model could be projected to the other countries in the region, the 2012 ENP strategy paper's references to the changed internal power structures in Tunisia, Morocco, Egypt and Libya show that the Commission and the European External Action Service had learned to distinguish the countries' different pathways to transition.<sup>184</sup> The 2014 ENP strategy paper did not mention the incentive-based approach at all, which could have been interpreted as a signal by the outgoing Commission that it would prefer to keep its hands free in distributing funds more quickly to respond to rapidly changing needs of partner countries, thus better serving the EU's (geo)political interests, rather than getting caught in its own web of spending rules.<sup>185</sup>

And yet the 2015 Review of the ENP produced by the new European Commission and High Representative paid lip service to the policy's signature concept of conditionality while at the same time proposing the exploration of alternative mechanisms in cases where 'more for more' does not achieve the desired results:

The incentive-based approach ("More for More") has been successful in supporting reforms in the fields of good governance, democracy, the rule of law and human rights, where there is a commitment by partners to such reforms. However, it has not proven a sufficiently strong incentive to create a commitment to reform, where there is not the political will. In these cases, the EU will explore more effective ways to make its case for fundamental reforms with partners, including through engagement with civil, economic and social actors.<sup>186</sup>

Another structural shortcoming of the revised neighbourhood framework to be mentioned in this context relates to what has already been noted in passing, i.e. that the ENP's key documents still apply the diplomatic *langue de bois* which characterised the 'old' policy. For instance, whereas the ill-defined term 'deep

<sup>184</sup> See T. Schumacher, "The European Union and Democracy Promotion: Readjusting to the Arab Spring", in L. Saki (ed.), *Routledge Handbook of the Arab Spring: Rethinking Democracy*, London: Routledge, 2015, pp. 559-573.

<sup>185</sup> See further section 4.4.

<sup>186</sup> JOIN (2015) 50 final, 18 November 2015, at 5.

democracy' was not retained in the 2015 ENP Review, the philosophy of it lives on in the EU's pursuit of "deeper engagement with civil society and social partners" and "deeper relations (...) based on shared values".<sup>187</sup>

Moreover, the EU's mechanisms to assess whether the situation in neighbouring countries matches the revised terminology, or is apt for the application thereof, represent a return to the *status quo ante* primarily donor-driven aid policies based on programmatic priorities and levels of absorption capacity.<sup>188</sup> As such, the EU continues to rely on the same kind of instruments as before, even if it chooses to change the labels to reflect a sense of 'joint ownership' in the definition thereof. This applies to the joint documents that were discussed over the course

*The EU continues to rely on the same kind of instruments as before, even if it changes the labels to reflect a sense of 'joint ownership'.*

of 2016 to determine the shape of bilateral relations on the basis of the recommendations contained in the 2015 ENP Review. These 'Partnership Priorities' call for reform efforts at the micro level

but suffer from the same terminological vagueness and lack of legal bite as their parent document.<sup>189</sup> This 'new' ENP instrument

<sup>187</sup> Ibid., at 3 and 4. See also in the context of migration and mobility, at 15.

<sup>188</sup> A parallel logic as applied back in 2012 by N. Gros-Verheyde, "Quand le «more and more» devient un «peu plus» c'est tout!", *Bruxelles2*, 8 July 2012: "Sous couvert de préciser quelques termes et déplacer quelques mots, on place en fait la barre «démocratique» beaucoup plus bas. L'incitation différenciée liée aux critères d'avancée dans les réformes, en particulier à l'approfondissement de la construction démocratique, fait ainsi place aux seuls critères, classiques, d'absorption et aux priorités «définies d'un commun accord». L'incitation démocratique est renvoyée à un soutien «additionnel»."

<sup>189</sup> See, e.g., Decision No 1/2016 of the EU-Lebanon Association Council agreeing on EU-Lebanon Partnership Priorities, UE-RL 3001/16, 11 November 2016; Annex to the Joint Proposal for a Council Decision on the Union position within the Association Council set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, with regard to the

thus “stands in the tradition of bilateral action plans (...) representing nothing more than a vague and incomplete catalog[ue] of reforms”.<sup>190</sup> To some extent this observation also applies to the DCFTAs, which at a basic level differentiate between neighbouring countries<sup>191</sup> but otherwise serve the EU’s interest and push model characteristics, irrespective of the differing conditions in partner countries. Arguably, this “confirms accusations of duplicity levelled against the ENP over the years”.<sup>192</sup>

Finally, as Witney and Dworkin have argued, the success of political reforms and democratic transformation in neighbouring countries is inextricably linked to improving the micro- and macro-economic situation, i.e. people’s living conditions. In view of the prevailing socio-economic problems in almost all Arab Mediterranean states, a concern about the consistent implementation of the ENP would therefore pertain to the potential systematic application of ‘less for less’ conditionality, even if the principle goes under a different name. Given that the reduction or cancellation of external support negatively impacts social welfare, it is worth limiting or excluding the application of

adoption of EU- Jordan Partnership Priorities and annexed Compact, JOIN(2016) 41 final ANNEX 1, 19 September 2016; and Priorités communes de Partenariat entre la République Algérienne Démocratique et Populaire (Algérie) et l’Union européenne (UE) au titre de la Politique européenne de voisinage révisée, UE-AL 3101/17 ADD 1, 7 March 2017.

<sup>190</sup> Schumacher (2012), op. cit., at 91. This observation was as true in 2012 as it is now.

<sup>191</sup> For instance, when compared to the EU-Ukraine AA (analysed in section 4.1), neither the EU-Georgia AA nor the EU-Moldova AA includes a non-discrimination clause for the treatment and mobility of workers (cf. Articles 17-18 EU-Ukraine AA). Similarly, these agreements do not foresee approximation clauses in the area of competition and “internal market treatment” in the area of establishment. Furthermore, the provisions on energy and IPR are less detailed in their DCFTAs. Also, legal approximation schedules differ, partially depending on the eagerness of EaP countries to take on EU commitments, with Moldova rushing ahead in an effort to boost its chances for accession.

<sup>192</sup> Schumacher (2012), op. cit., at 92-3.

negative ENP conditionality from those economic and social sectors that are most affected by structural (e.g. urban vs. rural; tourist coastal regions vs. agrarian interior) discrepancies: transport, energy, communication, distribution of water, and health care. Indeed, the logic of ‘more for more’ and ‘less for less’ could be more deftly evoked in those non-negotiable sectors in which reforms primarily affect the (abuse of the) power monopoly of a ruling authoritarian regime: political accountability, independence of the judiciary and freedom of expression.<sup>193</sup>

Whether positive and negative conditionality can ultimately produce a leveraging effect and inspire the wholesale reform desired by the EU is, to a considerable extent, dependent on the prospects offered by the Union to neighbouring states. Whereas the eastern neighbours have reason to hope that they may one day apply for EU membership, the southern neighbours have no such prospect as they are not considered ‘European’ in the sense of Article 49 TEU. Thus, the EU has to do more to develop its strategic commitment to the south if it wants the ENP to steer any reform momentum (revolutionary or otherwise) in the direction of the end goal spelled out in Article 8 TEU, i.e. the creation of “an

*The EU must do more to develop its strategic commitment to the south if the ENP is to steer any reform momentum.*

area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation”.

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<sup>193</sup> See N. Witney and A. Dworkin, “A Power Audit of EU-North Africa Relations”, ECFR Report, September 2012, at 58: Excluding certain socio-economic and humanitarian areas from the application of ‘less for less’ may prevent potential veto players from exploiting socio-economic hardship to block those transformation processes already underway. The application of negative conditionality is expendable in these areas, not only because it would generate more socio-economic problems and contradictions without necessarily generating greater political and societal influence over local transition processes, but also because the basic socio-economic deficiencies are comparable in all Arab Mediterranean neighbouring states.

#### **4.2.2 *Differentiation and (sub-)regional integration***

In light of the above, and in line with the publication in March 2015 of the traditional ENP package and a consultation paper that recognised past failures and called for fresh ideas to inject sense into the policy,<sup>194</sup> it comes as no surprise that the 2015 ENP Review has abandoned the enlargement methodology in managing the EU's relations with its neighbours. Notwithstanding the fact that the post-Lisbon AAs are in many respects more advanced than the SAAs with pre-accession countries,<sup>195</sup> new working methods proposed by the European Commission and the High Representative include the abolition of the annual package of country reports to measure progress (or lack thereof) in reforms aimed at approximating to the EU model.<sup>196</sup> Instead, reporting has become more tailor-made to the nature and working calendar of each relationship. The three DCFTA countries belonging to the Eastern Partnership were the first to receive their (ir)regular reports.<sup>197</sup> It is striking that these reports are shorter and more neutral in tone than the previous annual reports produced in the framework of the ENP. This betrays a less prescriptive approach by the European Commission and the EEAS. This is even more so for the 'Partnership Priorities' agreed to with the southern neighbours, even if these documents are likely to serve as checklists for future (ir)regular reports.<sup>198</sup> In addition to the country-specific reporting, regular thematic reports will track

<sup>194</sup> The 2015 ENP package is available at [http://eeas.europa.eu/enp/documents/progress-reports/index\\_en.htm](http://eeas.europa.eu/enp/documents/progress-reports/index_en.htm); Joint Consultation Paper, "Towards a new European Neighbourhood Policy", JOIN (2015) 6 final, 4 March 2015.

<sup>195</sup> See section 4.1.

<sup>196</sup> JOIN (2015) 50 final.

<sup>197</sup> See Joint Staff Working Document, "Association Implementation Report on Georgia", SWD(2016) 423 final, 25 November 2016; Joint Staff Working Document, "Association Implementation Report on Ukraine", SWD(2016) 446 final 9 December 2016; and Joint Staff Working Document, "Association Implementation Report on Moldova", SWD(2017) 110 final, 10 March 2017.

<sup>198</sup> See section 4.2.1.

developments in the neighbourhood, for instance on the rule of law, fundamental rights and gender equality.

The ENP's 'more for more' conditionality approach introduced in 2011 lay the basis for a stronger differentiation between neighbouring countries, one not based on geographic criteria but on merit in individual performances, allowing each partner country to develop its links with the EU as far as its own aspirations, needs and capacities allow. Ironically, this approach contained a strong driver to steer the EU further away from its constitutional obligation to create the single area of peace and prosperity that Article 8 TEU calls for.

The proposed basis for effective implementation of the 'new' ENP is increased differentiation and greater mutual ownership. The 2015 ENP Review recognises that "not all partners aspire to comply with EU rules and standards" and reflects "the wishes of each country concerning the nature and scope of its partnership with the EU".<sup>199</sup> Rather than insisting on a one-size-fits-all approach based on the EU's own values, the Union is instead offering to refocus relations with its neighbours, seeking "more effective ways" to promote "universal values" such as democracy, human rights, fundamental freedoms and the rule of law, and to address the political priorities regarded by both sides as the basis

*The proposed basis for effective implementation of the 'new' ENP is increased differentiation and greater mutual ownership. As such, it caters for less ideological and more transactional relationships.*

of the partnership. As such, the 'new' ENP further debases the obligation contained in Article 8 TEU to build a "special relationship with neighbouring countries (...) founded on the values of the Union". While the EU may insist that adherence to

universal values is a step towards the longer term goal prescribed by Article 8, autocratic rulers in Baku, Cairo and Minsk must have secretly welcomed the 2015 Review of the ENP because it caters for a less ideological and more transactional relationship with the EU. Oil-rich Azerbaijan is the first to benefit from the EU's new *Realpolitik*: on 14 November 2016, the Council adopted a mandate

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<sup>199</sup> JOIN (2015) 50 final, at 2.

for the European Commission and the High Representative to negotiate, on behalf of the EU and its member states, a ‘comprehensive agreement’ with Azerbaijan to replace the outdated PCA from 1996 and offer a “renewed basis for political dialogue and mutually beneficial cooperation”.<sup>200</sup>

For partners who do not wish to pursue the preferred model of concluding and implementing an AA/DCFTA, “the EU will offer more flexibility where possible, with lighter options, going beyond existing preferential or non-preferential trade agreements” (e.g. Agreements on Conformity Assessment and Acceptance, which allow for free movement of industrial products in specific sectors).<sup>201</sup> This approach is believed to “contribute to the long-term goal of a wider area of economic prosperity based on [WTO] rules and sovereign choices throughout Europe and beyond”.<sup>202</sup>

Whereas neighbouring countries have little more in common than their geographical proximity to the EU, the Union should beware not to swing the ‘one-size-fits-all’ ENP of yesteryear to the other extreme of the spectrum tomorrow. The implementation of the ‘new’ ENP risks overemphasising bilateral relationships, potentially leading to an atomisation of EU neighbourhood relations and the erosion of multilateral frameworks.

That said, the ‘new’ ENP does envisage strengthening the Eastern Partnership and the Union for the Mediterranean because of the desire expressed by neighbouring countries and member states alike to keep these multilateral frameworks for dialogue.<sup>203</sup> Israel,

*The implementation of the ‘new’ ENP risks overemphasising bilateral relationships, potentially leading to an atomisation of EU neighbourhood relations and the erosion of multilateral frameworks.*

<sup>200</sup> Council, “EU to launch negotiations on a new agreement with Azerbaijan”, Press release 655/16, 14 November 2016.

<sup>201</sup> Ibid., at 8. One could think of an ACAA with Egypt for textiles and certain agri-food products.

<sup>202</sup> The implicit reference here is to the possibility of striking up relations with the Eurasian Economic Union, once it becomes WTO-compliant.

<sup>203</sup> See, e.g., H. Kostanyan and B. Vandecasteele, “The EuroNest Parliamentary Assembly: The European Parliament as a Socializer of its

for instance, values the UfM – a glorified framework for project-based cooperation<sup>204</sup> – since it provides one of the few international fora for dialogue on practical matters with the Palestinians. While there is some merit in keeping such platforms and mechanisms, their impact should not be overemphasised. In this respect, it is telling that the 2015 Review of the ENP offered precious little extra to beef up the UfM. The EU merely committed itself to “give priority, wherever suitable, to the UfM in its regional cooperation efforts”.<sup>205</sup>

Rather than placing undue weight on existing mechanisms that promote limited cross-border projects, but no true regional approach to cooperation, the EU institutions included a more laudable proposal in their 2015 Review of the ENP, i.e. to develop “cross-cutting partnerships” between actors from the public and private sectors in the EU, individual member states, accession countries such as Turkey, other third countries and international organisations to support growth, employment and economic modernisation in the neighbourhood.<sup>206</sup> By way of ‘thematic frameworks’ on issues such as energy, transport and migration, sub-, trans- and interregional connections and interdependencies could thus be mobilised in a more functional fashion. Indeed, there is merit in clustering neighbouring countries so as to tackle (sub-/inter-)regional challenges (e.g. illegal migration, security of supplies of natural resources like water, oil and gas) and to tap

Counterparts in the EU’s Eastern Neighbourhood?”, EU Diplomacy Paper No. 5, 2013; H. Kostanyan, “The Civil Society Forum of the Eastern Partnership: Four Years on Progress, Challenges and Prospects”, CEPS Special Report, Brussels, 2014; R. Youngs, “The European Endowment for Democracy, Two Years On”, Carnegie Europe, September 2015; and I. Petrova and K. Raube, “Euronest: What Drives Inter-Parliamentary Cooperation in the Eastern Partnership?”, *European Foreign Affairs Review* 21, 2016, pp. 35–56.

<sup>204</sup> See A. Blanc Altemir and E. Ortiz Hernandez, “The Union for the Mediterranean (UfM): A critical approach”, *Paix et Sécurité Internationales*, No. 2, 2014, pp. 47–64.

<sup>205</sup> JOIN (2015) 50 final, at 18.

<sup>206</sup> JOIN (2015) 50 final, at 10.

into transnational opportunities (e.g., integrated transport and agriculture policies).<sup>207</sup>

Whereas extending economic integration has been the EU's method of choice to reinforce the ENP, slogans such as "everything but the institutions" and "a stake in the internal market" have in the past decade proved too vague and bureaucratic to rally support from the people on the streets of Algiers and Tunis, Amman and Beirut, or to inspire governing elites to engage in difficult and politically costly legal, administrative and economic reform. One way of resolving this lack of incentive is by offering neighbouring countries a real prospect of regional integration. Inspired by projects such as the Energy Community Treaty, the European Common Aviation Area and the Transport Community Treaty, and building on the lessons learnt in their preparation and application, the EU should explicitly inject "legally binding sectoral multilateralism" into the ENP as a means to provide a tangible perspective of real long-term benefits from EU cooperation to Mediterranean partners.<sup>208</sup> The strong symbolism of such well-defined multilateral projects would enhance the political profile of EU relations with the southern neighbourhood where the Union for the Mediterranean has faltered. While there is no silver bullet for EU engagement with these countries, the accession of Ukraine and Moldova to the Energy Community Treaty has already illustrated the potential of this approach in the Eastern Partnership, even if there is room for much more in that framework too.<sup>209</sup>

*The EU should inject "legally binding sectoral multilateralism" into the ENP to provide a tangible perspective of long-term benefits from EU cooperation to Mediterranean partners.*

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<sup>207</sup> See, in this respect S. Blockmans and B. Van Vooren, "Revitalizing the European 'Neighbourhood Economic Community': The case for legally binding sectoral multilateralism", *European Foreign Affairs Review* 17, 2012, pp. 577-604.

<sup>208</sup> Ibid.

<sup>209</sup> As noted in section 4.1, the new Association Agreements hardly mention the duty of regional (political and/or economic) cooperation,

## 4.3 Visa liberalisation

Visa liberalisation is an area of reform where the European Union holds considerable leverage over governments of neighbouring countries. It could steer some of their reform processes towards EU demands before extending the ultimate benefits of visa-free travel. Lessons learnt from the experiences of the countries of the Western Balkans, which completed the process a few years ago, are being put to use in the application of the ENP's incentive-based approach to the visa liberation processes with Eastern Partnership countries.

Following up on the conclusions of the 2011 EaP summit in Warsaw, the EU institutions adopted three major documents in May 2012. Central to the package, the European Commission and the High Representative issued 'A Roadmap to the Autumn 2013 Summit' at Vilnius.<sup>210</sup> That Roadmap covered both the bilateral and multilateral dimensions of the Eastern Partnership and was guided by the EU's principles of joint ownership, differentiation and conditionality.<sup>211</sup> The bilateral dimension comprised three central aims of the EU: i) forging new and deeper contractual relations between the EU and partner countries; ii) sector-specific cooperation that facilitates the participation of partner countries in EU programmes and agencies; and iii) supporting the mobility of citizens and visa liberalisation in a well-managed and secure environment, whereby the mobility of citizens in the partner countries would be promoted through visa facilitation and

certainly when compared to the Stabilisation and Association Agreements concluded with the countries of the Western Balkans.

<sup>210</sup> JOIN (2012) 13 final, 15 May 2012.

<sup>211</sup> See Joint Staff Working Document "The Eastern Partnership Roadmap 2012-2013: the multilateral dimension", SWD (2012) 108 final, 15 May 2012. Divided into 6 areas of aims the document points out specific objectives and projects precise EU support for each in order to meet the desired outcome: A. Democracy, good governance and stability, B. Economic integration and convergence with EU policies, C. Energy security, D. Contacts between people, E. Interaction with other stakeholders, F. Horizontal cooperation.

readmission agreements as a first step, with a visa-free regime as a final goal.

Visa liberalisation has become one of the centrepieces of the EU's foreign policy towards the countries on its outer periphery. Holding out a prospect of visa-free travel proves a powerful incentive to encourage reforms in neighbouring states, whose citizens want to shop, study, visit and work in the EU. The Visa Liberalisation Action Plan (VLAP) is the central document tracking the benchmarked process and making progress conditional upon far-reaching reforms in four areas ('blocks') of justice and home affairs: i) documents security;<sup>212</sup> ii) irregular immigration, including readmission;<sup>213</sup> iii) public security and order;<sup>214</sup> iv) external relations and fundamental rights.<sup>215</sup> Each block is divided

*Visa liberalisation has become one of the centrepieces of the EU's foreign policy towards the countries on its outer periphery.*

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<sup>212</sup> The first block of visa liberalisation focuses on personal documents and the protection against forging. Issuing biometric passports enables access for the EaP states to the Lost and stolen Passport database and maximises the reach of Interpol. Until the end of 2015, progress of each of the six EaP countries could be tracked here: <http://monitoring.visa-free-europe.eu/>.

<sup>213</sup> The second block reflects the progress made on border issues and migration and comprises three subgroups: i) border management, specifically focusing on establishing anti-corruption trainings and ethical code for officials, plus proper infrastructure; ii) migration management, which requires monitoring mechanisms which detect illegal migration; and iii) asylum policy, which aims to implement an appropriate legal framework for asylum-seekers.

<sup>214</sup> Preventing and fighting terrorism or organised crime, and delivering proper cooperation between EaP countries and the EU shape the main objectives of Block 3. Specifically, the subgroup on preventing and fighting organised crime, terrorism and corruption requires efforts to implement recommendations made by the UN, Council of Europe and GRECO. A further subgroup regarding judicial and law enforcement outlines the objective of implementing a legal framework and cooperation with Europol and Eurojust.

<sup>215</sup> Block 4 measures the individual rights of citizens and foreigners in two subgroups. The first subgroup aims at an effective in-state freedom of movement enshrined in a legal framework and correctly implemented.

into a legislative policy framework and effective implementation. Apart from regional or thematic instruments (e.g. ENI), the eastern neighbourhood benefits from additional financial support from, for instance, the European Bank for Reconstruction and Development (EBRD). The additional support aims to strengthen the common migration, asylum and border policies, as the EaP countries are met with high implementation costs in order to fulfil the necessary benchmarks. Monitoring is based on existing criteria listed in the VLAPs prepared by the European Commission and member states. The assessment of each country is performed by way of a questionnaire, developed and filled out by officials from the EaP state concerned. The Commission and member states perform their own reality check by collecting information from a variety of sources, including official data of relevant public institutions and authorities, reports by international organisations (UN, GRECO, ...), NGOs and independent experts.<sup>216</sup>

Moldova has enjoyed visa-free travel since April 2014.<sup>217</sup> Implementing the necessary reforms was relatively painless (at least when compared to Georgia and Ukraine) because approximately 15% of the population holds dual citizenship with Romanian passports.<sup>218</sup> Ukraine, which made gradual progress in all four domains, saw its advance stunted in autumn 2013, due to the political and security turmoil. The post-Maidan government

The second subgroup focuses on citizens' rights and defines clear benchmarks in adopting and implementing an anti-discrimination law and National Human Rights Action Plan and furthermore requires the ratification of relevant international documents.

<sup>216</sup> See <http://eastbook.eu/en/2012/11/country-en/poland-en/launch-of-the-eastern-partnership-visa-liberalisation-index/>

<sup>217</sup> See Council, "Visa liberalisation for Moldova", Press release 7645/14, 14 March 2014; and Regulation (EU) No 259/2014 of the European Parliament and of the Council of 3 April 2014 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2014 L 105/9.

<sup>218</sup> The author would like to thank Nicu Popescu for highlighting this point.

made big strides in meeting the VLAP criteria since it came to power, helped by the flexible interpretation given by the European Commission to some of them (in particular to take account of the fact that Kyiv is not in control of the management of parts of its internationally recognised borders). The Commission recommended in April 2016 that Ukraine be offered visa-free travel, but the Council took almost an entire year to follow through. In its negotiating position agreed in November 2016, COREPER took the view that the instrument for visa liberalisation should not enter into force before the entry into force of a revised suspension mechanism. The Council adopted the Regulation on the suspension mechanism on 27 February 2017,<sup>219</sup> paving the way for a vote in the European Parliament and subsequent adoption by the Council of the visa waiver system for Ukrainian citizens.<sup>220</sup> On that same 27 February, the Council adopted a regulation on visa liberalisation for Georgians travelling to the EU for a period of 90 days in any 180-day period.<sup>221</sup> Meanwhile, Armenia has

<sup>219</sup> Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (revision of the suspension mechanism), PE-CONS 58/16, 15 February 2017.

<sup>220</sup> Council, "Visas: Council confirms agreement on visa liberalisation for Ukrainians", Press release 98/17, 2 March 2017. Low-cost airline Ryanair was quick to follow suit. See V. Verbyany, "Ryanair Pushes East With First Flights From Untapped Ukraine", *Bloomberg*, 15 March 2017. See Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Ukraine), OJ 2017 L 133 (entry into force on 11 June 2017).

<sup>221</sup> See Council, "Visas: Council adopts regulation on visa liberalisation for Georgians", Press release 88/17 27 February 2017; and Regulation (EU) 2017/372 of the European Parliament and of the Council of 1 March 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Georgia), OJ 2017 L 61/7 (entry into force on 28 March 2017).

progressed on the track of visa facilitation, whereas Azerbaijan and Belarus lag behind due to the lack of political will of the authoritarian regimes to reform.

From the foregoing it can be deduced that visa liberalisation/facilitation between the European Union and the Eastern Partnership countries is simultaneously a technical and a highly political process. As visa policy acts as a safeguard against unlimited and unwanted migration as well as transborder organised crime, a visa-free regime is granted to countries that are deemed safe and well-governed, ensuring security and public order, and are not considered a potential source of undocumented economic migrants or asylum seekers. At the same time, visa liberalisation is conditional upon meeting a number of criteria in the realm of fundamental rights. Without respect for the latter, the visa liberalisation process cannot be completed. This visa policy has worked reasonably well, with Ukraine being the second biggest recipient of Schengen visas in the world (after Russia), and Belarus the fourth (ahead of Turkey).<sup>222</sup>

## 4.4 Security sector support

### 4.4.1 *Too little, too late?*

Already back in June 2003, the Council noted the importance of “shared responsibility for conflict prevention and conflict resolution” among ENP partners and the EU.<sup>223</sup> In a 15-item list of ‘incentives’ to implement ENP goals, it prioritised more effective political dialogue and cooperation, intensified cooperation to prevent and combat common security threats, and greater cooperation in conflict prevention and crisis management.<sup>224</sup> The

<sup>222</sup> See <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy#stats>. See also F. Gaub and N. Popescu, “The EU Neighbours 1995-2015: Shades of Grey”, Chaillot Paper No. 136, December 2015.

<sup>223</sup> GAERC, Council Conclusions of 16 June 2003, Press Release No. 10369/03 (Presse 166), at 33.

<sup>224</sup> Ibid.

Commission's 2004 ENP Strategy Paper noted a similar ambition and added specific areas of activity beyond political dialogue, namely "the possible involvement of partner countries in aspects of CFSP and [C]SDP, conflict prevention, crisis management, the exchange of information, joint training and exercises and possible participation in EU-led crisis management operations."<sup>225</sup> The ENP Action Plans established 'new partnership perspectives' over a broad range of activities, including a commitment by neighbouring countries to "certain essential aspects of the EU's external action, including ... the fight against terrorism and the proliferation of weapons of mass destruction (WMD), as well as efforts to achieve conflict resolution".<sup>226</sup> Benita Ferrero-Waldner, a former Commissioner for External Relations and the ENP, observed that these partnership perspectives would serve to both strengthen democratic governance in partner states and promote "our common foreign policy priorities, like making multilateral institutions more effective, and in addressing our common security threats".<sup>227</sup>

The case of Georgia is exemplary for both the potential of and the limits to a nexus between CFSP/CSDP and the ENP, for it was both a subject of and contributor to the EU's implementation of activities in the foreign and security realm. It was at the receiving end of the mediation efforts conducted by French President Nicolas Sarkozy in his capacity as holder of the rotating Presidency of the Council after the Russo-Georgian war of August 2008 – a war which the Commission's ENP staff in DG RELEX

<sup>225</sup> See COM (2004) 373 final, Brussels, 12 May 2004, under "A more effective political dialogue".

<sup>226</sup> See Communication from the Commission to the Council on the Commission proposals for Action Plans under the European Neighbourhood Policy (ENP), COM (2004) 795 final, Brussels, 9 December 2004. The Action Plans are 'benchmark roadmaps' aimed at introducing reforms needed to bring the neighbours closer to the EU.

<sup>227</sup> B. Ferrero-Waldner, "The European Neighbourhood Policy: bringing our neighbours closer", speech at the 10<sup>th</sup> Euro-Mediterranean Economic Transition Conference 'Giving the Neighbours a stake in the EU internal market', Brussels, SPEECH/06/346, 6 June 2006.

could – in spite of the apparent risks – not prevent, in part because of the unpredictability of the actors in the conflict, in part due to silos between the structures of the Commission and the Council. Sarkozy brokered a Six-Point Agreement concluded by the parties on 12 August 2008, which spearheaded the deployment of an EU Monitoring Mission (EUMM Georgia) along the occupation lines of the separatist regions of South Ossetia and Abkhazia.<sup>228</sup>

As a contributor to the CFSP/CSDP, Georgia has been aligning its foreign policy positions to the CFSP declarations since 2011. In 2014 Tbilisi aligned its position to 47% of the CFSP declarations. In 2015, Georgia joined 221 statements released by the EU in different international organisations.<sup>229</sup> Under the terms

*The case of Georgia in 2008 is exemplary for both the potential of and the limits to a nexus between CFSP/CSDP and the ENP.*

of its Association Agreement, Georgia has committed itself to continuing cooperation in crisis management and conflict prevention with a view to eliminating security threats to the EU, based on shared values and interests.<sup>230</sup>

Georgia is one of the most active non-member state partners in the CSDP. It contributed to the Immediate Reaction Team of the EU's Military Advisory Mission in the Central African Republic with 241 personnel, and to the EU Training Mission in Mali. Georgia's role in the former mission was acknowledged by European Council President Donald Tusk: "Georgia's participation, as the second largest contingent in the operation, has been essential to its success (...). Together, we are achieving something very important in a spirit of both global and

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<sup>228</sup> See M. Emerson and T. Kovziridze (eds), *Deepening EU-Georgian Relations. What, why and how?*, Brussels/Tbilisi/London: CEPS/Reformatics/Rowman and Littlefield, 2016, p. 26.

<sup>229</sup> Information available at <http://www.eu-nato.gov.ge/sites/default/files/AA%20NAP%202015%20Summary.pdf>.

<sup>230</sup> Contrary to the agreements with Ukraine and Moldova, the EU-Georgia Association Agreement explicitly refers to "the principle of host nation consent on stationing foreign armed forces" on Georgian territory (cf. EUMM Georgia).

European solidarity and cooperation".<sup>231</sup> In 2015, Georgia also deployed a representative to the EU Advisory Mission in Ukraine.

Russia's annexation of Crimea and destabilisation of Donbas have again highlighted the incapacity of the ENP to deal with hard security issues in neighbouring states,<sup>232</sup> even if the hybrid EEAS should be able to respond in a comprehensive manner to the 'civil-mil' elements that constitute 'hybrid warfare'.<sup>233</sup> Such efforts should start by activating the 'Crisis Platform' to coordinate EU and national capabilities in response to crises of all types. In the wake of the downing of Malaysian Airlines flight MH17 over eastern Ukraine, this mechanism failed.<sup>234</sup> The EU has admitted the need to "further reflect on better ways to prevent crises and respond to fast-changing situations, by adapting its decision-making procedures and, if appropriate, using additional policy instruments".<sup>235</sup> Member states, for their part, should show more solidarity with their fellow Council members and reach out more

<sup>231</sup> See "Meeting with Georgian troops deployed under the EUFOR CAR CSDP Mission", available at <http://tvnewsroom.consilium.europa.eu/video/shotlist/meeting-with-georgian-troops-deployed-under-the-eufor-car-csdp-mission>.

<sup>232</sup> To be fair, most western services were caught off guard. See House of Lords, European Union Committee, "The EU and Russia: before and beyond the crisis in Ukraine", 6<sup>th</sup> Report of Session 2014–15, February 2015

(<https://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/115/115.pdf>, at 25–26).

<sup>233</sup> The EEAS incorporates both ENP units that link up to the Commission's DG NEAR and crisis management bodies like the EU Military Staff and the EU Intelligence Analysis and Situation Centre (INTCEN) that cooperate with the member states.

<sup>234</sup> For reasons unknown to the author.

<sup>235</sup> JOIN(2014) 12 final, at 17–18. One wonders whether those additional instruments could be taken from the ENP toolbox, e.g. ENI funding to improve intelligence sharing between Ukrainian law enforcement bodies and - by extension - the EU.

proactively to the EEAS as a hub to coordinate collective crisis response.<sup>236</sup>

The latter lament touches upon a fundamental issue: the real test of the EU's effectiveness in preventing and defusing security threats in the neighbourhood and in responding to crises and post-conflict rehabilitation comes at the level of cohesion among its own member states.<sup>237</sup> When the biggest member states pursue their own selfish interests in bilateral deals with countries such as Russia, which defines relations with the 'shared' neighbourhood as a zero-sum game for 'spheres of influence', and when smaller member states stubbornly block decisions defining EU positions

*The EU's effectiveness in preventing and defusing security threats and in responding to crises and post-conflict rehabilitation comes at the level of cohesion among its own member states.*

and actions to draw attention to their own concerns, strategic competitors will divide and rule the Union. Internal decision-making procedures in CFSP/CSDP that require unanimity allow

any one member state to block any proposal carried by the others. They also have the potential to put the EU's conflict prevention, crisis management and dispute settlement efforts out of sync with the conflicts' own dynamics.<sup>238</sup> As other international actors step into the fray, the EU will remain condemned to paying the bills for security sector support *ex post facto*, an altogether more expensive exercise than conflict prevention. Arguably, a European Union that unites around clearly defined objectives will stand a much better chance of playing a stabilising role in the neighbourhood and

<sup>236</sup> In the given case in support of the Netherlands, which lost more than 200 citizens on board the plane but had to rely on forensic cooperation with Australia, which despatched a team to Ukraine to investigate the death of its own compatriots on board.

<sup>237</sup> See J. Batora, S. Blockmans et al., "Best Practices in EU Crisis Response and Policy Implementation", EUNPACK paper, 30 September 2016; and H. Dijkstra, P. Petrov and E. Mahr, "Reacting to Conflict: Civilian Capabilities in the EU, UN and OSCE", EU-CIVCAP paper, 2 November 2016.

<sup>238</sup> See, e.g., B. Coppieters, "The EU and Georgia: Time Perspectives in Conflict Resolution", EUISS Occasional Paper No. 70, 2007.

being taken seriously as an honest broker to settle disputes on its borders. In this respect, the adoption of the 2015 ENP Review, the 2016 EU Global Strategy, the 2016-17 Action Plan to take the EU's comprehensive approach to external conflicts and crises forward,<sup>239</sup> and the 2017 Joint Communication on Resilience (see Chapter 1), are steps in the right direction. But the proof of the pudding will be in the eating.<sup>240</sup>

In spite of the lofty objectives and the security sector support actions undertaken in the neighbourhood since the early days of the ENP (see Table 3, below), the changing realities on the ground have shown that, so far, the EU has not been able to achieve a great deal to prevent and counter security threats in its neighbourhood.<sup>241</sup> Admittedly, that is a tall order. It is telling that the lack of high-end involvement at EU-level stands in sharp contrast to the fact that member states have been active outside of the EU institutional framework, for instance in support of air strikes against Daesh in Syria carried out by France when it triggered the mutual assistance clause of Article 42(7) TEU in reaction to the terrorist attacks in Paris of November 2015.<sup>242</sup>

<sup>239</sup> Joint Staff Working Document, "Taking forward the EU's Comprehensive Approach to external conflicts and crises - Action Plan 2016-17", SWD(2016) 254 final, Brussels, 18 July 2016.

<sup>240</sup> Arguably, the legal bases exist already to speed up CFSP decision-making processes, e.g. by moving member states towards qualified majority voting or constructive abstention, but the use of these mechanisms requires the political will at the level of the European Council. See S. Blockmans, "Ukraine, Russia and the Need for more Flexibility in EU Foreign Policy-making", CEPS Policy Brief No. 320, Brussels, 25 July 2014; and "EU Global Strategy Expert Opinion No. 25", *Towards an EU Global Strategy – Consulting the Experts*, Paris: EUISS, 2016, pp. 57-58.

<sup>241</sup> See M. Smith and M. Webber, "Political Dialogue and Security in the European Neighbourhood: The Virtues and Limits of 'New Partnership Perspectives'", *European Foreign Affairs Review* 13, 2008, pp. 73-95.

<sup>242</sup> See C. Hillion and S. Blockmans, "Europe's Self-Defence: Tous pour un et un pour tous? ", CEPS Commentary, Brussels, 20 November 2015. France's operations *Serval* in Mali (2013-4) and *Barkhane* in the "G5 Sahel" (Burkina Faso, Chad, Mali, Mauritania and Niger; since August 2014) serve the neighbours of the EU's neighbouring countries.

*Table 3. CSDP missions and operations in the neighbourhood*

| CIVILIAN MISSIONS                     | Theatre                 | Period             | Remarks  |
|---------------------------------------|-------------------------|--------------------|--|
| EU border assistance missions         | Moldova/<br>Ukraine     | since 2005         | ~100 int'l staff                               |
|                                       | Rafah                   | since 2005         | ~2 int'l staff                                 |
|                                       | Libya                   | since 2013         | Operating from Tunisia since 08/2014 ~40 staff |
| EU police mission                     | Palestinian Territories | since 2006         | ~70 int'l staff                                |
| EU rule of law mission                | Georgia                 | 2004-2005          | ~10 int'l staff                                |
| EU monitoring mission                 | Georgia                 | since 2008         | ~200 int'l staff                               |
| EUSR<br>supporting/assistance mission | Georgia                 | 2005-2011          | ~13 int'l staff                                |
| EU civilian security sector reform    | Ukraine                 | since 2014         | ~80 int'l staff                                |
| <b>MILITARY OPERATIONS</b>            |                         |                    |  |
| EUFOR                                 | Libya                   | April-Nov.<br>2011 | Never operationalised                          |
| EU naval force                        | South Mediterranean     | since 2015         | Contributions from 24 member states            |

Source: author's own compilation.

One of the dimensions that has been conspicuously absent from the EU's tools employed in the geographical neighbourhood in the first decade of the ENP is hard security, i.e. military CSDP. But things are changing. The refugee and migrant crisis has given a new thrust to the development of CSDP in the neighbourhood and is therefore worth exploring.<sup>243</sup>

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<sup>243</sup> The next section draws on S. Blockmans, "New Thrust for the CSDP from the Refugee and Migrant Crisis", CEPS Special Report No. 142, Brussels, July 2016.

#### ***4.4.2 New thrust for the CSDP in the neighbourhood***

Although southern ‘frontline’ states of the EU have been coping with refugee and migrant flows for years, they have largely shouldered the burden on their own, despite temporary surges in numbers (e.g. in 2005 with the ‘assault’ on the border fences at Ceuta and Melilla) and calls for a common response. It is the dramatic increase in the numbers of people seeking refuge from wars in the Middle East<sup>244</sup> which spurred economic migrants from farther afield to follow and try their luck in finding a better life in Europe that has provoked an EU-wide reaction. The refugee crisis has mostly materialised over two migratory routes: through the south-central Mediterranean and the Aegean Sea.<sup>245</sup> The run on ‘fortress Europe’ has created a crisis in terms of EU member states’ border management and – above all – a humanitarian disaster of proportions not seen since World War II.<sup>246</sup>

The public outcry and unprecedented levels of political and media attention given to the appalling experiences and troubling images of asylum-seekers arriving in the EU have put huge pressure on the Union, collectively, to show that it can manage the crisis. The response of individual member states, the EU’s institutions and external border control agency FRONTEX, and that of NATO, has been meritorious given the traditional boundaries between external and homeland security. Yet the EU’s policy responses, both internally and in cooperation with third countries, have so far lacked the ‘comprehensive approach’ the EU professes to employ in its strategic actions. EU institutions and member states have in practice given priority to security-driven concerns. The focus on border controls, return and readmission and combating smuggling have (by and large) prevailed over

<sup>244</sup> Eurostat figures for 2014 show more than 600,000 asylum applications (almost 200,000 more than the highest figures in the previous 15 years), whereas 2015 broke all records with almost 1.4 million applications.

<sup>245</sup> For an overview of routes: <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>.

<sup>246</sup> One should keep both aspects in mind when using the term ‘refugee and migrant crisis’.

ensuring full compliance with fundamental rights and humanitarian principles. This, as has been argued elsewhere, “constitutes one of the Achilles heels of the current European Agenda on Migration”.<sup>247</sup> Indeed, it has triggered criticism about the “militarisation of a humanitarian crisis” in the neighbourhood.<sup>248</sup>

Nevertheless, the European Agenda adopts a holistic approach to migration that aims to respond to the immediate need to save lives and address emergency situations, and to tackle the ‘root causes’ of irregular migration and fight traffickers. Indeed, it is only in conjunction with an effective internal strategy to safeguard the Area of Freedom, Security and Justice (AFSJ) that the EU’s external action, including that under the CSDP, can work. In this respect, it is worth noting that the Council Decision to launch EUNAVFOR MED, one of the most emblematic responses of the EU to the refugee crisis, states that the CSDP naval operation will cooperate closely and coordinate activities with AFSJ actors such as Frontex and Europol and conclude arrangements to that end.<sup>249</sup> At the same time, the High Representative for Foreign and Security Policy (HR), who is also Vice-President of the European Commission (VP), has spearheaded EU efforts to establish partnerships with, *inter alia*, the International Organisation for Migration (IOM), the UN High Commissioner for Refugees

<sup>247</sup> See S. Carrera, S. Blockmans, D. Gros and E. Guild, “The EU’s Response to the Refugee Crisis: Taking stock and setting policy priorities”, CEPS Essay No. 20, Brussels, 16 December 2015; and S. Carrera, “The EU’s Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration”, CEPS Paper in Liberty and Security in Europe, Brussels, June 2011.

<sup>248</sup> As reported by A. Rettman, “Nato to join EU warships in Libya migrant operation”, *EU Observer*, 10 July 2016.

<sup>249</sup> Article 8(3) of Council Decision 2015/778/CFSP of 18 May 2015, OJ 2015 L 122/31. More generally, working arrangements between the EEAS, Frontex and Europol had already been signed. For an overview of institutional linkages, see M. Savary, “Box 2: Strengthening Ties between CSDP and FSJ”, in T. Tardy (ed.), *Recasting EU Civilian Crisis Management*, EUISS Issue Report No. 31, January 2017.

(UNHCR) and other members of the UN family, as well as regional partners (such as the African Union and the ‘G5’ of the Sahel: Mali, Mauritania, Niger, Chad, and Burkina Faso) to tackle some of the causes of fragility in the regions of origin, namely poverty, unemployment and conflict, and to decide on joint approaches to stemming migratory flows and fighting human traffickers. One noteworthy European Commission initiative from June 2016 was intended to replicate the infamous but effective EU-Turkey deal<sup>250</sup> and make development aid to Ethiopia, Mali, Niger, Nigeria and Senegal conditional on their acceptance to help stop people heading for Europe.<sup>251</sup> These so-called ‘migration compacts’ would not be restricted to Africa but would also extend to Lebanon, Jordan and other parts of the Middle East.<sup>252</sup> In the margins of the G5 Sahel meeting in Brussels on 17 June 2016, the HR/VP also launched an EU-facilitated dialogue between Libya, Chad and Niger on border management.<sup>253</sup>

<sup>250</sup> See by S. Carrera and E. Guild, “EU-Turkey plan for handling refugees is fraught with legal and procedural challenges”, CEPS Commentary, Brussels, 10 March 2016.

<sup>251</sup> See Foreign Affairs Conclusions on the Sahel of 20 June 2016. With the backing of all member states to the negotiation of partnership frameworks the HR/VP started on 17 June 2016 with migration compacts with two of the G5 Sahel countries: Mali and Niger. She was asked by Commission President Juncker to form a specific project team on this with Commissioners and Vice-Presidents. In addition, the implementation of the Trust Fund for Africa established at the Valletta Summit had reached a total amount of €2.3 billion of EU funds by the end of June 2016 and a start had been made with the financing of projects. For the Sahel, about €530 million worth of projects were being funded, among others security and border management projects to ensure more effective territorial control and to better tackle more illicit flows and trafficking.

<sup>252</sup> As reported by E. Zalan, “EU to make aid conditional on help with migrants”, *EU Observer*, 7 June 2016; and N. Nielsen, “EU development aid to finance armies in Africa”, *EU Observer*, 5 July 2016.

<sup>253</sup> In this context, see also S. Carrera and E. Guild, “Offshore Processing of Asylum Applications: Out of Sight, out of mind?”, CEPS Commentary, Brussels, 27 January 2017.

While recognising existing efforts, but also the deficiencies in the multi-sector approach of the EU, this study considers how the Common Security and Defence Policy has developed in the neighbourhood as a result of the ongoing refugee and migrant crisis. The origins of the EU's military response to the crisis went back 18 months before a CSDP operation was officially launched, off the coast of Lampedusa. In November 2013, Italian Foreign Affairs Minister Emma Bonino and Defence Minister Mario Mauro asked former High Representative Catherine Ashton for various measures, including the establishment of a naval rescue operation and the fight against traffickers, the strengthening of Frontex, and a discussion with third countries on migration. The options developed were military, civilian and diplomatic. Italy and Greece agreed to act together, but their push towards other member states failed. Most refused to fund the Italian-run rescue operation 'Mare Nostrum' and the European Council of December 2013 ended without result. Rome and Athens did not give up, however, and supported by Malta, Spain and Bulgaria, they demanded more European solidarity. They had to wait for more than one year.

In response to the rise in fatalities at sea since February 2015, HR Federica Mogherini, who in her capacity as Vice-President is responsible for the Commissioners' Group on External Action (CGEA),<sup>254</sup> declared 'migration' a key domain of intervention:

We cannot allow other tragedies at sea in the coming weeks and months; we need to be able to give a strong political and operational response. As I have announced today during the College in Strasbourg, I will convene an extraordinary meeting of the Commissioners' Group on External Action in the coming days in order to discuss with the Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, a review of our policies. I've also decided to put a discussion on migration on the agenda of the Foreign Affairs Council

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<sup>254</sup> See S. Blockmans and S. Russack, "The Commissioners' Group on External Action – Key political facilitator", CEPS Special Report No. 125, Brussels, 17 December 2015. The CGEA includes Commissioner Avramopoulos (DG HOME) in the broader cluster.

soon. The fight against smuggling and trafficking, the rescue of migrants at sea, the protection of asylum-seekers are shared challenges; they require a stronger exercise of shared responsibility.<sup>255</sup>

On the occasion of the Foreign Affairs Council in March 2015 (the first in ten years to discuss ‘migration’), an extraordinary meeting of Foreign and Interior Ministers was organised on April 20<sup>th</sup>. This first-ever joint ministerial meeting prepared the first ‘special’ European Council meeting on the refugee crisis on April 23rd, after the single-most deadly shipwreck in the Mediterranean claimed more than 900 lives. Mogherini has played an instrumental role in keeping the external dimension of the refugee crisis on the agenda ever since.

Whereas “the need to manage migration properly” (and strengthen ‘Triton’, the Frontex Operation in the south-central Mediterranean and the EU’s support to the countries of origin and transit) had already been recognised by EU Heads of State or Government in 2014, European Council President Donald Tusk tried to respond to the concerns expressed by a growing chorus of EU leaders by coordinating a more concerted effort at the highest political level. He assigned the EEAS’s former Executive Secretary General Pierre Vimont as his point man for the Valetta Summit process and has kept refugee and migration issues on the agenda of every regular European Council summit since. In parallel, the CSDP track was developed. It is in this context that the EU congratulated itself on the unanimity and speed with which a decision was taken, on June 22nd, to launch a common military response — two months after the abovementioned shipwreck.

Seen through the narrow prism of the CSDP, the time needed to move from the political initiative to conceive the operation, to identify capabilities, to build consensus for activation by Council decision and start deployment has indeed been remarkably short, even compared to previous fast EU deployments in Congo in 2003 (Operation Artemis) and Georgia in 2008 (a civilian monitoring mission). Force generation, the usual headache in mounting EU operations (witness Chad in 2008), took

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<sup>255</sup> See [http://eeas.europa.eu/statements-eeas/2015/150210\\_03\\_en.htm](http://eeas.europa.eu/statements-eeas/2015/150210_03_en.htm).

only one month to be agreed upon, in line with the initial intention to finalise planning by the Foreign Affairs Council in June 2015. The CSDP military operation in the south-central Mediterranean was given a mandate to “identify, capture and dispose of vessels as well as enabling assets used or suspected of being used by migrant smugglers or traffickers”.<sup>256</sup>

The price the EU paid for the speed to deploy its new naval force deployment in the Mediterranean – EUNAVFOR MED – was the criticism it drew from international partners and the general public when plans for a ‘boat-sinking’ operation were unveiled, raising fears about unacceptable levels of violence and ‘collateral damage’ as a result of putting migrants in the cross-fire.<sup>257</sup> Mogherini was on the defensive, stating time and again that the targets are not migrants but “those who are making money on their lives and too often on their deaths”.<sup>258</sup> For the first time in years, the EU was criticised for overreacting rather than for its absence from crises.

Yet the problems of EUNAVFOR MED lay less in clumsy public diplomacy than in the perilous mismatch between its stated objectives and the absence of a clear strategy and mandate under international law. It thus created both operational and political risks for the member states involved in the operation. Phase 1 of the operation (surveillance and assessment), began with no legal

*EUNAVFOR MED has raised fears about ‘collateral damage’ and putting migrants at risk. Unusually, the EU was criticised for overreacting rather than for its absence from crises.*

mandate to carry out the crucial phases 2 and 3 (seek and destroy), whose military planning and outcomes were undetermined. Despite these limitations, the naval force nevertheless marked a

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<sup>256</sup> Article 1(1) of Council Decision 2015/778/CFSP of 18 May 2015, OJ 2015 L 122/31.

<sup>257</sup> UN Secretary General Ban Ki-Moon travelled to Brussels on 27 May 2015 to raise his concerns at the European Parliament.

<sup>258</sup> Statement by High Representative/Vice-President Federica Mogherini on the Council decision to launch the naval operation EUNAVFOR Med, Luxembourg, 22 June 2015.

turning point in the EU's security narrative, because it meant that the Union was finally addressing the threats to security and the humanitarian tragedies in the south-central Mediterranean.

The operational model of EUNAVFOR MED was largely inspired by the EU's Naval Force Operation Atalanta off the Horn of Africa and in the Western Indian Ocean. Deployed since 2008, Atalanta has allowed the EU to acquire valuable know-how in maritime security, namely in deterring and disrupting acts of piracy and armed robbery, not just on the high seas but also ashore (cf. the helicopter gunship attacks to destroy pirates' logistical bases on the coast). This operational experience helped the EU to plan for EUNAVFOR MED, which is embedded in the idea of a holistic approach to migration. At the outset of the surge in June 2015, its force strength comprised nine surface units (warships), one submarine, three fixed-wing maritime patrol aircraft, five helicopters and one drone operating under the national flag of 14 member states (Belgium, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Slovenia, Spain, Sweden, and the UK).<sup>259</sup>

In many respects, EUNAVFOR MED is the trickiest CSDP operation in years. As mentioned above, public diplomacy has clearly lagged behind its inception process. But the real blind spots of the operation had to do with its strategy, legal mandate and operational practicalities. Phase 1 did not need a UN Security Council (UNSC) Resolution because surveillance is executed in international waters and airspace. But beyond this point there was little indication of what EU forces should do during phases 2 and 3; which means and budget should be used to carry out these tasks; and what conditions would have to be met for the Council to decide on the transition beyond phase 1, into Libyan territories. Success was not assured, either. Attacking traffickers and destroying their means might lead to counter-attacks by the militias that protect these resources and benefit from or organise

<sup>259</sup> See EEAS (2016) 126, 27 January 2016, <https://wikileaks.org/eu-military-refugees/EEAS-2016-126>. For an update on the operation's strength, see [https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/3790/eunavfor-med-operation-sophia\\_en](https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/3790/eunavfor-med-operation-sophia_en).

trafficking in one way or another. Indeed, the EU would have to calibrate its military activities, particularly when moving within Libyan territorial waters or ashore, to avoid destabilising a political process by ‘collateral damage’, by disrupting legitimate economic activity or by creating a perception of having taken sides.<sup>260</sup>

These considerations led to protracted discussions with Russia and China on the language of a UN Security Council resolution. Russia, in particular, insisted on a watertight mandate to prevent a repetition of what it considered to be an abuse by western nations of UN Security Council Resolution 1973 to impose a no-fly zone in Libya in 2011. The discussions in the Security Council revolved, *inter alia*, around the word “disposal” (read: sinking) of vessels and related assets, “before use”, and the legal definitions of “traffickers” and “smugglers”, who, unlike pirates, fall outside the scope of classic international law. Ultimately, Operation EUNAVFOR MED was granted an international legal mandate by way of UNSC Resolution 2240 on 9th October 2015. This resolution authorises states and regional organisations to intercept, inspect, seize and dispose (i.e. destroy) vessels on the high seas off the coast of Libya for a period of one year, but only when they have “reasonable grounds to believe” that these vessels, inflatable boats, rafts and dinghies are being used for smuggling and human trafficking from Libya.

Adopted under Chapter VII of the UN Charter, the Resolution effectively details the circumstances under which the use of force may be used, all in keeping with the protection of migrants’ rights, international human rights obligations,

<sup>260</sup> Illustrative in this respect is the report of 25 January 2016 by the Operation Commander, Rear Admiral Enrico Credendino of the Italian Navy, for the EU Military Committee and the Political and Security Committee. It gives refugee flow statistics and outlines the performed and planned operation phases (1, 2A, 2B and 3), the corresponding activities of the joint EU forces operating in the Mediterranean and the future strategies for the operation. See EEAS, “EUNAVFOR MED Op SOPHIA - Six Monthly Report 22 June-31 December 2015”, EEAS(2016) 126, 27 January 2016 (<https://wikileaks.org/eu-military-refugees/EEAS-2016-126>).

international refugee law and the UN Convention on the Law of the Sea. In short, UNSC Resolution 2240 lays down a set of standards that may well complicate the practical running of the operation, especially when confronted on the high seas with smugglers who show a callous disregard for the well-being of their 'clients'. To be sure, UNSC Resolution 2240 does not authorise EUNAVFOR MED to act within the territorial and internal waters of Libya, let alone on Libyan territory, as projected by the Decision adopted by the Council of the EU.<sup>261</sup>

The alternative legal justification for the implementation of phases 2 and 3 of EUNAVFOR MED was for the EU to act on the invitation of the legitimate government of Libya. However, with two power centres vying for dominance, any strategy that hinged on the invitation of one of the rivalling parties (i.e. that of the internationally recognised 'government' in Tobruk) risked irking the other (i.e. the Islamist 'government' in Tripoli). The EU's operation therefore carried serious political risks and might even have ended in impasse. For this reason the EU actively supported the efforts of the UN Secretary General's Special Envoy (first Bernardino de Léon, then Martin Kobler and Ghassan Salameh) to mediate an agreement for the formation of a unity government in Libya. Efforts to bring the competing parliaments and their backers together in a 'Government of National Accord' were further supported in an Italo-American process that led to the adoption of the Rome Communiqué of 13 December 2015. This formed the basis of the UN-brokered 'Libyan Political Agreement' reached at Skhirat on 16 December that, in turn, was unanimously endorsed by UNSC Resolution 2259 of December 23<sup>rd</sup>. The first meeting of the cabinet of the Government of National Accord took place on 2 January 2016 in Tunis but it was not until 30 March 2016 that key members arrived in Tripoli.

In the meantime, the practice of fighting traffickers had led to the re-baptism of EUNAVFOR MED as 'Operation Sophia', after the name given to the baby born on the ship that rescued her

<sup>261</sup> See part (ii) of phase 2 as well as phase 3 of the Operation, in Art. 2(2)(b) and (c) of Council Decision 2015/778/CFSP.

mother on 22nd August 2015 off the coast of Libya.<sup>262</sup> Shortly afterwards, on 7 October 2015, EUNAVFOR MED ‘Sophia’ entered its second phase. According to the information presented on the website of the EEAS at the end of May 2016 (but since removed), the Operation contributed to saving more than 14,800 people in its first year of deployment, while 71 people had been reported to the Italian authorities as possible smugglers and 127 vessels had been “removed” from the reach of illegal organisations.<sup>263</sup>

On 20 June 2016 the Council decided to extend the mandate of Operation Sophia for one year and expand it to two additional tasks: training Libyan coastguards and contributing to the implementation of the UN arms embargo on the high seas. These extra tasks were suggested by HR/VP Mogherini to the Government of National Accord Libya,<sup>264</sup> which requested EU support one month later.<sup>265</sup> This was subsequently unanimously endorsed by the UNSC in Resolution 2292 on 14 June 2016. The latter is, indeed, a very strong signal of international support for the EU’s role in the Mediterranean in tackling the smuggler networks, something that France and the UK, in particular, had been insisting on for a long time.<sup>266</sup> Thus, Operation Sophia matured from its surveillance and rescue phase into a proper Chapter VII operation, contributing to the enforcement of the arms embargo imposed by the UN Security Council. The last time the

<sup>262</sup> See Council Conclusions on Migration, 12 October 2015, <http://www.consilium.europa.eu/en/policies/migratory-pressures>.

<sup>263</sup> On file with the author.

<sup>264</sup> Remarks by High Representative/Vice-President Federica Mogherini at the press conference on Libya, Luxembourg, 18 April 2016; and Ministerial Meeting for Libya Joint Communiqué, Vienna, 16 May 2016.

<sup>265</sup> See Statement by the HR/VP Federica Mogherini on Libya, Brussels, 22 May 2016.

<sup>266</sup> See N. Gros-Verheyde, “L’opération Sophia devient une ‘vraie’ mission de présence en mer”, Bruxelles2.com, 20 June 2016. The German government was less insistent, as it has to obtain a new mandate by the Bundestag. According to some, the UNSC Resolution also constituted an implicit Russian snub to NATO, which was active in the Libyan air and maritime space in 2011.

EU member states carried out such an operation was in the Adriatic Sea under the cover of the Western European Union in the context of the wars in former Yugoslavia (1992-93). That operation was carried out in cooperation with NATO.<sup>267</sup>

Around the Horn of Africa, EUNAVFOR Atalanta had already demonstrated the EU's capacity to act as an effective crisis responder, as part of a more holistic and strategic approach to the Sahel region. EUNAVFOR MED is following the same model and has signalled the beginning of a more proactive European engagement to restore stability in the southern neighbourhood. When visiting one of the vessels participating in Operation Sophia in April 2017, the High Representative told the press that the mission had contributed to saving more than 35,000 people since the start of its activities, while more than 100 people had been reported to the Italian authorities as possible smugglers.<sup>268</sup>

There have been critical voices throughout the conduct of EUNAVFOR MED, however. The Operation has been dubbed by Libyan coastguard officials and others as a de facto 'taxi service' for irregular migrants.<sup>269</sup> Rather than destroying the business model used by human traffickers, Operation Sophia has been denounced for facilitating the 'work' of smugglers; rather than sending 500 or more people aboard more sea-worthy, larger vessels capable of reaching the middle of the Mediterranean, they used inflatable dinghies in the knowledge they would be picked up just outside Libya's territorial waters 12 miles off the coast. This has not only raised questions about whether Operation Sophia has had the desired impact on the flow of irregular migrants (which

<sup>267</sup> See S. Blockmans, *Tough Love: The EU's relations with the Western Balkans*, The Hague: Asser Press, 2007, p. 178.

<sup>268</sup> See Remarks by the High Representative/Vice-President Federica Mogherini during the visit at EUNAVFOR MED Sophia vessel ITS San Giusto, La Valletta, Press release 170426\_31, 26 April 2017. The naval ships had been successful in destroying more than 450 boats used in smuggling operations.

<sup>269</sup> See O. Guerin, "Nameless dead of the Mediterranean wash up on Libyan shore", *BBC News*, 28 July 2016.

reached a peak of 181,436 in 2016)<sup>270</sup> it has also led to severe criticism about the responsibility of EUNAVFOR MED for the increase in the number of tragic deaths at sea.

In July 2017, the UK House of Lords published a damning report in which it concluded that EUNAVFOR MED had failed in its mission to disrupt the business of people-smuggling and that the unintended consequences of the EU Naval Force's tactics to tackle people-smuggling had resulted in more deaths of refugees and migrants at sea.<sup>271</sup> The number of recorded casualties on the central Mediterranean route rose by 42% to more than 4,500 people drowning in 2016, compared with 3,175 in 2015.<sup>272</sup>

The uncertainties and risks surrounding the launch of Operation Sophia were the by-product of ten years of strategic inertia by the EU in the Mediterranean basin. But in the dramatically altered security climate since 2015, action could no longer be deferred. Waiting until all the elements fell into place to execute a detailed Mediterranean operation could have posed a far greater risk to human life. A more assertive European presence in the Mediterranean was badly needed, as civilian missions deployed by individual member states, through Frontex operations and an EU Border Assistance Mission to Libya,<sup>273</sup> had proved ineffective. Whereas Operation Sophia has failed to meet the objective of disrupting the business model of people-smuggling across the central Mediterranean route, its humanitarian activities are nevertheless crucial to saving lives. The House of Lords, too, found that EUNAVFOR MED should therefore continue its search and rescue work, provided it adapt its methods, in particular by employing non-military vessels.

<sup>270</sup> Joint Communication to the European Parliament, the European Council and the Council, "Migration on the Central Mediterranean route: Managing flows, saving lives", JOIN(2017) 4 final, 25 January 2017.

<sup>271</sup> House of Lords, European Union Committee, "Operation Sophia: A failed mission", 2<sup>nd</sup> report of Session 2017-19, HL Paper 5, 11 July 2017.

<sup>272</sup> Frontex, *Risk Analysis for 2017*, Warsaw, February 2017, at 8.

<sup>273</sup> Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), OJ L 138, 24 May 2013, at 5.

It is striking to note that the EU's response to the refugee and migrant crisis has moved completely outside of the ENP framework, in particular because the latter offers no particular added value to the operationalisation of the CSDP. Instead, the measures taken are indicative of a growing AFSJ-CSDP nexus. Not only has the existing civilian crisis management of Frontex morphed into the military realm of Operation Sophia,<sup>274</sup> plans have also matured to forge a semi-militarised European Border and Coast Guard (EBCG).<sup>275</sup> As a result, we witness the convergence of objectives, mandates and operations pursued by EU actors hitherto confined to either internal or external security, whereas their legal bases, decision-making procedures, budgetary modalities and staffing arrangements remain distinct. This evolution shows the propensity of the EU collectively, i.e. institutions and member states alike, to adapt to new circumstances rather than getting stuck in old paradigms.<sup>276</sup> It

*The EU's civ-mil response to the refugee and migrant crisis is now outside of the ENP framework; the latter offers no added value to the operationalisation of the CSDP.*

<sup>274</sup> See R. Parkes, "Frontex as Crisis Manager", in Tardy (ed.), op. cit., pp. 49-57.

<sup>275</sup> See S. Carrera, S. Blockmans et al., "The European Border and Coast Guard: Addressing migration and asylum challenges in the Mediterranean?", CEPS Task Force Report, Brussels, 1 February 2017. Based on Article 77.2(b) and (d) and Article 79.2(c) TFEU, the EBCG was developed in the shape of a regulation adopted under the ordinary legislative procedure. Endorsed in first reading by the European Parliament on 6th July 2016, i.e. barely half a year after the Commission tabled its proposal, the EU was swift in delivering on its commitments. But the need for speed has in this case resulted in less resolute legislative action than anticipated. See Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation 2016/399 and repealing Regulations No 863/2007 and No 2007/2004 and Council Decision 2005/267/EC, OJ 2016, L 251/1.

<sup>276</sup> See T. Tardy, "Civilian Crisis Management: Towards a new paradigm", EUISS Brief No. 23, July 2016.

is testament to the idea that no medium-to-small EU member state can address today's security challenges on its own.<sup>277</sup>

As the Common Security and Defence Policy moves closer to the EU's internal security activities, questions about the limits posed by the Lisbon Treaty on territorial defence (cf. Article 42.7 TEU) and intra-EU solidarity (Article 222 TFEU) will come into sharper focus.<sup>278</sup> Simultaneously, AFSJ actors are being lured 'out-of-area', as shown in the competences attributed to the new EBCG to conduct operations in third countries and in the cooperation between Frontex and NATO in the Aegean, a maritime area where – because of political idiosyncrasies in bilateral relations with Turkey – working through the North Atlantic Alliance trumps the deployment of a CSDP mission.<sup>279</sup> Cross-fertilisation of lessons learnt in the hitherto separate spheres of the AFSJ and the CSDP would benefit not only strategic analysis, planning and conduct of operations,<sup>280</sup> but also the design, development and training of civil-military capabilities (e.g. EBCG-EDA). It is time, therefore, to move the comprehensive approach to EU external action up a

<sup>277</sup> See "Shared Vision, Common Action: A Stronger Europe - A Global Strategy for the European Union's Foreign and Security Policy", June 2016.

<sup>278</sup> See S. Blockmans, "L'Union fait la force: Making the most of the Solidarity Clause (Art. 222 TFEU)", in I. Govaere and S. Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises*, Brill Publishers, 2014, pp. 111-135.

<sup>279</sup> But for how much longer? See S. Blockmans and S. Yilmaz, "Turkey and the Codification of Autocracy", CEPS Policy Insights No. 2017-10, Brussels, 10 March 2017.

<sup>280</sup> See, e.g., the Joint Staff Working Paper, "Strengthening Ties Between CSDP and FSJ Actors", SEC(2011)560 and the creation of a CIVCOM-COSI Support Group; the working arrangements between the EEAS and AFSJ agencies like EUROPOL and FRONTEX, annexed in the EEAS Working Document, "Strengthening Ties between CSDP and FSJ: Road Map implementation - Fourth annual progress report", EEAS(2015) 1422, 26 October 2015; and Joint Communication of the European Commission and the High Representative to the European Parliament and the Council, "Elements for an EU-wide Strategic Framework for supporting Security Sector Reform", JOIN(2016) 31 final, 5 July 2016.

notch and involve elements and actors of the Area of Freedom, Security and Justice on a more structural basis. It is only then that the blurred boundaries between internal and external security will become a continuum and enable a more effective handling of the security crises confronting the European Union. This is particularly relevant for states on either side of the external border of the EU. Arguably, the CGEA would be a good venue to discuss such issues from a more strategic and long-term perspective, also because this Group involves the European Commissioner for European Neighbourhood Policy and Enlargement Negotiations.

## 4.5 Is the policy as good as the tools?

The use of the EU's ample ENP toolbox reveals a highly differentiated pattern. This finding applies to the realities of striking up contractual relations, applying the principle of conditionality and liberalising visa regimes as much as it does to security sector support. With regard to the latter, it is clear from our analysis that the policy framework of the ENP does not represent the prism through which to seek concrete solutions to the daunting security challenges emanating from the European Union's outer periphery. Attempts to address the root causes of conflict and migration by supporting the development and growth of the poorest areas in the neighbourhood and beyond remain dependent on whether the EU (institutions and member states collectively) and its partners can muster the extra resources and political will to work together to implement the measures that are recommended in the 2015 ENP Review.<sup>281</sup> Here too, the EU's performance is rather erratic.

*The policy framework of the ENP does not offer concrete solutions to the security challenges coming from the EU's outer periphery.*

On a more conceptual level, the tendency to differentiate relations under the new ENP carries the risk of counteracting the treaty-based objective of Article 8 TEU which the EU has pursued

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<sup>281</sup> See, e.g., J. Apap and E. Pichon, "Building resilience with the EU's southern neighbourhood", *EPRS At a Glance*, June 2016.

for the last decade i.e. that of transforming the neighbourhood into one area of peace and prosperity built on democratic principles. If a recalibration were needed of how the EU employs its toolbox to protect its interests and advance its values in a ‘pragmatic’ way, i.e. by building resilient neighbouring states (and, subsidiarily, societies), then the Union might as well shed the pretence of conducting a policy specific to its neighbourhood. All it would be doing is conducting foreign policy in the classical sense.

This observation sours when we consider that, after all the talk about the perceived need to take the interests of countries such as Russia, Turkey, Iran and Saudi Arabia into account when defining relations with the ‘in-betweens’, the attention paid in the 2015 ENP Review to the ‘neighbours of the neighbours’ falls below expectations. The main message in the joint communication is that the new ENP “will seek to involve other regional actors, beyond the neighbourhood, where appropriate, in addressing regional challenges”.<sup>282</sup> Bilateral relations with Russia can only materialise “when conditions allow”;<sup>283</sup> with regard to Iran “as [soon as] the recent [nuclear] deal is implemented”.<sup>284</sup> China’s ‘Belt and Road’

*With no clear picture of how the EU should relate to the neighbours of its neighbours, the ‘new’ ENP cannot define a strategic basis for the countries on its borders.*

initiative has to be read between the lines, even if it is gaining traction in some Eastern Partnership states (e.g. Georgia).<sup>285</sup> In its effort to strike a more pragmatic tone, the 2015 ENP Review nevertheless fails to recognise significant realities. Without a clear

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<sup>282</sup> JOIN (2015) 50 final, 18 November 2015, at 3.

<sup>283</sup> Cf. the open-ended nature of the five guiding principles of the EU’s policy towards Russia, laid down in the Foreign Affairs Council conclusions of 14 March 2016.

<sup>284</sup> Arguably, that time has come. See S. Blockmans and A. Viaud, “EU Diplomacy and the Iran Nuclear Deal: Staying power?”, CEPS Policy Insights, Brussels, 14 July 2017.

<sup>285</sup> See the contributions to A. Amighini (ed.), *China’s Belt and Road: A Game Changer?*, Milan: ISPI, 2017; and T. Kovziridze, “Georgia-China FTA: A side effect of the EU-Georgia DCFTA?”, 3DCFTAs Working Paper, 3 July 2017.

picture of how the EU should relate to the neighbours of its neighbours, the 'new' ENP cannot (hope to) define a solid strategic basis for the individual countries on its borders. In this respect, the 2016 EU Global Strategy does not offer much support.



## 5. INSTITUTIONAL ADAPTATIONS: IN SEARCH OF COHERENCE

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The success of the EU institutions in addressing challenges and seizing opportunities in the neighbourhood, and indeed further afield, is aided by the constant revision of EU strategies, structures and working methods, and the focused support of and provision of resources by the member states. Arguably, without these elements, EU foreign policy founders.

The Treaty of Lisbon has had a double significance for the organisation of the EU's relations with its neighbours. Besides the introduction of a specific legal base in the form of Article 8 TEU, the Treaty's changes to the governance structures of EU external action<sup>286</sup> also impacted on the management and development of the ENP. The European Council, which has graduated to the full status of 'institution', has taken on a more active role in shaping neighbourhood relations. It has dealt with the neighbourhood in quasi-perpetual crisis mode since 2011.<sup>287</sup>

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<sup>286</sup> See, generally, J. Wouters, D. Coppens and B. De Meester, "The European Union's External Relations after the Lisbon Treaty", in S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU constitutionalism without a Constitutional Treaty?*, Vienna: Springer, 2008, pp. 143-203; J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, pp. 238-256; P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform*, Oxford: Oxford University Press, 2010, pp. 379-387; P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency", *Common Market Law Review* 47, 2010, p. 987.

<sup>287</sup> See, e.g., European Council Conclusions, EUCO 147/14, 16 July 2014. Its President – who, at his level and in that capacity, ensures the external representation of the Union on CFSP issues (Art. 15(6) TEU) – has regularly spoken out on issues pertaining to the neighbourhood. See, e.g.,

In the context of this study, the most significant of these changes relate – directly and indirectly – to the task of the High Representative to assist the Council and the Commission in ensuring coherence between the different areas of the Union's external action and between these and other EU policies.<sup>288</sup> In an effort to enhance the coherence, effectiveness and visibility of EU external action,<sup>289</sup> the Lisbon Treaty merged the position of Commissioner for External Relations with that of High Representative for the CFSP into the hybrid post of High Representative of the Union for Foreign Affairs and Security Policy / Vice-President of the Commission. The HR/VP would be supported by a European External Action Service (EEAS), composed of staff transferred from the European Commission's DG External Relations (RELEX), DG Development and network of external delegations, from the Council General Secretariat's DG External Relations, and from member states' diplomatic services.

In a pre-Lisbon move, European Commission President-elect José Manuel Barroso tried to prevent the Commission from losing all institutional control over the hitherto DG RELEX-driven European Neighbourhood Policy. When unveiling his new team of Commissioners in November 2009,<sup>290</sup> Barroso indicated by way of

Statement by Herman Van Rompuy, President of the European Council, on the EU's Eastern Partnership, PCE 049/11, 23 February 2011; his video message 'We want to turn this Arab Spring into a true new beginning', PCE 062/11, 10 March 2011; and more recently, on the occasion of the signing ceremony of the political provisions of the Association Agreement between the EU and Ukraine, PR PCE 61, 21 March 2014; and on the downing of a Ukrainian military aircraft, PR PCE 119, 14 June 2014.

<sup>288</sup> See Articles 18(4), 21(3) and 26(2) TEU. The European Parliament and the rotating Presidency of the Council also remain active on ENP-related matters.

<sup>289</sup> See *Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, COM (2006) 278 final; the pre-Lisbon Draft IGC Mandate, annexed to the Presidency Conclusions of 22-23 June 2007; and the Annual Report from the Council to the European Parliament on the Main Aspects and Basic Choices of the CFSP (2008).

<sup>290</sup> See Article 17(6)(b) TEU, which states that the President of the Commission shall "decide on the internal organisation of the

a simple asterisk that a new Commissioner for ‘Enlargement and European Neighbourhood Policy’ would exercise his functions “in close cooperation with the High Representative/Vice-President in accordance with the Treaties.”<sup>291</sup> The HR’s ‘Vice-Presidential’ powers were thus effectively curtailed, as the responsibility for the ENP was detached from the portfolio of the Commissioner of External Relations and added to that of new Commissioner for Enlargement. The decision to re-shuffle portfolios was not accompanied by a written explanation. Instead, Barroso asked Commissioner-designate Štefan Füle

to develop credible and attractive alternatives to membership for those neighbouring countries that will not become members. That is why an effective European Neighbourhood Policy is so important, and why I believe that it deserves the extra attention which could be offered by close cooperation between you and the High Representative/Vice-President.<sup>292</sup>

The latter addition is important from the point of coherence. Because DG RELEX’s staff was destined to transfer *en bloc* to the future EEAS, the new Commissioner would have to rely on members of cabinet to liaise with ‘his’ ENP staff on the other side of the *Rond Point Schuman*.<sup>293</sup> In the course of his hearing in the

Commission, ensuring that it acts consistently, efficiently and as a collegiate body”.

<sup>291</sup> Press release IP/09/1837 of 27 November 2009. The requirement of close cooperation was repeated in the Mission Letter of the same date from President Barroso to Commissioner-designate Stefan Füle. See [http://ec.europa.eu/commission\\_2010-2014/mission\\_letters/index\\_en.htm](http://ec.europa.eu/commission_2010-2014/mission_letters/index_en.htm).

<sup>292</sup> Mission Letter to Stefan Füle, at 2.

<sup>293</sup> A quick glance at the EEAS’ organisational chart of June 2017 shows that, together, two geographical Managing Directorates (MD) incorporate six units that deal with aspects of the ENP. Under MD-EURCA ‘Europe and Central Asia’, Division EURCA-EAST ‘Russia, Eastern Partnership; Central Asia, Regional Cooperation and OSCE’, the following units have been created: ‘Eastern Partnership, regional cooperation and OSCE’ and ‘Eastern Partnership, bilateral’. Under MD-MENA ‘Middle East and North Africa’ exist the following units: ‘MENA 1 – Egypt, Syria, Lebanon,

European Parliament on 12 January 2010, Füle paid lip service to the idea that his actions would significantly assist the HR/VP, by declaring that the two of them would work together for the common good of EU-neighbours relations.<sup>294</sup> In practice, this cooperation was reflected in the references to the joint parenthood (i.e. European Commission and High Representative) of new ENP policy documents.<sup>295</sup>

The requirement of close cooperation with the HR/VP and the condition to work closely with the EEAS (as provided in the Mission Letter) was later formalised in a Note from the Commission President in which he established clusters of Commissioners responsible for certain themes, including external

Jordan', 'MENA 2 - Israel, occupied Palestinian territories and MEPP', MENA 3 'Maghreb' and MENA 5 'Strategy and instruments of the ENP'.

<sup>294</sup> Opening statement of Štefan Füle, Commissioner-Designate for Enlargement and European Neighbourhood Policy, European Parliament, 12 January 2010, at 3. The speech is available at [http://www.europarl.europa.eu/hearings/static/commissioners/speeches/fuele\\_speeches\\_en.pdf](http://www.europarl.europa.eu/hearings/static/commissioners/speeches/fuele_speeches_en.pdf). At the hearing, Füle underlined that he would be solely accountable to the European Parliament, whilst the High Representative would answer to both Parliament and member states. He signalled that, as a Commissioner, he would attach more importance to substance than procedures when it came to both enlargement and neighbourhood policy. Füle thereby gave more leeway to the creeping intergovernmentalisation of enlargement and ENP, at least more than his boss was prepared to accept prior to the entry into force of the Treaty of Lisbon. See Füle, "I'll make enlargement more political", *EurActiv.com*, 14 January 2010.

<sup>295</sup> See, e.g., European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean", COM (2011) 200 final; and European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A new response to a changing Neighbourhood", COM (2011) 303 final.

relations.<sup>296</sup> HR/VP Catherine Ashton convened the Group a number of times but each time she was sidelined by Barroso, who would insist on chairing the meeting. It is said that the gatherings had a rather formalistic character and added no value to the normal inter-service consultation processes in the Commission, let alone to the goal of joining up the Commission's strands of EU external action with those managed by the Council and the EEAS. The practice of convening the Group was quietly abandoned for the remainder of the Barroso II Commission (2009-14). The high number of 'line' Commissioners and Directorates (33 DGs and 11 Services) made effective internal coordination difficult. The 'flat' internal organisation of the College increased the tendency to negotiate dossiers between the President and the respective Commissioner(s) on a bilateral basis rather than through discussions within clusters or the entire College. Few decisions were ever put to a vote, despite the controversy generated by some of them. This practice was counterproductive in terms of collegiality and favoured a silo approach to policymaking. In fact, this practice stood in stark contrast to the Lisbon Treaty's spirit of a more holistic and integrated approach to dealing with increasing interdependencies between policy areas.

To address these shortcomings, Barroso's successor, Jean-Claude Juncker, rearranged the structure of the College to respond to the political guidelines presented by the Commission President-designate to the European Parliament in July 2014. Stressing the "need to be more effective in bringing together the tools of Europe's external action" Juncker expressed his expectation that the next High Representative would:

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<sup>296</sup> Information Note from the President, "Commissioners groups", SEC (2010) 475 final, in which the VP was tasked to chair the group of Commissioners responsible for 'External relations', a group further composed of the Commissioners responsible for trade, development cooperation, humanitarian aid and crisis response, enlargement and ENP, economic and monetary affairs. The Note also said that "the President can decide to attend any meeting, which he will then chair". Thus, Barroso assigned himself the final responsibility to ensure coherence of external policies within the Commission, while the day-to-day coordination was entrusted to VP Catherine Ashton.

combine national and European tools, and all the tools available in the Commission, in a more effective way than in the past. He or she must act in concert with our European Commissioners for Trade, Development and Humanitarian Aid as well as for Neighbourhood Policy. This will require the High Representative to more fully play his/her role within the College of Commissioners.<sup>297</sup>

In his Mission Letter of 1 November 2014 to HR/VP-designate Federica Mogherini (and each of the other Commissioners), Juncker reiterated his expectation that she would play her role as Vice-President to the full.<sup>298</sup> To underline her role as VP Mogherini took the symbolic decision to install her office and cabinet in the Commission's Berlaymont building; to appoint an experienced hand at the Commission as her *chef de cabinet*; and to recruit half of her cabinet from Commission staff. The suggestion that, in case of need, Commissioner for 'Enlargement Negotiations and European Neighbourhood Policy' Johannes Hahn and other Commissioners could deputise for her "in areas related to Commission competence"<sup>299</sup> also points in this direction, as indeed to the Juncker Commission's flexibility in re-organising its own structures to match priorities.<sup>300</sup> This need not imply, however, that the ENP is now exclusively governed by the 'community

<sup>297</sup> J.-C. Juncker, "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change", 15 July 2014.

<sup>298</sup> Juncker's Mission Letter to Mogherini is available at [http://ec.europa.eu/commission/sites/cwt/files/commissioner\\_mission\\_letters/mogherini\\_en.pdf](http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/mogherini_en.pdf).

<sup>299</sup> Ibid., at 4.

<sup>300</sup> See also Communication from the President to the Commission, "The Working Methods of the European Commission 2014-2019", C(2014) 9004, 11 November 2014. The principle of collegiality, which governs decision-making in the Commission (Article 17(6) TEU), guarantees the equal participation of all the Commissioners and the collective responsibility for the decisions taken. As a general rule, the President does not place a new initiative on the agenda of the College "unless this is recommended to [him] by one of the Vice-Presidents on the basis of sound arguments and a clear narrative that is coherent with the priority projects of the Political Guidelines". See, e.g., Mission Letter to Mogherini, at 2. A strong bond to

method'. In fact, now that neighbourhood issues have become *Chefsache*, i.e. top priority for the European Council, supported by the HR/VP and her politically guided deputy in the Commission responsible for neighbourhood relations (who relies on staff moved from the Commission to the EEAS) we are witnessing the creeping intergovernmentalisation of the ENP.<sup>301</sup> This ought not, in theory at least, to prejudge the Union's political orientation towards its neighbours, nor the effectiveness of its actions. Yet, in the face of the instability on the EU's outer periphery, centrifugal and centripetal forces will continue to push or pull the ENP in one direction or the other, irrespective of the direction shown on the Treaty's strategic compass.

*We are witnessing the creeping intergovernmentalisation of the ENP. Centrifugal and centripetal forces will continue to push or pull the ENP in one direction or the other, irrespective of the direction shown on the Treaty's strategic compass.*

With the dual aim of achieving greater coherence in EU foreign policymaking and greater efficiency in the consistency and effectiveness of its implementation, President Juncker reanimated the Commissioners' Group on External Action (CGEA).<sup>302</sup> In concrete terms, Juncker instructed Mogherini to guide the work of the Commissioners for European Neighbourhood Policy and Enlargement Negotiations (Johannes Hahn), International Cooperation and Development (Neven Mimica), Humanitarian Aid and Crisis Management (Christos Stylianides), and Trade (Cecilia Malmström). Commissioners who do not belong to this core cluster but who are nevertheless concerned by the items on the Group's agenda are also invited, in particular Dimitris

the College is also ensured by Mogherini's obligation to regularly report back to Juncker and to the whole College about "geopolitical developments". *Ibid*, at 4.

<sup>301</sup> Cf. C. Hillion, "The Creeping Nationalisation of the EU Enlargement Policy", SIEPS Report 2010:6.

<sup>302</sup> Decision of the President of the European Commission on the Creation of a Commissioners' Group on External Action, C(2014) 9003, 11 November 2014.

Avramopoulos (Migration and Home Affairs), Miguel Arias Cañete (Climate Action and Energy), and Violeta Bulc (Transport), who belong to her broader cluster. Due to the blurring of boundaries between internal and external policy areas, the fact that the CGEA meets on a regular basis and caters for real political debates between Commissioners, the Group's meeting has at times ballooned in size, especially as each of them normally comes with his or her Director-General.

The CGEA does not have the power to adopt official decisions and does not replace the standard procedure of decision-making within the Commission. Since the Group follows a four-week interval, it is less suitable to discuss short-term matters and crisis management but is better designed to work on more structural issues and long-term trends. Hence, the agenda usually comprises three items of either a geographical or thematic nature. Examples related to the neighbourhood include the Strategy for Syria and Iraq; the situation in Ukraine; Eastern partners; economic diplomacy; capacity-building (train & equip); cultural diplomacy; responsible supply chains; and an action plan for human rights and migration.

The CGEA is supported by a joint secretariat, which is led by the Head of Unit 'International Dimension' of the Secretariat-General of the Commission and the Head of Division 'Policy Coordination' of the EEAS. The joint secretariat assists the cabinets of Mogherini and Juncker in establishing the agenda for the upcoming meetings of the CGEA.

The CGEA facilitates political discussion on EU external action across the entire Commission. It forces the services to abandon their silo mentalities, share information and create linkages to give 'hands and feet' to a more comprehensive approach to EU external action. As such, the Commissioners' Group serves to 'deconflict', both between the Directorates General of the Commission and with the EEAS. As the logical counterpart of the Foreign Affairs Council, the Commissioners' Group enables the HRVP to play her role to the full and deliver on her duty to assist the Council and the Commission to ensure consistency in EU external action (Article 21(3) TEU). Mogherini acts as a coordinator to mobilise instruments, budget and expertise managed by the Commission and to capitalise on a political consensus reached in

the Council.<sup>303</sup> A concrete example concerns the adoption by the Commission of a legislative proposal offering additional temporary access for Tunisian olive oil to the EU market to help support Tunisia's recovery in the wake of the terrorist attack of 26 June 2015 in Sousse, which had prompted a reaction from the FAC on 20 July 2015 on the need to further assist Tunisia in its political and economic transition, in a concrete and targeted manner.

Whereas the ENP structures devised post-Lisbon are in principle a good example for more comprehensive and coherent EU external action and carry within them the potential for further 'deputisation' of the HR/VP on ENP matters across the institutional divide,<sup>304</sup> practical experiences so far have also revealed the need for extra inter-institutional coordination mechanisms to paper over the cracks between the focal points of ENP governance.<sup>305</sup> A close

*Whereas post-Lisbon ENP structures are a good example for more coherent EU external action, practice shows the need for extra inter-institutional coordination to paper over the cracks in ENP governance.*

<sup>303</sup> Conversely, Mogherini is in a position to induce political will among member states by showing that the tools managed by the Commission can be put at the Union's disposal in order to boost effective foreign policy. A good example of this go-getting attitude is the cascade of actions she set off in response to a spike in the refugee crisis in February 2015. See Blockmans and Russack, *op. cit.*, at 10-11.

<sup>304</sup> For a different view, see C. Hillion, "The EU Mandate to Develop a 'Special Relationship' with its (Southern) Neighbours", in G. Fernandez Arribas, K. Pieters and T. Takács (eds), *The European Union's Relations with the Southern-Mediterranean in the Aftermath of the Arab Spring*, CLEER Working Paper No. 2013/3, pp. 11-17, at 16: "Often presented as a template for cohesive and coherent EU external action, the ENP is thus less well-integrated post-Lisbon, than it was under the previous dispensation."

<sup>305</sup> See, e.g., "HR/VP Catherine Ashton sets up Task Force for the Southern Mediterranean", A 226/11, Brussels, 7 June 2011. The Task Force brings together expertise from the EEAS, the European Commission, the EIB, the EBRD and other international financial institutions to act as a focal point for assistance to countries in North Africa which are going through political transformation.

reading of Articles 3(1) and 2(1) of the Council Decision establishing the EEAS points out that the Service shall support and work in cooperation with, *inter alia*, the services of the Commission, “without prejudice to the normal tasks” of those services.<sup>306</sup> The inclusion of the latter phrase raises the question of what exactly the normal tasks of the Commission are in ENP-related matters. In the absence of an exhaustive *Kompetenzkatalog* and with the very idea of normality in EU external action having shifted dramatically since the entry into force of the Lisbon Treaty, it should come as no surprise that the neutral phrase “normal tasks” has been interpreted differently by persons with different institutional affiliations.

With regard to the EU’s ‘foreign policy instruments’ such a risk has been foregone by the drawing up of detailed rules regarding the planning, programming and implementation of EU funds. The ensuing complexity is poignantly illustrated by the system put in place to operate the European Neighbourhood Instrument (ENI). Article 9(5) of the 2010 Council Decision establishing the EEAS prescribes that:

any proposals, including those for changes in the basic regulations and the programming documents referred to in paragraph 3, shall be prepared jointly by the relevant services in the EEAS and in the Commission under the responsibility of the Commissioner responsible for Neighbourhood Policy and shall be submitted jointly with the High Representative for adoption by the Commission.

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<sup>306</sup> Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010 L 201/30. For backgrounds and analysis, see S. Blockmans and C. Hillion (eds), *EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service*, SIEPS, Stockholm, 2013. With respect to the coordination and cooperation between the EEAS and the services of the Commission, Art. 3(2) specifically obliges the parties to consult each other on *all* matters relating to the external action of the Union in the exercise of their respective functions, except on matters of CSDP.

In turn, Article 9(3) states:

In particular, the EEAS shall contribute to the programming and management cycle for the instruments referred to in paragraph 2 [incl. the ENI], on the basis of the policy objectives set out in those instruments. It shall have responsibility for preparing the following decisions of the Commission regarding the strategic, multiannual steps within the programming cycle: (i) country allocations to determine the global financial envelope for each region, subject to the indicative breakdown of the multiannual financial framework. Within each region, a proportion of funding will be reserved for regional programmes; (ii) country and regional strategic papers; (iii) national and regional indicative programmes. In accordance with Article 3 [of the EEAS Council Decision], throughout the whole cycle of programming, planning and implementation of the instruments referred to in paragraph 2, the High Representative and the EEAS shall work with the relevant members and services of the Commission without prejudice to [the authority of the HR over the EEAS, as laid down in] Article 1(3). All proposals for decisions will be prepared by following the Commission's procedures and will be submitted to the Commission for adoption.

The implementation of this particular strand of the obligation of sincere cooperation between the EU institutions has been spelled out in the "Working Arrangements between Commission services and the European External Action Service (EEAS) in relation to external relations issues" of 13 January 2012.<sup>307</sup> That document provides, *inter alia*, that the Commission services and the EEAS

will perform their respective tasks throughout the programming and implementation cycle in full transparency, informing and consulting each other, sufficiently in advance, on initiatives or announcements that could have an impact on each other's areas of responsibility. This includes an exchange of information on preparation of policy and programme documents of both a formal and informal nature. It relates to the representation

<sup>307</sup> SEC(2012)48, Ref. Ares(2012)41133 - 13 January 2012.

of EU positions vis-à-vis recipient countries or other donors and related reporting and feedback.<sup>308</sup>

In short, whereas the management of the European Union's ENP and adjacent cooperation programmes remains under the responsibility of the Commission (Article 9(1) EEAS Council Decision), it shares the role of 'programming', i.e. designing, scheduling, or planning the EU's external cooperation programmes (only an element of the wider concept of 'management'), with the EEAS. In fact, the High Representative is under a particular obligation to avail her-/himself of these instruments to ensure the overall political coordination, unity, consistency and effectiveness of the Union's external action, "without prejudice to the respective roles of the Commission and of the EEAS in programming". Thus, the basic prescript, namely that during the whole process of planning and implementation both parts of the organisation should work together and that all proposals for decision have to be prepared through the Commission procedures and submitted to the Commission (Article 9(3)), has remained unchanged, but the advent of the EEAS and the ensuing inter-service cooperation has substantially increased

*Inter-service cooperation increases complexity in the management of ENP funds – a small price to pay for a comprehensive approach to the neighbourhood, and the allocation of appropriate funding to the ENP.*

complexity in the management of ENP funds post-Lisbon. Then again, this is a small price to pay for a comprehensive approach to the neighbourhood, and indeed the allocation of appropriate funding to the ENP. It would be far more difficult to argue for the

latter if all funding for EU external action were brought under one budget line.<sup>309</sup> Herein lies perhaps the single-most important justification to keep the ENP as a separate policy framework.

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<sup>308</sup> Ibid., at 15.

<sup>309</sup> A point made by Emma Udwin, Deputy Head of Cabinet of Commissioner Hahn, at a public seminar hosted by SIEPS and CEPS on 2 June 2017 in Brussels.

## **6. CONCLUSION: CLASSIC FOREIGN POLICY FOR THE NEIGHBOURHOOD**

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*“However beautiful the strategy,  
you should occasionally look at the results.”*

Winston Churchill

The Lisbon Treaty was intended to create tools for the European Union to develop a more coherent, more effective and more visible foreign policy, in particular for relations with the neighbours. Yet, while the EU Treaty now contains a specific clause (Article 8 TEU) that envisions a peaceful and prosperous neighbourhood and provides a legal base for the conclusion of agreements to associate the neighbouring countries more closely, realities on the ground have moved in the opposite direction.

Whereas the EU cannot be blamed for the dire economic outlook, the backsliding of respect for democratic principles, fundamental rights and the rule of law, the deterioration of the security environment, and other woes that have befallen or been generated by the countries in its outer periphery, the neighbourhood does constitute one of the most important geopolitical tests for the EU. How it deals with its own neighbourhood will define not just the Union, but also the perception its international partners have of the EU's role on the global stage.

In this respect, Article 8(1) TEU represents a container concept that does not provide the necessary teeth for the Union's paper ENP tiger to survive in the mercurial neighbourhood. Moreover, the instruments through which the European Neighbourhood Policy has to be implemented have to be borrowed from other parts of the treaties, from which Article 8 TEU is disconnected. There is only so much the hybrid positions

and bodies created in accordance with the Lisbon Treaty can do to paper over the legal cracks of EU primary law and forge an integrated European policy towards the neighbourhood.

When looking at the big picture, the inclusion of a specific neighbourhood clause in the Lisbon Treaty is emblematic of the overall reactive nature of the EU's actions in its neighbourhood, captured by the maxim 'too little, too late'. Indeed, the Union's slow and timid response to the dramatic events of the Arab Spring of 2011, the war in Syria and the waves of refugees that it propelled into Jordan, Lebanon, Turkey, illustrate the limits of the innovations to the ENP, not just in the sphere of the attribution of competences and institutional architecture, but particularly in the area of security. Indeed, the policy framework of the ENP does not represent the prism through which to seek concrete solutions to the daunting security challenges emanating from the EU's outer periphery. Yet the ENP is nowhere if the EU does not get crisis management and conflict resolution right. The EU's response to the aggression of Putin's Russia against Ukraine – a repeat of his Georgian playbook in 2008 – is a case in point. Whereas short-term political and economic gains may be made through the ENP, the 'widgets' that Russia has created to destabilise the geopolitics of much of the Eastern Partnership remain in place. Conceptually flawed from the beginning, the ENP is still ill-conceived and badly equipped to deal with an unstable environment and the zero-sum gaming neighbours of neighbours. Even if crisis response and conflict management fall outside the realm of the ENP, a strong nexus with the CFSP/CSDP might have been presumed but has still not materialised.

In order to bridge the gap between the rather naive-looking ambition stated in the Treaty and the worsening realities on the ground, European policymakers had no choice but to instil more realism into the implementation of the obligation to tactically work towards attaining the goals prescribed by Article 8(1) TEU. One year after the Juncker Commission took office, a long-overdue review of the ENP was published.<sup>310</sup> At the presentation of the

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<sup>310</sup> JOIN(2015) 50 final.

'new ENP' with High Representative Mogherini, Commissioner Hahn offered a sobering reality check:

Our most pressing challenge is the stabilisation of our neighbourhood. Conflicts, terrorism and radicalisation threaten us all. But poverty, corruption and poor governance are also sources of insecurity. That is why we will refocus relations with our partners where necessary on our genuinely shared common interests. In particular economic development, with a major focus on youth employment and skills will be key.<sup>311</sup>

Hahn's statement encapsulated the essence of the 2015 ENP Review: greater emphasis on stability (in security and economic terms); more differentiation in relations with neighbours (i.e. doing more with 'partners'); and greater emphasis on shared interests rather than on the Union's own values.

The 'old' ENP was designed for fairer weather, at a time when EU confidence was high and the neighbourhood was mostly stable. Economically strong and confident about the process that was intended to put the EU on a firm constitutional basis and serve the reunited halves of the continent, the EU set out a policy to "prevent the emergence of new dividing lines between the enlarged EU and its neighbours". Yet, in the absence of a clear membership prospect for ENP countries, the EU's demands and prescriptive methods of harmonising legal frameworks and reforming institutions and economies have largely failed to inspire the neighbours, especially those who do not share the Union's values. Inadvertently, new borders have now materialised, in particular in the south.

On a more fundamental level, the old ENP did not manage to tackle the root causes of the protracted conflicts in the region, again mainly in the south: poverty, lack of education, and unemployment. The Association Agreements and Deep and Comprehensive Free Trade Areas with the EU, the most prestigious form of contractual relations under the ENP, even

<sup>311</sup> European Commission, "Review of the European Neighbourhood Policy (ENP): stronger partnerships for a stronger neighbourhood", Press release IP/15/6121, 18 November 2015.

ended up inciting violence, as was shown in Ukraine in 2013 after President Yanukovych pulled the plug on the conclusion of the country's AA/DCFTA. In spite of a remarkable pro-EU revolutionary wave that swept out the *ancien régime* and managed to keep most of the country united in its determination to sign the agreement, the ENP – and in particular the Eastern Partnership – suffered a serious blow due to the EU's collective lack of strategic foresight about Russia's belligerence in Crimea and the Donbas. With assistance packages and trust funds too small to make a difference, the ENP has also had precious little impact in terms of longer-term peacebuilding. Arguably, the only successful 'Arabellion' – the one in Tunisia – has been achieved in spite of rather than thanks to the increasingly conditional ('more for more') support introduced in the 2011 review of the ENP. As far as the DCFTAs are concerned, the mismatch between the strict terms of the agreements (which even blur their level of ambition with that laid down in the accords concluded with pre-accession countries) and the resistance to and reversibility of change in the power structures of EaP countries are unlikely to produce the desired levels of administrative, regulatory and economic approximation any time soon.

In light of the above, it comes as no surprise that the 2015 ENP Review has tried to abandon the enlargement methodology in favour of managing relations between the EU and all of its neighbours more pragmatically. The Review recognises that "not all partners aspire to comply with EU rules and standards" and reflects "the wishes of each country concerning the nature and scope of its partnership with the EU". New working methods include the abolition of the annual package of country reports to measure progress (or the lack thereof) in reforms. Instead, (ir)regular reporting has become more tailor-made to the nature and working calendar of each relationship. Yet the EU's priority continues to lie in AA/DCFTA partners' comprehensive approximation to the *acquis* as a means to their gradual economic integration into the internal market. As such, the 'enlargement lite' fiction is kept up. While this ambition transcends the political limits of the ENP and contradicts the 2015 Review, the pretence is nevertheless symbolic for the 'European' states of the EaP that aspire to one day meet all EU membership conditions. But it has a

rather counterfactual meaning for non-European countries like Morocco and Tunisia, with which DCFTA talks have been launched. It would seem, therefore, that in the name of flexibility both the policy framework and the flagship instruments of the ENP are being stretched beyond recognition.

For partners who cannot or do not wish to pursue the preferred model of concluding and implementing an AA/DCFTA, the way forward may well lie in the exploration of lighter options, going beyond existing preferential or non-preferential trade agreements (e.g. Agreements on Conformity Assessment and Acceptance (ACAA), which allow for the free movement of industrial products in specific sectors). Such an approach could contribute to the long-term goal of a wider area of economic prosperity based on WTO rules and sovereign choices by neighbouring countries. It could also help in accommodating the interests of their neighbours, for instance in striking up relations with the Eurasian Economic Union, once it becomes WTO-compliant.

Apart from the introduction of a healthy dose of differentiation and greater mutual ownership, the European Commission and the High Representative put more emphasis on political and economic 'stabilisation' – a political priority of the Juncker Commission. Since 2015 the term 'stabilisation' has gradually been replaced by the notion of 'resilience'. The services' adoption of this buzzword reflects the shift in debate about the nature of EU engagement with third states, neighbouring countries in particular. It de-emphasises the goal of transformation that formed the bedrock of the 'old' ENP and replaces it with support for the ability to withstand systemic shocks and threats at both the state and societal level. By prioritising security interests over values in increasingly transactional partnerships, the policy now takes a more pragmatic approach to improving relations with neighbouring countries on a differentiated basis. Whereas the fuzziness of the term 'resilience' is helpful for diplomats, as it allows them to back-peddle when political circumstances change, the vagueness of the concept and the flexibility with which policy objectives can be (re-)interpreted hinder those who have to implement the ENP in the countries concerned, with the instruments and budgets at their disposal. Arguably, without the

political will to mobilise the necessary security and financial resources to tackle the region's multiple crises, and without a strategic vision to guide relations with the neighbours of the EU's neighbours, the ENP remains in suspended animation.

Moving away from the idealistic goals set out at its launch in 2004 and codified in the 2009 Lisbon Treaty, the ENP currently represents little more than an elegantly crafted fig leaf that purports to be a framework for a comprehensive soft power approach to the EU's outer periphery, but masks an inclination towards a more hard-nosed *Realpolitik* whose heterogeneous practice makes it indistinguishable from foreign policy in the classic sense of the term. The 'new' ENP is neither a complete overhaul of the 'old' ENP nor a fully fledged strategic (re)vision of the EU's relations with its neighbours. Rather, it continues the break-up of former Commission President Prodi's proverbial 'ring of friends'.

The 2011 Review had already split the unitary concept of the ENP by creating the Eastern Partnership and the Union for the Mediterranean. The 2015 Review offers parallel organic forms of regional cooperation that will – if implemented – speed up the descent into irrelevance of the static formations of countries that were artificially lumped together in the EaP and the UfM. The stated need to stabilise the 'ring of fire' that surrounds the EU denotes a realistic approach that will further atomise relations with the neighbouring countries, to the point where the EU may want to admit that it just intends to conduct traditional foreign policy, i.e. implement a variegated set of bilateral strategies in the pragmatic pursuit of its own interests. This approach would do away with the pretence of acting under the grand banner of a so-called European Neighbourhood Policy in pursuit of the seemingly unattainable objectives laid down in the Treaty.

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The idealism that engendered the European Neighbourhood Policy in 2004, later codified in the Lisbon Treaty in 2009, has since been reviewed to adapt to the turbulence that has befallen the EU and its neighbourhood. The ENP is now little more than an elegantly crafted fig leaf that purports to take a soft power approach to the EU's outer periphery, argues the author, but in effect it inclines more towards *Realpolitik*.

By prioritising security interests over liberal values in increasingly transactional partnerships, the EU is atomising relations with its neighbouring countries. And without the political will and a strategic vision to guide relations with the neighbours of the EU's neighbours, the ENP remains in suspended animation.

*“Blockmans offers a refreshingly accessible and provocative account of the EU’s foreign policy towards its ‘near abroad’. Whether or not one agrees with the book’s conclusion that the ENP is in ‘suspended animation’, this is a highly thought-provoking, detailed and illuminating analysis.”*

Tobias Schumacher, European Neighbourhood Policy Chairholder,  
College of Europe, Natolin.

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Eka Tkeshelashvili, President of the Georgian Institute for Strategic Studies,  
former Minister of Foreign Affairs of Georgia.

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