

## WHAT IS WRONG WITH EUROPEAN NEIGHBOURHOOD POLICY? LESSONS FROM ART. 8 TEU IN APPROACHING ITS REFORM

### 1. Preliminary remarks

On 4<sup>th</sup> March 2015, the European Commission and the High Representative Mogherini issued a joint consultation paper titled “[Towards a new European Neighbourhood policy](#)”. The document aims at putting the frame of a debate among EU institutions, partners, civil society and member States on the direction the EU neighbourhood policy shall take in the years to come. The review document is expected in mid-November this year and will take into consideration the outcome of the public consultation held until 30<sup>th</sup> June 2015 (now closed). Interestingly enough, if we compare the response rate to [this public consultation](#) with the response rate to another one launched one year before by the European Commission on [investment protection and investor-to-state dispute settlement \(ISDS\) in the Transatlantic Trade and Investment Partnership Agreement](#), participation is comparatively “poor” this time, with around 150 replies to the former *vis-à-vis* 150.000 to the latter. Despite the limited interest of the general public, the policy at stake has a considerable impact on a series of aspects of our day-by-day life, such as migration, stability and exchanges in general with third Countries in our vicinity. Undoubtedly, the turmoil experienced in the recent years both in the Southern and Eastern neighbourhood complicated considerably EU attempts to deliver on this policy. The presence of strong third actors in the neighbours’ geo-political space (the so called “neighbour of neighbours”) has challenged EU “transformative dream”, highlighting the weaknesses of an approach merely based on “soft” power. Also, aspirations of neighbouring countries have changed throughout time, requiring the EU to offer new and differentiated “products” to its partners. Products that the complexities of EU decision-making process, the lack of shared political vision among the member States, and the absence of flexible EU foreign policy tools have struggled to yield. These flaws pervade the consultation paper, as a sort of “*mea culpa*”, and are particularly vibrant in one of the first questions the Commission and the High Representative ask the public: “should the ENP be maintained?”. The argument is submitted here that EU needs its neighbourhood policy now more than ever. This was also the overwhelming response of the public to the consultation paper. An attempt should therefore be made to convert it into something different. The EU may hide some harrows in its... Treaties.

### 2. The EU neighbourhood: geographical scope and geo-political concepts

The ENP was launched through a soft law document of the Commission, namely the Communication COM(2003)104 ‘[Wider Europe](#)’. The document, designed as a complement of the so called “big-bang

enlargement” of 2004, provided the first conceptual framework to bring under a common hat – *rectius* a common policy – the relations with third countries sharing geographical proximity with the (then) newly established EU external borders. More precisely, the new “policy” was conceived to strengthen the framework for the Union’s relations with those neighbouring countries that did not have the perspective of EU membership, at least in the medium term. Candidate countries such as Turkey, Romania and Bulgaria, or the Western Balkans countries were thus excluded from its geographical scope, as their relations with the EU were on a different path. Conversely, the Commission expressly endorsed the relations with both the Southern Mediterranean countries (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria, Tunisia) and Western Newly Independent States (Ukraine, Belarus, Moldova). Southern Caucasus countries (Armenia, Georgia, Azerbaijan) were originally left out of the initiative, due to their location, but eventually included in 2004. Russia, instead, refused to be part of the ENP, despite its initial inclusion among the “target” countries. Russia’s reticence was based on its conviction to represent a self-sufficient pole of attraction and influence in the European continent, able to maintain with EU a relationship based on equality, partnership and non-interference. This attitude seems to contain the seeds of the hurdles EU is meeting in the realization of ENP today (see below, §§ 2 and 3). At the time, however, cooperation with Southern countries was more developed than with the Eastern ones, due to the regional initiative of the [Barcelona Process](#) already started in 1995. Nevertheless, after the 2004 enlargement, Eastern partners started to show more aspirations to cooperate with the EU. Today, association agreements establishing Deep and Comprehensive Free Trade Areas (“DCFTA”) concluded with countries such as Georgia, Moldova and Ukraine, together with the regional initiative of the [Eastern Partnership](#), show a more advanced integration in the East. In this regard, ENP was successful in avoiding dividing lines within Europe, namely between those countries that had just become members as a result of enlargement, and their Eastern neighbours, remained outside the membership process. The idea was to develop a zone of prosperity around Europe, based on friendly, peaceful and co-operative relations with neighbouring countries (a “ring of friends” of the EU). It was believed that enhanced political and economic interdependence could by itself promote stability, security and sustainable development both within and outside the EU. Progressive economic and political integration of such countries was to be achieved through their commitment to common values and the implementation of political, economic and institutional reforms based on EU *acquis*. The policy was built on what has been defined a “constructive ambiguity”, namely that of “*using the transformative power Europe without explicitly offering the big prize: membership*” ([Speech by Commissioner for European Neighbourhood Policy and Enlargement Negotiations, Johannes Hahn](#), on 17 September 2015, College of Europe, Bruges). It should be said that ENP was not taking place in a legal vacuum. EU already had a series of international agreements in place with some of the partners, whether association, partnership or trade agreements, establishing differing degrees of cooperation. Such existing tools remained at the base of the neighbourhood relationship and evolved with it. They were re-oriented and strengthened within a wider political framework, designed by Country or regional Action Plans agreed with the interested partners *i.e.* political documents setting out the strategic policy targets and benchmarks to be reached by the third Country under the “supervision” of the EU. A “conditionality” approach (or “more for more” approach) underpinned EU action in this field: the more a Country would undertake

reforms towards democracy, human rights and rule of law, the more funding (under relevant **EU financial instruments**), access to visa and trade liberalization it would get in return from the EU (on the combination of soft and hard law tools in the policy at stake, C. Hillion, *The EU's Neighbourhood Policy towards Eastern Europe*, in A. Dashwood, M. Marescau (eds.), *Law and practice of EU external relations*, 2008, p. 324 e ss.; Id., *Institutional aspects for the partnership between the European Union and the newly Independent States of the former Soviet Union*, in *Common Market Law Review*, 2000, p. 1219; B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy*, New York, 2012, pp. 179-2011). In the long run, to quote a famous formula of President Prodi, these Countries would share with EU members "everything but institutions", on the model of the European Economic Area. Indeed, the geo-political concept behind the new foreign policy tool elaborated by the Commission was based on the assumption that neighbouring countries were willing to conduct reforms in exchange of closer integration to the EU.

### **3. Reviewing ENP and the 2015 consultation paper**

ENP initiatives allowed the EU to develop stronger relationships with partners in a wide range of cooperation fields, from energy to education, from transport to research. ENP content has also significantly deepened in some areas, offering to third countries the opportunity to establish DCFTAs, mobility partnerships and visa free regimes. However, the idea of EU support to political reforms in neighbouring Countries, to the benefit of stability in the region, conveyed limited results. The recent events regarding the Arab Spring, the instability in the Middle East, the continuing repressions in Belarus as well as the Ukrainian crisis show the difficulties of delivering on political improvements in a neighbourhood facing rapid changes. This is why in 2011, the High Representative and the Commission issued a **Joint Communication – A new response to a changing neighbourhood**, COM(2011)303, calling for a more responsive, flexible and tailored ENP. The review document anticipated some aspects of the deeper reform process started with the consultation paper of March 2015. The building blocks on which this reform shall be articulated are listed in the same consultation paper and deserve some attention.

In the first place, reference is made to greater *differentiation* with individual partners. Indeed, the assumption that all the neighbouring countries were willing to have the same level of integration with the EU has proved to be false. Although awareness of the different starting conditions of each Country was already present at the origin of ENP, the idea that the same integration opportunities and pre-established targets of reforms should be offered to all the partners led to a biased relationship, in which partners pretended to reform and EU pretended to believe them (*Speech by Commissioner for European Neighbourhood Policy and Enlargement Negotiations, Johannes Hahn*, above). The reality is that costs arising in the short term as a result of partnership with EU, together with the strategic interests of each Country, determine different sovereign choices with regard to the level of integration they are willing to establish with the EU. A more tailored relationship would allow the EU to induce partners to work on selected priorities they are genuinely willing to carry out.

The second point envisaged in the consultation paper is a sharper *focus* on areas of interest for the EU. This entails for the EU to carry out a more strategic preparatory work, in order to approach

negotiations with a clear idea of what its priorities are in a given Country. The consultation paper spots out some proposals in this regard. However, it is here submitted that such areas of interest and priorities can change over time, depending on endogenous as much as exogenous factors. Moreover, EU priorities should adjust depending on what each Country is able and willing to offer: energy security, cooperation on migration fluxes, transportation networks, defense assistance, security dialogue, fight against organizational crime, etc. In this context, a permanent and genuine diplomatic dialogue seems needed, in order for ENP to result flexible and responsive, and to avoid that such instrument becomes an empty box.

*Flexibility* is indeed the third challenge mentioned in the consultation paper, what entails also a capacity to react to emergencies arising in the neighbouring countries, overcoming the complexities of EU decision making processes. In this respect, new financial tools can be created to support a more responsive political action.

The last pillar of reform is *ownership and visibility*. The idea is that partner Countries would feel more engaged in the neighbouring relationship if they perceive to be treated as equals and communities are aware of the aims and impact of this policy. Furthermore, as the Ukrainian crisis has thought, the EU is not alone in the relationship with neighbours, and “neighbours of neighbours” need to be taken into account when dialoguing with interested countries. At the same time, competing integration processes exist, such as the recently established [Eurasian Economic Union](#) (funded in 2014 between Russian Federation, Belarus, Kazakhstan, Armenia, Kyrgyzstan) that may overlap with EU scope of action (see, on each point, also the [European Parliament Resolution of 9 July 2015 on the review of the European Neighbourhood Policy](#)).

#### **4. The need to explore further the potential of the Lisbon normative shift**

Without guessing on the content of the review document that shall be published later this year, let us draw some considerations on the legal framework within which the reform shall take place. The Lisbon Treaty introduced for the first time a legal basis for ENP in art. 8 TEU, according to which “[t]he 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”. The wording of the provision not only codifies existing practice, but seems to incorporate a change of approach at primary law level: on the one hand, the verb “shall” suggests that the EU is bound to engage with neighbouring countries, with a specific view to protect its own interests in the stability around its borders. More precisely, the Union should develop peaceful cooperation relations based on its own values. The reference to the “values of the Union”, and not to “shared” or “common values”, referred to in the early documents regarding ENP, supports the functional relationship between the policy at stake and the *interests* of the Union. The importance to pursue EU interests in its relations with the rest of the world is also mandated by art. 3.5 TEU. On the contrary, compliance with certain legal, political and economic standards on the side of partners seems not a prerequisite of EU engagement in the neighbourhood. In other words, as it has been [suggested](#), the Union should not wait that third Countries comply with human rights, democracy and rule of law before engaging with them. Rather, the EU interest in stability should be pursued in the first

place, a special relationship based on EU values being the means to reach such goal (C. Hillion, *The EU neighbourhood competence under art. 8 TEU*, in *Notre Europe Policy Paper* no. 69/2013; *contra*, D. Hanf, *The ENP in the light of the new “neighbourhood clause” (Article 8 TEU)*, in *College of Europe, Research Paper in Law – Cahiers juridiques*, No. 2/2011; P. Van Elsuwege, R. Petrov, *Article 8 TEU: Towards a New Generation of Agreements with the Countries of the European Union?*, in *European Law Review*, 2011, p. 688). What follows is that a “catch all” approach based on a wide range of political and legal reforms as a precondition to partnership, similar to that pursued on the model of enlargement practice, seems not required nor necessary in the implementation of the policy at stake, although conditionality method is not excluded. In order to deliver in accordance with the Treaty mandate, focus should rather be put on selected priorities reflecting EU interests in stability.

The above reading of the provision seems further confirmed by the location of art. 8 within the “Common Provisions” of TEU. It is not related to the enlargement provision (art. 49 TEU), nor is it included in the specific sections of the Treaties relating to the external action of the Union, namely Title V TEU, and Part V TFEU. As a consequence, ENP qualifies as a structural element of the EU, a necessary tool for its ... peaceful existence. In order to be effective, ENP is designed as an *inter-treaty* (formerly *inter-pillar*) legal basis, involving as much TFEU competences (e.g. migration, development, energy, transport, environment, free movement of persons, trade) as CFSP competences (e.g. political dialogue, security and defense). In this perspective, its location outside of Title V TEU regarding specific provisions on CFSP allows art. 8 TEU to operate regardless of the limits imposed by art. 40 TEU (see [ECJ, C-91/05, \*Commission v. Council\* \(ECOWAS\)](#) ECR [2008] I-3651). This means that the drafters of the Lisbon Treaty required the integration of political and defense goals into ENP, as opposed to the initial idea, inspired to Jean Monnet’s and Robert Schuman’s philosophy, of crafting a tool of merely technical cooperation. It is true that, in some cases, the technical approach allows cooperation to take place irrespective of political deadlocks. However, the limits of this method are clear in the escalation of political tensions surrounding European external borders. EU needs to use its toolbox in a smarter and more effective way. This is particularly relevant with regard to the scope of “neighbourhood” agreements with the countries concerned that could in principle replace existing agreements in accordance with art. 8.2. TEU. But not only. Also unilateral measures aimed to support reforms or address emergencies in the neighbouring countries could be adopted on the grounds of art. 8 TFEU, endorsing all the sectors necessary to pursue EU stability objectives, whether they belong to CFSP, CSDP or TFEU competences.

Despite the significant normative shift introduced by the Lisbon Treaty, practice has shown some legal and political hurdles in the use of art. 8 TEU as a legal basis for EU action towards its neighbours. For example, the recently signed association agreements with Ukraine (followed by those with Moldova and Georgia) were concluded on grounds of traditional legal basis such as art. 217 and 218 TFEU, despite their clear “neighbourhood” context (on complexities regarding the legal basis of such agreements, see G. Van Der Loo, P. Van Elsuwege, R. Petrov, *The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument*, EUI Working Paper n. 2014/9, p. 8). If this can be partly due to some ambiguities that still surround the procedures applying to art. 8 TEU (A. Lang, *Art. 8 TUE*, in F. Pocar, M. C. Baruffi (a cura di), *Commentario breve ai Trattati dell’Unione*



*europa*, p. 48; G. Strozzi, *Art. 8 TUE*, in A. Tizzano (a cura di), *Trattati dell'Unione europea*, p. 83), a decisive factor in the exclusion of art. 8 TEU as the legal basis of the agreements was the refusal of the interested countries to be put under the framework of "good neighbourliness", based on the argument that they wanted a clear recognition as part of Europe and not of the European neighbourhood. In this respect, countries that have today stronger European aspirations might perceive neighbourhood as a non-including process, a space where minor partners are placed. At the same time, some Southern partners have recently shown little interest in committing to legal approximation and comprehensive integration with the EU in line with ENP targets.

In this respect, it seems clear that the advocated change of approach in the implementation of ENP is needed in order to avoid that this innovative legal base remains a "dead" provision. Different levels of integration should be made available to the different partners, depending on their aspirations. A "variable geometry" ENP seems fully compatible with art. 8 TEU, if not mandated by it. Association and other kind of agreements can still coexist with ENP. However, an effort should be made to clarify the goals and advantages of ENP agreements to third countries, provided that membership (art. 49 TEU) is not *per se* excluded by neighbourhood. On the other hand, conditionality should not be a barrier to access of third countries to neighbourhood relationship, but should be maintained as a tool for ensuring that the agreed priorities are met. Provided that the strongest economic and political support must be ensured to countries that wish to align closer, a shift from a donor to an investment dynamic would probably help the EU to make partnership more interesting for those countries not willing to engage in deep integration processes. If a more "self-interested" approach is followed by the EU, in the spirit of art. 8 TFEU, it is possible that also some types of reticence from third Countries could be overcome. It would be a real shame to fail on this attempt.

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