

THE EUROPEAN NEIGHBOURHOOD POLICY: PRE-ACCESSION MISTAKES REPEATED

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Combining a questionable practice of conditionality used outside of its initial context with a lack of real incentives for the partners and reliance on a phantom of common values, the ENP is likely to fall short of the ambitious goals set for it. The failure of conditionality in the areas not covered by the *acquis communautaire* apparent from the conduct of the recent enlargement is likely to be repeated within the ENP context, where no *acquis* has been formulated. The whole instrumental framework of the ENP is a blind copy of the pre-accession democracy and the Rule of Law promotion practices, labelled by the Commission as very successful. Studying the ENP it is necessary to start with dismissing this assumption of success.

INTRODUCTION

The main task of this paper is to provide criticism of the European Neighbourhood Policy (ENP) based on exposing the ill-founded assumptions that lay at the core of the policy. Most importantly, this concerns the assumption of success of the employment of the conditionality principle concerning the EU's main values in the course of the preparation of accessions. While the ideas of democracy, the Rule of Law, and the protection of human rights indeed played a prominent role in the preparation of the recent rounds of the Eastern enlargement of the European Union (EU),¹ the Commission's recurrent characterisation of this role as overtly positive seems to be an overstatement. So while the Commission presumes the success of its pre-accession activities in the fields of democracy, human rights and the Rule of Law, this presumption is dubious.² Consequently, when the Commission copies the key elements of the policy which it characterised as a success from the context of the pre-accession assessment into the field of the ENP expecting it to work there just as productively as it supposedly did in the pre-accession, plentiful questions arise. Once the presumption of success is rebutted, what arguments can be made for the transfer of the pre-accession conditionality policy in the field of values of the Union into the core of the ENP?

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¹ On the legal aspects of the enlargement process see Ott and Inglis (2002); Hillion (2004); Cremona (2003). For a concise overview of EU enlargement law see Kochenov (2005).

² Kochenov (2008).

BORROWING OF THE PRE-ACCESSION CONDITIONALITY STRUCTURES

The whole system of instruments employed in the context of the day-to-day management of the ENP is heavily reminiscent of the legal and political system of tools employed by the EU in the course of the pre-accession assessment of the candidate countries' compliance with the Copenhagen criteria and the *acquis communautaire*.³ No secrets have been made out of it: the Commission was willing to capitalise on the perceived success of its pre-accession engagement with the candidate countries which ultimately resulted in their accession to the EU. Scholars speak about 'direct mechanical borrowing from enlargement experiences'⁴ resulting in a "shadow of enlargement", containing diluted versions of enlargement methodologies applied reflexively by the Commission to the new policy context, with little evidence of regard for their appropriateness'.⁵

Besides the idea of using the enlargement-related know-how in a new context offered by the ENP, scholars point at yet another stake the Commission had in the process, namely, to remain an important actor in the area of EU foreign policy even upon the successful conclusion of the 'big Eastern enlargement' chapter of the Community development. As Magen rightly put it,

[T]he inception of the ENP represents an attempt on the part of the Commission to expand its foreign policy role at a time when the conclusions of enlargement negotiations threatened to narrow its domain.⁶

The ENP has been designed within the auspices of DG Enlargement, and only afterwards were the civil servants who framed the policy moved into DG External relations.⁷ It is thus not surprising that the whole array of pre-accession conditionality instruments and practices has been copy-pasted into the ENP. While the dangers of such borrowing have been outlined in the literature in detail, in order to agree or disagree with this body of literature a somewhat deeper dive into the pre-accession application of the conditionality principle is required.

ENP AND THE PRESUMPTION OF SUCCESS OF THE PRE-ACCESSION CONDITIONALITY

There are in fact two problems related to such borrowing. One is potentially less important than the other. The first is related to the possible failure of the presumption

³ This is not the only known instance of such borrowing, since the Stabilisation and Association Process (SAP) instruments used by the EU in the Western Balkans are largely reminiscent of the pre-accession too. For a comparison between SAP and ENP see Magen (2006), 383, 401–410. For the legal analysis of the SAP see Blockmans (2006), 326–353

⁴ Kelley (2006), 29, 32.

⁵ Magen (2006), 383, 390.

⁶ *Id.*

⁷ For details see Kelley (2006), 29, 32; Magen (2006), 383, 397.

that the borrowed instruments will work in the new context which is radically different from that of the pre-accession given that the ultimate carrot of full membership of the EU is not on offer.⁸ In the words of Cremona and Hillion:

Transplanting pre-accession routines into a policy otherwise conceived as an alternative to accession and intended to enhance the security of the Union, may however undermine both its current effectiveness and its longer-term viability, if not its rationale.⁹

The second is related to the possible failure of another assumption, namely that the system of instruments which was being borrowed had actually functioned successfully within the previous context.

While the Commission never doubted either of these points, it would seem unreasonable to take its optimism for granted. There is a growing literature scrutinising the workability of the legal and political instruments transplanted from the context of the pre-accession into the ENP setting. Surprisingly, questions are never asked about whether the system which was being transplanted has actually worked in the context for which it was initially designed, *i.e.* EU enlargement regulation and, more specifically, the pre-accession.

While plentiful contributions to the literature on the topic assess the problem of pre-accession conditionality tools' transplantation into the ENP context in detail, thus refusing to believe the Commission that such a transplant was destined to be a success, scholars did not go further, to question the first and ultimately much more important Commission's assumption, namely that the system of pre-accession conditionality was actually workable when applied to the terrains of particular interest for reaching the objective of 'creating a ring of friends', *i.e.* the promotion of democracy, human rights and the Rule of Law. Yet, such analysis is indispensable in order to test the likely workability of the transplanted conditionality system in the context of the ENP. It is equally clear that if the system could never reach the goals it was designed to achieve, the debate surrounding its likely functioning in a different context makes no sense whatsoever. Consequently, this paper proceeds omitting the repetition of the discussion of the problem related to the transplantation itself and will make a sketch of the functioning of the pre-accession conditionality system in the fields of promotion of democracy, human rights, and the Rule of Law, *i.e.* roughly within the domain of the Copenhagen political criteria (and that of the founding values of the ENP).

⁸ See Zaiotti (2007), 143, 151; Meloni (2007a), 97–111; Magen (2006), 383, 401–410.

⁹ Cremona and Hillion (2006), 26.

ACQUIS-RELATED AND NON-ACQUIS-RELATED CONDITIONALITY IN THE PRE-ACCESSION

Democracy and the Rule of Law do not make part of the *acquis* and have never actually been covered by it.¹⁰ It means that even in the course of the pre-accession assessment of the candidate countries a huge discrepancy existed between the application of conditionality in the areas covered by the *acquis* and those merely lying within the scope of the Copenhagen political criteria and thus falling outside the scope of *acquis communautaire*.¹¹

Consequently, a distinction needs to be made between *acquis*-related issues¹² and other (democracy, the Rule of Law and, partly, human rights protection¹³) issues when assessing the success of the pre-accession employment of the conditionality principle and the practical application of the whole system of the Copenhagen-related legal and political documents. The differences marking the application of conditionality in these two areas are quite remarkable and have direct implications for the likely effectiveness of the ENP. This is so since the ENP does not necessarily build on the *acquis communautaire* directly, notwithstanding the fact that the latter can potentially play a role with regard to the approximation of economic, immigration and other legislation, corresponding to the fields where the EC is competent to act.¹⁴ First giving references to the need to incorporate the relevant parts of the *acquis*,¹⁵ the Commission's communications gradually drifted away from this idea. The Action Plans are marked by huge diversity of approaches to *acquis* incorporation, so while the Action Plan with Jordan requires this country to transpose the *acquis* in a number of areas, Action Plans with the Ukraine and Israel make no references to the *acquis* incorporation, as Magen reports.¹⁶ However, the need to adopt the *acquis* resurfaces on a regular basis, if not in the Action Plans actually guiding the development of reforms in the partner countries, then in the Council conclusions.¹⁷ Moreover, applicable to technical issues within specific ENP policies (sectoral co-operation, institutional participation and the like), the requirement to adhere to the norms of the

¹⁰ These notions play an important role in the EU legal system as general principles which are, according to Article 6(1) EU 'common to the Member States'. Their precise meaning in the legal context of EU law remains contested. On the discussion of the principle of democracy in the context of the EU see *e.g.* Craig (1999), 1. On the Rule of Law, see *e.g.* Arnulf (2002), 240.

¹¹ Kochenov (2006), 171.

¹² Delcourt (2001), 854 (providing a critical outline of the scope of the notion of *acquis communautaire*).

¹³ Generally on EU and Human Rights see *e.g.* Alston and Weiler (1999), 2.

¹⁴ The Commission recognised the importance of the *acquis* for the ENP particularly in the field of economic legislation: see COM(2003) 104 final, 10.

¹⁵ See *e.g.* COM(2003) 104 final, 5, speaking of 'effective implementation of political, economic and institutional reforms, including in *aligning legislation with the acquis*' (emphasis added).

¹⁶ Magen (2006), 383, 406.

¹⁷ *E.g.* GAERC, 'Strengthening the European Neighbourhood Policy. Presidency Progress Report', of 18, 19 June 2007, section 3.

acquis makes no sense whatsoever in the area of utmost importance in the ENP context, *i.e.* making sure that the 'common values' of the EU and the ENP partners are indeed adhered to by the latter.

Here is where borrowing of the pre-accession instruments of conditionality becomes really problematic. In order to expect them to function well within the core of the ENP, what especially concerns the promotion of the values of the ENP *not* covered by the *acquis*, it is necessary to conduct a separate analysis of their application in the course of the pre-accession conditionality which will only cover non-*acquis*-related issues.

PRE-ACCESSION CONDITIONALITY IN THE AREAS OF DEMOCRACY AND THE RULE OF LAW

While the EU was in possession of a potentially functional system of the Copenhagen-related documents designed to make sure that the principle of conditionality becomes functional in practice throughout all the areas of pre-accession interest of the Union,¹⁸ thus including the promotion of the objectives set in the Copenhagen political criteria, in practice, the day-to-day application of this system of instruments, later transplanted (albeit in a somewhat modified form) into the ENP context, left very much to be desired.¹⁹

At least six main deficiencies of pre-accession application of conditionality in the fields of democracy and the Rule of Law can be outlined.²⁰ Taken one by one, as well as cumulatively, they clearly point to the fact that the idea of conditionality that was supposed to guide the pre-accession process throughout (the non-*acquis*-related areas included) did not in fact inform Commission's decisions in the pre-accession context. Otherwise put, the conditionality principle remained without application, a huge amount of documents dedicated to making it functional notwithstanding.

Although not all of the six main drawbacks of conditionality are of importance for the principle's possible functioning in the ENP context, all of them need to be named, in order to present a complete picture of the failure of conditionality in its initial context, where it was meant to succeed. Analysed in overwhelming detail elsewhere,²¹ only a sketch of the failure of conditionality needs to be provided here in order to make the basic point clear: contrary to the Commission's claims, conditionality has never become a functional principle in the context of the pre-accession promotion of democracy and the Rule of Law in the candidate countries.

The first drawback concerned the low threshold of meeting the Copenhagen criterion of democracy and the Rule of Law. All the candidate countries at the time with the exception of Slovakia were acknowledged by the Commission to have met

¹⁸ Kochenov (2008), 65–80.

¹⁹ *Id.*, *passim*, *esp.* 300–311.

²⁰ *Id.*, 300, 301. The analysis which follows is largely based on the concluding chapter of this book.

²¹ *Id.*

the criterion already in the first documents the Commission released dedicated to 'serious' country assessment, *i.e.* in the Opinions of 1997. Taken into account the assessments provided by the Commission in the Reports released in the pre-accession years that followed, this initial acknowledgement was largely meaningless due to a number of factors. Some countries to have met the criteria had dysfunctional parliaments in place, did not have classical three-tier judiciaries (first instance, appeal, cassation), did not possess any independent professional civil service, lacked independent well-trained judiciary, and had the executives legislating instead of the parliaments.²² In some countries minorities amounting to up to 40% of population were not only deprived of citizenship, but also of any political rights.²³ All these facts taken together make it clear that the candidate countries' 'readiness' to meet the initial political criteria was a political question on the EU side, rather than a result of any more or less serious assessment.²⁴ The situation did not change after 1997.

All the subsequent Reports released by the Commission follow the 1997 Opinions in their soft approach towards the candidate countries. What was the second drawback of application of pre-accession conditionality is not this softness, however, but a total lack of any clarity as to what was actually expected of the candidate countries.²⁵ In other words, at the core of pre-accession conditionality lay a complete lack of standards of democracy and the Rule of Law to promote.²⁶ This simple fact notwithstanding, the Commission was behaving as if it had such standards at hand throughout, constantly asking the candidate countries to comply with the 'Copenhagen political criteria' without explaining what they actually meant. In the absence of any *acquis* on democracy and the Rule of Law, this *de facto* resulted in sending random and *ad hoc* demands around asking the candidate countries to comply with the unknown.

Even in a situation where the standards were lacking, the Commission could theoretically use its position of an informed actor in a wise way in order to create the badly needed standards in the course of the assessment.²⁷ This has not happened: the demands it was sending to the candidate countries were often contradictory and entirely unpredictable. To provide just several examples,

while Slovakia was allowed to legislate by decree, Romania was not; while the Czech Republic could get positive assessments of its pre-accession progress having no civil service law in place, Slovakia, also lacking such law, saw its accession to the EU being made conditional upon its adoption. While creating an organ responsible for the civil service reform in Latvia was regarded by the

²² *Id.* 300 *et seq.*

²³ See Shaw (2007), 329–342. On the EU's attempts to influence this situation in the context of the pre-accession assessment of the candidate countries see Kochenov, (2004b).

²⁴ Grabbe (2002), 264.

²⁵ Kochenov (2008), 300 *et seq.*

²⁶ *E.g.* Smilov (2003), 2. See also OSI (2002).

²⁷ For an attempt of discovering some standards behind the Commission's Reports in the areas lying outside the scope of the *acquis* see *e.g.* Kochenov (2004a) (in the area of democracy and the Rule of Law); Hughes and Sasse (2003) (in the area of minority protection).

Commission as a positive development, Romania was criticised for having done just that; while the Czech Republic could be praised for only intended innovations, other candidate countries were criticised for making concrete reform steps. While politicisation of civil service was criticised in the majority of the candidate countries, 1999 Slovak Report declared that alleged politicisation was not against the law, closing its eyes on the fact that the civil service law simply did not exist in Slovakia back then. While Romania was supposed to ensure that the institution responsible for the training of the judges was fully independent, the Czech Republic was praised for a decision to train the judges in the auspices of the Ministry of Justice.²⁸

Such situation was a direct result of Commission's total inability to provide any quality assessment of the situation on the ground in the candidate countries and *de facto* meant a move away from the proclaimed conditionality idea in the pre-accession that the candidate countries 'were destined to join the Union on the basis of the same criteria and [...] on equal footing'.²⁹ Simply put, no serious assessment of any issues falling outside the scope of *acquis communautaire* has ever been provided by the Commission.

The fourth drawback was also related to the lack of standards and to the failure by the Commission to provide serious assessment of democracy and the Rule of Law issues. As a consequence of the lacking standards, no benchmarks were available to the EU and the candidate countries in order to judge whether the Copenhagen political criteria or further Commission's demands were actually complied with. Any reliable assessment was made impossible: so was any predictable movement towards 'democracy and the Rule of Law' ideals by the candidate countries. So even if the 'standards' were presumably met, it was impossible to check it or to be certain about it.³⁰

In the absence of serious analysis, standards, and assessment benchmarks, the Commission nevertheless remained faithful to the conditionality rhetoric, presuming its own ability to differentiate among the candidate countries, praising some of them for 'compliance' while criticising the others.³¹ Consequently, those candidate countries not reforming certain sectors *at all* were left alone, while others, trying to follow the recommendations from the Commission ended up being constantly criticised. The non-transparent and truly byzantine labyrinth of conditionality application was ultimately turned into a window-dressing mechanism for the public justification of political choices having little to do with the candidate countries' actual performance. Agreeing with Maresceau, 'the true and complete story of unexpected choice by the Commission will probably never be fully known'.³²

²⁸ Kochenov (2008), 309.

²⁹ Presidency Conclusions, Luxembourg European Council, 12, 13 December 1997, §10.

³⁰ Kochenov (2008), 308.

³¹ *Id.*, 309.

³² Maresceau (2001), 18 (writing in the context of the division of the candidate countries into two waves at the Luxembourg European Council (1997), which resulted in putting Estonia and Latvia, where the situation with democracy, the Rule of Law and minority protection was equally bad, into different waves of accession).

Lastly, as the sixth drawback, comes the final blow to all the remains of conditionality in the system described. Namely, no connection was made by the Commission between the actual pre-accession prospects of the candidate countries and their pre-accession performance. Consequently, while the candidates were moving closer towards membership of the EU, their progress in this direction did not depend on the Commission's findings related to their progress towards moving closer to the ideas of democracy and the Rule of Law as outlined in the Copenhagen political criteria.³³ The beautiful idea of conditionality was thus entirely disregarded and never applied in the context of the pre-accession. Can the same be expected of the conditionality in the context of the ENP?

ENP CONDITIONALITY IN THE LIGHT OF THE PRE-ACCESSION CONDITIONALITY IN THE AREAS RELATED TO EU'S VALUES

The problems related to the functioning of the pre-accession conditionality so obvious from the conduct of the democracy and the Rule of Law promotion in the pre-accession phase of the Eastern Enlargement of the EU were most likely to be repeated in the new context, given that the instruments of conditionality employed by the Commission were truly similar.

All the problems inherent in the functioning of conditionality in the pre-accession context are to be found in the ENP context. There is one exception however. While the differentiated treatment of the candidate countries in the context of the pre-accession went against the core of the principle of the pre-accession conditionality, since all the candidate countries were 'destined to join the Union on the basis of the same criteria [...] and on equal footing',³⁴ in the ENP context, the role played by the principle of differentiation is much more important. As a consequence, differences in the treatment of different ENP partners cannot be regarded as a problem any more. The importance of this adjustment of the principle of conditionality to the new context fades away when compared with a new, overwhelming problem related to conditionality's application which is new to the ENP context compared with the pre-accession: this is the lack of strong rewards on offer for the countries successfully playing along. With no really attractive incentives on offer conditionality is unlikely to be applied successfully, even if all the other problems were corrected.

Assuming all the problems related to the application of the pre-accession conditionality are solved in the context of the ENP, the lack of attractive incentives is likely to be accompanied by yet another problem new to the conditionality application and absent from the pre-accession context. This problem is related to the lack of a broad agreement among *all* the Institutions of the Community involved in the process and the 27 Member States regarding what the ENP is concretely trying to achieve and what the precise roles of all the actors involved within this soft-law cross-pillar policy are. As a result, the ENP suffers

³³ Kochenov (2008), 309–311.

³⁴ Luxembourg European Council (12, 13 December 1997), Presidency Conclusions, § 10.

from inter-institutional rivalry and the inability to deliver on the promises given to the partners due to specific sensitivities of the Member States.

PRE-ACCESSION CONDITIONALITY MISTAKES REPEATED

Five problems inherent in the application of the pre-accession conditionality predictably resurface in the ENP context. Their appearance is not surprising, since the Commission, blinded by the presumption of success of the pre-accession conditionality did not even try to remedy them, it seems, when trying to apply the principle in a new setting. The problems, all too well known from the pre-accession context, are related to the low level of initial expectations, total lack of standards to be promoted by the Union in the context of its own values where *acquis* is non-existent; *de facto* inability to assess the compliance of the ENP partners with the unknown in the lack of benchmarks; the absence of any tradition of serious assessment of progress in these crucial areas by the Commission, going back straight to the superficial and fragmented pre-accession assessment, and, finally, the failure to connect the positive findings with granting rewards. The first of these is particularly telling: from the low threshold of meeting the Copenhagen political criteria in the pre-accession context obvious from the 1997 Opinions released by the Commission, the EU moved to placing the threshold even lower in the ENP context, where the adherence to the same values was simply assumed and never questioned.

Depending on the clarity of formulation of what is expected of the partners, the assessment of compliance can become either simplified, or made impossible. The Action Plans lean towards the latter: to agree with Smith, whatever they contain, 'clear benchmarks these are not'.³⁵ Long lists of 'priorities' suffer from poor prioritisation within them³⁶ and often make it impossible not only to say who is supposed to take an action on a given priority,³⁷ but also how the compliance is to be judged and what the time-frame for compliance is. So having asked a neighbour to 'enhance institutional and administrative capacity', or 'ensure that any further legislative reforms be conducted in line with international standards' are guidelines entirely deprived of any meaning whatsoever unless clear benchmarks are provided. And they are not.

The analysis of the National Action Plans (NAPs), which have been concluded thus far, has highlighted that the approach of the EU is not always coherent. The necessity to respect Human Rights is always mentioned in text of the agreements – with the outstanding exception of Jordan – but there is a 'manifest

³⁵ Smith (2005), 757, 765.

³⁶ So the Action Plan with Ukraine lists 300 'priorities': Smith (2005), 757, 764.

³⁷ Karen Smith provides a telling example: one of the priorities of the Action Plan with Ukraine is to 'undertake first assessment of the impact of EU enlargement on trade between the EU and Ukraine during 2005 and regularly thereafter as appropriate': Smith (2005), 757, 765.

inconsistency' concerning the definition of the key elements which should be taken into consideration when it comes to the promotion of democracy.³⁸

Besides incoherence and the simple lack of clarity, the Action Plans mostly suffer from a general lack of reform vision to be offered to the ENP partners. As Magen put it 'the determinacy of rules with which the EU seeks compliance is undermined by the absence of a comprehensive, detailed roadmap for reform'.³⁹ A conditionality system drawing on such rules promotion is destined to fail, repeating the pre-accession democracy and the Rule of Law conditionality story.

The Commission diligently transplanted all the fatal mistakes it made in the pre-accession context in the areas not covered by the *acquis* into the ENP. Given the lack of any concrete ENP *acquis* to guide the Commission's reform promotion exercise at least in some areas (as was the case in the pre-accession), the ENP conditionality became entirely non-operational.

POOR INCENTIVES

In addition to all the problems inherited by the ENP from the pre-accession application of conditionality, the policy only offers very poor incentives unable to interest the partners and generate true change.⁴⁰ Thus, unlike the instruments employed by the ENP, the incentives offered within the framework of the policy are not comparable with those which were on offer within the pre-accession strategy.

The Commission stated that '[t]he aim of the new Neighbourhood Policy is [...] to provide a framework for the development of a *new relationship* which would not, in the medium-term, include a perspective of membership or a role in the Union's institutions'.⁴¹ The ENP is thus a clear attempt of the EU to postpone the discussion of the *finalités géographiques* of integration to some unknown time in the future. In this way the ENP, at least applied to East-European partners is very similar to the initial ideology behind the EEA,⁴² as well as the initial approach to Eastern Europe preceding the 1993 Copenhagen European Council⁴³ and the subsequent pre-accession reorientation of the Europe Agreements.⁴⁴ While in the pre-accession full membership was on offer, the ultimate prize in the ENP race is the participation in the Neighbourhood Economic Community, of which nothing is known besides the name.

³⁸ Meloni (2007b), 97, 99 (with further references).

³⁹ Magen (2006), 383, 415.

⁴⁰ Tocci (2007), 23; Magen (2006), 383, 411–414 (characterising the incentives as 'both vague and uncertain at best' (at 414)); Dannreuther (2006), 189, 190.

⁴¹ COM(2003) 104 final, 5, emphasis added.

⁴² Smith (2005), 757, 761.

⁴³ For a concise history of Central and Eastern European countries – EEC relations *see* Smith (2004); de la Serre (1994).

⁴⁴ Inglis (2000).

INTER-INSTITUTIONAL RIVALRY AND THE DIFFERENCES IN MEMBER STATES' POSITIONS

Seeing the low level of attractiveness offered by the ENP, the Commission has been seeking to improve the system of instruments and incentives within this policy framework with every revision of the policy. The results brought by such attempts to enhance the policy have been mixed. While some incentives get added, others somehow disappear from the list. The latter is most telling with regard to the four freedoms, which got substituted with the 'stake in the internal market'.⁴⁵ As the security dimension of the ENP grows, the viable incentives offered to the partners in 2003 get gradually watered down.⁴⁶ This is linked in the literature with the increasing role played by the Council in governing the policy. Playing no role in the formulation of the policy in the beginning, the Council reasserted its influence by the time the second Commission's Communication was drafted in 2004 by insisting that the Member States be fully informed on the conduct of the consultations leading to the adoption of the Action Plans,⁴⁷ the participation of the representatives of the Council Secretariat, the Presidency and the HR for CFSP in all the Commission's consultations with ENP partners, the endorsement of the Commission's Country Reports leading to the Action Plans and the involvement of the High Representative for the CFSP in the shaping of the content of the policy at all the stages of monitoring progress.⁴⁸ Consequently, the 2004 Communication was purged of some of the incentives. In other words, all the attempts of the Commission notwithstanding, the incentives on offer still seem inadequate, and this is unlikely to change with the Council gaining a more important role to play, given its conservatism and the overall negative effects of inter-institutional rivalry, making scholars and policy-makers describe possible alternatives.⁴⁹

Add to this the differences existing between the vision of the ENP espoused by each of the 27 Member States and it becomes clear that the unattractiveness of the incentives on offer has systemic explanations. It is true, just as it was five years ago when William Wallace wrote it, that 'within the current EU there is no consensus on priorities to be given to the eastern or southern neighbours, or on the trade or financial incentives which should be offered'.⁵⁰ The differences between the Member States' positions can also have more important implications. When the time is ripe to conclude the European Neighbourhood Agreements, the disagreements between the Member States regarding the desirable directions of ENP evolution can result in a blockade of this important incentive offered to the ENP partners. Given the

⁴⁵ COM(2004) 373final, 3.

⁴⁶ Kelley (2006), 29, 36; Magen (2006), 383, 413.

⁴⁷ GAERC Conclusions of 25 April 2005, 8035/05.

⁴⁸ COM(2004) 795final, 10.

⁴⁹ See *e.g.* Emerson *et al.* (2007).

⁵⁰ Wallace (2003), 1.

procedural sophistication which is to accompany the negotiation, signing and entry into force of the new Agreements, each of the Member States will have plenty of chances to block their conclusion and entry into force, be it at the level of the Council, where unanimity is required, or during the national ratification process.

EU's inability to deliver on its own promises, just as its inability to move forward towards a better set of incentives for the ENP partners can partly be explained by the security dimension of the ENP, which plays an important role in the policy. Agreeing with Zaiotti the emphasis of security 'not only limits the capacity of the EU to meet the expectations generated by its offer, but also opens the door for imposing on the neighbours further restrictions and a set of onerous obligations'.⁵¹

CONCLUSION

Upon the analysis of the ENP and, especially, putting it in the perspective of the pre-accession application of conditionality in the areas of democracy and the Rule of Law, which are not connected with the *acquis communautaire*, it becomes absolutely clear that it would be naïve to expect this policy to deliver meaningful change in the crucial values areas in the ENP partner countries. It is indeed true that 'a closer look at the Policy suggests not only that the ENP's democracy and the human rights rhetorical aspirations are well above its potential, but also that the ENP *cannot* engender meaningful change in these areas'.⁵² To remedy this situation, the presumption of success of the pre-accession promotion of democracy and the Rule of Law taken by the Commission for granted needs to be reassessed.

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⁵¹ Zaiotti (2007), 143, 151.

⁵² Tocci (2007), 23, 26.

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