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## ENP's Value Conditionality from Enlargements to Post-Crimea

Dimitry Kochenov and Elena Basheska



**CLEER**



CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**ENP'S VALUE CONDITIONALITY FROM ENLARGEMENTS  
TO POST-CRIMEA**

**DIMITRY KOCHENOV AND ELENA BASHESKA**

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## LIST OF ABBREVIATIONS

CML Rev	Common Market Law Review
CSO	Civil Society Organisations
CUP	Cambridge University Press
DCFTA	Deep and Comprehensive Free Trade Areas
DFTA	Deep Free Trade Agreements
ECJ	European Court of justice
EEA	European Economic Area
EIoP	European Integration online Papers
ELJ	European Law Journal
ENI	European Neighbourhood Instrument
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood Partnership Instrument
EU	European Union
EUI	European University Institute
GAERC	General Affairs & External Relations Council
IJCL	International Journal of Constitutional Law
LGDJ	La Librairie générale de droit et de jurisprudence
NEC	Neighbourhood Economic Community
NIF	Neighbourhood Investment Facility (NIF)
OUP	Oxford University Press
PUF	Presses Universitaires de France
QIL	Questions of International Law
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNGA	United Nations General Assembly
VLAP	Visa Liberalisation Action Plans

## ABSTRACT

This paper puts the problems with value conditionality in the EU's neighbourhood in the context of the general resounding failure of the European Neighbourhood Policy (ENP). Embarking to establish a 'ring of friends' around the EU, the policy has not delivered: the neighbourhood is much poorer and infinitely more dangerous now than ever before in the recent past. From Russia's annexation of the part of Ukraine and its pocket war in Donbass to the rise of the Islamic State, the initial goal of the ENP could not be any further from achievement than it is now. The Union, advancing its policy of slogans, has entirely ignored *Realpolitik*, to a point that led to the aforementioned embarrassing results. We look at the objective of the 'ring of friends' (2) and then focus on the three key presumptions underlying the deployment of the principle of conditionality in the context of the ENP: the presumption of shared values (3); the presumption of effectiveness of the value based conditionality (4); the presumption of the sufficient incentives (5); – all the three untenable, we argue – only to address the issue of what could be done to solve the outstanding problems (6). The ENP should be getting much stricter scrutiny in the post-Crimea world, in which Russian propaganda bureaucrats and ISIS fundamentalists seem to be much more effective – in the short term at least – than the European Union. This puts to light the fourth untenable presumption – the presumption that the EU acts in vacuum in a world with no opposition and disagreement, while doing 'the right thing'. We argue that the ENP has to be rethought in the vein of *Realpolitik* with less reliance on questionable slogans and utterly unattainable goals.

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## 1. INTRODUCTION

The European Neighbourhood Policy's (ENP) story started with the idea of a 'Wider Europe', formulated shortly before the 2004 Eastern enlargement as the first response to the challenge of the changing geopolitical reality.<sup>1</sup> The renewed Union emerged as a leading regional actor and was keen to capitalise on this potential.<sup>2</sup> The neighbourhood changed with the Union itself, with the new neighbours lying hundreds of kilometres away from Brussels.

In dealing with the new neighbours, the EU set out to create a 'ring of friends'<sup>3</sup> to ensure stability, prosperity and peace in the neighbouring countries engaged in the process of transformation to come closer to internalising the

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<sup>1</sup> As presented in the letter (requested by GAERC) by Chris Patten and Javier Solana at an informal meeting of the Foreign Ministers in September 2002.

<sup>2</sup> Literature on the ENP is growing very fast. See, most importantly, N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Oxford: Hart 2014). See, also, R. Petrov and P. Van Elsuwege (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* (London: Routledge 2014); C. Kaunert and S. Léonard (eds.), *European Security Governance and the European Neighbourhood After the Lisbon Treaty* (London: Routledge 2013); B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (London: Routledge 2012); L. Delocour and E. Tulmets (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood* (Baden-Baden: Nomos 2008); R. Zaiotti, 'Of Friends and Fences: Europe's Neighbourhood Policy and the "Gated Community Syndrome"', 29 *European Integration* 2007, 143-162; G. Sasse, "'Conditionality-lite': The European Neighbourhood Policy and the EU's Eastern Neighbours", in N. Casarini and C. Musu (eds.), *European Foreign Policy in an Evolving International System: The Road towards Convergence* (London: Palgrave Macmillan 2007), 163-180; M. Cremona and G. Meloni (eds.), 'The European Neighbourhood Policy: A Framework for Modernisation?', 21 *EUI Working Papers* (2007), available at <<http://cadmus.eui.eu/handle/1814/6976>>; R. Balfour and A. Missiroli, 'Reassessing the European Neighbourhood Policy' 54 *EPC Issue Paper* (2007), available at <<http://bit.ly/1fFL1PO>>; J. Kelley, 'New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy', 44 *Journal of Common Market Studies* 2006, 29-55; 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', 39 *EUI Working Papers*, Law 2006; A. Magen, 'The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance', 12 *Columbia Journal of European Law* 2006, 383-427; R. Dannreuter, 'Developing the Alternative to Enlargement: The European Neighbourhood Policy' 11 *European Foreign Affairs Review* 2006, 183-201; K.E. Smith, 'The Outsiders: The European Neighbourhood Policy', 81 *4 International Affairs* 2005, 757-773; F. Attinà, Fulvio and R. Rossi (eds.), *European Neighbourhood Policy: Political, Economic and Social Issues* (Catania: University of Catania 2004).

<sup>3</sup> See Speech by José Manuel Barroso, President of the European Commission, on 'The European Union and the Emerging World Order – Perceptions and Strategies', at the 7th ECSA World Conference (Brussels, 30 November 2004), available at <[http://eu-un.europa.eu/articles/en/article\\_4099\\_en.htm](http://eu-un.europa.eu/articles/en/article_4099_en.htm)>. See also some of the key documents outlining the basics of the ENP: European Commission, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM(2003) 104 final, 4; European Commission, 'European Neighbourhood Policy: Strategy Paper', COM(2004) 373 final; European Commission, 'On Strengthening the European Neighbourhood Policy', COM(2006) 726 final; European Commission, 'A Strong European Neighbourhood Policy', COM(2007) 774 final.

goals set out in the Treaties.<sup>4</sup> While plentiful congratulatory accounts exist, EU pre-accession strategy aside,<sup>5</sup> before the inauguration of the ENP the EU has been particularly ineffective in ensuring precisely this in its immediate neighbourhood, from Srebrenica to Libya, Syria and Palestine prosperity, peace and other values cherished within the Union have been lacking.<sup>6</sup> The ENP was thus a relatively new and also a most atypical – empty rhetoric or enlargements aside – approach to EU’s neighbourhood.

This approach is deeply rooted in international law. In particular, the principle of good neighbourly relations between states in international law designates a model of interstate relations or a certain type of ties among neighbouring states, providing for peaceful coexistence, dialogue and cooperation and is based on the main principles in international law embodied in Article 2 of the UN Charter.<sup>7</sup> Article 3(5) TEU imposes an obligation on the Union to contribute to the ‘strict observance and the development of international law, including respect for the principles of the United Nations Charter’ in its relations with the wider world.<sup>8</sup> In addition, Article 21(1) TEU refers to the ‘respect for the principles of the United Nations Charter and international law’. Thus, the EU has committed to respect and to promote international law in general and the UN principle on which good neighbourly relations rests in particular in its relations with the ‘wider world’, similarly to what one would expect of individual states. New Association Agreements with the ENP countries provide, for instance, that:

[t]he respect for democratic principles, human rights and fundamental freedoms and respect for the principle of the rule of law, promotion of 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 constitute essential elements of that Agreement.<sup>9</sup>

<sup>4</sup> Most broadly conceived, the goals are reflected in Article 3 TEU and serve as a continuation and elaboration of the foundational values of Article 2 TEU.

<sup>5</sup> M. Maresceau, ‘Quelques réflexions sur l’application des principes fondamentaux dans la stratégie d’adhésion de l’UE’, in *Le droit de l’Union européenne en principes: Liber amicorum en l’honneur de Jean Raux* (Paris: LGDJ 2006), 69-97; M. Maresceau, ‘The EU Pre-accession Strategies: A Political and Legal Analysis’, in M. Maresceau and E. Lanon (eds.), *The EU’s Enlargement and Mediterranean Strategies, A Comparative Analysis* (New York: Palgrave 2001), 3-28, 18.

<sup>6</sup> A. Williams, *The Ethos of Europe* (Cambridge: CUP 2010), see, especially, Chapter 2.

<sup>7</sup> See E. Basheska, ‘The Position of the Good Neighbourliness Principle in International and EU law’, in D. Kochenov and E. Basheska (eds.), *Good Neighbourliness in the European Legal Context* (London/Boston: Martinus Nijhoff 2015), 24-56. See also Iftene Pop, *Components of Good Neighbourliness Between States – Its Specific Legal Contents – Some Considerations Concerning the Reports of the Sub-Committee on Good-Neighbourliness Created by the Legal Committee of the General-Assembly of the United Nations* (Bucharest: Editura R.A.I. 1991); and Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter, UNGA Res 2625 (XXV), 24 October 1970.

<sup>8</sup> For a meticulous analysis of the EU’s objectives related to the shaping of the international order, see, J. Larik, ‘Shaping the International Order as an EU Objective’, in D. Kochenov and F. Amtenbrink (eds.), *European Union’s Shaping of the International Legal Order* (Cambridge: CUP 2013), 62-86.

<sup>9</sup> E.g. Article 2 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ [2004] L 161/3, 29.5.2014.

Rhetoric and good intentions aside, the EU's aim to establish good relations with its neighbours through an attempt to bring about change is highly problematic, both when approached through the point of view of its legal-political organisation, and when assessed against the aims it was supposed to reach, opening the Pandora's box of questions with regard to the EU's future engagement with the neighbourhood. The truth is, it seems, that conditionality is poorly suited for the promotion of values – especially when such a promotion, as in the case of the ENP, is based on a presumption of commonly shared values between the EU and its partners: a presumption, which does not find any support in reality. Worse still, in the post-Crimea context of growing hostility in Europe, the ENP seems to be failing not only in terms of legal instruments and starting assumptions, but also at the diplomatic level: EU's incentives for transformation fade away in the context of Russia's bullying tactic, as the EU is having difficulties with offering support and protection to those ENP partners, which choose to adhere to the values it preaches. The ineffective strategy designed for a vacuum world where the EU is the only actor is even more difficult to implement in a reality which is infinitely more complex and hostile than what Brussels has traditionally been ready to admit.<sup>10</sup>

Analysing some key drawbacks, this paper scrutinises the evolution of some key EU instruments, principles, assumptions and approaches, deployed with an eye to bringing about a 'ring of friends' in the Union's neighbourhood, focusing, chiefly, on the key element of the whole edifice – which is the principle of conditionality. This is done only to find that conditionality – a principle inherited by the EU from the pre-accession context, where it has not worked well<sup>11</sup> – is poorly suited for the promotion of values (democracy, the Rule of Law, and other fundamental aspects of importance for the EU's ENP agenda), as opposed to the promotion of the concrete rules – the *acquis*.<sup>12</sup> The elephant in the room in the context of the ENP is, obviously, Russia, which did not only reject the EU's offer to join the ENP,<sup>13</sup> but is also strongly opposed to the EU's efforts to 'Europeanise' its neighbourhood. Yet, EU-Russia relations<sup>14</sup> have an essentially

<sup>10</sup> It is important to take into account, in this context, that scholars have discovered a powerful promotion of individual interests behind the EU's altruistic claims: the EU emerges as an actor in international relations, which is akin to any other. See, for a vivid example, A. Boute, 'The EU's Shaping of International Law on Energy Efficiency', in D. Kochenov and F. Amtenbrink (eds.), *EU's Shaping of the International Legal Order* (Cambridge: CUP 2013), 238-260.

<sup>11</sup> D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan den Rijn: Kluwer Law International 2008).

<sup>12</sup> For more on this distinction, see D. Kochenov, 'The Issue of Values', in Petrov and Van Elsuwege *supra* note 2, 46–62.

<sup>13</sup> Which ultimately resulted in the creation of the 'Four Spaces': first outlined at the EU–Russia St. Petersburg Summit in May 2003 (Joint Statement of the Summit available at <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/er/75969.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/75969.pdf)>, and later articulated at the EU–Russia Moscow Summit of May 2005 taking the shape of Four Road Maps, available at <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/er/84815.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/84815.pdf)>.

<sup>14</sup> P. Kalinichenko, 'Some Legal Issues of the EU-Russia Relations in the Post-Crimea Era: From Good Neighbourliness to Crisis and Back?', in D. Kochenov and E. Basheska, *supra* note 7, 334-353.

important bearing on the success of the EU's ENP efforts, no matter how well the legal instruments behind the ENP are being designed.

Any discussion of the ENP's legal framework without constantly having this consideration in mind would thus be futile and unhelpful, as the Russia-sponsored insurgency coupled with the occupation of part of Ukraine,<sup>15</sup> constant pressure on Moldova<sup>16</sup> and the *de facto* withdrawal of Armenia from the further steps of the ENP process<sup>17</sup> clearly testify. Turning to the Mediterranean dimension of the ENP, a similarly sad picture emerges: with the rise of the Islamic State and instability in the whole region some of the ENP partners *de facto* do not exist anymore as sovereign states with a functioning government enjoying control of their territory. War, terrorist attacks and the destruction of effective statehood caused large flows of migrants embarking towards EU borders – a problem which the EU has been remarkably incapable of dealing with.<sup>18</sup> The ENP – as an initiative aimed at projecting the EU's influence to the neighbourhood – has failed entirely: the neighbourhood is much worse off now than it was when the ENP was inaugurated. Make no mistake: blaming the ENP for the failure of the neighbours would be an overstatement. However, a failure of EU's diplomacy and a complete lack of capacity to assess the risks that the ENP would encounter make it legitimate to put at least part of the blame on the EU's actions, which scholars and policy-makers are bound to recognise and assess critically.

Approached against this context of an all-around deterioration of the situation of the EU's neighbourhood, the design problems undermining the ENP's likely effectiveness this paper embarks to discuss are somewhat dwarfed by *Realpolitik*. Yet, such problems still deserve serious consideration since they demonstrate that the ENP was most unlikely to deliver even in an ideal international relations climate. We look at the objective of the 'ring of friends' (2) and then focus on the three key presumptions underlying the deployment of the

<sup>15</sup> See J. Green, 'Editorial Comment. The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited', 1 *Journal on the Use of Force and International Law* 2014, 3-10; See also: E. Milano, 'The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question', 1 *QIL Zoom Out* 2014, 35-55; A. Tancredi, 'The Russian Annexation of the Crimea: Questions Relating to the Use of Force', 1 *QIL Zoom Out* 2014, 5-34. Cf. R. Müllersson, 'Ukraine: Victim of Geopolitics', 13 *Chinese Journal of International Law* 2014, 133-145.

<sup>16</sup> See e.g. P. Fogarty, 'Riding Three Horses: Moldova's Enduring Identity as a Strategy for Survival', in K. Engelbrekt and B. Nygren (eds.), *Russia and Europe: Building Bridges, Digging Trenches* (London/New York: Routledge 2010), 230-248.

<sup>17</sup> See N. Ghazaryan, *supra* note 2, Post-scriptum. The Treaty aiming for Armenia's accession to the Eurasian Economic Union was signed on 9 October 2014 and entered into force on 2 January 2015, available at <<http://www.customs-code.ru/pravovbaza/18429-dogovor-arm>>.

<sup>18</sup> See, in this respect, E. Basheska and D. Kochenov, 'EuroMed, Migration and Frenemyship: Pretending to Deepen Cooperation across the Mediterranean', in F. Ippolito and S. Trevisanut (eds.), *Migration in Mare Nostrum: Mechanisms of International Co-operation* (Cambridge: CUP 2016), 41-65; See also: S. Wolff, *The Mediterranean Dimension of the European Union's Internal Security* (New York: Palgrave MacMillan 2012); M. Ceccorulli and N. Labanca (eds.), *The EU, Migration and the Politics of Administrative Detention* (London/New York: Routledge 2014); A. Triandafyllidou and T. Maroukis, *Migrant Smuggling: Irregular Migration from Asia and Africa to Europe* (Basingstoke/New York: Palgrave Macmillan 2012).

principle of conditionality in the context of the ENP: the presumption of shared values (3); the presumption of effectiveness of the value based conditionality (4); the presumption of the sufficient incentives (5); – all the three untenable, we argue – only to address the issue of what could be done to solve the outstanding problems (6). The ENP should be getting much stricter scrutiny in the post-Crimea world, when the fourth untenable presumption – the presumption that the EU acts in vacuum in a world with no opposition and disagreement, while doing ‘the right thing’ – has been undermined so resoundingly.

## 2. ARTICLE 8 TEU AND THE ‘RING OF FRIENDS’

Article 8(1) TEU provides that good neighbourliness is based on the foundational values of the Union. In particular, ‘[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’.<sup>19</sup> As noted by Hillion, the use of the phrase ‘shall’ stipulates an obligation for the EU to engage with its neighbourhood in the above described way.<sup>20</sup> Yet, several issues come to mind when reading this provision.

First, the substance of the ‘special relationship[s]’ referred to in the first paragraph is not clear.<sup>21</sup> Similar wording can be found for the association agreements based on Article 217 TFEU, which are said to be ‘creating special, privileged links’ between the Union and non-member countries. The doubt arises as to the ambiguity of an association which can ‘[range] from little more than a free trade agreement to a level of integration that comes close to membership.’<sup>22</sup> Closely resembling Article 217 TFEU, agreements based on Article 8 TEU can cover all the EU’s competences,<sup>23</sup> and a procedural basis can be found in Article 218 TFEU.<sup>24</sup>

Another question is raised by the countries affected by Article 8 TEU. Pointing to the relations between the EU and its neighbours, the provision in question has been primarily associated with the ENP countries, which not only include immediate neighbours, but also states from the wider surroundings.<sup>25</sup> Some

<sup>19</sup> Article 8(1) TEU.

<sup>20</sup> C. Hillion, ‘Anatomy of EU Norm Export towards the Neighbourhood’, in R. Petrov and P. Van Elsuwege, *supra* note 2, 13-20, at 16.

<sup>21</sup> Article 8(1) refers to ‘a special relationship’, while other versions of the Treaty, for instance the German and the French version, use the plural form referring to ‘besondere Beziehungen’ and ‘des relations privilégiées’ respectively.

<sup>22</sup> P. Van Elsuwege, *From Soviet Republics to EU Member States: A Legal and Political Assessment of the Baltic States’ Accession to the EU* (Leiden/Boston: Martinus Nijhoff 2008), at 131.

<sup>23</sup> In ECJ, Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 9, the ECJ held that Article 217 TFEU (then Article 238 EC Treaty), ‘must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty’.

<sup>24</sup> M. Cremona, ‘The Two (or Three) Treaty Solution: The New Treaty Structure of the EU’, in A. Bjondi and P. Eeckhout (eds.), *EU Law after Lisbon* (Oxford: OUP 2012), 40-61, at 46.

<sup>25</sup> Armenia and Azerbaijan, for instance, participate in the ENP although not being immediate neighbours of the EU. See in this respect: European Commission, ‘European Neighbourhood

scholars go as far as to suggest that the new article codifies the ENP and confers a constitutional status to the relationship between the Union and its neighbours.<sup>26</sup> In any event, countries outside the ENP have not been explicitly excluded from the scope of application of Article 8 TEU. This leaves space for broader interpretation of this provision to also cover other nearby countries such as the European microstates, EEA states, Switzerland and Russia.<sup>27</sup> It has been suggested, however, that the context of relations with the European states enjoying clear prospects of membership would exclude the application of this provision.<sup>28</sup> This can be inferred from the purpose of the agreements concluded under Article 8(2) TEU, which merely aim to establish ‘an area of prosperity and good neighbourliness’, rather than to bring non-EU states closer to membership.<sup>29</sup>

Finally, Article 8 TEU suggests that EU views good neighbourliness through the prism of its own values, *i.e.* as being founded on:

‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities [which] are common to the Member States in a society in which pluralism, non-discrimination, justice, solidarity and equality between women and men prevail.’<sup>30</sup>

It goes without saying that EU values are far from unique.<sup>31</sup> In general, they coincide with the fundamental values essential to international relations established by the United Nations Millennium Declaration.<sup>32</sup> The crucial question that

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Policy Strategy Paper’, COM(2004) 373 final, 10–11.

<sup>26</sup> E.g. R. Schütze, *European Constitutional Law* (Cambridge: CUP 2012), at 190; D. Hanf, ‘The European Neighbourhood Policy in the Light of the New “Neighbourhood Clause” (Article 8 TEU)’, in E. Lannon (ed.) *The European Neighbourhood Policy’s Challenges* (Brussels: P.I.E. Peter Lang 2012), 109–123.

<sup>27</sup> Such an understanding is also implied by the Declaration on Article 8 TEU annexed to the Lisbon Treaty, which does not exclude non-ENP states but stipulates that ‘the Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it’ (Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon OJ [2008] C 115/337, 09 May 2008).

<sup>28</sup> Some scholars go even further, arguing that Article 8 TEU was introduced to distinguish between countries with accession prospects and states without them. See in this respect P. Van Elsuwege and R. Petrov, ‘Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?’, 36 5 *EL Rev* 2011, 688–703, at 693, noting that the provision confirms the ‘disconnection between ENP and enlargement’ through its objectives. See also P. P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Oxford: OUP, 5th edition, 2011), at 324.

<sup>29</sup> See P. Van Elsuwege and E. Petrov, *supra* note 28, at 693.

<sup>30</sup> Article 2 TEU.

<sup>31</sup> See e.g. P. Leino and E. Petrov, ‘Between “Common Values” and Competing Universals—The Promotion of the EU’s Common Values through the European Neighbourhood Policy’, 15 5 *ELJ* 2009, 654–671.

<sup>32</sup> The fundamental values essential to international relations in the twenty-first century were highlighted in the United Nations Millennium Declaration, UNGA Res 55/2 [2003] A/Res/55L.2, 8 September 2000. These include: ‘a) Freedom (meaning that) men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights; b) Equality (meaning that) no individual and no nation must be denied



arises, however, is whether all partners in the ENP process equally respect and are committed to the promotion of these values<sup>33</sup> and whether they are rewarded accordingly.

Crucially, although neither Article 8 TEU, nor any other relevant provision in the Treaties actually makes a direct reference to the principle of conditionality as the driving force of achieving the 'ring of friends', conditionality has emerged as the corner-stone of the ENP edifice. Partly a pre-accession implant,<sup>34</sup> partly a nod in the direction of management and governance approaches to regulation, the principle, like the basis of the ancient world, stands on three pillars of groundless assumptions: a) that the proclaimed values of Article 8 TEU – as also reflected in other Treaty instruments – are shared between the EU and partners; b) that improved adherence to these values can be achieved even in the context of autocratic regimes, or countries which are radically different, in essence, from the EU Member States; c) that it only takes to provide sufficient incentives of a 'stake in the internal market' or Deep Free Trade Agreements (DFTAs) to ensure compliance with the values the EU is seeking to promote. All the three will be addressed further one by one with yet another failed presumption in mind: that the EU is the only actor in an empty world, where opposition to its external policies is unlikely.

### 3. THE PRESUMPTION OF SHARED VALUES

Essentially, the ENP is largely aimed at uniting the efforts of the EU and the ENP partners to create an area of peace and prosperity surrounding the Union that will benefit all. One cannot help but wonder what could play the role of common ground to bridge many a world the ENP is concerned with. The numerous countries on the list of ENP partners are not just different; the differences between them seem at times to be absolute. Consequently, the Commission chose to play the old card of 'values'. It had been submitted – and optimistically

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the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured; c) Solidarity (meaning that) global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most; d) Tolerance (meaning that) human beings must respect one other, in all their diversity of belief, culture and language. Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted; e) Respect for nature (meaning that) prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development [...]; f) Shared responsibility (meaning that) responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role'.

<sup>33</sup> This, quite importantly includes the EU's own Member States, and here the deviations are far from uncommon: J.-W. Müller, 'Should the EU Protect Democracy and the Rule of Law Inside the Member States?', 21 2 *ELJ* 2015, 141-160; C. Closa and D. Kochenov (eds.), *Reinforcement of the Rule of Law Oversight in the European Union* (Cambridge: CUP 2015).

<sup>34</sup> A. Magen, *supra* note 2; D. Kochenov, 'The ENP Conditionality: Pre-accession Mistakes Repeated', in L. Delcourt and E. Tulmets, *supra* note 2, 105-120.

or reluctantly accepted by the partners – that they share with the EU some values of significant importance.<sup>35</sup> The values approach was deemed to soften the perceived differences between the participants of the ENP and make the move, together, towards certain goals possible. In practice, this amounts to making the application of conditionality possible, as the shared values provide the starting ground for common engagement: in order to participate in the policy, the ENP partners were supposed to subscribe to the values of the Union, which are ‘common to the Member States’.<sup>36</sup>

The prescribed values, including, *inter alia*, democracy, the protection of human rights, the free market economy and the Rule of Law, are virtually identical to the Copenhagen political criteria applied in the course of the preparation of the Eastern enlargement and are also rooted in the text of Article 2 TEU and the constitutional traditions of the Member States.<sup>37</sup> It is here, in the terrain of values, where a serious drawback in the design of the ENP arises. This is related to the extent that the Union can project its values on the partners.

This paper is not an argument against universalism, especially given that at the purely rhetorical level all states would subscribe to the values outlined. However, the fact that the absolute majority of the ENP partner countries are in fact co-operating with the EU under the auspices of these values – excluding those not actively participating, of course, like Belarus<sup>38</sup> – speaks for the fact that these countries are viewed by the EU as ultimately adhering to these values. Is it so in practice? Doubts can be plentiful. It seems unreasonable to dismiss such doubts as unjustified: the meaning of the Rule of Law, democracy and the protection of human rights in most ENP countries is clearly not to be compared with that in, say, Finland or Spain. Ongoing conflicts aside, the concerns in this respect are numerous. As noted in the most recent Communication on the implementation of the ENP:

‘In Egypt, the space for debate in general – and activities by CSOs in particular – was narrowed through enhanced controls. The democratisation and human rights environment in Azerbaijan worsened over the past year (...) In Belarus, the lack of progress on human rights, the rule of law and democratic principles persisted. Political developments in Israel and Palestine were significantly influenced by the re-

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<sup>35</sup> The Commission formulated these in the following way: ‘the Union is founded on the values of respect of human dignity, liberty, democracy, equality, the Rule of Law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination. The Union’s aim is to promote peace, its values and the well-being of its peoples’, COM(2004) 373 final, 7. The earlier formulation of the list of values on which the policy is based, which is contained in fn. 2 to the Commission’s Communication on Wider Europe (COM(2003) 104 final) was slightly different and included ‘democracy, respect for human rights and the rule of law, as set out within the EU in the Charter of Fundamental Rights’.

<sup>36</sup> Art. 8(1) TEU, emphasis added.

<sup>37</sup> For analysis see C. Hillion, ‘The Copenhagen Criteria and Their Progeny’, in C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford: Hart 2004), 1-22, at 19; D. Kochenov, ‘Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law’, 8 *EloP* 2004, 1-34, at 10.

<sup>38</sup> This is despite the various EU engagements in the country. For more details of EU’s engagement in Belarus see e.g. European Commission, Memo: ENP Package – Belarus, available at <[http://europa.eu/rapid/press-release\\_MEMO-14-222\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-222_en.htm)>.



gional situation, a more conflictual political atmosphere, and hostilities in Gaza. (In respect to) Israel (...) there were concerns in 2014 as regards the protection of minority rights, including of Bedouins. In Palestine, key legislation on democratic structures, such as legislation outlining the responsibilities of judicial institutions, still needs to be adopted. Concerns about the respect for human rights remained to be addressed, in particular with regard to the death sentence: it continued to be carried out in Gaza by the *de facto* authorities and executions were resumed in Egypt and Jordan after moratoria had applied in both countries in the years before.<sup>39</sup>

This demonstrates how infinitely low the threshold of 'adherence' is. Once it has been agreed that values are the common ground on which the policy is built, the dangers related to the discovery that they are not actually adhered to, or even exist, has critical implications for a policy such as the ENP. Connected to the issue of values are the interests that the partners presumably want to pursue together. The presumption of common values thus not only makes the building of the ENP possible, but also affects the expectations of the EU and the ENP partners, trying to respond to the shared problems related to common interests, thus potentially presenting the absence of values in an even more dangerous light. The point that values should ideally be shared also *de facto*, not only *de jure*, at the level of proclamations, is not a merely rhetorical one: the principle of conditionality, seemingly functioning fine in the context of exporting concrete rules, i.e. in the contexts where the issue of adherence to the values does not arise, is most unworkable in the context of value-export, as will be demonstrated below. The presumption of shared values, thus, opens the doors to the application of conditionality outside of the realm of its effectiveness, threatening to bring about wasted efforts and rampant non-compliance.

#### 4. THE PRESUMPTION OF EFFECTIVENESS OF VALUE-BASED CONDITIONALITY

It is clear that notwithstanding the fact that all the active partners subscribe to the values of the Union, the only way for the Union to make sure that they actually play an important role on the other side of the EU external border is to regularly monitor the ENP partners' movement towards the realities which these values embody, and to provide the partners with positive incentives for change to ensure that the values are actually embraced. Moreover, those unable or unwilling to move in the stated direction should face the negative consequences of such an unfortunate policy choice. This is, essentially, the core of the idea of conditionality espoused by the Commission in the course of the Eastern enlargement preparation.<sup>40</sup> In the Eastern enlargement context the EU was faced with a similar task, albeit in a more potentially dangerous form:

<sup>39</sup> Joint Communication to the European Parliament, the Council, the European Economic and Social

Committee and the Committee of the Regions, JOIN(2015) 9 final, 5.

<sup>40</sup> For a criticism, see, D. Kochenov, 'Overestimating Conditionality', in Inge Govaere et al. (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden/Boston: Martinus Nijhoff 2014), 541-556.

instead of simply seeking to be surrounded by friends (amid the growing fears of the 'other' beyond the external EU border<sup>41</sup>), the EU had to make sure that in terms of membership accession, going to 'bed with bad guys'<sup>42</sup> would not be the culmination of its Eastern enlargement efforts. The warnings sounded by one of us elsewhere with regard to the failure of conditionality in the pre-accession context<sup>43</sup> seem to have materialised: liberal democratic constitutionalism in a number of the Member States which used to be subject to the pre-accession scrutiny by the Union is experiencing a worrisome melt-down.<sup>44</sup> Klabbers' 'bad guys' are in our bed and it is most unclear what to do with them.<sup>45</sup>

Is value-based conditionality functioning in the ENP context? If the ENP partners are actually reluctant to pursue democratisation and adhere to the values outlined by the EU, the incentives on offer should be substantial enough in order to compensate for the obvious losses to be suffered by the elites in the countries in question, and rewarding of partners must reflect their genuine complying efforts. Practically, it is difficult, if not impossible, to imagine how substantial such incentives should be in order to incite regime change in Belarus or effective protection of human rights in Egypt, for instance. Thus, viewed from a purely practical perspective, the idea of conditionality as entrenched in the ENP can hardly promote the EU values in all ENP countries.

Quite the contrary, the ENP might have become a vehicle for promoting EU's 'hard interests' in its tough neighbourhood rather than a value oriented framework driven by EU's 'soft power'.<sup>46</sup> To agree with Brummer, '[w]hen security and welfare interests are at stake, the EU refrains from adopting sanc-

<sup>41</sup> A. Magen, *supra* note 2, 383, 398 (calling the fear of the neighbours one of the main motivations behind the formulation of the policy).

<sup>42</sup> J. Klabbers, 'On Babies, Bathwater and the Three Musketeers, or the Beginning of the End of European Integration', in V. Heiskanen and K. Kulovesi (eds.), *Function and Future of European Law* (Helsinki: Publications of the Faculty of Law, University of Helsinki 1999).

<sup>43</sup> D. Kochenov, *supra* note 11.

<sup>44</sup> J.-W. Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of the International Legal Order', 3 *Transatlantic Academy Paper Series* 2012-2013. See, also, A. von Bogdandy and P. Sonnevend, *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015); M. Bánkuti, G. Halmai, and K.L. Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution', 23 *Journal of Democracy* 2012, 138-146. See, also, R. Uitz, 'Can You Tell When and Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', 13 *IJCL* 2015, 279-300. V. Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis', 13 *IJCL* 2015, 246-278; M.A. Vachudova, 'Why Improve EU Oversight of the Rule of Law? The Two-Headed Problem of Defending Liberal Democracy and Fighting Corruption', in C. Closa and D. Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: CUP, 2015), forthcoming, (analysing the situation in the Czech Republic).

<sup>45</sup> For an inventory of means, see, C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union', *EUI Working Papers*, RSCAS 2014/2105; Jan-Werner Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States', *Revista de Estudios Políticos* 2014, 141-162.

<sup>46</sup> The term 'soft power' is borrowed from J.S. Nye, *Soft Power: The Means To Success In World Politics* (New York: Public Affairs 2004), at 86, and designates an 'ability to achieve goals through attraction rather than coercion. It works by convincing others to follow or getting them to agree to norms and institutions that produce the desired behavior'. See also E. Lazarou, M. Gianniou and G. Tsouropas, 'The Limits of Norm Promotion: The EU in Egypt and Israel/Palestine', 15 2 *Insight Turkey* 2013, 171-193.

tions. Conversely, sanctions are only imposed when they entail little cost for the Member States'.<sup>47</sup> The EU leans instead towards a more flexible approach to secure its interests, even if such leaning means establishing and furthering cooperation with authoritarian regimes.<sup>48</sup> The authorization for and the start of the negotiations of Visa Facilitation and Readmission Agreements with Belarus 'driven by the desire to fill in a gap and conclude a readmission agreement with the only Eastern partner that has not opened negotiations with the EU in this respect';<sup>49</sup> the maintaining of negotiations with Egypt 'even at a time of a country's serious internal political de-liberalization',<sup>50</sup> or the tacit approval of the violations of human rights by Israel testify to the above.<sup>51</sup>

Here a theoretical distinction made by Tocci, differentiating between 'willing' and 'reluctant' partners, becomes operational.<sup>52</sup> While countries like Moldova or Georgia might willingly embrace the values that the EU expects them to subscribe to in the context of the ENP, other states, such as Egypt or Tunisia, for instance, are rather outside the reach of conditionality policies. Following on from the argument of Magen,<sup>53</sup> Tocci is absolutely right in stating that:

'If democratisation and human rights call for a redistribution of powers, the legal and institutional installation and protection of rights and the enhancement of political participation, it is unclear how EU relations with states whose entire modus operandi often negate these developments, can meaningfully promote these values.'<sup>54</sup>

The value-based conditionality is thus non-operational in relations with reluctant ENP partners. This can be clearly demonstrated analytically at a purely theoretical level. In this context, the question about the likely success of conditionality in the EU's relations with the 'willing' ENP partner states naturally arises. While functional in theory, analogy with the application of value-based conditionality by the EU outside of the ENP setting demonstrates quite clearly that, in the case of the willing partners, conditionality is also unlikely to be highly successful. Having failed in the pre-accession,<sup>55</sup> where the candidate countries were overwhelmingly determined to join the Union and could thus be expected to co-operate with the EU in the most wholehearted manner, when transplanted

<sup>47</sup> K. Brummer, 'Imposing Sanctions: The Not So "Normative Power Europe"', 14 2 *European Foreign Affairs Review* 2009, 191-207, at 193. The picture is not the same outside of the context of the ENP, where sanctions against Russia following the occupation of Crimea and the support of the militants in Eastern Ukraine met a strong response from the Union. For the step-by-step evolution of the sanctions regime, see, P. Kalinichenko, *supra* note 14.

<sup>48</sup> E. Lazarou, M. Gianniou and G. Tsoouropas, *supra* note 46.

<sup>49</sup> Laure Delcour, 'The European Union: Shaping Migration Patterns in its Neighbourhood and Beyond?', in D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the Legal International Order* (Cambridge: CUP 2013), 261-282, 272.

<sup>50</sup> E. Lazarou, M. Gianniou and G. Tsoouropas, *supra* note 46, at 180.

<sup>51</sup> *Ibid.*, 182 et seq.

<sup>52</sup> N. Tocci, 'Can the EU Promote Democracy and Human Rights through the ENP? The Case for Refocusing on the Rule of Law', in M. Cremona and Meloni, *supra* note 2, 23-35, 26-32.

<sup>53</sup> A. Magen, *supra* note 2, at 383, 418, 419.

<sup>54</sup> Tocci, *supra* note 52, 23, 29.

<sup>55</sup> For a compelling analysis see Kochenov, *supra* note 11.

into the ENP setting where the incentives at stake are much more modest,<sup>56</sup> it seems that value-based conditionality cannot possibly deliver any of the meaningful results expected of it.<sup>57</sup> Such transplantation has only resulted in a “shadow of enlargement,” containing diluted versions of enlargement methodologies applied reflexively by the Commission to the new policy context, with little evidence of regard for their appropriateness’.<sup>58</sup> In the words of Cremona and Hillion:

‘Transplanting pre-accession routines into a policy otherwise conceived as an alternative to accession and intended to enhance the security of the Union, may [...] undermine both its current effectiveness and its longer-term viability, if not its rationale.’<sup>59</sup>

Potentially, however, there are no conceptual considerations that would prove the inoperability of conditionality in such a setting – in sharp contrast with the EU’s relations with the ‘reluctant’ partners. Conditionality can govern the relations with the ‘willing’ partners. This is only possible if the mistakes made by the Commission in the course of the pre-accession application of conditionality are remedied before the transplantation of value-based conditionality regulation into the ENP context.<sup>60</sup>

## 5. THE PRESUMPTION OF SUFFICIENT INCENTIVES

The ENP is a clear attempt of the EU to postpone the discussion of the *finalités géographiques* of integration to some unknown time in the future.<sup>61</sup> In this way the ENP, at least when applied to East European partners, is very similar to the initial ideology behind the EEA,<sup>62</sup> as well as the initial approach to Eastern Europe preceding the 1993 Copenhagen European Council,<sup>63</sup> and the

<sup>56</sup> J. Kelley, *supra* note 2, 32. See also Zaiotti, *supra* note 2, 151; 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. Meloni, *supra* note 2, 97-111.

<sup>57</sup> For analysis of value-based conditionality in the ENP context as applied also to the ‘willing’ partners see D. Kochenov, ‘The ENP Conditionality: Pre-Accession Mistakes Repeated’, in L. Delocour and E. Tulmets, *supra* note 2, at 105.

<sup>58</sup> A. Magen, *supra* note 2, at 390.

<sup>59</sup> M. Cremona and C. Hillion, *supra* note 2, at 26.

<sup>60</sup> D. Kochenov, *supra* note 11, at 119.

<sup>61</sup> As initially stated by the European Commission, COM(2003) 104 final, 5, [emphasis added]: ‘[t]he aim of the new Neighbourhood Policy is [...] to provide a framework for the development of a new relationship which would not, in the medium-term, include a perspective of membership or a role in the Union’s institutions’.

<sup>62</sup> K.E. Smith, *supra* note 2, at 757, 761.

<sup>63</sup> For a concise history of Central and Eastern European countries – EEC relations see K.E. Smith, *The Making of EU Foreign Policy: The Case of Eastern Europe* (London: 2nd edn, Palgrave Macmillan 2004); F. de la Serre, ‘A la recherche d’une Ostpolitik’, in F. de la Serre, C. Lequesne and J. Rupnik (eds.), *L’Union européenne: ouverture à l’Est?* (Paris: PUF 1994).

subsequent pre-accession reorientation of the Europe Agreements.<sup>64</sup> While in the pre-accession process full membership was on offer, the ultimate prize in the ENP race is the participation in the Neighbourhood Economic Community (NEC), or some watered-down analogies of such.

The ENP is thus entirely decoupled from the eventual accession prospects of the partner countries and is implemented, in the words of the Commission, 'without prejudging how [the partners'] relationship with the EU may develop in the future'.<sup>65</sup> While it is probably not so important for the ENP partners to the South of the Mediterranean, this is bad news for the East European partners and the countries in the Caucasus, since membership of the EU is among their foreign policy priorities. A very positive element of the ENP in this context is the policy of vagueness.<sup>66</sup> While not coupled with the eventual possibility to give accession prospects in the future to those partners who are interested and meet the necessary requirements of Article 49 EU,<sup>67</sup> it does not mean the closure of the Union's gates to those countries seeking to join. Consequently, good performance in the context of the ENP can be viewed in those countries as the first of a number of steps on the way towards future accession of the Union. This has certainly been the case in Ukraine, Moldova, and Georgia, three of the most active ENP partner states.<sup>68</sup>

Smaller incentives aside, the jewel in the crown of incentives employed by the Commission in the context of the ENP is the prospective NEC. According to the Commission,

'The Neighbourhood Economic Community would boost trade further among ENP partners via the elimination of both tariffs and non-tariff barriers and by establishing a minimum base for common behind-the-border rules, thereby creating a common regulatory space. This would expand the size of the Common Market, stimulate growth of the ENP partners, and boost productivity through a better exploitation of economies of scale.'<sup>69</sup>

<sup>64</sup> K. Inglis, 'The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation', 37 5 *CML Rev* 2000, 1173-1210.

<sup>65</sup> COM(2006) 726 final. Some Member States were severely opposed to such decoupling. Particularly Poland argued for the necessity of making a link between the neighbourhood policy and an EU membership perspective: P. Kratochvíl, 'New EU Members and the ENP: Different Agendas, Different Strategies', contribution to the forum 'The Neighbourhood Policy of the European Union', *Intereconomics* 2007, 191-196, 193.

<sup>66</sup> It is a positive development, in this respect, that the Commission's Communication on the 'enlargement capacity' does not embrace any strict approach to the EU's future borders. See European Commission, 'Enlargement Strategy and Main Challenges 2006–2007', COM(2006) 649 final.

<sup>67</sup> D. Kochenov, *supra* note 11, Chapter 1.

<sup>68</sup> Joint Communication to the European Parliament, the Council, the European Economic and Social

Committee and the Committee of the Regions, JOIN(2015) 9 final, 2.

<sup>69</sup> European Commission, Non-Paper Expanding on the Proposals Contained in the Communication to the European Parliament and the Council on 'Strengthening the ENP' – COM(2006) 726 final of 4 December 2006, at 7.

Besides the conditional formulation of this blurred perspective, it is also known from the Commission's documents that the creation of such an economic community will depend on the "partners" willingness to integrate further',<sup>70</sup> which means that both the EU and the ENP partners will have to ascertain their willingness to move in this direction in the future. Ultimately, it means that the NEC is not a real incentive for the partners to continue on the path of the ENP.

Unlike the blurred nature and doubtful attractiveness of the initial promises involving the NEC and a 'stake in the Common Market', the new generation of agreements to be concluded between the EU and those ENP partners, which respect and successfully implement the priorities set out in the Action Plans, seems to have the potential to become a viable attraction tool. Content-wise, the new agreements are, in the words of the Commission, 'tailor-made deep and comprehensive free trade agreements (DFTAs), including measures to reduce non-tariff barriers through regulatory convergence'<sup>71</sup> and 'cover substantially all trade in goods and services between the [EU] and the ENP partner as well as strong legally-binding provisions on the implementation of trade and economic regulatory issues'.<sup>72</sup> Three such agreements, i.e. Association Agreements, including Deep and Comprehensive Free Trade Areas (DCFTAs), were signed in 2014 with Georgia, Moldova and Ukraine,<sup>73</sup> representing 'ENP's core achievements and (...) a milestone in the EU's relations with some of its closest partners, upgrading these ties to a significantly higher level'.<sup>74</sup>

The then President of the European Commission, José Manuel Barroso, described the Association Agreements, which Georgia, Moldova and Ukraine signed with the EU as 'the most ambitious document the European Union has entered into so far'.<sup>75</sup> Clearly, partners see these agreements as a step towards membership. Thus, the optimism and active participation of the partner countries signing the agreements can be explained by a reference to their future membership aspirations, rather than by the success of the existing ENP framework and attractiveness of its incentives. For instance, Georgia's Prime Minister, Irakli Garibashvili, stated the following on the day of signing the Association Agreement: 'Unofficially we applied for EU membership today; officially, it depends on the progress that we will make, but I can guarantee you that we will

<sup>70</sup> Ibid., at 8.

<sup>71</sup> COM(2007) 774 final, at 4.

<sup>72</sup> Ibid. For broader analysis of the new agreements, see G. Van der Loo, P. Van Elsuwege and R. Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument', 9 *EUI Working Papers* 2014.

<sup>73</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, *OJ* [2014] L 261/4, 30.8.2014; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, *OJ* [2014] L 260/4, 30.8.2014; Association Agreement between the European Union and its Member States, of the one part, and the Republic of Ukraine, of the other part, *OJ* [2014] L 161/3, 29.5.2014.

<sup>74</sup> Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, JOIN(2015) 9 final, at 9.

<sup>75</sup> See 'Association Agreement "most ambitious" deal for EU', available at <<http://agenda.ge/news/16836/eng>>.



do our best to meet all of the requirements of the European Union'.<sup>76</sup> Similarly, the Ukrainian President, Petro Poroshenko stated: 'We are ambitious in our plans and our belief, and that's why we declare that within five years we will provide effective implementation of the [EU] association agreement and meet conditions required to apply for membership in the European Union'.<sup>77</sup> These expectations were not particularly welcomed in the EU. As the President of the European Parliament, Martin Schulz, noted most recently, the EU is 'facing a different problem today (...) to stabilize the country politically, economically, socially. With a stabilized Ukraine, [there is] a chance to gain stability for the region as a whole'.<sup>78</sup>

The agreements enter fully into force after their approval by the European Parliament and their ratification by the EU Member States and the partner country, although large parts can come into force provisionally at an earlier date. The progress of the three countries which have signed these agreements is different, with the implementation of DCFTA being delayed for Ukraine until 31 December 2015 upon a request of Russia,<sup>79</sup> which largely interfered in its neighbour's policy preferences.

The conclusion of an Association Agreement means, first of all, that these are legally binding agreements, and have the potential to have direct effect.<sup>80</sup> In other words, the ENP framework, knowing only the European Neighbourhood Instrument (ENI<sup>81</sup>) and its predecessor, European Neighbourhood Partnership Instrument (ENPI<sup>82</sup>), as purely legal instruments by now besides the foundational bilateral agreements, is moving more and more towards a legal framing of the policy. This means less 'soft law' and more clarity regarding the actual benefits offered to the ENP partners and better articulated rules of compliance.<sup>83</sup> The new agreements will mean a lot for the ENP, since they, unlike all the

<sup>76</sup> See 'Georgia, EU Sign Association Agreement', available at <[http://www.civil.ge/eng/\\_print.php?id=27417](http://www.civil.ge/eng/_print.php?id=27417)>.

<sup>77</sup> 'Poroshenko: Ukraine Will Be Ready to Join EU Within 5 Years' *VOA News* (27 April 2015), available at <<http://www.voanews.com/content/poroshenko-ukraine-europan-union-five-years/2736534.html>>.

<sup>78</sup> 'Schulz: Ukraine's EU membership bid too early to be discussed' *UNIAN Information Agency* (6 July 2015), available at <<http://www.unian.info/politics/1097308-schulz-ukraines-eu-membership-bid-too-early-to-be-discussed.html>>.

<sup>79</sup> Joint Ministerial Statement on the Implementation of the EU-Ukraine AA/DCFTA (12 September 2014, Brussels).

<sup>80</sup> ECJ, Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 14. It should not be forgotten, however, that the provisions of the PCA's can also have direct effect: ECJ, Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I-2579. See Van der Loo, Van Elsuwege and Petrov, *supra* note 72, 14, with regard to dispute settlement across sectors.

<sup>81</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] L77/27, 11.03.2014.

<sup>82</sup> Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument *OJ* [2014] L310, 24.10.2006.

<sup>83</sup> See also L. Delcour and K. Wolczuk, 'Eurasian Economic Integration and Implications for the EU's policy in the Eastern Neighbourhood', in R. Dragneva and K. Wolczuk (eds.), *Eurasian Economic Integration: Law, Policy, and Politics* (Cheltenham: Edward Elgar 2013), 179-204, at 190.

existing conditionality machinery in place (with the sole exception of the ENI), will fall under the scrutiny of the ECJ. This will partly remedy the situation of the legal vacuum and the over-flexible construct of the policy at the moment.

The funds granted under the EN(P)I also form part of the incentives built into the ENP. The amounts allocated for the implementation of the programmes have grown constantly – while for the period 2007–2013 the ENPI made 11.2 billion euro available to finance the programme,<sup>84</sup> the budget for the 2014–2020 programme the ENI made available is over 15.4 billion euro. Under the previous programmes 8.6 billion euro was allocated for the period between 2000–2006. The developments in financing the ENP could also be considered more significant, since the ENPI was better tuned to guarantee funds' absorption, which was a problem with the previous financing framework. Moreover, a special ENPI 'Governance Facility' was established by the ENPI to reward the best performing ENP partners.<sup>85</sup> Crowning the ENPI system, the Neighbourhood Investment Facility (NIF) was introduced, with a budget of 700 million euro.<sup>86</sup> The ENI, which replaced the ENPI in 2014, was established

'with a view to advancing further towards an area of shared prosperity and good neighbourliness involving the Union and the (...) partner countries by developing a special relationship founded on cooperation, peace and security, mutual accountability and a shared commitment to the universal values of democracy, the rule of law and respect for human rights in accordance with the TEU.'<sup>87</sup>

Discrepancies exist between the perceived needs, as outlined by the Commission,<sup>88</sup> and the funds allocated. Consequently, notwithstanding an increase in the fund's allocation, the actual money available for the implementation of the ENP still falls short of the policy's needs. According to Balfour and Missiroli, the policy was 'seriously under-funded'<sup>89</sup> almost ten years ago. So it remains today.

Ultimately, financial assistance cannot be viewed as the main incentive offered to the ENP partners within the framework of the policy. Given the nature of the majority of the partner countries and their obvious problems with adhering to the values of the ENP, two problems related to the ENPI's financial assistance become obvious. First of all, virtually any amount allocated will still not be enough to 'buy' the regime change in the countries concerned, since deep reform touching upon all the spheres of organisation of the state is likely to cost the ruling elites infinitely more. Secondly, all the money allocated (including the money not going to the ENP partner governments directly) still ends up in the economies of the problematic regimes, making them stronger and does

<sup>84</sup> This includes funds for projects in Russia, which is also covered by the ENPI.

<sup>85</sup> The budget of the Governance Facility amounts to 300 million euro (43 million per year on average): COM(2006) 726 final, at 12; COM(2007) 774 final, at 10.

<sup>86</sup> COM(2006) 726 final, at 13; COM(2007) 774 final, at 10.

<sup>87</sup> Article 1(1), Regulation (EU) No 232/2014, *supra* note 81.

<sup>88</sup> For the initial ambitious expectations see Commission proposal for a Regulation establishing a European Neighbourhood and Partnership Instrument COM(2004) 628final.

<sup>89</sup> R. Balfour and A. Missiroli, *supra* note 2, at 6.



not necessarily result in any change or move to bring such partners closer to the practical realisation of the values of democracy, the Rule of Law and the protection of human rights.

The most important progress has probably been made in the field of mobility. The inability of the EU in its relations with the ENP partners to deliver on the facilitation of people-to-people contacts and the relaxation of visa rules, outlined by the Commission as one of the incentives within the ENP framework, was a particularly weak point.<sup>90</sup> A step forward has been made in this respect with the visa liberalisation dialogues built on 'Visa Liberalisation Action Plans' (VLAP), which include benchmarks related to document security, border management, migration and asylum, public order and security, and external relations and fundamental rights, and were launched initially with Georgia, Moldova and Ukraine.<sup>91</sup> Moldova has first successfully implemented all the benchmarks set in its VLAP, which allowed its citizens to enjoy visa-free travel to the Schengen countries as of spring 2014.<sup>92</sup>

This being said, and seeing the low level of attractiveness in terms of the incentives offered by the ENP, the Commission has been seeking to improve the system of instruments and incentives within this policy framework with every revision of the policy. Indeed, this has been recently recognised by the Commission itself: 'There have been calls for a major overhaul of the ENP's toolbox, to enable the EU to respond better to partners' differing aspirations, and more quickly to a fast-changing neighbourhood and broader global trends'.<sup>93</sup> The results so far have been mixed. While some incentives get added, others somehow disappear from the list. The latter is most telling with regard to the four freedoms, which were replaced with the 'stake in the internal market'.<sup>94</sup> So as the security dimension of the ENP grows, the viable incentives offered to the partners in 2003 have been gradually watered down.<sup>95</sup> Notwithstanding all the attempts of the Commission, the incentives on offer still seem inadequate, and this is unlikely to change with the Council gaining a more important role to play, given its conservatism and the overall negative effects of inter-institutional rivalry, making scholars and policy-makers describe possible alternatives.

Add to this the differences existing between the vision of the ENP espoused by each of the 28 Member States and it becomes clear that the unattractiveness of the incentives on offer has systemic explanations.<sup>96</sup> One thing is clear, however: the current incentives cannot possibly provide effective backing for the deployment of conditionality in dealing with the 'reluctant' partners.

<sup>90</sup> All Commission Papers mention this incentive.

<sup>91</sup> Joint Communication to the European Parliament, the Council, the European Economic and Social

Committee and the Committee of the Regions, JOIN(2015) 9 final, 2.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> COM(2004) 373 final, 3.

<sup>95</sup> J. Kelley, *supra* note 2, 36; Magen, *supra* note 2, 413.

<sup>96</sup> For a telling illustration of the differences in the Member States' approaches to the neighbourhood see M. Natorski, 'National Concerns in the EU Neighbourhood: Spanish and Polish Policies on the Southern and Eastern Dimensions', in L. Delocour and E. Tulmets, *supra* note 2, 57.

## 6. CONCLUSION

All the pro-active rhetoric notwithstanding,<sup>97</sup> the EU is not ready to be wholeheartedly engaged with the ENP partners; particularly so, in the context of the growing pressures from the East, where Russia still seems to be approaching some ENP countries as its *de facto* colonies.<sup>98</sup> Member States have demonstrated with abundant clarity that they are totally unprepared to come up with clearly articulated functional neighbourhood policy in the contemporary context. Pretending that the ENP exists in vacuum is most unhelpful. The policy has failed to pave a way to the increased security and prosperity in the neighbourhood. Indeed, the situation has deteriorated dramatically since the moment when the ENP was introduced. The neighbourhood is now poorer and unquestionably infinitely less stable than before, which puts the attainment of the goals of the ENP in danger. Clearly, the only viable way to engage with the neighbourhood is to redesign it from scratch. The new design should not start with seeking uniform approaches to all the states that happen to be in the EU's geographical proximity. A tailor-made engagement with the neighbours is needed, starting not only with the EU's security, migration, and other concerns, but also with the actual needs of the neighbours. If such an approach is adopted, the Commission will not need the propaganda language of values and 'joint ownership' of the process anymore. There will be no need to pretend that Azerbaijan or Egypt are functional democracies, sharing EU ideals of human rights and the rule of law. The need to change the current approaches applies particularly strongly to the conditionality idea. Depending on the needs of the partner in question, a clear choice needs to be made whether or not to apply conditionality. As has been compellingly demonstrated in the literature, conditionality cannot possibly work in a context when the partner states in question do not wholeheartedly embrace the changes promoted by the EU. This means that playing conditionality games with the 'reluctant' partners should stop. With regard to those partners ready to embrace change advocated by the Union, conditionality should remain the norm.

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<sup>97</sup> See, for instance, W. Wallace, 'Looking after the Neighbourhood: Responsibilities for the EU-25', 4 *Notre Europe Policy Paper* 2003, 1-30, 7, noting that: 'The European Union has a long record of rhetorical commitments to foreign policy initiatives, not followed through by national governments or by needed agreement to common policies'.

<sup>98</sup> See: R. Petrov, 'The Principle, 'Good Neighbourliness and the European Neighbourhood Policy', in D. Kochenov and E. Basheska, *supra* note 7; P. Kalinichenko, *supra* note 14; N. Ghazaryan, "'Good Neighbourliness" and Conflict Resolution in Nagorno-Karabakh: A Rhetoric or Part of the Legal Method of the European Neighbourhood Policy?', in D. Kochenov and E. Basheska, *supra* note 7; N. Ghazaryan, *supra* note 2, Post-scriptum.