

To  
European Commission  
Directorate-General for Neighbourhood Policy and Enlargement Negotiations  
NEAR A.1 (Strategy and Policy)  
LOI 15  
1049 Bruxelles / Brussels  
Belgique / België

**Re : Consultation: Towards a new European Neighbourhood Policy; Submission**

Dear Madam, dear Sir!

As a Professor and teacher of European Union Law and Public International Law and Jean Monnet Professor since 1995 at the Faculty of Law, University of Graz, Austria, I herewith submit the following observations regarding the ongoing review of the European Neighbourhood Policy (further: ENP). This contribution is divided into 4 parts:

1. General remarks on ENP and the review
2. Causes for the "failure" of the ENP
3. Recommendations concerning adaptation / answers to some of the questions raised in the Joint Consultation Paper
4. Summary answers to the questions raised in the Joint Consultation Paper

Ad 1.

The ENP has been set up in 2003/2004 in view of the forthcoming enlargement of the European Union (mainly) to the East. Its objective was (and is) "that the EU should aim to develop a zone of prosperity and a friendly neighbourhood – a 'ring of friends' - with whom the EU enjoys close, peaceful and co-operative relations. In return for concrete progress demonstrating *shared values and effective implementation of political, economic*

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and institutional reforms, including in aligning legislation with the *acquis*, the EU's neighbourhood should benefit from the *prospect of closer economic integration with the EU*. To this end, Russia, the countries of the Western NIS (Belarus, Moldova, Ukraine, Armenia, Georgia, Azerbaijan) and the Southern Mediterranean should be offered the *prospect of a stake in the EU's Internal Market* and further integration and liberalisation to promote the free movement of – persons, goods, services and capital (four freedoms)."<sup>1</sup> (Emphasis added) The *Europeanization* of the neighborhood was considered an external policy priority; it should support the consolidation of democracy and in the transition countries, and constitute an attractive alternative to full membership, for which the target countries were not (or not yet) eligible, due to their level of political and economic development. However, the status as a "neighbor" under this policy should not prejudge the future development of relationship of the individual country with the EU, and the emergence of new dividing lines should be avoided. With Art. 8 TEU, inserted with the Lisbon Treaty, ENP was not only anchored in EU primary law, the development of a "special relationship" with the neighbouring countries "aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation" became a formal task entrusted to the Union and its institutions. Originally and chiefly a bilateral policy between the EU and each partner country, ENP was complemented by regional and multilateral co-operation initiatives: the Euro-Mediterranean Partnership (EUROMED) in 2008, the Eastern Partnership (launched in Prague in May 2009), and the Black Sea Synergy (launched in Kiev in February 2008).

The concept of the ENP made sense and it seemed to be adequate under the circumstances that existed at the time of its birth; adequate to the existing conditions, adequate to the envisaged objectives, adequate also to the limited capacities of the Union.

Looking back after 10 years of its operation, it becomes obvious that the ENP strategy held, already at that time, some hidden but "genuine" faults: It was too ambitious and apparently did not sufficiently take into account the diversity of the target countries in all respects, the complexity of the existing and developing structures within these countries and between them, the impact of various international actors in the respective regions, and it underestimated the firmness and the obstinacy with which the ruling elites would oppose or even foil any plan of *Europeanization* of the country's political and economic

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<sup>1</sup> Wider Europe – Neighbourhood: A New Framework for relations with our Eastern and Southern Neighbours, COM(2003) 104 final, 11.3.2003, p. 4; see also GAERC conclusions "European Neighbourhood Policy", 2590<sup>th</sup> Council of the European Union Meeting, 14 June 2004, 10189/04 (Presse 195), p. 11.

system – a plan that could but endanger their positions and oust them from power.

In addition to this, the well-known developments that occurred both in the Eastern and Southern neighbourhood over the last years revealed another important aspect – and shortcoming – of the strategy: it did not adequately take into account the geopolitical dimension and strategic importance of the target regions for some important players, both local/regional and international. Together with the aforementioned genuine deficits, the lack of a geopolitically valuable strategy and the almost complete absence of “robust” means to enforce a policy that was conceived as an “offer to the willing”, these developments resulted in what is qualified by some observers as a (total) “failure” of ENP, requiring its more or less total overhaul.

#### Ad 2. **Causes for failure:**

Based on the “lessons learned”, the Joint Consultation Paper raises a great number of questions on the future of the policy. This contribution will try to contribute to answering some of these questions. Before doing so, the major causes for the failure – as they were identified in particular by academia (in addition to what is said in the Commission’s assessment) - will be briefly resumed, in order to find incisive answers. Failure of ENP so far was probably due to *inter alia* the following causes:

- The policy did not sufficiently differentiate between the countries which in fact constitute a very heterogeneous group. This is true for the Eastern and the Southern part of it as well as within each group. The situation for Georgia or Moldova is different from Ukraine, and their situation again is very different from Ukraine’s, not to speak of Azerbaijan or even Belarus.
- The approach was too Eurocentric and did not sufficiently take into account the different needs and/or ambitions of partner countries.
- The policy is very much modelled along the lines of the EU’s enlargement policy; it more or less applies enlargement conditionality, pursues similar goals, follows a similar procedure, but it is not backed by the same political will, the same financial resources and it does not offer the same “prize” – membership. As such, ENP does not offer an attractive alternative to membership. On the other hand, the Union has only very limited leverage in the case of non-compliance on the part of the partner countries (“carrot & stick” does not function).
- The approach was too “technical” for the politicized environment in which ENP applied – even before the crisis in Ukraine broke out. Whatever the procedures, whatever the institutional setting, whatever the instruments used may be – given its objectives and its value basis, it must definitely be understood, construed and applied as a political instrument.

- ENP did not sufficiently take into account the geopolitical environment – and the instruments available within a technical policy are not sufficient to master such a political challenge.
- Some of the partner countries definitely do not or are not willing to share the “European values” which however so far constitute a *conditio sine qua non* for participation in the programme. Moreover, domestic elites – contrary to the population - in many cases are not favourable to “Europeanization” as it may endanger their traditional power positions.
- The Union underestimated the de-stabilizing effects which this transformation policy may have in the short and mid-term perspective, in particular without a clear “benefit” for the countries in the long run.
- On the Union’s side there is obviously no clear vision on what ENP stands for and which goals it pursues.

### Ad 3. Recommendations:

- The aim (the finality) of ENP must be and in fact is already defined: “develop a zone of prosperity and a friendly neighbourhood – a ‘ring of friends’ - with whom the EU enjoys close, peaceful and co-operative relations”. (It must be recognized that integration will only be an option for very few partner countries, and only in the very long run.) In order to make this possible and realistic, the objective of ENP should not and cannot be anything else than to support the target countries in their process of transformation. The limits of this transformation – and therefore of ENP too – are twofold: On the one hand, it is the partner country that will decide on the path, the speed and the limits of transformation. In so far, ENP should become a “policy on demand”, more or less of a co-operative manner. On the other hand, there must be no doubt about the Union’s firm determination to respect fully its values (Art 21 TEU) as the basis of its policy as a normative actor. The degree of value-conditionality may vary to a certain extent in view of a viable balance with the country’s demands and needs, but it may never question the very essence of in particular rule of law, democracy and respect for fundamental rights as the key elements of any transformation in the European context! The EU, however, is not only a normative power that tends to spread certain values through its external policies – it is also an international actor with specific, legitimate interests (security and stability in the neighbourhood) which it pursues with the means put at its disposal by the Treaties.
- Consequently, finality will determine conditionality: A more-for-more approach is appropriate, as long as it corresponds to the mutually agreed objectives and priorities. And it must be beyond doubt: Support is not for free.

- With good reason, the Joint Consultation Paper identifies differentiation as one out of four key priorities for future ENP. However, this is not really new. For more ambitious partner countries, association (Art.217 TFEU) offers a very wide range of differentiated relationship with the Union. For others, with less ambition towards integration proper, neighbourhood agreements (based on Art. 8 TEU) might provide an appropriate framework. For those partner countries, which are not capable or willing to accept a minimum of conditionality, the level of relations will remain low, with “partnership agreements” of a purely co-operative nature as the maximum offer from the Union side. Differentiation would apply between the South and the East, and differentiation should be sharpened within the East where Georgia, Moldova and Ukraine are very different in their position vis-à-vis the Union, compared to the other three members of the Eastern Partnership. Technical, administrative and financial support will vary according to the level of the partner’s concrete and implemented commitment.
- The Union must try to make ENP more “political” for two reasons: First, the (geo) political dimension of the policy requires the use of political, not only “technical” means. Second, more than until now, ENP will need the full backing by the member states, it cannot be implemented by “Brussels” alone. Therefore, political consensus must be achieved, and member states will have to support this policy “actively and unreservedly in a spirit of loyalty and mutual solidarity” (Art 24 para. 3 TEU). However, in this re-orientation, the “supranational” element of ENP must not get lost. It will be the particular responsibility of the double-hatted High Representative/Vice-President of the Commission, to ensure consistency, in close co-operation with the Commissioner for European Neighbourhood Policy & Enlargement Negotiations.
- As for the priority “ownership & visibility”, it will be of crucial importance to enhance, improve and strengthen the people-to-people element in the ENP. This seems to be the only promising way to exercise some continuous pressure on the ruling elites and to make ENP in the longer run a “modernization from the bottom – policy”.
- ENP is and will remain a mainly bilateral policy, in particular when differentiation plays a key role. The added value of the multilateral exercise of the Eastern and Southern Partnerships may be questioned, not least in the light of its very limited results so far. It may find its justification in a general political strategy that of course will be different for the East and the South respectively.
- Maintaining unity within diversity will be a key challenge for the future of ENP. A clear commitment to the values, well-defined differentiated procedures, sustainable political orientations and uniform support by the Member States may provide the necessary overarching framework that upholds unity against a pretty diverse and heterogeneous neighbourhood.

Ad 4. **Summary answers:**

- *Should the ENP be maintained? Yes.*
- *Should a single framework continue to cover both East and South? Yes, there should be a general framework covering both regional parts of ENP.*
- *Should the current geographical scope be maintained? Yes. ENP proper should not be extended to the neighbours of the neighbours, but the latter should be kept in mind when framing and implementing the ENP.*
- *Should the ENP allow for more flexible ways of working with the neighbours of the neighbours? Yes.*
- *Are the Association Agreements and DCFTAs the right objective for all or should more tailor-made alternatives be developed, to reflect differing interests and ambitions of some partners? AA/DCFTA should be applied only towards partners with a realistic option for later membership.*
- *Should the reporting be modulated according to the level of engagement of the ENP partner concerned? Yes.*
- *Should CFSP and CSDP activities be better integrated in the ENP framework? Yes, but they should not dominate. (In plain language: ENP should not be totally dominated by actual or potential reactions of Russia, but Russia should be borne in mind as what it is: the key non-EU/ENP player in the Eastern neighbourhood with legitimate geopolitical interests (under whatever government or Presidency).*
- *Is the multilateral dimension able to deliver further added value? Are these formats fit for purpose? No.*
- *Should the EU gradually explore new relationship formats to satisfy the aspirations and choices of those who do not consider the Association Agreements as the final stage of political association and economic integration? The existing types of agreements with varying substance are sufficient, but they should all be used. ENP agreements should be used.*
- *Is there scope within the ENP for some kind of variable geometry, with different kinds of relationships for those partners that choose different levels of engagement? Yes, this is the core of differentiation.*
- *Do you agree with the proposed areas of focus? Yes.*
- *Is annual reporting needed for countries which do not choose to pursue closer political and economic integration? Yes, annual reporting is important to maintain the momentum.*
- *How can EU Member States be involved more effectively in the design and*

*implementation of the policy, including as concerns foreign policy and security related activities? How can the activities in EU Member States be better coordinated with the ENP? Member States' full commitment and involvement will be absolutely indispensable for a better accomplishment of ENP in the future. Based on fundamental strategic decisions, agreed upon by the European Council, all channels of CFSP must be exhausted and Member States must abide by their obligations of solidarity, loyalty and active participation under the TEU.*

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