Istituto Affari Internazionali

DOCUMENTI IAI 13 | 08 – November 2013

ISSN 2280-6164

The Janus-Faced New European Neighbourhood Policy: Normative (Hard) Power vs. the Pragmatic (Soft) Approach

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Abstract

The implementation of the European Neighbourhood Policy has drawn strong criticism. Commentators have highlighted its inefficiency and the weak institutional and legal frameworks that have so far characterized this domain. An especially vexed issue is the legal nature of the ENP instruments so far developed by EU actors. This article explores the impact the Lisbon Treaty has had on the definition of ENP tools. I observe that, although some clear features of the new primary-law framework suggest the need for "formalized" ENP tools, the ENP, and in particular its southern dimension, continues to be implemented for the most part by means of soft-law instruments. Despite an undeniable evolution of nonbinding ENP tools, a similar trend could jeopardize the development of the ENP as a whole. I argue that a broader recourse to multilateral or bilateral agreements could make the ENP more effective while strengthening its democratic accountability: a new ENP model based on treaty cooperation would exclude neither flexibility nor a complementary or parallel recourse to soft-law instruments, and would at the same time make the actors involved more accountable, all the while enabling stronger cooperation, at the EU level, between the EU's institutions and its Member States.

Keywords: *European Neighbourhood Policy (ENP) / EU law / International law*

The Janus-Faced New European Neighbourhood Policy: Normative (Hard) Power vs. the Pragmatic (Soft) Approach

Federico Casolari*

Introduction

It is commonly observed that the implementation of the European Neighbourhood Policy (ENP) draws strong criticism. Commentators have highlighted its inefficiency and the weak institutional and legal frameworks that have so far characterized this domain.[1] An especially vexed issue is the legal nature of the ENP instruments so far developed by the European Union (EU) and by Union actors. As is known, the ENP's legal construction has mainly been based on soft-law instruments (Commission communications, Council conclusions laying down political guidelines, agreed action plans, or other equivalent documents):[2] these tools bespeak a clearly pragmatic approach to the contractual relations between the Union and its neighbours, an approach heavily reliant on soft-law instruments as the best way to ensure flexible, customized partnerships that can be set up on an informal basis and without delay.

In light of the foregoing remarks, this contribution explores the impact the Lisbon Treaty has had on the definition of ENP tools. I observe that, although some clear features of the new primary-law framework suggest the need to "formalize" ENP tools, the ENP, and in particular its southern dimension, continues to be implemented for the most part by means of soft-law instruments. Despite an undeniable evolution of nonbinding ENP tools, this trend could undermine the effectiveness of the binding mandate that Article 8 of the Treaty on European Union (TEU) imposes in that domain on EU institutions, and this could consequently jeopardize the development of the ENP as a whole. The argument presented in this contribution is that a broader recourse to multilateral or bilateral agreements could make the ENP more effective while strengthening its democratic accountability: a new ENP model based on treaty cooperation would

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Revised version of a paper presented at the Lisboan seminar on "The European Neighbourhood Policy and the Lisbon Treaty: What has changed?", Rome, 22 March 2013. Thanks to the other speakers and participants, for stimulating discussions.

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[1] See, inter alia, Steven Blockmans, "Friend or Foe? Reviewing EU Relations with Its Neighbours Post Lisbon", in Panos Koutrakos (ed.), "The European Union's External Relations a Year After Lisbon", in *CLEER Working Papers*, No. 2011/3 (2011), p. 113-124, http://www.asser.nl/default.aspx?site_id=26&textid=39397; Steven Blockmans and Bart Van Vooren, "Revitalizing the European 'Neighbourhood Economic Community': The Case for Legally Binding Sectoral Multilateralism", in *European Foreign Affairs Review*, Vol. 17, No. 4 (November 2012), p. 577-604; Michele Comelli, "Potential and Limits of EU Policies in the Neighbourhood", in Elvire Fabry and Chiara Rosselli (eds.), *Think Global-Act European IV*, Paris, Notre Europe-Jacques Delors Institute, April 2013, p. 197-203, http://www.iai.it/content.asp?langid=2&contentid=932.

[2] See Article 3 of *Regulation (EC) No 1638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument*, 24 October, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:32006r1638:en:not.

exclude neither flexibility nor a complementary or parallel recourse to soft-law instruments, and would at the same time make the actors involved more accountable, all the while - at the EU level - mandating stronger cooperation between EU institutions and Member States.

I will accordingly start out in this contribution by highlighting the major features of the pre-Lisbon ENP and the way this policy has been reshaped by the Reform Treaty (sect. 1). I will then assess inherent post-Lisbon practice (sect. 2). And I will finally close with a summary of my main findings.

The term "soft law" will be understood here to have the meaning defined in the most prominent work so far devoted to soft law in EU law, that is, it will be understood to designate "[r]ules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects."[3]

1. The ENP in the pre-Lisbon era and the new legal framework

Before the Lisbon Treaty came into force, it was widely agreed that the ENP was to be implemented chiefly by means of soft-law instruments. After an initial period in which the EU institutions established the main contents of the ENP by means of political (i.e., policy) instruments - that is, by way of European Commission communications[4] and Council conclusions[5] - the ENP came to be executed predominantly through the

[3] Linda Senden, *Soft Law in European Community Law*, Oxford and Portland, Hart, 2004, p. 112. This definition in turn draws on and recasts the definition of soft law as understood in international law. See Dinah Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System*, Oxford, Oxford University Press, 2000; Alan Boyle, "Soft Law in International Law-Making", in Malcolm E. Evans (ed.), *International Law*, 2nd ed., Oxford, Oxford University Press, 2006, p. 141-157; Daniel Thürer, "Soft Law", in *Max Planck Encyclopedia of Public International Law*, updated March 2009.

[4] Cf. European Commission, *Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours* (COM(2003) 104 final), 11 March 2003, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:52003dc0104:en:not; European Commission, *Paving the Way for a New Neighbourhood Instrument* (COM(2003) 393 final), 1 July 2003, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:52003dc0393:en:not.

[5] Cf. General Affairs (GA) and General Affairs and External Relations (GAER) Council conclusions: *2421st Council meeting GA*, Luxembourg, 15 April 2002 (7705/02 Presse 91), p. 10, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/70160.pdf; *2450th Council session GAER*, Brussels, 30 September 2002 (12134/02 Presse 279), p. 8, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/72321.pdf; *2463rd Council meeting GAER*, Brussels, 18 November 2002 (14183/02 Presse 350), p. I-II, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/73248.pdf; *2487th Council meeting GAER*, Brussels, 24 February 2003 (6604/03 Presse 52), p. 5, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/74669.pdf; *2495th Council meeting GAER*, Brussels, 18 March 2003 (6941/03 Presse 63), p. 6, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/75004.pdf; *2501st Council meeting GAER*, Luxembourg, 14 April 2003 (8220/03 Presse 105), p. 7-8, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/75419.pdf; *2518th Council meeting GAER*, Luxembourg, 16 June 2003 (10369/03 Presse 166), p. V-VII, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/76201.pdf; *2533rd Council meeting GAER*, Luxembourg, 13 October 2003 (13099/1/03 REV 1 (en) Presse 292), p. 5-6, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/77597.pdf. See also Presidency conclusions of the Copenhagen European Council, 12-13 December 2002 (15917/02), p. 6-7,

bilateral action plans agreed to with neighbourhood countries. The action plans (or association agendas for Eastern partner countries) are conceived as the main instruments for implementing the general existing agreements between the EU and its neighbours (i.e., association agreements and partnership-and-cooperation agreements): the European Commission has described these plans as "*political documents* - drawing together existing and future work in the full range of the EU's relations with its neighbours"[6] - but they nonetheless represent a significant step forward on the way to defining the ENP.[7]

Indeed, it should be noted that action plans are usually adopted as a recommendation of the Association Agreement Council or the Partnership Cooperation Council concerned. It thus follows, to borrow the words of the European Court of Justice (ECJ) in *Deutsche Shell*, that

> [s]ince measures emanating from bodies which have been established by an international agreement [...], and which have been entrusted with responsibility for its implementation, are directly linked to the agreement which they implement, *they form part of the [EU] legal order*.[8]

The incorporation of ENP action plans in the EU legal order is not without consequences as far as their legal status is concerned. In the first place, it suggests the possibility of invoking the consistent-interpretation doctrine by analogy to the ECJ's application of it to EU internal nonbinding instruments,[9] with the consequence that EU actors would have to interpret inherent EU law in light of the wording and purpose of the action plans. But, on closer inspection, the ECJ's case law itself seems to suggest that the duties imposed on EU actors may also go beyond. To go back to the ECJ's words in *Deutsche Shell*, although the action plans (or equivalent documents) adopted under the umbrella of association or partnership-and-cooperation agreements

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/73842.pdf; Thessaloniki European Council, 19-20 June 2003 (11638/03), p. 13, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/76279.pdf; and Brussels European Council, 16-17 October 2003 (15188/03), p. 13, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/77679.pdf.

[6] European Commission, *Wider Europe - Neighbourhood …*, cit., p. 16.

[7] Sixteen action plans have so far been agreed to, with Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestinian Authority, Syria, Tunisia, and Ukraine. In some cases, after the original action plan expired, the EU and the state concerned jointly agreed to extend the plan (as in the case of the EU-Georgia action plan). In other cases, action plans have been replaced by other non-binding documents (as is the case with the EU-Ukraine Association Agenda). Source: http://eeas.europa.eu/enp/documents/action-plans/index_en.htm.

[8] ECJ, Case C-188/91: *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg*, 21 January 1993, para 17, http://eur-lex.europa.eu/LexUriServ/LexUri-Serv.do?uri=celex:61991CJ0188:en:not [emphasis added].

[9] See ECJ, Case C-322/88: *Salvatore Grimaldi v Fonds des maladies professionnelles*, 13 December 1989, para 19, http://eur-lex.europa.eu/LexUriServ/LexUri-Serv.do?uri=celex:61988CJ0322:en:not. For a recent overview of the consistent-interpretation doctrine, see Antonino Alì, "Some Reflections on the Principle of Consistent Interpretation Through the Case Law of the European Court of Justice", in Nerina Boschiero et al. (eds.), *International Courts and the Development of International Law*, The Hague, T.M.C. Asser Press, 2013, p. 881-895. On the application of the duty of consistent interpretation to EU international legal sources, see Federico Casolari, "Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation", in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds.), *International Law as Law of the European Union*, Leiden and Boston, Nijhoff, 2012, p. 395-415.

> cannot confer upon individuals rights which they may enforce before national courts, *the latter are nevertheless obliged to take them into consideration in order to resolve disputes submitted to them*, especially when, as in this case, they are of relevance in interpreting the provisions of the [Agreements].[10]

In brief, because action plans are so closely kinked to the association and partnership-and-cooperation agreements they seek to implement, they should influence not only the way in which these agreements (as well as inherent EU law) are *interpreted* by institutional actors, but also the way they are *applied*.[11] On the other hand, action plans are also especially relevant as concerns good faith, since the good-faith principle requires the actors concerned not to contradict their own conduct and, consequently, not to renege on the "commitments" expressed in the action plans. That said, the content of ENP action plans or equivalent documents is still often too vague and open-ended, thus leaving must leeway to the actors involved in their implementation.

Against this backdrop, the Lisbon reform has paved the way for a further "formalization" of the ENP. The main result of this process lies the introduction of a specific Treaty provision devoted to the ENP, namely, Article 8 TEU.[12] The provision starts out by defining the objectives of the European policy and the binding mandate of EU engagement:

> 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.

It then significantly lays special emphasis on recourse to international treaties in establishing and maintaining relationships with the EU neighbours. Article 8 TEU states, in this regard, that

> [f]or the purpose of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be subject of periodic consultation.

[10] ECJ, Case C-188/91: *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg*, cit., para 18 [emphasis added].
[11] See also Bart Van Vooren, *EU External Relations Law and the European Neighbourhood Policy. A Paradigm for Coherence*, London and New York, Routledge, 2012, p. 196-200. On the possibility of considering soft law a vehicle for interpreting and implementing the international treaty to which it refers, see Alan Boyle, "Soft Law in International Law-Making", cit., p. 146-148.
[12] On this provision, see Peter Van Elsuwege and Roman Petrov, "Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union", in *European Law Review* , Vol. 36, No. 5 (October 2011), p. 688-703; Christophe Hillion, "The EU Neighbourhood Competence Under Article 8 TEU", in Elvire Fabry and Chiara Rosselli (eds.), *Think Global-Act European IV*, Paris, Notre Europe-Jacques Delors Institute, April 2013, p. 204-214, http://www.iai.it/content.asp?langid=2&contentid=932; and Michele Comelli, "Article 8 and the Revision of the European Neighbourhood Policy", in Lucia Serena Rossi and Federico Casolari (eds.), *The EU After Lisbon: Amending or Coping with the Existing Treaties?*, Dordrecht, Springer, forthcoming.

From a theoretical standpoint, the role Article 8 TEU is called on to play is thus twofold. On the one hand, the provision, in line with the Lisbon Treaty's general reshaping of the Union's external action,[13] clarifies the contents of the ENP and implicitly recognizes that - despite the ENP's placement within the TEU - the policy now ranks as a formal strand of the EU's external relations: the references to EU values is particularly relevant in this regard, since it echoes the general formula contained in Article 21(1) TEU, to some extent considered the "constitutional clause" of the EU's external action.[14] On the other hand, as a further consequence of this recognition, the provision makes it clear that the main instrument for implementing the ENP should be the ordinary one provided for in the EU's external-relations toolbox, namely, the international agreement. In short, Article 8 TEU suggests that the preexisting pragmatic (or soft) approach to the ENP needs to be superseded by embracing a new conception of the policy, a conception on which primacy is accorded to the Union's normative (or hard) power.

2. The dual approach to the post-Lisbon ENP: can we move on?

Despite the Treaty drafters' clear-cut formalization of the ENP, the subsequent practice does not show any real progress beyond the preexisting pragmatic approach.[15] This conclusion is borne out by the most important strategic documents that EU institutional actors have drafted in that domain since the Lisbon Treaty came into force. A first illustration of this trend can be appreciated in the May 2011 joint communication *A new response to a changing Neighbourhood*,[16] which the European Commission and the High Representative for Foreign Affairs and Security Policy (HR) adopted to promote a new approach aimed at strengthening the partnership between the EU and its neighbours in light of the innovations introduced by the Lisbon Treaty. Just like the previous ENP strategic papers, the 2011 communication stresses the need to ensure adequate differentiation in defining the EU's relations with each of its partners.[17] A catalyst role can be expected to be played here by the so-called "more for more" conditionality mechanism, based on the concrete performances of the States concerned, and which is also envisaged in the new Partnership for Democracy and Shared Prosperity with the Southern Mediterranean.[18] What is interesting to note for the present purposes is that the 2011 joint communication - in line with the pragmatic, project-centred approach of the pre-Lisbon era - suggests that such a mechanism should be implemented chiefly by means of soft-law instruments. As evidence of this attitude, one need only consider how rarely the joint communication mentions the need

[13] On this topic, see Jan Wouters, Dominic Coppens and Bart De Meester, "The European Union's External Relations after the Lisbon Treaty", in Stefan Griller and Jacques Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Dordrecht, Springer 2008, p. 143-203.
[14] Aside from specifying the values on which the EU's external action must be based, the provision sets out the objectives of that action and the relative guiding principles.
[15] On this topic, Michele Comelli, "Article 8 and the Revision of the European Neighbourhood Policy", cit..
[16] European Commission and HR, *A new response to a changing Neighbourhood* (COM(2011) 303 final), 25 May 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:52011dc0303:en:not.
[17] Ibid., p. 2-3.
[18] European Commission and HR, *A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean* (COM(2011) 200 final), 8 March 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:52011dc0200:en:not.

to resort to international binding commitments: these come up only in connection with (*i*) the protection of human rights and fundamental freedoms,[19] (*ii*) trade cooperation,[20] (*iii*) the visa-facilitation and readmission policy,[21] and (*iv*) energy and environmental cooperation.[22] Significantly, the position expressed in the May 2011 communication was subsequently confirmed by the Council of the European Union (in June 2011)[23] and the European Parliament (in December 2011),[24] and was then reaffirmed by the Commission and the HR themselves (in May 2012) in the joint communication *Delivering on a new European Neighbourhood Policy*.[25]

On the other hand, the post-Lisbon lawmaking in that domain seems to mirror the approach that emerged from the strategic documents. It will suffice to mention, in this regard, the *Proposal for a Regulation establishing a European Neighbourhood Instrument*,[26] which the European Commission adopted at the end of 2011 so as to align the general ENP facility with the new policy vision. Not surprisingly, this proposal essentially rehashes the existing ENP toolbox.[27] Indeed, under Article 3(1) of the proposal, the general framework for EU support - and it is significant here that the proposal prefers to speak of a "*policy* framework" - should consist of

> [t]he partnership and cooperation agreements, the association agreements and other existing or future agreements that establish a relationship with partner countries, corresponding Communications, Council conclusions and European Parliament Resolutions as well as relevant conclusions of ministerial meetings with the partner countries […].

But the proposal goes further, by specifying that

> [j]ointly agreed action plans or other equivalent documents between the partner countries and the Union shall [still] provide the key point of reference for setting the priorities for Union support.

In essence, these examples make it clear that the ENP is still being conceived by EU actors as a Janus-faced process, where hard-law instruments (in particular, the international agreements) must necessarily coexist with a significant number of soft-law instruments, the latter regarded as the *only* ones capable of ensuring the flexibility and

[19] European Commission and HR, *A new response to a changing Neighbourhood*, cit., p. 5.
[20] Ibid., p. 9 and 26.
[21] Ibid., p. 12.
[22] Ibid., p. 10, 15 and 18.
[23] Foreign Affairs Council Conclusions, *3101st Council meeting Foreign Affairs*, Luxembourg, 20 June 2011 (11824/11 Presse 181), p. 10-14, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/122937.pdf.
[24] European Parliament, Resolution *on the review of the European Neighbourhood Policy* (P7_TA(2011)0576), 14 December 2011, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-576.
[25] European Commission and HR, *Delivering on a new European Neighbourhood Policy* (JOIN(2012) 14), 15 May 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:52012jc0014:en:not.
[26] European Commission, *Proposal for a Regulation establishing a European Neighbourhood Instrument* (COM(2011) 839 final), 7 December 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:52011pc0839:en:not.
[27] As mentioned in Article 3 of *Regulation (EC) No 1638/2006*, cit.

differentiation needed for the EU to forge unique, distinctive relationships with each of its partners in short order.

Though appealing, this view turns out, on closer scrutiny, to be unconvincing. There are indeed a number of elements that suggest a different approach to the ENP's implementation process.

In general, it should be borne in mind that not only soft-law instruments but also international agreements can make for flexibility and differentiation. International practice shows much recourse to different types of legal devices to promote the widest possible acceptance of international agreements (e.g., reservations, "pick and choose" methods, *ad hoc* clauses, and protocols): for one thing, these devices lessen the legal burden that would otherwise be imposed on contracting parties, and, for another, they can make it possible to confer a distinctive status to some contracting parties in view of their special interests or peculiar features. As is apparent from the European integration process, both EU institutions and Member States alike are very familiar with this type of issue.[28] But what is particularly interesting to note for the present purposes is that some traces of this attitude - i.e., flexibility by means of treaty-based law - can also be found in the relationships the EU has *already* established with its neighbours. This can be appreciated, for example, in Article 24 of the Energy Community Treaty (ECT), which the European Union has concluded with Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Moldova, Montenegro Serbia, Ukraine, and UNMIK, with a view to establishing an Integrated Energy Market Organisation in southeast Europe.[29] Indeed, under this provision, the adaptation and evolution of the Energy Community *acquis* must take into account "both the institutional framework of this Treaty [the ECT] and *the specific situation of each of the Contracting Parties*."[30] As has rightly been pointed out by Blockmans and Van Vooren, the ECT gives us a case study (also mentioned by them is the cooperation the EU and its eastern partners maintain on transport) that clearly illustrates the possibility of bringing a "legally binding sectoral multilateralism" to bear on the new ENP. This approach, based on sectoral multilateral agreements between the Union and its neighbours,[31] offers several advantages in implementing the ENP.

Overall, it seems more effective at striking the right balance between the binding mandate contained in Article 8 TEU - and hence the new shape the Treaty drafters sought to give the ENP - and the need for flexibility and differentiation. Indeed, aside from making it possible to craft multilateral sectoral agreements in such a way as to recognize the contracting parties' specificities, sectoral multilateralism also enables these parties to adopt other tailor-made binding or nonbinding instruments. For

[28] Cf. Bruno De Witte, Dominik Hanf, Ellen Vos (eds.), *The Many Faces of Differentiation in EU Law*, Antwerpen, Intersentia, 2001, and Andrea Ott, "EU Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration?", in Andrea Ott and Ellen Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives*, The Hague, T.M.C. Asser Press, 2009, p. 113-138.
[29] *Council Decision 2006/500/EC on the conclusion by the European Community of the Energy Community Treaty*, 29 May 2006, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:32006d0500:en:not.
[30] See *Treaty establishing the Energy Community*, Brussels, 25 October 2005, http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/Treaty [emphasis added].
[31] Steven Blockmans and Bart Van Vooren, "Revitalizing the European 'Neighbourhood Economic Community' …", cit.

example, in some cases political or practical reasons might make it impossible to set up *multilateral* contractual relations between the Union and its neighbours, and in these cases, the EU and its partners could thus negotiate *bilateral* agreements.[32] At the same time, implementing the ENP by means of international agreements does not rule out the possibility of resorting in parallel to soft-law instruments so as to support and integrate the legally binding multilateral or bilateral cooperation. And only when it becomes apparent that international agreements (whether multilateral or bilateral) are unavailable should we look at the possibility of *mainly* implementing neighbourhood cooperation by means of soft-law tools. Furthermore, wide recourse to multilateral sectoral agreements would contribute to overcoming the dichotomy between the ENP's multilateral dimension and its bilateral dimension. Indeed, this dichotomy turns out to be rather artificial, for practical experience shows that in many cases there is significant overlap between these two dimensions (or, stated otherwise, the theoretical dichotomy tends to melt away in the practical implementation of the ENP).[33]

At EU level, the advantages flowing from such an approach should equal those highlighted with regard to the relationship between the Union and its neighbours. First, broad recourse to binding instruments would ensure a proper involvement of the European Parliament in the ENP, in line with the growing role the Lisbon Treaty attributes to that institution when it comes to implementing the EU's external action.[34] Second, in light of the general Loyalty Clause codified in Article 4(3) TEU,[35] this different approach would imply stronger loyalty duties than those emerging from the previously discussed Deutsche Shell case.[36] This circumstance turns out to be particularly relevant if one considers, on the one hand, the way the ECJ has interpreted the loyal-cooperation duties of EU institutions and Member States on the international scene,[37] and on the other the fact that inherent EU action can often lead to overlaps

[32] Consider, for example, the way the Union is cooperating with some neighbours on visas and illegal migration.

[33] The need for greater balance between multilateralism and bilateralism has recently been highlighted with regard to the ENP's southern dimension in Jan Wouters and Sanderijn Duquet, "The Arab Uprisings and the European Union: In Search of a Comprehensive Strategy", in Gloria Fernández Arribas, Karolien Pieters and Tamara Takács (eds.), "The European Union's Relations with the Southern-Mediterranean in the Aftermath of the Arab Spring", in *CLEER Working Papers*, No. 2013/3, p. 19-52, http://www.asser.nl/default.aspx?site_id=26&textid=40669.

[34] The important role the European Parliament has played in all phases and areas of the ENP's development has clearly been stressed in the European Parliament resolution of 14 December 2011 on the review of the European Neighbourhood Policy, *supra* n. 23, para 92. For some broad considerations on the way soft law is affecting the principle of democracy, see also: European Parliament, *Resolution on institutional and legal implications of the use of "soft law" instruments* (P6_TA(2007)0366), 4 September 2007, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0366.

[35] On the principle of loyal cooperation, see Federico Casolari, "EU Loyalty after Lisbon: An Expectation Gap to Be Filled?", in Lucia Serena Rossi and Federico Casolari (eds.), *The EU after Lisbon: Amending or Coping with the Existing Treaties?*, Dordrecht, Springer, forthcoming.

[36] See sect. 1.

[37] For a general overview of the case law, see Andrés Delgado Casteleiro and Joris Larik, "The Duty to Remain Silent: Limitless Loyalty in EU External Relations?", in *European Law Review*, Vol. 36, No. 4 (September 2011), p. 524-541, and Federico Casolari, "The Principle of Loyal Co-operation: A 'Master Key' for EU External Representation?", in Steven Blockmans and Ramses A. Wessel (eds.), "Principles and Practices of EU External Representation", in *CLEER Working Papers*, No. 2012/5, p. 11-35, http://www.asser.nl/default.aspx?site_id=26&textid=40434.

with a Member State's international commitments.[38] More to the point, since the Member States' duties stemming from the Loyalty Clause are increasingly being understood by the Court mainly in terms of abstention obligations (even in relation to mixed agreements),[39] the Union's adoption of binding instruments could avert the risk of jeopardizing the ENP's implementation. At the same time, that same strategy could also help solve the problems arising out of the way competences are allocated between the EU and its Member States - another element which has prevented so far EU actors from implementing the ENP by way of binding instruments. Last, but not least, broad recourse to binding instruments is likely to improve legal certainty for the natural and legal persons involved in the ENP's implementation, while affording greater protection of their inherent rights.

Conclusions

In a new joint communication of 20 March 2013, the European Commission and the HR assess the developments and results of the revised ENP launched in 2011.[40] Significantly, the communication underlines the importance of sector cooperation, inviting the EU to

> reflect on how to progressively extend the geographic scope of these instruments [i.e., the existing sectoral multilateral agreement] to open them to other ENP partners, or on developing with willing partners sector arrangements like the transport community with countries of the Western Balkans.[41]

It remains to be seen whether this policy suggestion will be taken up, in such a way as to make it possible to actually move beyond current practice, or whether, on the contrary, in reading the joint communication of 2013 - with its great emphasis on the need for differentiation and flexibility in implementing the ENP,[42] coupled with its call for

[38] That is the case, for instance, in the investment policy domain. See European Commission, *Towards a comprehensive European international investments policy* (COM(2010) 343 final), 7 July 2010, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:52010dc0343:en:not. But similar problems can come up in other ENP domains, such as cooperation on illegal migration. For a general survey of the interplay between the EU's international commitments and those of the member states in the area of freedom, security, and justice, see Federico Casolari, "EU Member States' International Engagements in AFSJ Domain: Between Subordination, Complementarity, and Incorporation", in Catherine Flaesch-Mougin and Lucia Serena Rossi (eds.), *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union européenne après le traité de Lisbonne*, Brussels, Bruylant, 2013, p. 23-69.

[39] See, for instance, ECJ, Case C-246/07: *European Commission v Kingdom of Sweden*, 20 April 2010, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:62007cj0246:en:not, and Marise Cremona, "Case C-246/07, Commission v Sweden (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010", in *Common Market Law Review*, Vol. 48, No. 5 (2011), p. 1639-1665.

[40] European Commission and HR, *European Neighbourhood Policy: Working towards a Stronger Partnership* (JOIN(2013) 4 final), 20 March 2013, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:52013jc0004:en:not.

[41] Ibid., para 48. Significantly, the approach in question has also been recalled in the 2011 joint declaration of the Eastern Partnership Summit. See Council of the European Union, *Joint Declaration of the Eastern Partnership Summit*, Warsaw, 29-30 September 2011 (14983/11 Presse 341), paras 11-18, http://www.consilium.eu.int/uedocs/cms_data/docs/pressdata/en/er/124845.pdf.

[42] European Commission and HR, *European Neighbourhood Policy: Working towards a Stronger Partnership*, cit., para 95.

an ENP toolbox enabling the EU to adapt its policy approach and response to the individual context of its partners and their aspirations[43] - EU institutions will take this to mean that they can and should continue along the same path they have so far been following, that of the pragmatic (or soft) approach. It is true that the latest iteration of soft-law instruments in the ENP evinces a growing degree of formalization.[44] But it is equally true that the parties involved have openly denied that these instruments or the mechanisms they bring into being are legally binding. In other words, these soft-law instruments may reflect an incremental approach to addressing the problems arising in connection with the ENP, but this does not necessarily mean that they link up directly to binding solutions or that they are intended to yield such solutions. In light of the ENP's unsatisfactory results, EU institutional actors should seriously reflect on the need to be more careful and deliberate in balancing differentiation against effectiveness.

Updated: 17 September 2013

[43] Ibid.

[44] See sect. 1, and Bart Van Vooren, *EU External Relations Law and the European Neighbourhood Policy …*, cit, p. 203-211.

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