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L'Union fait la force? Potential and Limitations  
of the European Neighbourhood Policy as an  
Integrated EU Foreign and Security Policy

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## **Abstract**

The external policies of the European Union may be viewed as the outcome of the interaction between the Member States, the European Community (acting in the context of the 'first pillar') and the European Union (acting on the basis of the second and third pillars). This tripartite interaction, which involves a large number of actors operating within different institutional logics, makes it challenging for the Union to conduct coherent policies, or to fulfil its objective of affirming its identity on the world stage (Article 2 TEU). The European Neighbourhood Policy (ENP) is a particularly developed expression of a policy designed to meet the challenge of ensuring coherence between the three EU pillars. As an alternative mechanism designed to offer coherent policy-making in the cross-pillar context of relations with the EU's strategically important neighbours, the ENP does not rely on new instruments but rather offers a way of integrating existing instruments via 'soft' frameworks, such as European Council and Council Conclusions and Commission policy papers. This paper aims to analyse the ENP as a contribution to the EU's efforts to evolve a more coherent external action. Ukraine will serve as an example, as the advanced implementation of the ENP towards this country offers the best illustration of the policy, in both its potential and its shortcomings. It will demonstrate that the ENP is a cross-pillar security policy, which draws heavily on the specific methodology developed within the framework of the EU pre-accession strategy. It will be argued that while this new formula of external action carries the potential of fostering the coherence of EU external action, its effectiveness, in policy terms, may be hampered by several inherent paradoxes and tensions

## **Keywords**

Competences – European law – international agreements – common commercial policy – Third Pillar – trade policy – EEA-agreement – CFSP/ESDP – EU-East-Central Europe – international relations – Mediterranean – security/external

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*L'Union fait la force?*

***POTENTIAL AND LIMITATIONS OF THE EUROPEAN  
NEIGHBOURHOOD POLICY  
AS AN INTEGRATED EU FOREIGN AND SECURITY POLICY***

Marise Cremona\* and Christophe Hillion\*\*

**Introduction**

The external policies of the European Union may be viewed as the outcome of the interaction between the Member States, the European Community (acting in the context of the 'first pillar') and the European Union (acting on the basis of the second and third pillars). This tripartite interaction, which involves a large number of actors, operating within different institutional logics, makes it challenging for the Union to conduct coherent policies, or to fulfil its objective of affirming its identity on the world stage (Article 2 TEU).

Complex legal arrangements and institutional practices have developed over the years in order to promote coherence between the Member States and the Community (vertical coherence), mixed agreements being a case in point. Increasingly, attention has also been given to the challenge of ensuring coherence between the three EU pillars (horizontal coherence).<sup>1</sup> Thus far, in the absence of a complete collapse of the pillar structure, the solution has been to attempt to integrate the pillars within the framework of one policy. The European Neighbourhood Policy (ENP) is a particularly developed expression of such a policy.

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<sup>1</sup> On coherence, see e.g. Gauttier, 'Horizontal coherence and the external competences of the European Union', (2004) 10 *ELJ* 23.

This is no coincidence. In fact, the need for a coherent over-arching policy with a security dimension towards its neighbours, especially the eastern European States of the former Soviet Union, has been recognised and prioritised by the EU since well before the formal establishment of the ENP. The first Common Strategies to be adopted were with Russia and Ukraine,<sup>2</sup> Common Strategies having been introduced by the Treaty of Amsterdam into Title V TEU in order to provide a framework for coherent policy-making across the pillars.<sup>3</sup> The Vienna European Council, discussing the implementation of the Amsterdam Treaty in December 1998, accepted the Council's recommendation to draft the first Common Strategies on relations with the EU's neighbouring countries: Russia, Ukraine, the Mediterranean and the Western Balkans.<sup>4</sup> The Council had argued that it was with the neighbours that 'the EU has the greatest long-term common interests and the greatest need for coherence and effectiveness.'<sup>5</sup> As Maresceau has said, the Common Strategy as an instrument designed to facilitate cross-pillar activity within existing decision-making frameworks, seemed destined to have a promising future.<sup>6</sup> However that potential was not fulfilled, for a number of reasons including the Common Strategy's firm positioning within Title V of the TEU. The ENP, as an alternative mechanism designed to offer coherent policy-making in the cross-pillar context of relations with the EU's strategically important neighbours, does not rely on new instruments but rather offers a way of integrating existing instruments via 'soft' frameworks (European Council and Council Conclusions and Commission policy papers among others).

The EU appears to have great faith in the potential of the ENP both as an instrument of an integrated foreign policy for the EU and as a framework for increasing stability and security within the EU's neighbourhood. Indeed, since the Commission published its first policy papers on 'Wider Europe' in 2003-04,<sup>7</sup> the EU Council has decided to widen the geographical scope of the Policy to embrace Armenia, Azerbaijan and Georgia,<sup>8</sup> in addition to the initial 'ENP countries' in Eastern Europe (Belarus, Moldova and Ukraine) and the Southern Mediterranean (Israel, Jordan, Morocco, the Palestinian Authority and Tunisia). The Council has also invited the Commission, in cooperation with the High Representative for CFSP, to continue talks already engaged with Egypt and Lebanon.<sup>9</sup>

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<sup>2</sup> At the Cologne European Council in June 1999 and the Helsinki European Council in December 1999 respectively.

<sup>3</sup> Hillion, 'Common Strategies and the interface between EC external relations and the CFSP: lessons of the Partnership between the EU and Russia' in Dashwood and Hillion (eds.) *The General Law of EC External Relations* (Sweet & Maxwell 2000); Maresceau, 'EU Enlargement and EU Common Strategies on Russia and Ukraine: An Ambiguous yet Unavoidable Connection' in Hillion (ed.) *EU Enlargement: A Legal Approach* (Hart 2004).

<sup>4</sup> Conclusions of the European Council, Vienna 11-12<sup>th</sup> December 1998, para 74.

<sup>5</sup> Report from the Council to the European Council on Common Strategies, 7 December 1998, doc.13943/98.

<sup>6</sup> Maresceau, note 3, at 182.

<sup>7</sup> Communication from the Commission to the Council and the European Parliament, 'Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', 11 March 2003, COM(2003) 104; Communication from the Commission, 'European Neighbourhood Policy – Strategy Paper', 12 May 2004, COM(2004) 373.

<sup>8</sup> Council Conclusions of 14 June 2004 on the ENP; 10189/04 (Presse 195), see in particular pt. 12 of the Conclusions. See also the Conclusions of the European Council on the ENP of 17/18 June 2004.

<sup>9</sup> General Affairs and External Relations Council Conclusions of 25 April 2005, 8035/05 (Presse 86).

As well as widening the ENP, the EU has also deepened its policy in relation to its initial addressees, Ukraine in particular. As a supplement to the Action Plan for Ukraine adopted in 2005,<sup>10</sup> a list of specific measures to intensify EU-Ukraine cooperation was approved by the Council in 2005, following the 'Orange Revolution'.<sup>11</sup> In addition, the Commission has proposed to start negotiations for an enhanced agreement with Ukraine to reinforce the Partnership and step up EU-Ukraine cooperation.<sup>12</sup> All these initiatives cover the whole breadth of bilateral relations, from closer cooperation in the area of foreign and security policy and visa policy to cooperation in key sectors including energy, transport, environment and health.

The present paper aims to analyse the ENP as a contribution to the EU's efforts to evolve a more coherent external action. Ukraine will serve as an example, as the advanced implementation of the ENP towards this country offers the best illustration of the policy, in both its potential and its shortcomings. It will be shown that the ENP is a cross-pillar security policy (1), which draws heavily on the specific methodology developed within the framework of the EU pre-accession strategy (2). It will be argued that, while this new formula of external action carries the potential of fostering the coherence of EU external action, its effectiveness, in policy terms, may be hampered by several inherent paradoxes and tensions (3).

## **1. A cross-pillar security policy**

The ENP is broad in its coverage, addressing issues dealt with under all the pillars of the Union, ranging from human rights and the rule of law to economic integration and environmental protection. Underpinning the Union's engagement is its concern with security (a). More specifically, the ENP may be regarded as a regional implementation of the European Security Strategy, thus reflecting the Union's ambition to provide coherence in its relations with the outside world (b).

### ***a) Comprehensive security as a driving force***

The idea of a European Neighbourhood Policy was formally launched by the joint Solana/Patten letter of 7 August 2002,<sup>13</sup> which put security high on the agenda:

'What are our interests and what do we want to achieve? There are a number of overriding objectives for our neighbourhood policy: stability, prosperity, shared values and the rule of law along our borders are all fundamental for our own security. Failure in any of these areas will lead to increased risks of negative spill-over on the Union.'

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<sup>10</sup> Recommendation No. 1/2005 of the EU-Ukraine Cooperation Council of 21/02/2005 on the implementation of the EU/Ukraine Action Plan.

<sup>11</sup> GAERC 21 Feb 2005, Conclusions on Ukraine.

<sup>12</sup> See Press Release IP/06/1184, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/1184&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>13</sup> Joint letter by EU Commissioner Chris Patten and the EU High Representative for the Common Foreign and Security Policy on Wider Europe. 7 August 2002. [http://www.europa.eu.int/comm/world/enp/pdf/0130163334\\_001\\_en.pdf](http://www.europa.eu.int/comm/world/enp/pdf/0130163334_001_en.pdf)

Indeed, the security dimension of the ENP is not merely an incidental component, it is fundamental to the policy as a whole. At the launch of the first ENP Action Plans in December 2004, Commissioner Ferrero-Waldner outlined what she saw as the three main benefits to the EU:

‘The EU gains the benefits of a stable neighbourhood. Our assistance will support countries in their own economic and political reforms to spread the benefits of prosperity and democracy. This is good for us as well as our neighbours.

The EU gains improved security around its borders. Increased cross border cooperation will help us to tackle problems from migration to organised crime.

The EU gains because our partners sign up to stronger commitments on the fight against terrorism, non-proliferation of WMD, and to the peaceful resolution of regional conflicts.’

This emphasis on security as the basis for the ENP overall, and relations with Ukraine in particular, is not surprising. Nor is it new. For instance, the Common Strategy with Ukraine adopted in December 1999 identified as the second ‘strategic goal’ of the Strategy, ‘the maintenance of stability and security in Europe and the wider world’.<sup>14</sup> The political dialogue established under Article 6 of the Partnership and Cooperation Agreement<sup>15</sup> with Ukraine also has among other objectives,

‘- to bring about an increasing convergence of positions on international issues of mutual concern thus increasing security and stability,  
- that the Parties endeavour to cooperate on matters pertaining to the strengthening of stability and security in Europe.’

However the idea of security as underpinning EU policy towards the region more generally, rather than one goal among several, is more recent. It can be traced to a number of factors. It is linked to the terrorist attacks on the US on 11 September 2001, leading to a greater concern with terrorism and its links to organised crime and the regulation of cross-border movement. It is also related to the impact of EU enlargement, the moving eastwards of the EU’s borders, which runs parallel to the efforts to remove internal border controls within the EU, thus placing increased emphasis on the security of external borders. Indeed, enlargement entails the creation of new ‘dividing lines’ within Europe, and the ensuing risk of economic and political instability at the EU’s doorstep. Further, for the eastern dimension of the ENP, the concern for security may be traced to the size, strategic importance and economic potential of Ukraine, and its potential as a regional leader. Finally, the European Security Strategy, adopted by the European Council in December 2003, puts neighbourhood security as a key strategic objective of the Union, as shall be seen below.

It should be noted that ‘security’ is a broad concept in the ENP. In June 2004 the Council defined the objective of the European Neighbourhood Policy as being

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<sup>14</sup> See also the Common Position defined by the Council on the basis of Article J.2 of the Treaty on European Union on the objectives and priorities of the European Union towards Ukraine [OJ 1994 L313/1].

<sup>15</sup> OJ 1998 L 49.

'... to share the benefits of an enlarged EU with neighbouring countries in order to contribute to increased stability, security and prosperity of the European Union and its neighbours.'<sup>16</sup>

Security is here linked to stability and prosperity, and indeed stability and prosperity are not only objectives in their own right but are designed to lead through political and economic development to security. Different dimensions to security are emphasised: internal stability, cooperation between the enlarged EU and its neighbours (avoiding the creation of new dividing lines) and in particular 'mutual commitment' in relation to specific matters of concern to the EU's security policy: terrorism, non-proliferation and WMD, regional conflict resolution and justice and home affairs and border control issues (immigration and organised crime in particular).<sup>17</sup> Thus, security is taken to imply security within the neighbouring States, security within the region, security at the external borders of the EU, and security within the EU itself, each of these impacting on the others. Also, and as High Representative Javier Solana has argued, security extends beyond the purely military to include broader political, economic, social and even environmental aspects:

'It is a long time since security was thought of only in terms of military force. We all know that security is far broader today, that it includes economic, environmental, and social issues. Indeed, non-military threats to security loom much larger in the mind of most people . . . These non-military security threats are not adequately dealt with by any of our international institutions. . . . This is where the European Union must take up the challenge.'<sup>18</sup>

The ENP's cross-pillar dimension is thus an important aspect of its security basis. Its objectives can be related to the first pillar (economic development and closer economic integration, environmental protection, energy policy, border control); the second pillar (enhanced domestic political stability, cooperation in regional conflict prevention, alignment to EU policy on WMD) and the third pillar (cooperation on organised crime and terrorism), while all contributing to the overall security objective. The ENP thus epitomises the emerging role of security in EU external policy. No longer is security just one aspect of the Common Foreign and Security Policy. Rather, it has become a cross-pillar policy in its own right, creating a potentially more coherent EU external action which integrates the three poles of decision-making: the Member States, the Community pillar and the EU pillars, but which also carries the potential for inter-pillar boundary disputes.<sup>19</sup>

### ***b) Regional implementation of the European Security Strategy***

The comprehensive approach of the ENP to security is best understood within the wider framework of the European Security Strategy (ESS), adopted by the European Council on 12 December 2003.<sup>20</sup>

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<sup>16</sup> GAERC 14 June 2004.

<sup>17</sup> See also GAERC 13-14 Dec 2004.

<sup>18</sup> Javier Solana, 'The EU-Russia strategic partnership', speech delivered 13 October 1999, Stockholm.

<sup>19</sup> See for example case C-91/05 *Commission v Council*, pending.

<sup>20</sup> Available on <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>

The elaboration of the ESS was triggered by the US decision to invade Iraq.<sup>21</sup> US policy, and the consequent divide between the EU Member States, gave rise to the need to articulate, for the first time, a distinctively European approach to security (which would nevertheless emphasise the ‘irreplaceable’ nature of the transatlantic relationship).<sup>22</sup> The EU sees its responsibility for global security<sup>23</sup> as based on its own achievements in terms of peace and integration.<sup>24</sup> In addition to supporting multilateralism and strengthening international and regional institutions, the EU presents itself as a model for conflict resolution, for regional conflict prevention,<sup>25</sup> and – based on its enlargement practice – as having a great deal of experience in state building.<sup>26</sup> Enlargement has been an important instrument, and still is: as far as the Balkans are concerned, for example, the ESS claims that ‘[t]he European perspective offers both a strategic objective and an incentive for reform.’<sup>27</sup>

There is thus a strong regional dimension to the ESS and, in spite of its title and references to global security, the main emphasis is on security in the neighbourhood and at its borders:

‘It is in the European interest that countries on our borders are well-governed. Neighbours who are engaged in violent conflict, weak states where organised crime flourishes, dysfunctional societies or exploding population growth on its borders all pose problems for Europe.

The integration of acceding states increases our security but also brings the EU closer to troubled areas. Our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations.’<sup>28</sup>

There are several reasons for this emphasis on the neighbourhood. It is a security objective which the Member States can all agree to support; it is in the EU’s neighbourhood that a distinctively European contribution to security, based on State-building, is most feasible; moreover, the security concerns within the neighbourhood both demand and provide a focus for a deliberate attempt by the EU to build a coherent cross-pillar policy.

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<sup>21</sup> Toje, ‘The 2003 European Union Security Strategy: A Critical Appraisal’, (2005) 10 EFA Rev. 117 at 119.

<sup>22</sup> At the Informal GAERC at Kastelorizo, Greece, 2-3 May 2003, it was agreed to ask HR Solana to draw up what was referred to as a ‘European strategic concept’ and specific proposals ‘on how to project and deepen ESDP’ (see Presidency Press Statement available on <http://www.eu2003.gr/en/articles/2003/5/3/2662/>); the draft ESS was presented to the Thessaloniki European Council, 20-21 June 2003. There are obvious analogies with the NATO Strategic Concept, adopted in 1999, and the US National Security Strategy of 2002; on this see Duke, ‘The European Security Strategy in a Comparative Framework’ (2004) 9 EFA Rev 459.

<sup>23</sup> ‘Europe should be ready to share in the responsibility for global security and in building a better world’, ESS, 1.

<sup>24</sup> Duke, ‘The European Security Strategy in a Comparative Framework’ (2004) 9 EFA Rev 459 at 463.

<sup>25</sup> Kronenberger and Wouters (eds.): *The European Union and Conflict Prevention* (2004, Asser Press).

<sup>26</sup> Roles which are indeed codified in Article III-292 of the Treaty establishing a Constitution for Europe.

<sup>27</sup> ESS, 8.

<sup>28</sup> ESS, 7. Duke, ‘The European Security Strategy in a Comparative Framework’ (2004) 9 EFA Rev 459 at 464.

Thus the ESS puts neighbourhood security as one of its strategic objectives, and stresses the importance of the regional dimension: 'Coherent policies are also needed regionally, especially in dealing with conflict. Problems are rarely solved on a single country basis, or without regional support.'<sup>29</sup> But it goes deeper than that. The ENP is one of the first examples of a policy that in its priorities, especially as set out in the Action Plans, deliberately reflects the threats identified by the ESS, its overall approach to security and its strategic objectives. A contrast can be drawn between the ENP objectives of stability, security and prosperity and the 'cycle of conflict, insecurity and poverty' in which, as the ESS argues, a number of countries and regions are trapped.<sup>30</sup> The five threats identified in the ESS (terrorism, proliferation of WMD, regional conflicts, state failure and organised crime) as well as the strategic objectives designed to combat those threats (building neighbourhood security, and a commitment to effective multilateralism, the 'development of a stronger international society, well functioning international institutions and a rule-based international order'<sup>31</sup>) are all strongly reflected in the Action Plans of the ENP. Thus we can find in these Action Plans an emphasis on good governance and state-building through support for economic and social transition; the use of trade and assistance programmes to promote economic and political reform; an emphasis on the importance of a rule-based international system, with references to the need for the partners to subscribe to international legal and soft law instruments and to participate in international and regional institutions. Hence, for example, in encouraging a Ukrainian contribution to and participation in EU-led crisis management and conflict prevention policies the ENP also seeks to co-opt the EU's partners into sharing and helping to achieve its ESS objectives.

In seeking to realise those objectives, the ESS reaffirms the existing approach, methodologies and instruments of EU external policy in general and the ENP in particular. It emphasises the role of international institutions, regional organisations, international legal instruments (such as arms control treaties and the establishment of the International Criminal Court), improvements of governance (especially the rule of law, fighting corruption, the protection of human rights) through 'assistance programmes, conditionality and targeted trade measures' and the use of conditionality against countries that 'have placed themselves outside the bounds of international society'.<sup>32</sup> Security policy is thus to be achieved not solely through the development of the military and civilian dimensions of the emerging security and defence policy (such as military operations, police missions, crisis management, and peacekeeping) but also uses traditional first-pillar instruments such as trade policy, international agreements, technical assistance programmes and conditionality.<sup>33</sup> The ENP reflects a desire to improve coherence in the use of instruments, to bring together under one policy umbrella a number of instruments including bilateral agreements, assistance programmes and Action Plans.<sup>34</sup> There is a greater attempt to integrate the JHA

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<sup>29</sup> ESS, 13.

<sup>30</sup> ESS, 2.

<sup>31</sup> ESS, 9.

<sup>32</sup> ESS, 10.

<sup>33</sup> Whitman, 'Road Map for a Route March? (De-)civilianizing through the EU's Security Strategy' (2006) 11 EFA Rev. 1.

<sup>34</sup> 'The challenge now is to bring together the different instruments and capabilities: European assistance programmes and the European Development Fund, military and civilian capabilities from Member

dimension into the wider external relations picture.<sup>35</sup> This is not only about making the EU more efficient, but as pointed out in the ESS:

‘In contrast to the massive visible threat in the Cold War, none of the new threats is purely military; nor can any be tackled by purely military means. Each requires a mixture of instruments. ... The European Union is particularly well equipped to respond to such multi-faceted situations.’<sup>36</sup>

The range of instruments at the Union’s disposal can indeed be seen as an opportunity to create a coherent security policy, but also raises challenges both in identifying appropriate instruments and in managing a strategy which seeks to combine the EU’s own security agenda with a concept of joint ownership.

## 2. A methodology inspired by the integrated EU enlargement policy

The EU desire to provide a coherent policy towards its immediate environment is not only reflected in the *issues* covered by the ENP. It is also visible in the *methodology* established to implement the policy. Highly reminiscent of the practices developed within the framework of the EU pre-accession policy since the mid-1990s onwards (a), the ENP methodology (b) contains elements which challenge the ‘pillar politics’ that have often characterised the development of the EU system of external relations.<sup>37</sup>

### *a) EU enlargement policy: An efficient external policy transcending ‘pillar-politics’*

The EU enlargement policy was developed by the EU institutions and Member States particularly in relation to the countries from Central and Eastern Europe with a view to preparing those states to become members of the Union. Its efficiency has been remarkable, mainly due to an unprecedented system of multilayered conditionality, backed up by unique institutional practices demonstrating a high level of integration and coherence in the Union’s policy towards the candidate states. Indeed, the very *nature* of enlargement necessitates an integrated approach. It entails the promotion of the *EU acquis* as a whole vis-à-vis a third state having applied to become member. The applicant state should not only be ready to observe EC norms, it should also accept those of the other sub-orders of the EU, namely CFSP principles and measures, as well as all the rules related to the JHA/PJCCM. The division of the EU into sub-orders therefore does not matter in the accession process because the latter is all-encompassing by definition.

The comprehensive character of the EU enlargement process has been articulated particularly in the ‘pre-accession strategy’.<sup>38</sup> This strategy relied notably on the so-

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States and other instruments. All of these can have an impact on our security and on that of third countries. Security is the first condition for development.’ ESS, 13.

<sup>35</sup> See also the Strategy on the external dimension of JHA, agreed by the Council in December 2005.

<sup>36</sup> ESS, 7.

<sup>37</sup> See e.g. Timmermans, ‘The uneasy relationship between the Community and the second pillar of the Union: back to the Plan Fouchet?’ (1996) 1 LIEI 66

<sup>38</sup> For a detailed analysis of the pre-accession strategy, see Maresceau, ‘Pre-accession’ in Cremona (ed), *The enlargement of the European Union* (OUP, 2003) 9.

called 'accession partnership',<sup>39</sup> which not only transformed the existing bilateral 'Europe agreements' into a key pre-accession instrument,<sup>40</sup> but which also led to the emergence of a system whereby the candidates would adapt to all *EU* standards under close scrutiny by the EU institutions.<sup>41</sup>

Under this ad hoc system, the Commission drafts, in consultation with each of the candidates, individual accession partnerships setting out a list of principles, objectives and priorities on which the candidate's adaptation efforts should focus with a view to meeting fully the EU accession conditions, i.e. the 'Copenhagen criteria'.<sup>42</sup> Candidates' performance in meeting all those targets is assessed by the Commission in annual progress reports,<sup>43</sup> On the basis of the Commission's comprehensive reports,<sup>44</sup> the Council determines the evolution of the relationship with each candidate, and in particular the pace of accession negotiations, as well as the allocation of pre-accession financial assistance. Indeed, the Accession Partnership Regulation establishes a system whereby the Council, on a proposal from the Commission, can *review* the pre-accession financial assistance, if progress in meeting the Copenhagen criteria is held insufficient.<sup>45</sup> The Council then reports to the European Council, acting as the final political arbiter on the matter.<sup>46</sup>

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<sup>39</sup> Council Regulation No 622/98 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships (OJ 1998 L85/1).

<sup>40</sup> Maresceau and Montaguti, 'The relations between the European Union and central and eastern Europe: a legal appraisal' (1995) 32 *CMLRev* 1327.

<sup>41</sup> On Accession Partnership, see Grabbe, 'A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants', *Working Paper no. 99/12* (EUI Robert Schuman Centre for Advanced Studies, 1999); Inglis 'The pre-accession strategy and the accession partnerships' in Ott and Inglis (eds), *Handbook on European Enlargement* (TMC Asser, 2002) 103; Hillion, 'Enlargement: a legal analysis' in A. Arnulf and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP, 2002) 403.

<sup>42</sup> Further on the Copenhagen criteria: Hoffmeister, 'Earlier enlargements', in Ott and Inglis (eds), *Handbook on European Enlargement* (TMC Asser, 2002) 90.

<sup>43</sup> The 1997 Luxembourg European Council decided that '[f]rom the end of 1998, the Commission will make regular reports to the Council, together with any necessary recommendations for opening bilateral intergovernmental conferences, reviewing the progress of each Central and Eastern European applicant State towards accession in the light of the Copenhagen criteria, in particular the rate at which it is adopting the Union *acquis* ... The Commission's reports will serve as the basis for taking, in the Council context, the necessary decisions on the conduct of the accession negotiations or their extension to other applicants. In that context, the Commission will continue to follow the method adopted by Agenda 2000 in evaluating applicant States' ability to meet the economic criteria and fulfil the obligations deriving from accession' (see pt. 29, Presidency Conclusions). Annual Reports can be consulted at: [http://ec.europa.eu/enlargement/key\\_documents/index\\_en.htm](http://ec.europa.eu/enlargement/key_documents/index_en.htm)

<sup>44</sup> The Commission always provides an assessment of the candidates' progress in meeting all the Copenhagen criteria, including the political conditions, such as the protection of minorities. As regards more particularly the scrutiny of the political conditionality, see Williams, 'Enlargement of the Union and human rights conditionality: a policy' (2000), 25 *ELRev* 601; Smith, 'The evolution and application of EU membership conditionality' in Cremona (ed), *The enlargement of the European Union* (OUP, 2003) 105.

<sup>45</sup> Art. 4 of Council Regulation 622/98.

<sup>46</sup> For instance, at its meeting on 9 November 1998, the General Affairs Council, 'took note of a presentation by the Commission of its first regular reports on progress towards accession by Cyprus, the ten candidate States of Central and Eastern Europe, and Turkey, in line with the conclusions of the European Council at its meetings in Luxembourg and Cardiff. In a broad exchange of views, Ministers made preliminary comments on the Commission's progress reports. The Council asked the Permanent Representatives Committee to examine the documents submitted by the Commission and

The management of the accession partnership thus typifies the development of new roles for the institutions, and novel forms of interaction between them. In particular, the Commission has been granted a pivotal role in implementing the *Union* enlargement policy, as broadly defined by the European Council. It promotes, and controls the progressive application of the wider *Union's* *acquis* by the potential future members, thereby acting well beyond its traditional role of 'guardian of the [EC] Treaty' vis-à-vis the current Member States.<sup>47</sup> It also becomes clear that both in substantive and institutional terms, the enlargement process is characterised by a high level of integration. It involves a *de facto modus vivendi* between the institutions and the Member States for conducting what is essentially an *EU* policy towards third states, in casu the candidate states. Unsurprisingly, this precedent has been taken, notably by the Commission, as a model for developing, beyond the enlargement context, an integrated organisation of *EU* external policies in general, and of the neighbourhood policy in particular.

***b) A methodology penetrating the ENP***

Perceived as a successful policy, the institutional routines which were established in the context of this pre-accession process have inspired the ENP methodology.<sup>48</sup> Although not designed to prepare for membership, the ENP implants key features of the enlargement *methodology* in the development and implementation of the existing bilateral agreements with the 'ENP countries', which in the case of Ukraine is the Partnership and Cooperation Agreement (PCA). For instance, as happened with pre-accession in relation to the Europe Agreements, the ENP sparks a 'political re-orientation' of the PCA.<sup>49</sup> Without being formally renegotiated, the terms of the Agreement have been further articulated to fit in the overall policy framework set out by the new encompassing policy.

Moreover, in substantive terms, the ENP involves the projection of various *EU* principles and standards vis-à-vis the neighbours. Such projection does not only concern Community norms, but relates also to standards of the Union *as a whole*.<sup>50</sup>

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to present a report to the Council for its meeting on 7 December 1998, with a view to preparing the Vienna European Council'.

<sup>47</sup> The Commission also supervises the progress made by the candidate in adopting the *acquis* in Justice and Home Affairs, and CFSP; see chapters 24 and 27 of the regular reports for each candidate country.

<sup>48</sup> Kelley, 'New Wine In Old Wineskins: Policy Adaptation In The European Neighbourhood Policy', (2006) 44 *Journal of Common Market Studies* 29.

<sup>49</sup> Maresceau and Montaguti, 'The relations between the European Union and central and eastern Europe: a legal appraisal' (1995) 32 *CMLRev* 1327; Inglis, 'The Europe Agreements compared in the light of their pre-accession reorientation' (2000) 37 *CMLRev* 1173.

<sup>50</sup> While offering the ENP countries 'the prospect of a stake in the internal market', subject to legislative and regulatory approximation by the partner country to *EU* standards, the ENP also emphasises the neighbours' commitment to shared values in the field of fundamental rights (political and social), as advocated by the Union, and derived from various international norms to which the Member States are committed. In addition, it promotes a more effective political dialogue with the partners, inspired by CFSP objectives and principles. It also foresees possible involvement of the partner countries in aspects of CFSP and ESDP, and participation in *EU*-led-crisis management operations. On Justice and Home Affairs, the ENP promotes effective functioning of public administration, ensuring high standards of administrative efficiency, particularly as regards border management (European

Indeed, the Commission has emphasised that the ENP is 'a comprehensive policy integrating related components from all three 'pillars' of the Union's present structure'.<sup>51</sup> It offers 'a means for an enhanced and more focused policy approach of the EU towards its neighbourhood, *bringing together the principal instruments at the disposal of the Union and its member States*. It will contribute to further advancing and supporting the EU's foreign policy objectives' (emphasis added).<sup>52</sup>

The projection of the Union as an integrated normative whole towards the ENP countries is not only reflected by the list of objectives of the ENP. It is also evidenced in the 'action plans' (APs), which constitute the key element of the European neighbourhood policy.<sup>53</sup> Like the individual accession partnerships, the APs are intended to set out political and economic priorities for action by the ENP country. They provide for 'a benchmarked roadmap in bringing about needed reforms',<sup>54</sup> and fulfilment of these priorities is meant to 'bring [the neighbour] closer to the European Union'. The APs are comprehensive, covering 'political dialogue and reform; trade and measures preparing the partner for gradually obtaining a stake in the EU's internal market; justice and home affairs; energy transport, information society, environment and research and innovation, and social policy and people-to-people contacts'.<sup>55</sup> Indeed, the priorities set out in the AP take account of prior 'country reports' compiled by the Commission and containing an assessment of bilateral relations between the EU and each of the ENP countries, as well as an overview of its political, economic, social and legislative situation. In the case of Ukraine, the report assessed the progress made in implementing the PCA, and 'describe[d] the current situation in selected areas of particular interest for this partnership', namely 'the development of political institutions based on the values... underlined in the [PCA], regional stability and cooperation in justice and home affairs, and economic and social reforms... and further liberalisation of trade and for gradual participation in the Internal Market'.<sup>56</sup> The AP thus seeks to support and stimulate Ukraine's fulfilment of its obligations under the PCA, which remains a 'valid basis of EU-Ukraine cooperation', but in the all-encompassing perspective of the neighbourhood policy. The AP does not replace the Agreement, rather it sets out concrete steps, targets and priorities 'covering a number of key areas for specific action'<sup>57</sup> with a view to giving practical guidance to the Ukrainian

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Commission, Communication on the European Neighbourhood Policy – Strategy Paper; COM(04) 373).

<sup>51</sup> COM(04) 373, 6.

<sup>52</sup> COM(04) 373, 8.

<sup>53</sup> COM(04) 373, 3.

<sup>54</sup> Address by Javier Solana, 'The role of the EU in promoting and consolidating democracy in Europe's East' at the Common Vision for a Common neighbourhood Conference (Vilnius, 4 May 2006). Further on the APs, Hillion, 'Thou shalt love thy neighbour': the draft European Neighbourhood Policy Action Plan between the EU and Ukraine' in Mayhew and Copsey (eds.) *Ukraine and European Neighbourhood Policy* (Sussex European Institute, 2005), 17.

<sup>55</sup> Communication from the Commission to the Council on the Commission proposals for Action Plans under the European Neighbourhood Policy (ENP). COM(2004) 795, 2.

<sup>56</sup> 'Commission Staff Working Paper 'European Neighbourhood Policy – Country Report – Ukraine'. SEC(2004) 566.

<sup>57</sup> COM(04) 373, 3.

authorities to further their compliance with the rules of the Agreement, in the light of the ENP objectives.<sup>58</sup>

Adopted as a Recommendation of the PCA Cooperation Council,<sup>59</sup> the AP does not have a legally binding effect, but remains essentially a soft law instrument, like the individual accession partnerships drafted by the Commission.<sup>60</sup> It means that the AP's 'entry into force' is not subject to a process of ratification, and can thus be implemented immediately after its endorsement by the Cooperation Council. In addition, the non-legally binding nature of the ENP, also an essential feature of the pre-accession strategy, prevents long competence discussions and 'pillar politics' from stalling and undermining policy development and coherence.

While not legally binding, each AP makes it clear that the deepening of the existing relationship is subject to the neighbour's fulfilment of the *commitments* set out in the Action Plan. For instance, the Council, in speaking of a possible future enhanced agreement with Ukraine, predicated the opening of discussions on Ukraine addressing the political priorities of the AP, e.g. strengthening the rule of law, democracy and respect for human rights.<sup>61</sup> Such multilayered conditionality is reminiscent of the evolution of the Copenhagen political criteria into an 'admissibility' condition, i.e.

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<sup>58</sup> Further: Hillion, note 58,

<sup>59</sup> Recommendation No. 1/2005 of the EU-Ukraine Council of 21/02/2005 on the implementation of the EU/Ukraine Action Plan; Recommendation No 1/2005 of the EU Moldova Cooperation Council of 22/02/2005 on the implementation of the EU/Moldova Action Plan. In the case of the Mediterranean Partners, the APs were endorsed. In the Commission proposal [for a Council Decision on the 'position to be adopted by the Community and its Member States within the cooperation Council established by the [PCA]... with regard to the adoption of a Recommendation on the implementation of the EU-Ukraine Action Plan' (COM(2004)791)] the legal basis of the AP combines Art. 2(1) of the Council and Commission decision on the conclusion of the PCA, but also refers to Art. 15 TEU on CFSP Common positions; thereby confirming the cross-pillar dimension of the AP. The draft decision contains a single article which provides that the position to be adopted by the Communities and their Member States within the Cooperation Council shall be based on the draft Recommendation of the Cooperation Council, which is annexed to the Decision. The recommendation is based on Art. 85 PCA establishing the Cooperation Council. It contains a sole Article whereby the Cooperation Council recommends that the Parties implement the AP annexed, insofar as such implementation is directed towards attainment of the objectives of the PCA. Art. 85 PCA Ukraine provides that 'A Cooperation Council is hereby established which shall supervise the implementation of this Agreement. It shall meet at ministerial level once a year and when circumstances require. It shall examine any major issues arising within the framework of the Agreement and any other bilateral or international issues of mutual interest for the purpose of attaining the objectives of this Agreement. The Cooperation Council may also make appropriate recommendations, by agreement between the Parties.'

<sup>60</sup> The Mediterranean APs were also adopted as recommendations by the Association Council established by the Euro-Mediterranean Association Agreements, despite such Councils having a power to adopt binding decisions (e.g. Art. 83 of EMEA with Morocco; OJ 2000 L 70/2). Had they been adopted in the form of a decision, APs would have formally become part of the Community legal order, with potentially far reaching legal implications, notably direct effect (see see Case C-192/89 *Sevince* [1990] ECR I-3461).

<sup>61</sup> The Joint Statement of the EU-Ukraine Summit of December 2005 includes the following paragraph: 'EU leaders confirmed their commitment to initiate early consultations on a new enhanced agreement between EU and Ukraine to replace the Partnership and Cooperation Agreement, as soon as the political priorities of the Action Plan have been addressed' ; see: <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/05/337&format=HTML&aged=0&language=EN&guiLanguage=en>

precedent for opening accession negotiations.<sup>62</sup> The deepening of the relationship is also subject to the Partner's commitment to promote market oriented economic reforms and cooperation on key foreign policy objectives such as counter-terrorism and non-proliferation of weapons of mass-destruction. The fulfilment of the AP priorities by the ENP partner equally influences the allocation of EU *funds*, under the present assistance programmes, but also in the future under the new European Neighbourhood and Partnership Instrument.<sup>63</sup> Article 28 of the draft ENPI Regulation provides that where a partner country fails to observe the principles set out in the ENPI, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps in respect of any assistance granted to the partner country under the ENPI Regulation.<sup>64</sup> The ENPI thereby represents a financial incentive for global reform of the ENP countries,<sup>65</sup> but also embodies a system of sanction in case progress in meeting the AP objectives is lacking, a system which was foreshadowed on the basis of the Accession Partnerships.

The ENP thus embeds existing relations with the neighbouring States into a new policy framework within which the Union further promotes its trade, economic, social and political standards and principles. This development is reminiscent of the re-orientation of the Europe Agreements that took place in the context of the pre-accession strategy. Like the Accession Partnership, and despite its non-legally binding nature, the AP introduces further conditionality in the relationship. Through a blend of incentives and potential sanctions, it makes the deepening of links and the financing of the ENP

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<sup>62</sup> Further: Cremona, 'Accession to the European Union: Membership Conditionality and Accession Criteria' 25 *Polish Yearbook of International Law* (2002) 219 at 234-8.

<sup>63</sup> Proposal for a Regulation laying down general provisions establishing a European Neighbourhood and Partnership Instrument, 29 September 2004, COM(2004) 628.

<sup>64</sup> Such conditionality is without prejudice to the provisions on the suspension of aid in partnership and cooperation agreements which provide that respect for human rights and democratic principles constitute an essential element of the Agreement. Any violation of such an essential element may lead to the immediate suspension of the PCA. Further: Cremona, 'Human rights and democracy clauses in the EC's trade agreements' in Emiliou and O'Keeffe (eds), *The European Union and world trade law* (Wiley, 1996) 62; Hillion, 'Introduction to the partnership and cooperation agreements' in Kellermann, de Zwaan and Czuczai (eds), *EU enlargement – The Constitutional Impact at EU and National Level* (TMC Asser Press, 2001) 215.

<sup>65</sup> This new Instrument seeks to foster coordination and coherence between the distinct financial instruments which hitherto have operated separately [Currently, INTERREG (part of Structural Funds) covers cross-border and transnational cooperation among Member States, whereas operations within Eastern neighbouring states are covered by TACIS, with no particular synergy between them being sought]. Intended to replace existing instruments such as TACIS [Council Regulation (EC, Euratom) 99/2000 of 29 December 1999 (TACIS) concerning the provision of assistance to the partner States in Eastern Europe and Central Asia, OJ 2000 L 12/1] and MEDA [Council Regulation 1488/96/EC on financial and technical measures to support the reform of economic and social structures in Mediterranean non-member countries and territories (MEDA) in the framework of the Euro-Med Partnership OJ 1996 L 189/1 as amended by Reg. 2698/2000/EC OJ 2000 L 311/1 and Reg. 2112/2005/EC OJ 2005 L 344/23] from 2007, the Instrument is set to taking a new approach to border issues and cross-border cooperation. It will also operate alongside two other general instruments, one for pre-accession (to include the Western Balkans) and one for development, and will cover 2007-2013. Before the entry into force of the new Instrument, coordination of existing programmes is to be fostered and ensured through introduction of Neighbourhood Programmes, in the form of single projects operating on both sides of the border; Communication to the Commission by Commissioner Ferrero-Waldner, Implementing and Promoting the ENP, 22 November 2005, SEC(2005) 1521.

countries' rapprochement with the Union as a whole, subject to the fulfilment by them of the standards it advocates.

The Neighbourhood Policy does not only import various policy tools of the pre-accession strategy, it also imitates its institutional set up. The emerging ENP is not based on any specific Treaty provisions. Rather, it is the product of informal interactions between the Commission (particularly DG external relations) and the Council (including the HR for CFSP) together with the European Council.<sup>66</sup> These informal interactions are particularly evident in the *conduct* of the policy, and notably at the level of the *elaboration* and *suivi* of the APs. In the case of Ukraine, the Commission started the elaboration of the AP 'in close coordination with the Member States', following the publication of its country report.<sup>67</sup> Once that country report was endorsed by the Council, the Commission started drafting the Action Plan in cooperation with the HR for CFSP, and in consultation with the country concerned;<sup>68</sup> while Member States were kept informed of this consultation and of the development of the AP.<sup>69</sup> Following its adoption by the Commission,<sup>70</sup> the AP was swiftly endorsed by the Council,<sup>71</sup> before its final presentation to the Cooperation Council of the PCA for formal approval.<sup>72</sup> As regards the *suivi*, the ENP foresees that it is the responsibility of the Commission to draw up periodic progress reports on the implementation of the AP,<sup>73</sup> in cooperation with the HR for CFSP on issues related to political dialogue and

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<sup>66</sup> On the initiation of the 'Wider Europe' and subsequently ENP, see e.g. Lannon and van Elsuwege, 'The EU's emerging Neighbourhood Policy and its potential impact on the Euro-Mediterranean partnership' in Xuereb (ed), *Euro-Med Integration and the "ring of friends": The Mediterranean's Europe Challenge* (European Documentation and Research Centre, VOL. IV, 2003), 21

<sup>67</sup> Commission Staff Working Paper 'European Neighbourhood Policy - Country Report - Ukraine'. SEC(2004) 566.

<sup>68</sup> Successive presidencies, the Council Secretariat and representatives of HR Solana participated in all consultations with partners (Communication from the Commission to the Council on the Commission proposals for Action Plans under the European Neighbourhood Policy (ENP); COM(2004) 795, 3). In particular, the representative for the HR was involved on all discussions 'regarding the political dialogue and cooperation, and CFSP issues'. Indeed, this participation is recurrently emphasised in all policy documents of the Commission related to the ENP. It follows the formula envisaged by the Council.

<sup>69</sup> The Council has insisted on the Member States' being kept 'fully informed of the progress of [the Commission's] consultations' leading to the drafting of the [future] Action plans. General Affairs and External Relations Council Conclusions of 25 April 2005, 8035/05 (Presse 86)

<sup>70</sup> See the press-conference given by Commissioner Ferrero-Waldner on the launch of the first seven APs under the ENP, Brussels, 9 December 2004.

<sup>71</sup> The GAER Council adopted the APs on 13 December after the Commission had adopted them on 9 December. This swift adoption by the Council can be taken as evidence of the earlier involvement of the HR for CFSP. The APs were transmitted to the European Parliament, the Economic and Social Committee, and the Committee of the region for information.

<sup>72</sup> The Council invited the Committee of Permanent Representatives to prepare the necessary decisions enabling the Co-operation Councils with the respective ENP partners to confirm these action plans and to launch their implementation. As pointed out by the Council, it is only a *confirmation*. The APs were in practice already 'agreed' with the partner countries concerned even before the Commission, as a college, had formally adopted them on 9 December 2004.

<sup>73</sup> It should be noted that 2003 Accession Treaty has partly maintained this extraordinary role for the Commission, by endowing it with the power to adopt specific safeguard measures in the field of Justice and Home affairs, with no equivalent in the context of the TEU; see Art. 39 of the Act of Accession (OJ 2003 L236/33). Further: Inglis, 'The Unions fifth accession treaty New means to make

cooperation, and the CFSP.<sup>74</sup> These reports should then be transmitted to the Council which should decide, in tandem with the European Council,<sup>75</sup> on the development of the Partnership, on the potential review of the financial assistance, and as the case may be, on opening negotiations with a view to establishing a 'European Neighbourhood Agreement'.

It thus becomes apparent that the methodology underpinning the ENP heavily draws on the techniques of the pre-accession strategy. Aimed at handling the multi-faceted external implications of the 2004 enlargement, the neighbourhood policy is equally comprehensive in that it involves the Union as a whole. Furthermore, the deepening of the EU relationship with the neighbours on the basis of the ENP is made conditional upon the neighbours' ability to meet the priorities defined in the AP, and thus relies extensively on benchmarking and monitoring. Finally, the institutional set up of the ENP reproduces, to a considerable extent, the institutions' interactions developed in the context of the pre-accession strategy, outside the ordinary EU constitutional *modus operandi*. By borrowing several features of the pre-accession policy, the ENP takes advantage of the immunity from 'pillar politics' that has characterised that policy, thus enhancing the coherence of the EU action towards its neighbours. At the same time, transplanting the pre-accession mechanisms into a policy aimed at embodying an alternative to accession may also put at risk the overall efficiency and *raison d'être* of that policy. The next section will shed light on the inherent systemic weaknesses of the ENP.

#### **4. Inherent systemic weaknesses of the ENP**

Various criticisms have been formulated with respect to the ENP. This section does not aim to recall all of them, but to shed light on some of the tensions that are inherent in the ENP, in particular those that arise out of the ENP's attempt to use a cross-pillar enlargement-based methodology to achieve security objectives.

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enlargement possible' (2004) 41 CMLRev 937, Hillion, "The European Union is dead. Long live the European Union... A Commentary on the Accession Treaty 2003" (2004) 29 ELRev 583.

<sup>74</sup> At its meeting on 13 Dec. 2004, the GAER Council recalled its intention to undertake a first review of the implementation of the action plans at the latest two years from their adoption, on the basis of assessment reports to be prepared by the Commission, in close co-operation with the Presidency and the SG/HR on issues related to political cooperation and the CFSP, and with the contribution of ENP partners. At its meeting on 16/17 December 2004, the European Council also invited the Commission and the High Representative to report regularly on progress accomplished. This joint exercise by the Commission and the HR, which contrasts with the enlargement policy, seemingly prefigures the 'double-hatting' system introduced by the Constitutional Treaty.

<sup>75</sup> It should be pointed out that the Cooperation Council, Committee and sub-committees are endowed with the monitoring of the implementation of the AP. Such use of the institutional framework of the Agreement again draws on the enlargement methodology; see Council Regulation 622/98 establishing the Accession Partnership which emphasises that 'the role played by the bodies set up by the EAs is central to ensuring the proper implementation and follow up of these action plans', see 11<sup>th</sup> Recital of the Preamble (OJ 1998 L85/1).

**a) *The increasing pressure for differentiation within a widening ENP***

The ENP was initially designed as a ‘proximity policy’ towards Eastern neighbours, namely Moldova, Russia, Ukraine, and potentially Belarus.<sup>76</sup> It was only at a later stage that Mediterranean neighbours were included in the new policy; while Russia made it clear that it would favour a bilateral strategic partnership. Since its launch, the ENP has been widened still further. At the same time as the first Action Plans were finalised with respect to Ukraine, Moldova, Morocco, Tunisia, Israel and the Palestinian Authority, the EU extended the ENP to the South Caucasian States.

The decision to include southern Mediterranean countries and East Europeans in the same one-size-fits-all framework had already been perceived by Ukraine as an indication that it may not have better chance of acceding to the Union than Morocco.<sup>77</sup> Extended to the South, the ENP has thus become less palatable for the first-chosen ‘neighbours’ and, arguably, the inclusion of south Caucasian states might further reduce its attractiveness.<sup>78</sup> In other words, lengthening the list of ENP beneficiaries may eventually dilute the political value of the new Policy, pushing neighbours such as Ukraine to require further differentiation, either in the form of a distinct future agreement, and/or more generous objectives in terms of integration.<sup>79</sup> This factor, with its emphasis on differentiation, raises the question of the ultimate *goal* of the ENP and what relationship is ultimately envisaged for the neighbour States, and increases the pressure on the EU to define those goals more explicitly. Unlike the enlargement process, there is no clear mutually agreed objective applying to all partner States.

**b) *Limits of the enlargement methodology***

As we have seen, in spite of having different aims, the ENP has been influenced by enlargement methodology, and one factor in this development is undoubtedly the desire

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<sup>76</sup> See the Joint letter by EU Commissioner Chris Patten and the EU High Representative for the Common Foreign and Security Policy on Wider Europe. 7 August 2002; [http://www.europa.eu.int/comm/world/enp/pdf/0130163334\\_001\\_en.pdf](http://www.europa.eu.int/comm/world/enp/pdf/0130163334_001_en.pdf)

Prior to this letter, Jack Straw, then Foreign Secretary, sent a letter to the then Spanish Presidency of the EU calling for ‘special neighbour status’ to Ukraine, Belarus and Moldova, meaning ‘free trade rights with the EU and a close relationship on border, justice, home affairs, security and defence issues’ (*The Independent*, 16/04/2002; *The Financial Times*, 15/04/2002).

<sup>77</sup> In May 2004, the Commission had published its Country Report on Ukraine that triggered consultations with the Ukrainian authorities with a view to drafting the Action Plan (COM(2004)373, 12 May 2004). The discussions however stalled over disagreement about the evolution of the relationship after the expiry of the AP. In particular, Ukraine wanted the differentiation principle to be reflected in a statement of Ukraine’s position, in particular the difference between Ukraine and the Mediterranean ENP partners. Discussions resumed following the EU-Ukraine summit in July 2004.

<sup>78</sup> The southern Mediterranean neighbours have not been happier with the ENP. The latter has been regarded as diminishing the spirit of ‘Partnership’ underpinning the Euro-Med relations since the Barcelona declaration; increasing instead the unilateral nature of the EU relationship with its Mediterranean neighbours. further Lannon and van Elsuwege, above note 71.

<sup>79</sup> That phenomenon appeared with the extension of the Europe Agreements’ network in the nineties. While this type of specific association was initially negotiated with Czechoslovakia, Hungary and Poland, increasing the list of potential associated states reduced its attractive character for the first signatories which then redoubled efforts to have their accession prospect recognised. See in this regard: Raux, ‘Les instruments juridiques de la Communauté avec les Etats de l’Europe de l’Est’ in Gautron (ed), *Les relations Communauté européenne – Europe de l’Est* (Economica, 1991) 41.

to build on and repeat the success story represented by enlargement – success in effectively managing a hugely complex process of approximation to the EU acquis over the entire range of Union policy areas. However the use of this methodology creates its own difficulties and tensions in the different context of the ENP.

In the first place, it sends contradictory signals to the Partners: if the ENP is separate from the question of membership, as the EU claims,<sup>80</sup> why use pre-accession techniques? Lynch argues that this approach has led to a focus by the EU on *tactics* (i.e. techniques) at the expense of *strategy* (i.e. the long-term goal of the relationship).<sup>81</sup> Thus, to the extent that the ENP incarnates the initial EU differentiation between central and eastern Europe,<sup>82</sup> it is unsustainable. The better it succeeds, the less the ENP can legitimately be disconnected from the membership prospect of the eligible partners, because the conditions for membership are *de facto* being met. In other words, if it works, the ENP will *create* candidates.<sup>83</sup>

On the other hand, if the ENP is not about membership, then we can question the rationale for insisting that the partner countries adopt so much of the EU acquis. Although one can see the advantages for the EU itself, the latter has not yet succeeded in convincing its Partners of the merits for them of the adoption of the acquis at this level, and the appropriateness of EU standards, in the absence of a membership perspective. Thus the use of enlargement methodology adds to the uncertainty as to the EU's long-term goal for the relationship, it does not adequately explain the choice of short-term objectives, and puts into question the content and objectives of a possible future ENP agreement.

Moreover, we have seen that the ENP has used, as its institutional basis, the institutional frameworks created by existing bilateral agreements, such as the PCAs. This approach, modelled on the use of the Europe Agreements in the enlargement process, reflects a degree of continuing ambiguity over what kind of institutional framework is necessary or appropriate for the ENP, going to the heart of its nature as bilateral or multilateral. In his December 2002 speech on what was then being called a Proximity Policy, Prodi uses the phrase that has become a catch-phrase of the ENP:

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<sup>80</sup> For example: 'Let's be clear about what ENP is, and what it is not. It is not an Enlargement policy. It does not close any doors to European countries that may at some future point wish to apply for membership, but it does not provide a specific accession prospect either.' Commissioner Ferrero Waldner, Press Conference to launch first seven Action Plans under the European Neighbourhood Policy, Brussels, 9 December 2004; SPEECH/04/529.

<sup>81</sup> Lynch, 'The New Eastern Dimension of the Enlarged EU' in *Partners and Neighbours: A CFSP for a Wider Europe*, Chaillot Papers No.64 (Institute for Security Studies, 2003) 39.

<sup>82</sup> Further on this differentiation, Maresceau 'On association, partnership, pre-accession and accession' in Maresceau, M (ed), *Enlarging the European Union* (1997, Longman) 3.

<sup>83</sup> At the same time, the EU, arguably more boldly than ever, refuses to make any connection. Commissioner Ferrero Waldner has made the point on several occasions that the two policies are distinct. 'Let's be clear about what ENP is, and what it is not. It is not an Enlargement policy. It does not close any doors to European countries that may at some future point wish to apply for membership, but it does not provide a specific accession prospect either.'; Commissioner Ferrero Waldner, Press Conference to launch first seven Action Plans under the European Neighbourhood Policy, Brussels, 9 December 2004; SPEECH/04/529.

‘sharing everything with the EU but institutions’.<sup>84</sup> What does this say about the institutional basis of the ENP? The Solana-Patten letter is also cautious about shared institutions:

‘we could foresee a gradually evolving framework for an economic and political space surrounding the Union, which would nevertheless stop short of full membership or creating shared institutions.’<sup>85</sup>

Prodi himself makes it clear a little later in the same speech that he meant that existing EU institutions could not be shared – that would require full membership. But other joint institutions might be created:

‘The idea of “sharing everything but institutions” itself applies to existing EU institutions. But this does not exclude the possibility of developing new structures with our neighbours at a later stage, if necessary.’

At present, the institutional structure of the bilateral relationships within the ENP is provided by the bilateral agreements, emphasising the essentially bilateral nature of the ENP. There is no multilateral institutional basis. While this could change, there is no proposal for the creation of institutional links between the ENP States, such as the EEA with its EFTA Court and Surveillance Authority. A new type of agreement will create its own institutional structures, although there is no indication that these will be qualitatively different from existing Cooperation or Association Councils or what decision-making powers they might have. If the policy is to develop into something substantial and long-term, thought needs to be given to the nature of its institutional framework, and in particular whether to maintain the essentially bilateral approach (which is based on the enlargement model) or to seek to establish either a two-pillar approach (like the EEA) or a multilateral/regional framework (more like the Barcelona Process) that would supplement the bilateral institutional framework. The European Conference might have promised the basis for such a framework, but although attempts were made to broaden its membership beyond the candidate States,<sup>86</sup> it has not managed to create for itself an identity separate from the accession process.<sup>87</sup>

### *c) The gap between the neighbours’ expectations and the EU capacity to deliver*

The ENP Strategy Paper evokes the establishment of a ‘European Neighbourhood Agreement’ that would replace the present generation of bilateral agreements,<sup>88</sup> for those ENP countries that fulfil the Action Plan objectives. The EU has however

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<sup>84</sup> Prodi, ‘A Wider Europe – A Proximity Policy as the key to stability’, speech to the Sixth ECSA-World Conference, Brussels, 5-6 December 2002, SPEECH/02/619.

<sup>85</sup> Joint letter by EU Commissioner Chris Patten and the EU High Representative for the Common Foreign and Security Policy on Wider Europe. 7 August 2002. [http://www.europa.eu.int/comm/world/enp/pdf/0130163334\\_001\\_en.pdf](http://www.europa.eu.int/comm/world/enp/pdf/0130163334_001_en.pdf)

<sup>86</sup> See in this regard the Declaration adopted on 17 April 2003 by the ‘enlarged European Conference and Russia’: [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressdata/en/misc/75487.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/misc/75487.pdf)

<sup>87</sup> Maresceau, ‘Pre-Accession’ in Cremona (ed.) *The Enlargement of the European Union* (Oxford 2003) 27-30.

<sup>88</sup> COM(04) 373, 5. Some ENP documents only refer to ‘enhanced agreement’ (cf Action Plan with Ukraine), or to a ‘new contractual relationship’/‘arrangement’ (cf Action Plan with Moldova).

remained unclear as to what this new Agreement would be in terms of its nature, objectives, and content. In the case of Ukraine, it points out only that 'its scope would be defined in the light of progress in meeting the priorities set out in the AP',<sup>89</sup> and 'the overall evolution of EU-Ukraine relations'.<sup>90</sup>

With respect to its *nature*, one could anticipate that, in the absence of the Constitutional Treaty,<sup>91</sup> the 'enhanced agreement' would be an association agreement based on Article 310 EC, thus establishing a privileged relationship, potentially close to the Europe agreements concluded with the CEECs or the Stabilisation and Association Agreements with the Western Balkan States. Indeed, any agreement below association would not be perceived as an 'enhanced' contractual relationship, particularly given the already existing association agreements with the Mediterranean countries. The terminology used in the introductory section of the AP with Ukraine hints at the progressive establishment of a relationship that includes various features of association agreements as defined by the European Court of Justice's *Demirel* judgment.<sup>92</sup> Particularly, the ENP perspective of moving beyond cooperation to a significant degree of integration and the possibility for Ukraine to participate progressively in key aspects of EU policies and programmes, seems to echo the formula used by the Court.<sup>93</sup>

Given the cross-pillar dimension of the AP, and to a lesser but still real extent of the PCA, it can be assumed that the enhanced relationship will also cover the whole gamut of EU activities. Indeed, the agreement could take the form of an association-like agreement between the *EU* and its partner.<sup>94</sup> Beyond the question of its nature, the new agreement's content will have to be substantial if it is to constitute a credible and attractive alternative to accession. This is particularly true for those countries such as Ukraine that have a membership agenda, but is also important for the credibility of the ENP as a whole.

The difficulty in establishing such an ambitious agreement, both in terms of scope and objectives, lies notably in the procedural requirements connected to its negotiation, conclusion and implementation. For instance, concluding an Association-like agreement would require a unanimous vote within the Council.<sup>95</sup> Furthermore, assuming that it would cover most areas of EC external relations, the agreement would be mixed (EC/Member States), and would therefore require the ratification by all 27, if

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<sup>89</sup> COM(04) 373, 4.

<sup>90</sup> Pt. 1 (Introduction) AP.

<sup>91</sup> Which envisaged in Art. I-57 the possibility of specific agreements with the Union's neighbours.

<sup>92</sup> In its judgment, the Court considers at para 9 that an 'association agreement creat[es] special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system'; Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719.

<sup>93</sup> The importance of the nature of the agreement, and its label should not be exaggerated, as suggested by the case law of the European Court of Justice, see in particular Case 265/03 *Simutenkov* [2005] ECR I-2579.

<sup>94</sup> Further on Association agreements of the EU, see Raux, "Towards a pan-Euro-Mediterranean strategy: association of proximity" Maresceau, and Lannon (eds), *The EU's enlargement and Mediterranean strategies* (Palgrave, 2001) 42; Raux, "Association et perspectives partenariales" in Christophe-Tchakaloff, M-F (ed), *Le concept d'association dans les accords passés par la Communauté: essai de clarification* (Bruylant, 1999) 89.

<sup>95</sup> See Article 300 (2) EC.

not more, Member States of the Union, at a rather inauspicious moment. Indeed, if it were to cover all EU external dimensions as suggested earlier, the enhanced agreement could be 'doubly mixed' (EC/EU/Member States), thus potentially involving intricate procedural squabbling, and leading the EU institutions and Member States back to the pillar-politics that the ENP has, to some extent, managed to keep at bay. On the whole therefore, it appears that the Union may be in a difficult constitutional position to offer an agreement that would match the neighbours' expectations. A bundle of bilateral sectoral agreements could thus be explored as an alternative to an all-encompassing agreement, although this arrangement would need to be spearheaded by an overall institutional framework.

Another promise the Union might have difficulty in delivering relates to the financial support it advertised for the implementation of the ENP. The finalising of the ENPI, its budget and thus its ability to be a genuine incentive are determined by the agreement reached within the EU on the overall financial framework for 2007-2013. In this respect, it appears that the Commission's initial ambitions<sup>96</sup> have not been followed by the European Council, the latter having envisaged a more restricted funding for the ENPI.<sup>97</sup>

Alongside the more modest financial package that the Union is committing to support the ENP, it remains to be seen whether the new Member States, struggling to get what they may have expected from the EU budget (agriculture, structural funds...), will be willing to share the pot with an increasing number of ENP countries.

#### *d) The inherent tension between joint ownership and conditionality*

The financial issues just mentioned are rather starkly illustrative of one of the more fundamental questions raised by the ENP: to what extent is this policy really one of mutuality and joint ownership? The EU has presented joint ownership based on mutual interests as one of the ENP's key characteristics.

'Joint ownership of the process, based on the awareness of shared values and common interests, is essential. The EU does not seek to impose priorities or conditions on its partners. The Action Plans depend, for their success, on the clear recognition of mutual interests in addressing a set of priority issues. There can be no question of asking partners to accept a pre-determined set of priorities. These will be defined by common consent and will thus vary from country to country.'<sup>98</sup>

We can speak of shared values and aims, mutual interests, a common project, of burden sharing and the perception of common tasks, all consonant with the security basis of the ENP. Joint ownership emphasises the (potential) equality in the relationship, or at least the idea that both the EU and the partner state will contribute to shaping a policy and identifying common responses to common problems, as well as carrying them out. This

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<sup>96</sup> Commission proposal for a Regulation establishing a European Neighbourhood and Partnership Instrument COM(2004) 628 final.

<sup>97</sup> See 'Heading 4' of the Financial Perspectives 2007-2013 <available at: [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/misc/87677.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/87677.pdf)> agreed by the European Council on 15/16 December 2005 (see pt. 6).

<sup>98</sup> Commission Communication, European Neighbourhood Policy Strategy Paper, COM(2004) 373 final, 12 May 2004, 8.

approach to the EU's neighbours could be characterised as one of solidarity (as well as equality). The EU and the neighbours have certain interests in common (such as border control, environmental protection or regional security) and agree to work together to achieve those ends; there is thus a level of inter-dependence as well as cooperation. It is perhaps a view of the ENP which is most likely to offer a credible alternative to membership, a possibility of progress in the relationship which is not based on the debate about accession but rather on concrete actions which build trust; a relationship built on 'doing together what can be done together' rather than on fulfilling conditions. It might be contrasted to a view of the ENP that is based on a deal or bargain, whereby each party has something to offer that the other wants (but they are not necessarily the same).<sup>99</sup>

However there are a number of difficulties with this model. First, the ENP is essentially a *unilateral policy* aimed at changing the Union's environment.<sup>100</sup> This point is emphasised in fact by the use of the word 'policy' to describe the ENP: it is not a 'space' (c.f. the four common spaces being developed with Russia), nor an 'area' (c.f. EEA), nor a 'process' (c.f. the Barcelona Process or the Stabilisation and Association Process in the Western Balkans), nor a 'partnership' (c.f. the Euro-Mediterranean Partnership) although the current agreements with the eastern neighbours are Partnership and Cooperation Agreements. A policy is driven by the policy-maker. The ENP is clearly and unambiguously an *EU policy* directed at its neighbours rather than the creation of something new (a space or an area) or a shared enterprise (a process or partnership). Although drafted in consultation with the neighbours, the Action Plans are first and foremost a vehicle for the EU to *project* a corpus of norms and practices considered to be appropriate for political and economic reform.

Indeed, brief comparison of the shaping of the ENP and the parallel development of the EU-Russia 'Common Spaces' brings additional support to the proposition that, despite the consultation of the neighbours, the ENP remains essentially unilateral. In particular, the creation of the Common Spaces was, in contrast to the ENP, launched by the Parties in the context of the EU-Russia Summit.<sup>101</sup> In the same vein, the conceptualisation of the Common Economic Space was the task of an EU-Russia High Level Group consisting of an equal number of Russian and EU representatives,<sup>102</sup> rather than the

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<sup>99</sup> At the launch of the first Action Plans in December 2004, Commissioner Ferrero-Waldner characterised the ENP as *not* an enlargement policy, but as a *deal*, incorporating an offer from the EU 'A substantial offer ... of much deeper cooperation and progressive integration into certain EU policies and programmes, depending on the fulfilment of commitments.' She sets the ENP out in terms of a *deal in the interests of both sides* explaining what the EU gets out of it, and what the neighbours get. Ferrero-Waldner, 9 December 2004, Speech 04/529.

<sup>100</sup> In December 2004, the Council adopted a Final Report on its Common Strategy on Ukraine, which expired at the end of December 2004, taking the view that from 2005, the Action Plan would replace the Common Strategy as the basis for cooperation. See Council report to the European Council on the implementation of the Common Strategy of the European Union on Ukraine, 15 December 2004, 15989/04. The Common Strategy was adopted in 1999 and was one of the only three such Common Strategies to be adopted under Article 13(2) TEU (the others being on Russia and the Mediterranean).

<sup>101</sup> EU-Russia summit, 31 May 2003, St. Petersburg, Joint Statement, Press release No. 9937/03; The idea was further worked out at the EU-Russia summit in Rome in November 2003.

<sup>102</sup> The HLG was established by the Brussels EU-Russia summit of October 2001 (EU-Russia Summit, Joint statement. Brussels, 3 October 2001. Press release No. 12423/01) in accordance with Art. 93 PCA. Meeting twice a year, the HLG was co-chaired by representatives of the Russian Federation and

exclusive job of the Commission and Council services.<sup>103</sup> Thus, joint ownership appears to have a different connotation in the development of the Common Spaces, and in the ENP.

Second, this notion that the ENP, and the Action Plans in particular, are inherently unilateral rather than based on the spirit of partnership and joint ownership, is epitomised by the highly specific conditionality that these instruments envisage.<sup>104</sup> Conditionality, which is at the heart of the ENP, is essentially based on the idea of a deal, or a bargain ('if you will do this, then we will do that') and implies an assessment of the performance of one party by the other. Whereas conditionality may be an appropriate mechanism for achieving results in the case of trade-related objectives, and possibly also for achieving the political criteria (democracy, rule of law) for further integration, it undermines the claim to joint ownership of the process. Kelley refers to the 'intentional ambiguity' in the relationship between joint ownership and conditionality within the ENP.<sup>105</sup> It is hard to reconcile true joint ownership with the unequal relationship implied by conditionality.

This ambiguity is exemplified by the use of differentiation as a principle underlying the ENP. On the one hand differentiation is justified by reference to the principle of joint ownership – hence the need to identify common targets, to recognise differing starting points, circumstances and priorities:

'The intensity and level of ambition of relations with each ENP partner is differentiated, reflecting the degree to which common values are effectively shared, the existing state of relations with each country, its needs and capacities, as well as common interests.'<sup>106</sup>

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of the European Union. In practice, vice-Prime Minister Khristenko and External Relations Commissioner Patten, later replaced by Enlargement Commissioner Verheugen, chaired the HLG. The decision to establish the HLG was taken by the Russia-EU summit meeting in Moscow in May 2001 (EU-Russia Summit, Joint statement. Moscow, 17 May 2001. Press release No. 8853/01) following a meeting in Stockholm in March 2001 between the Heads of State and Government of the European Union and the President of the Russian Federation, where the idea of the CEES was reinvigorated. The HLG submitted various reports; i.a. *The Common European Economic Space (CEES) – Concept Paper*, submitted to the EU-Russia summit in Rome, 6 November 2003, Press release No. 13990/03.

<sup>103</sup> Further: Vinokurov, 'The making of the concept of the EU-Russia Common Economic Space', *Chair Interbrew – Baillet Latour Working Paper no. 22* (2004b, K.U. Leuven), [www.soc.kuleuven.ac.be/pol/docs/docs\\_ibl/WP22-Vinokurov.pdf](http://www.soc.kuleuven.ac.be/pol/docs/docs_ibl/WP22-Vinokurov.pdf); Hillion, 'The Russian Federation' in Blockmans & Lazowski (eds), *The European Union and its Neighbours* (TMC Asser Press – CUP, 2006).

<sup>104</sup> 'action plans [are] to be agreed jointly with the neighbouring countries concerned. They should have a minimum duration of three years and be subject to renewal by mutual consent. Such action plans should be based on common principles but be differentiated, as appropriate, taking into account the specificities of each neighbour, its national reform processes and its relations with the EU. Action plans should be comprehensive but at the same time identify clearly a limited number of key priorities and offer real incentives for reform. Action plans should also contribute, where possible, to regional cooperation. ....' Council Conclusions 14 June 2004. See also Commission Communication on Commission Proposals for Action Plans under the ENP, 9 December 2004, COM(2004) 795 final.

<sup>105</sup> Kelley, above note 51, 36.

<sup>106</sup> Commission Communication on Proposals for Action Plans under the ENP, 9 December 2004, COM(2004) 795 final, p.3.

As we have already seen, the widening of the ENP is likely to lead to a greater emphasis, on the part of the partner States, on the need for differentiation as to ultimate objectives ('level of ambition'). On the other hand, differentiation is linked to conditionality, the differentiation that results from differing levels of progress made in meeting conditions, as judged by the EU. The policy will be structured around 'a differentiated framework, which responds to progress made by the partner countries in defined areas'.<sup>107</sup> Although there is a tension between these two aspects of differentiation, both demonstrate the risk that existing differences between the neighbours in their relations with the EU will grow wider rather than narrower: creating new dividing lines and undermining rather than supporting the principle of joint ownership.

Apart from these ambiguities in the notion of joint ownership, a real difficulty in achieving true joint ownership flows from the nature of the Community/Union legal order. Who will really make the policy? The EU finds it difficult to allow anyone else a seat at the table where internal laws or rules are being adopted. As Lavenex points out, external governance may imply an expansion of the EU's 'legal borders' without an expansion of its institutional borders,<sup>108</sup> while Lynch asks 'can membership of the Union be blurred?'<sup>109</sup> Maybe one solution might be found in the use of bilateral agreements (such as some type of new Neighbourhood Agreement) and other instruments, such as codes of conduct, which can be jointly agreed. Another solution would be the upgrading of the PCA institutional framework to allow (binding) decisions to be taken by the PCA Cooperation Council, although it is notable that while the Euro-Mediterranean Association Councils, unlike the PCA Cooperation Councils, do have the power to take binding decisions, all the ENP Action Plans were none-the-less adopted as recommendations.<sup>110</sup> Were the institutional framework in the existing and/or future bilateral agreements to be enhanced in order to provide a real impetus to the development of the ENP, a decision-making power would need to be accompanied by specific areas of decision-making competence, giving the institutions a field in which to act. In other words, there is a need for institutions with real capacity if joint ownership is to be tangible and meaningful.

#### ***e) The lacking regional dimension of the ENP***

Enlargement (absorption into the Union) is of course a deep form of regional integration and the pre-accession period thus saw for the accession States a staged process of gradually increasing integration into EU norms, structures and policies. Inevitably, this process entailed a closer integration of the candidate States between themselves, but this was largely a by-product of their rapprochement with the EU rather than becoming a goal in its own right. Outside the enlargement context, the EU sees

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<sup>107</sup> Council Conclusions on Wider Europe – New Neighbourhood, 16 June 2003, para 5.

<sup>108</sup> Lavenex, 'EU External Governance in Wider Europe', (2004) 11 (4) *Journal of European Public Policy*, 680 at 683; Myrjord, 'Governance Beyond the Union: EU Boundaries in the Barents Euro-Arctic Region' (2003) *EFARev* 239.

<sup>109</sup> Lynch, 'The New Eastern Dimension of the Enlarged EU' in *Partners and Neighbours: A CFSP for a Wider Europe*, Chaillot Papers No.64 (Institute for Security Studies, 2003) 37.

<sup>110</sup> See note 65.

itself as a champion (and model) of regional integration, particularly regional integration as a mechanism for economic development and conflict resolution.

How do these concepts of regional integration relate to the ENP? The Union's policy documents on the ENP suggest that the promotion of regional cooperation and the peaceful resolution of conflict is a central aspect of the ENP, being part of its central security dimension. The promotion of good neighbourly relations is one of the common values underpinning the proposed relationship and the peaceful settlement of disputes is said to be one of the 'essential aspects of the EU's external action' on which commitments will be sought.<sup>111</sup> Specific examples of this focus are increased EU involvement in the Transnistria problem in Moldova and the way it has encouraged Ukraine and Moldova to engage in a joint border management project.<sup>112</sup> However, as we have seen, the ENP does not provide for any institutionalization of the regional dimension, and although the Barcelona process provides a regional dimension for the south,<sup>113</sup> there is no equivalent for the eastern neighbours. Rather the contrary: such regional initiatives that exist (such as the CIS Eurasian Economic Community (Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan) and the Single Economic Space (Belarus, Kazakhstan, Russia and Ukraine)) have been seen as in some sense rivalrous to 'EU integration' goals.<sup>114</sup> In practice, the institutional focus is centred on the Partners' bilateral relations with the EU, and the structures are designed to further the possible ENP goal of each neighbour becoming 'as close to the EU as possible without becoming a member'.<sup>115</sup>

It could well be argued that a regional framework created (or imposed) by the EU will have no substance and that it needs to come from the partner States themselves, as for example the Western Balkans have eventually done by proposing to transform their network of bilateral agreements into a south-east European FTA. It could also be argued that insofar as a regional dimension is the creation of the EU, this is best achieved through concrete projects, whether trans-European networks such as road-building projects, cumulation of origin rules in trade policy, the extension of the Energy Community Treaty to include the ENP States, or the creation of a common aviation area. Here, the ENPI emphasis on cross-border cooperation is important.

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<sup>111</sup> Commission Communication, European Neighbourhood Policy Strategy Paper, COM(2004) 373 final, 12 May 2004, p.3.

<sup>112</sup> A Memorandum of Understanding has been signed between the EU, Ukraine and Moldova on 7 Oct. 2005, providing for an EU Border Mission aimed at assisting Ukraine and Moldova on border management, customs and issues of border security. The Mission was launched on 30 Nov. 2005 and will operate along the Ukraine-Moldova border, including Transnistria; IP05/1448, 29 November 2005. Council Joint Action 2005/776/CFSP of 7 November 2005 amending the mandate of the European Union Special Representative for Moldova, OJ 2005 L 292/13. The Memorandum of Understanding is available on <http://www.eubam.org/>

<sup>113</sup> It has indeed been argued that the ENP may dilute the Barcelona *acquis*, notably in terms of its regional dimension; See Lannon and van Elsuwege, note 71, 55.

<sup>114</sup> On these regional integrations, see Petrov, "Regional Integration in the Post-USSR Area: Legal and Institutional Aspects", 10(3) *Law and Business Review of the Americas* (2004) 631.

<sup>115</sup> Prodi, 'A Wider Europe – A Proximity Policy as the key to stability', speech to the Sixth ECSA-World Conference, Brussels, 5-6 December 2002, SPEECH/02/619.

However to the extent that, as we have argued, security is a core ENP objective, this carries implications for the EU in approaching the regional dimension of the ENP. Security is difficult to manage on a bilateral basis. It will require not only a pan-ENP approach but also a consideration of how ENP objectives require working together with other major players, especially Russia. Not only has Russia chosen not to be a part of the ENP. The absence of any reference to Russia in the EU's ENP strategy papers is striking, as is the absence of any mention of the ENP in the EU-Russia Road Maps for the four 'common spaces' which it was decided to set up at the St Petersburg Summit in May 2003.<sup>116</sup> And yet Russia is very much there, of course, both for the neighbours themselves complicating their relations with the EU and dividing their own societies in some cases, and for the EU and its Member States, who have historically diverse relations with Russia. It is arguable that the dominance of Russia in the region and the legacy of its empire, together with its importance for some Member States, has made it difficult for the EU to develop an effective autonomous policy towards the region.<sup>117</sup> Cooperation on external security is one of the 'common spaces' in the EU-Russia Partnership and both sides appear to strongly support this aspect of their bilateral relations; but progress has been slow.<sup>118</sup> How does this affect the ENP security dimension? Would greater involvement by the EU in neighbouring conflicts (even by proxy) such as Transnistria, South Ossetia, Abkhazia and Nagorno-Karabakh be seen by Russia as a threat to its own security interests in its own 'near abroad'?<sup>119</sup> The Commission has called for a more coherent, robust and concrete relationship with Russia.<sup>120</sup> However we appear to have many more questions than answers, and the longer term development of both the ENP and the EU-Ukraine relationship will depend on establishing a clear basis for Russia's relations with the EU, its role vis-à-vis European Security Policy and its position towards the ENP.

## Concluding remarks

The ENP is a contribution to the EU's efforts to evolve a more coherent external action. It was designed to offer integrated policy-making in the cross-pillar context of the Union's existing relations with its strategically important neighbours, with a view to

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<sup>116</sup> The four 'spaces' are a Common Economic Space, A Common Space of Freedom, Security and Justice, a Common Space of Cooperation in the field of External Security, and a Common Space on Research Education and Culture. Road Maps for the Common Spaces were adopted at the EU-Russia Summit on 10 May 2005. The Road Map on the Common Space on External Security is largely focused on joint support for international initiatives and Conventions rather than envisaging any concrete joint initiatives.

<sup>117</sup> As Lynch says, the eastern neighbours are 'European-plus', and the *plus* factor includes their Russian, Slavic links; Lynch, 'The New Eastern Dimension of the Enlarged EU' in *Partners and Neighbours: A CFSP for a Wider Europe*, Chaillot Papers No.64, Institute for Security Studies, 2003, 35.

<sup>118</sup> Forsberg: 'The EU-Russia Security Partnership: Why the Opportunity was Missed' (2004) EFA Rev. 247. Forsberg summarises the difficulties in the way of progress as the primacy of the USA (both sides taking the view that this relationship is the more important), ignorance and bureaucratic inertia, different strategic culture and values (in particular the EU emphasis on common values and the Russian emphasis on common interests as the basis for a relationship), and the absence of a shared understanding of the parties' relative power and status.

<sup>119</sup> Andrei Zagorski, 'Russia and the Shared Neighbourhood' in Dov Lynch (ed.) *What Russia sees*, Chaillot Paper n° 74, January 2005, available on <http://www.iss-eu.org/chaillot/chai74.pdf>

<sup>120</sup> Commission Communication on relations with Russia, 09/02/04, COM(2004) 106, 6.

enhancing security and stability at its periphery. The degree of coherence actually achieved derives not only from the over-arching security dimension to the ENP, but also from the ‘soft law’ methodology that it embodies. In particular, the neighbourhood policy incorporates several elements of the pre-accession strategy, with the result that so far it has shared the latter’s relative immunity from ‘pillar politics’.

Transplanting pre-accession routines into a policy otherwise conceived as an alternative to accession and intended to enhance the security of the Union, may however undermine both its current effectiveness and its longer-term viability, if not its rationale. The current “soft” instrumental framework which borrows from the pre-accession model may avoid inter-pillar questions, but a substantive development of the policy would require the negotiation of new agreements. Unlike the Accession Treaties (the end of the pre-accession process) these agreements will not be purely intergovernmental, and issues of legal base and demarcation between pillars will re-emerge. Using techniques specifically designed to prepare third States’ entry into the Union, the ENP is in fact prone to fuel accession claims rather than offering a genuine alternative to entry, notably for countries like Ukraine. Conversely, as an alleged substitute for membership, the ENP lacks clarity as to its ultimate aims, and credibility as to what the Union can deliver, thereby undermining the rationale, as far as its partners are concerned, for their adoption of EU standards. Indeed, while its professed basis in ‘joint-ownership’ is the key to its success both as a security policy and as a genuine alternative to accession, that basis is damaged by the essentially unilateral character of the ENP, epitomised by reliance on conditionality and its negligible institutional component. Although explained by the need to differentiate each partner according to its specificity and merits, the lack of a substantiated regional dimension to the ENP also weakens its capacity to foster stability and security at the Union’s periphery.

Thus, in using some of the pre-accession techniques, the ENP as it stands seems systemically flawed both as a substitute for accession and as a policy aimed at fostering shared security in Europe and beyond. Does this mean that the Policy should simply be abandoned? Certainly serious thought needs to be given to addressing some of these weaknesses, tensions and ambiguities in order to enhance the coherence between objectives and instruments and (most important) to adapt the ENP more adequately to the specific needs of the neighbourhood. This is an effort worth making; the ENP remains a valuable model of an integrated approach to EU external action, particularly from a policy making point of view. Indeed the ENP, like the Common Strategies, can be seen in the context of the evolution of EU-NIS instruments, illustrating that the development of EU relations with eastern European countries, given their strategic importance for the Union, is a work in progress and a laboratory for testing new EU external relations methodologies and instruments. As the Security Strategy argues, it is precisely in its neighbourhood that the EU can most clearly make a contribution to global security and governance; the ENP provides a testing ground for the ways in which it can take up that challenge while recognising and building on its own unique constitutional character.