

# Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?

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## Abstract

*Article 8 of the Treaty on European Union (TEU) provides a new legal basis for developing the European Union's relations with its neighbouring countries. This contribution traces the origins of this provision and analyses its objectives and potential application in practice. It is argued that Article 8 TEU codifies the conditionality approach of the European Neighbourhood Policy (ENP) and introduces a differentiation with traditional association agreements for political reasons. The launch of the Eastern Partnership in May 2009, including the offer of concluding association agreements with the EU's eastern partners, largely undermines the significance of*

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*this distinction. It is, however, not to be excluded that Article 8 TEU is used in relation to other neighbouring countries, which are not interested in formal association with the EU.*

## **Introduction**

The Treaty of Lisbon significantly amends the legal framework of European Union (EU) external action. Apart from the much commented institutional innovations and the abolition of the pillar structure,<sup>1</sup> the inclusion of a legal basis for the development of the Union's relations with its neighbouring countries is of particular significance. According to new Article 8 of the Treaty on European Union (TEU):

*"1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.*

*2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation".*

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<sup>1</sup> See: P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure. In Search of a New Balance between Delimitation and Consistency", (2010) 47 C.M.L. Rev. 987.

This provision is remarkable for a number of reasons. First, it provides a legal basis for a new type of bilateral agreements to be concluded on the basis of geographical and political criteria. Only “neighbouring countries” respecting the “values of the Union” are eligible for what is ambiguously called a “special relationship”. Second, Article 8 TEU does formally not belong to the Treaty provisions on EU external action but is part of the so-called “common provisions” of the TEU including the Union’s foundational values, basic objectives and fundamental principles. This position within the structure of the Treaties reveals the importance attributed to the EU’s neighbourhood relations but, at the same time, it raises questions about the concrete implications of this Article. Third, it is remarkable that the wording of Article 8 (2) TEU seems to be inspired by the traditional provision on the conclusion of association agreements, which is retained in Article 217 of the Treaty on the Functioning of the European Union (TFEU).<sup>2</sup> Hence, the legal implications of Article 8 TEU and, in particular, its relationship with the other Treaty provisions on EU external action are far from clear. In order to tackle those issues, this contribution traces the origins and objectives of this Article, analyses its legal scope and discusses its potential application in the framework of the European Neighbourhood Policy (ENP), the EU’s Strategic Partnership with Russia and the relations with the Union’s “old neighbours” (EFTA countries and micro-States).

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<sup>2</sup> Art. 217 TFEU (ex 310 EC) states that “The Union may conclude, with one or more States or international organisations, agreements establishing an association involving reciprocal rights and obligations, common action and special procedure”.

## The genesis of Article 8 TEU

The idea to introduce a specific Treaty provision concerning the relations between the EU and its neighbours was launched within the European Convention during the preparation of a Draft Treaty establishing a Constitution for Europe. According to the *travaux préparatoires*, a separate title and an article on “the Union and its immediate environment” was deemed necessary to stress the importance to the Union of privileged relations with its neighbours.<sup>3</sup> This proposal cannot be disconnected from the general political context at that time. After a long and intensive period of pre-accession preparations, starting with the June 1993 Copenhagen European Council and resulting in the finalization of negotiations with ten countries at the December 2002 Copenhagen European Council, the development of a proper neighbourhood strategy became a top priority for the Union.

In a joint document, External Relations Commissioner Christopher Patten and High Representative for Common Foreign and Security Policy Javier Solana proposed a new “proximity policy initiative”. Significantly, they explicitly suggested “to create new contractual arrangements such as Neighbourhood or Proximity Agreements”.<sup>4</sup> The European Commission adopted this idea in its proposals for a European Neighbourhood Policy (ENP). The ENP aims to

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<sup>3</sup> CONV 649/03, “Title IX: The Union and its immediate environment”, 2 April 2003 (available at: <http://european-convention.eu.int>).

<sup>4</sup> Joint Letter on Wider Europe by Commissioner Chris Patten and High Representative Javier Solano, 8 August 2002 (available at: [http://ec.europa.eu/world/enp/pdf/\\_0130163334\\_001\\_en.pdf](http://ec.europa.eu/world/enp/pdf/_0130163334_001_en.pdf)).

avoid the emergence of new dividing lines between the enlarged EU and the neighbouring countries that do not (currently) have an accession perspective. It is an 'umbrella' policy with a strong degree of differentiation, bringing together the EU's eastern and southern neighbours in a single framework. The main objective is to open up certain sectors of the EU internal market for the ENP countries and to enhance political dialogue between the partners in return for substantive political, economic and legal reforms. The perspective of enhanced bilateral relations between the EU and each ENP partner country is complemented with specific regional and multilateral cooperation initiatives: the Eastern Partnership (launched in Prague in May 2009) including the EU's Eastern partners Ukraine, Belarus, Moldova, Georgia, Armenia and Azerbaijan; the Union for the Mediterranean (the former Euro-Mediterranean Partnership or Barcelona process, re-launched in Paris in July 2008) targeting the EU's southern neighbours (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and the Palestine Authority); and the Black Sea Synergy (launched in Kiev in February 2008) promoting regional cooperation among the Black Sea littoral states.<sup>5</sup>

In its first Communication on the ENP, the Commission announced the prospect of new Neighbourhood Agreements to upgrade the contractual relations with the Union's Eastern and

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<sup>5</sup> On 25 May 2011, the Commission and the High Representative issued the Joint Communication, "A New Response to a Changing Neighbourhood", COM (2011) 303, which confirms the ENP as a comprehensive policy framework for the EU's eastern and southern neighbours. For more information: see: <http://ec.europa.eu/world/enp>.

Southern neighbours.<sup>6</sup> In addition, it argued that “the EU should aim to develop a zone of prosperity and a friendly neighbourhood [...] with whom the EU enjoys close, peaceful and cooperative relations”. The parallels with the wording of Article 8 TEU are striking. Hence, despite the absence of any explicit reference to the ENP in Article 8 TEU, it is obvious that the discussions surrounding the elaboration of the ENP affected the final decision to include a specific Treaty provision on the Union’s relations with its immediate environment in the Draft Constitutional Treaty.<sup>7</sup> Reflecting the geographical extension of the ENP to the Southern Caucasus countries, which did not have a direct land or sea border with the EU, the final version of the Constitutional Treaty referred more generally to “the Union and its neighbours”.<sup>8</sup>

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<sup>6</sup> Communication from the European Commission to the Council and the European Parliament, “Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Partners”, COM (2003) 104 final, 11 March 2003, p. 17.

<sup>7</sup> The explanatory note on “Title IX: the Union and its immediate environment” , published by the Secretariat of the Convention on 2 April 2003, states without any ambiguity that this provision “sets out the Union’s intention to establish a neighbourhood policy”(CONV 649/03). On the establishment of the ENP and its relations with the work of the Convention, see: E. Lannon and P. Van Elsuwege, “The EU’s Emerging Neighbourhood Policy and its Impact on the Euro-Mediterranean Partnership”, in P. Xuereb (ed.), *Euro-Med Integration and the Ring of Friends. The Mediterranean’s European Challenge* (Malta: EDRC, 2003) pp. 21-51.

<sup>8</sup> Compare Article 56 of the Draft Treaty establishing a Constitution for Europe (CONV 850/03, 18 July 2003) with Article I-57 of the Treaty establishing a Constitution for Europe, OJ (2004) C 310/38.

Notwithstanding suggestions from several Convention members that such an article was either redundant or at least should be placed elsewhere in the Constitution,<sup>9</sup> its position in the first part of the Draft Treaty was retained to highlight the importance of the EU's neighbourhood relations. Moreover, this article preceded a title on Union membership and, accordingly, underlined the distinction between the ENP and enlargement as two separate yet equally important policies of the Union. The restructuring of the Treaties after the negative outcome of the ratification referenda in France and the Netherlands brought an end to this connection. The article on enlargement kept its numbering (Art. 49 TEU) and its traditional position under Title VI "Final Provisions" of the TEU. The article on the Union's neighbourhood relations (Art. 8 TEU), on the other hand, was no longer awarded a separate title but was integrated under Title I "Common Provisions" of the TEU.

It is obvious that the inclusion of Article 8 TEU is largely inspired by political and symbolical motivations. The Patten and Solana paper already acknowledged that "the strong symbolism of a new label that marks a strengthened commitment of the Union could help to raise the profile of relations with the EU and unlock additional political will and administrative capacity".<sup>10</sup> In line with this approach, the European Commission used the prospect of new contractual links,

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<sup>9</sup> CONV 671/03, "Reactions to draft Article 42 (The Union and its immediate environment)", 14 April 2003 (available at: <http://european-convention.eu.int>).

<sup>10</sup> Joint Letter on Wider Europe by Commissioner Chris Patten and High Representative Javier Solano, 8 August 2002 (available at: [http://ec.europa.eu/world/enp/pdf/0130163334\\_001\\_en.pdf](http://ec.europa.eu/world/enp/pdf/0130163334_001_en.pdf)).

in the form of European Neighbourhood Agreements, as an incentive within the ENP.<sup>11</sup> Remarkably, since the failed ratification of the Constitutional Treaty, the Commission no longer applies the term “Neighbourhood Agreements” but rather refers to “Deep and Comprehensive Free Trade Agreements” (DCFTAs), “enhanced agreements” and a new generation of “Association Agreements” (AAs).<sup>12</sup> The entry into force of the Treaty of Lisbon on 1 December 2009 did not affect this evolution. For instance, on 15 July 2010, the EU launched negotiations on association agreements with Armenia, Georgia and Azerbaijan, and negotiations on the conclusion of association agreements with Ukraine and Moldova are also still going on. Taking into account that the practice of association is nothing new in the external relations of the EU, the question arises what role Article 8 TEU can play within the context of the EU’s neighbourhood strategy.

### **The scope and objectives of Article 8 TEU**

The wording of Article 8 (1) TEU reflects the objectives and conditions that have to be fulfilled before the Union can conclude a specific agreement with a certain category of third countries.

In particular, the countries concerned have to be “neighbouring countries”, who are interested

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<sup>11</sup> Communication from the Commission, “European Neighbourhood Policy. Strategy Paper”, COM (2004) 373 final, 12 May 2004, p. 9.

<sup>12</sup> See e.g. Communication from the Commission to the Council and the European Parliament, “On Strengthening the European Neighbourhood Policy”, COM (2006) 726 final, 4 December 2006 and Communication from the Commission, “A Strong European Neighbourhood Policy”, COM (2007) 774 final, 5 December 2007.

in a “special relationship” which is founded on the “values of the Union”, and aims at the establishment of “an area of prosperity and good neighbourliness” and is characterized by “close and peaceful relations based on cooperation”.

### *Neighbouring countries of the Union*

The application of Article 8 TEU depends on explicit geographical criteria and is restricted to “neighbouring countries”. Taking into account the genesis of Art. 8 TEU it appears that this provision essentially concerns the target countries of the ENP (cf. *supra*). Significantly, the ENP itself has never been very clear in defining the specific scope of the notion “neighbourhood”. For instance, the very first ENP documents referred to the ENP as an external EU policy towards the Union’s “immediate neighbourhood” which implied third countries sharing a land or sea border with the EU.<sup>13</sup> This explains why also the Draft Constitutional Treaty referred to the “Union and its immediate environment”. Later documents distinguished between “neighbourhood” and “immediate neighbourhood” and envisaged the extension of the ENP

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<sup>13</sup> Communication from the Commission “Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours” (COM (2003) 104 final). Also the European Security Strategy, endorsed at the European Council of December 2003, states that the EU’s task is to “make a particular contribution to stability and good governance in our immediate neighbourhood [and] 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”.

towards countries where the EU “has a strong interest in the stability and development” of the region.<sup>14</sup>

Generally speaking, the ENP now brings together a variety of countries which are situated in the southern and eastern periphery of the Union.<sup>15</sup> It is an ‘umbrella’ policy with a strong degree of differentiation, including the Southern Mediterranean countries of the ‘Union for the Mediterranean’ (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and the Palestinian Authority) and the partner countries of the ‘Eastern Partnership’ (Ukraine , Belarus, Moldova, Georgia, Azerbaijan and Armenia). In other words, the ENP is a flexible policy directed at countries situated in regions within a relevant proximity to the EU’s borders and of strategic political importance to the Union. This interpretation implies that the term “neighbouring country” is not exclusively defined on the basis of geographical criteria. The Southern Caucasus countries, for instance, are geographically speaking no immediate neighbours of the Union but are nevertheless included in the geographical scope of the ENP for political reasons.<sup>16</sup>

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<sup>14</sup> Communication from the Commission “European Neighbourhood Policy Strategy Paper” COM(2004) 373 final.

<sup>15</sup> Communication from the Commission “Taking Stock of the European Neighbourhood Policy” (COM (2010) 207 final.

<sup>16</sup> Whereas Georgia has a sea border with the Union since the accession of Romania and Bulgaria, this is not the case for Armenia and Azerbaijan. As a result of their geographical location, the three Caucasus countries were not included in the initial proposals on the ENP. This was changed for political reasons and after pressure on the part of the CFSP High Representative, the EU Special Representative for the Southern Caucasus and the European Parliament. See: ENP Strategy Paper, COM (2004) 373 final, pp. 10-11. On the initial discussions regarding the geographical scope of the ENP, see: Lannon and Van Elsuwege, “The EU’s Emerging Neighbourhood Policy and its

Apart from the ENP partners, nothing seems to prevent the potential application of Article 8 TEU with regard to other neighbours such as Russia, the EFTA countries or the European micro-states. For the latter countries in particular, Article 8 TEU might become an interesting instrument to formalise their peculiar relationship with the Union.<sup>17</sup> In this respect, it is noteworthy that a Declaration on Article 8 TEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, explicitly provides that “[t]he Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it”.<sup>18</sup> This Declaration indicates that the geographical scope of Article 8 TEU is not necessarily restricted to the ENP partner countries but may be used as a *passe-partout* for designing the Union’s relations with other neighbouring countries as well.

### *A special relationship with the Union*

Article 8 TEU pursues the objective of establishing a “special relationship” with the EU’s neighbours. The parallels with the traditional provision on the conclusion of association

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Impact on the Euro-Mediterranean Partnership”, in P. Xuereb (ed.), *Euro-Med Integration and the Ring of Friends. The Mediterranean’s European Challenge* (Malta: EDRC, 2003), pp. 74-76.

<sup>17</sup> M. Maresceau, “The Relations between the EU and Andorra, San Marino and Monaco”, in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge: CUP, 2008) p. 305.

<sup>18</sup> Declaration No. 3 on Article 8 of the Treaty on European Union, OJ (2010) C 83/337.

agreements, which is retained in Article 217 TFEU, are striking. The ambiguous and undefined notion of a “special relationship” is almost identical to the “special privileged links” which characterise the association agreements according to the Court of Justice.<sup>19</sup> Moreover, the reference to “rights and reciprocal obligations” is drawn from Article 217 TFEU and the regular consultation foreseen in the last sentence of Article 8 (2) TEU is usually provided for under association agreements through the creation of a structural relationship (e.g. Association Council/Committee).<sup>20</sup> Finally, the loose formulation of both Article 8 TEU and Article 217 TFEU allows for a high level of flexibility, which is a prerequisite to ensure sufficient differentiation in the relations with the various partners. As can be derived from the practice of association, the established privileged relationship can take several forms, ranging from little more than a free trade agreement to a level of integration that comes close to membership.<sup>21</sup> The actual scope of the association depends on the outcome of the negotiations. The same flexibility applies with regard to the envisaged new generation of agreements under Article 8 TEU. Both provisions are, in other words, flexible legal instruments allowing for a variety of ties with states interested in a formal legal relationship with the EU.

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<sup>19</sup> Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para.9.

<sup>20</sup> CONV 649/03, “Title IX: The Union and its immediate environment”, 2 April 2003.

<sup>21</sup> Walter Hallstein, former Commission president, declared that “association can be anything between full membership minus 1% and a trade and co-operation agreement plus 1%”. Cited in D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield: Sheffield Academic Press, 1999) p. 23.

Arguably, the frequent use of association agreements in recent periods, which has resulted in a certain inflation of associated countries,<sup>22</sup> explains the inclusion of a specific clause for the Union's neighbours. This once again underlines the symbolic importance of Article 8 TEU as a label differentiating the EU's special relations with its neighbouring countries from traditional association agreements. There is, however, no explicit or compelling link between Article 8 TEU and Article 217 TFEU. Article 8 TEU may even be considered as an alternative to formal association. In comparison to traditional association agreements, agreements based on Article 8 TEU have a clear objective, i.e. "to establish an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation". This *finalité* is important because, from a political point of view, the conclusion of an association agreement with a European country is often perceived as a stepping-stone to EU membership.<sup>23</sup> Article 8 TEU, on the other hand, leaves no doubt about the objectives of the established relationship and thus confirms the EU's official position about the disconnection between ENP and enlargement.

#### *Founded on the values of the Union*

The EU's external action in general and its neighbourhood relations in particular, are value -

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<sup>22</sup> See : Gaudissart M.-A., "Réflexions sur la nature et la portée du concept d'association à la lumière de sa mise en œuvre", in Tchakaloff M.-F. (ed.), *Le concept d'association dans les accords passés par la Communauté : Essai de clarification* (Brussels : Bruylant, 1999) p. 3.

<sup>23</sup> D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield, Sheffield Academic Press: 1999).

driven. Pursuant to Article 3 (5) TEU, the Union “shall uphold and promote its values” – laid down in Article 2 TEU<sup>24</sup> – in its relations with the wider world. Article 8 (1) TEU applies this principle with regard to the EU’s neighbourhood. The reference to the “values of the Union” is not only a logical consequence of the EU’s ambition to act as a normative power in the world, it is also fully consistent with the strategy of the ENP. The 2004 ENP Strategy Paper underlines that “the privileged relationship with neighbours will build on mutual commitments to common values principally within the fields of the rule of law, good governance, the respect for human rights, including minority rights, the promotion of good neighbourly relations, and the principles of market economy and sustainable development.”<sup>25</sup> All bilateral documents between the EU and the neighbouring countries (Action Plans, Association Agenda) emphasise the need for the latter to adhere to common values as a precondition for further enhancement of their bilateral relations with the EU.

Significantly, the ENP policy documents all refer to ‘shared’ or ‘common’ values whereas Article 8 TEU explicitly refers to ‘the values of the Union’. This difference reflects the double function of values in the EU’s political discourse. On the one hand, the values of Article 2 TEU constitute the foundation of the EU’s identity; on the other hand, they are considered to be

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<sup>24</sup> Pursuant to Article 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

<sup>25</sup> COM (2004) 373 final p. 3.

universal.<sup>26</sup> The abstract nature of values such as ‘democracy’, ‘freedom’ or ‘equality’ implies that they can easily be regarded as ‘shared’ or ‘common’. The key question is who decides about the interpretation of these values in a particular context. Within the framework of the ENP, it appears that common or shared values should be fundamentally understood as ‘the EU’s fundamental values and objectives’.<sup>27</sup> For example, the EU is explicit that “the depth of the EU-Ukraine relationship will be determined by the implementation of reforms and by further consolidation of common values”.<sup>28</sup> In practice it means that any further enhancement of bilateral relations (liberalisation of visa regime, economic and trade cooperation) is strongly linked to practical adherence of Ukraine to the EU’s democratic and human rights values.

In order to counterbalance the perception that the EU unilaterally imposes external conditions on the partner countries, the European Commission initiated the concept of ‘joint ownership’ as a key principle of the ENP. The idea that both the EU and the partner countries contribute to shaping and implementing the bilateral relationship is reflected in the procedure for the adoption of the ENP Action Plans and the monitoring of its implementation, which both occur within the bodies established under the Partnership and Co-operation Agreements or Association Agreements. However, this practice does not alter the essentially unilateral

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<sup>26</sup> P. Leino, R. Petrov, “Between ‘Common Values’ and Competing Universals: The Promotion of the EU’s Common Values through the European Neighbourhood Policy”, (2009) 15 E.L.J. 654-671, at 655.

<sup>27</sup> The 2004 European Neighbourhood Strategy Paper, for instance, explicitly provided that the ENP’s vision involves “a ring of countries, sharing the EU’s values and objectives”. COM (2004) 373 final, at p. 5.

<sup>28</sup> See the Joint Press Statement of the 14<sup>th</sup> EU-Ukraine Summit in Brussels on 22 November 2010 ([http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/er/117912.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/117912.pdf)).

character of the ENP.<sup>29</sup> The agenda of the Action Plans is primarily arranged by the EU and the evaluation of progress remains based upon periodic Commission reports. Despite the rhetoric of joint ownership, it is obvious that the Union is the dominant party in a relationship that is characterised by a strict conditionality approach. The neighbouring countries are required to implement a significant portion of the *acquis communautaire* and to launch ambitious political, legal and economic reforms under a ‘pre-accession’ type monitoring process carried out by the EU institutions.

The EU’s common values represent an incentive for the implementation of this reform programme. The political elites of the neighbouring countries can refer to the ‘shared values’ enshrined in the Action Plans as objectives and benchmarks for further internal legal, political and economic reforms. It is noteworthy that the scope of value references included in the ENP Action Plans extends beyond the values of the Union as they are defined in Article 2 TEU and include references to democratic norms and standards developed by other international and regional institutions (United Nations, Organisation for Security and Cooperation in Europe, Council of Europe, International Labour Organisation).<sup>30</sup> Furthermore, various other elements

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<sup>29</sup> M. Cremona and C. Hillion, “L’Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy”, EUI Working Papers, 2006/39, p. 20.

<sup>30</sup> For instance, the ENP Action Plan with Georgia provides that local, parliamentary and presidential elections have to be conducted “in accordance with international standards, through implementation of OSCE/ODIHR and Council of Europe recommendations.” Moreover, Georgia is to “enhance support for the UN and the OSCE in order for them to carry out the implementation of their mandate, including in the field of human rights.” Finally, core labour standards have to be implemented “in accordance with relevant ILO conventions as ratified by Georgia.” (See:

which are not directly related to the traditional values have also been added to the list of commitments in the Action Plans, including, for instance, the fight against terrorism, the proliferation of weapons of mass destruction and efforts to achieve conflict resolution.<sup>31</sup> In other words, the multiple references to shared and common values are instrumental to promote the EU's own interests in different areas.

The asymmetrical nature of the EU's neighbourhood relations is enshrined in Article 8 TEU. In principle, only partner countries respecting the EU's values are eligible for a special relationship. The EU already applied this approach in the 1990s when it was to conclude the PCAs with the countries of the former Soviet Union. Only countries respecting the rule of law, democracy and human rights; guaranteeing the rights of minorities; accepting the inviolability of frontiers and committing themselves to a peaceful resolution of conflicts were considered eligible for this new type of agreements.<sup>32</sup> This explains why the PCA with Belarus never entered into force after the establishment of an authoritarian regime by Alexander Lukashenko. A similar conditionality approach is applied with regard to the EU's southern neighbours. The entry into force of an association agreement with Syria, for instance, is still pending due to the political circumstances in that country. Moreover, all the PCAs and Euro-Mediterranean association agreements contain an 'essential element clause' stating that respect for human

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[http://ec.europa.eu/world/enp/pdf/action\\_plans/georgia\\_enp\\_ap\\_final\\_en.pdf](http://ec.europa.eu/world/enp/pdf/action_plans/georgia_enp_ap_final_en.pdf)). Similar provisions can be found in the Action Plans with other ENP partner countries.

<sup>31</sup> European Neighbourhood Policy Strategy Paper, COM(2004) 373 final, p.8.

<sup>32</sup> C. Hillion, "Partnership and cooperation agreements between the EU and the Newly Independent States of the ex-Soviet Union", (1998) 3 EFA. Rev. 399-415.

rights and democratic principles is an essential element of the agreement and a 'non-execution clause' providing that the parties may take appropriate measures in the event that the other party fails to comply with an obligation. A violation of the essential elements clause is considered to be 'a case of special urgency' allowing the parties to act without prior consultation in the joint council under the agreement. Obviously, this type of conditionality is a prerequisite for the conclusion of agreements under Article 8 TEU.

It remains to be seen how the reference to 'the values of the Union' will be implemented in practice. A strict interpretation suggests that all the values listed in Article 2 TEU are to be considered as 'essential elements' of the bilateral relationship between the EU and its neighbours. However, proceeding from existing practice and taking into account the importance of joint ownership, it seems more likely to seek a common denominator in the form of international legal instruments. For the Eastern neighbours, the Council of Europe and the Organisation for Cooperation and Security in Europe provide the common standards,<sup>33</sup> for the Southern neighbours this will be the United Nations and other relevant international organisations.

*An area of prosperity and good neighbourliness characterised by peaceful relations based on cooperation*

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<sup>33</sup> For instance, the EU urges Ukraine to conduct its constitutional reform in close cooperation with the Venice Commission of the Council of Europe (advisory body of the Council of Europe composed of independent experts in the field of constitutional law). See the Joint Press Statement of the 14<sup>th</sup> EU-Ukraine Summit in Brussels on 22 November 2010.

Article 8 TEU envisages the establishment of an ‘area of prosperity and good neighbourliness’. These, at first sight, rather vague and broad terms have been frequently used by the EU institutions in the context of the ENP and the pre-accession strategies. The notion of ‘prosperity’ is usually linked with ‘stability and security’. Whereas prosperity is mainly of an economic origin and is related to the well-being of the population, the notions of stability and security are closely associated with democracy and good governance and imply preserving the territorial sovereignty of the neighbouring countries.<sup>34</sup> The concept of ‘good neighbourliness’ was introduced as a condition for accession in the Presidency Conclusions of the 1994 Essen European Council.<sup>35</sup> It basically implies a commitment to resolve any outstanding (border) conflicts by peaceful means. Taking into account the close connection between the pre-accession methodology and the ENP, it is no surprise that this concept has found its way to Article 8 TEU.

The reference to ‘peaceful relations based on cooperation’ strengthens the perception that the objective of Article 8 TEU is not to prepare the (full) integration and (potential) accession of the neighbouring countries but, rather, to ensure close economic and political relations. Hence, despite the similarities with the Treaty provision on association, the final objective of Article 8 TEU, i.e. close cooperation, resembles more the wording of the Partnership and Cooperation Agreements (PCAs) concluded with the former Soviet Republics – with the exception of the Baltic States – in the period of 1994-1999. Accordingly, agreements based on Article 8 TEU

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<sup>34</sup> Communication from the Commission ‘Eastern Partnership’ COM(2008) 823 final.

<sup>35</sup> Presidency Conclusions Essen European Council (9-10 December 1994), Bull. EU (1994) 12, I.13.

appear to provide a pragmatic solution to upgrade the PCAs without entering into the politically sensitive area of association. It would, however, be inconsistent with both the rationale of the ENP and the idea of establishing a special relationship with the EU's neighbours to suggest that forms of advanced integration going beyond mere cooperation would be out of the scope of Article 8 TEU.<sup>36</sup> To the contrary, the possibility of undertaking activities jointly and the creation of reciprocal rights and obligations suggest a form of far-reaching integration based upon the export of the *acquis* to non-EU Member States. The only limit seems to be the exclusion of the neighbouring countries from the formal decision-making of the Union. This reflects Romano Prodi's idea about "sharing everything but institutions" as a model for the EU's neighbourhood relations.<sup>37</sup>

### **The potential application of Article 8 TEU**

The specific characteristics of Article 8 TEU, including its position within the Treaties and political inspiration, raise questions about its potential applicability in practice. In particular, the procedural requirements and potential use in the EU's relations with the ENP partner countries,

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<sup>36</sup> The 2004 ENP Strategy Paper, for instance, explicitly states the objective to draw the ENP partner states into "an increasingly close relationship, going beyond cooperation to involve a significant measure of economic and political integration". COM (2004) 373 final, at p. 5.

<sup>37</sup> Romano Prodi, "A Wider Europe - A Proximity Policy as the Key to Stability." Sixth ECSA-World Conference. Jean Monnet Project, Brussels, 5-6 December 2002.

the Russian Federation and the so-called 'old neighbours' of the Union (EFTA countries and micro-states) deserve specific attention.

### *Procedural requirements for the application of Article 8 TEU*

Taking into account the flexibility of its wording and its place within the structure of the Treaties, Article 8 TEU is essentially a framework provision and a declaration of intent. The clause remains vague as to the concrete substance of the EU's neighbourhood relations and the added value in comparison to existing legal bases for the conclusion of bilateral agreements, in particular Article 217 TFEU on association, seems rather limited.<sup>38</sup> Hence, the question arises to what extent Article 8 TEU can make a difference in the development of the EU's relations with its neighbours. Is it, for instance, in itself a sufficient legal basis for the conclusion of a new generation of bilateral agreements with the neighbouring countries or does it always require a combination with the material legal bases included in the Treaty on the Functioning of the European Union (TFEU)?

In principle, nothing in the Treaties seems to prevent that Article 8 (2) TEU in itself is used to conclude a specific agreement with a neighbouring country. After all, Article 216 (1) TFEU makes clear that a legal basis for concluding international agreements can also be found

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<sup>38</sup> D. Hanf, "The ENP in the light of the new neighbourhood clause", in: E. Lannon (ed.), *Challenges of the European Neighbourhood Policy* (Brussels-Berlin: Peter Lang Publishers, 2011), in press.

in the TEU.<sup>39</sup> Moreover, Article 8 TEU can be considered as a ‘catch-all provision’, which does not require the determination of specific substantial legal bases but is, in itself, a sufficient legal basis for the conclusion of agreements of a general nature.<sup>40</sup> In line with the practice of association, agreements based on the single legal basis of Article 8 TEU could cover any of the competences attributed to the Union. Taking into account the broad scope and importance of those agreements as well as their strong focus on political dialogue and conditionality, they can be expected to be mixed, requiring also the Member States to be a party to the agreement.

Notwithstanding the attractiveness of a special type of neighbourhood agreements to be concluded on the single legal basis of Article 8 TEU, this option raises a number of practical and political questions. For instance, the procedure for the conclusion of agreements on the basis of Art. 8 TEU is not very clear. No procedural requirements are included in this Article, which implies the application of Art. 218 TFEU as the general provision for the conclusion of international agreements by the Union. While Art. 218 TFEU proceeds from the principle that qualified majority voting in the Council is the rule during this procedure, a specific number of areas require unanimity in the Council (*i.e.* when unanimity is required internally, for

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<sup>39</sup> Pursuant to Article 216 (1) TFEU: “The Union may conclude an agreement with one or more third countries or international organisations *where the Treaties so provide* or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, *one of the objectives referred to in the Treaties*, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.” [Emphasis added]

<sup>40</sup> The same characteristic applies to traditional association agreements. See: M. Maresceau, “Bilateral Agreements Concluded by the European Community”, (2004) 309 *Recueil des cours de l’académie de droit international* 411.

association agreements, co-operation agreements with candidate countries and the agreement on accession to the European Convention of Human Rights). No explicit reference to neighbourhood agreements is, however, included. Based upon the close connection between the wording and rationale of Article 8 TEU and Article 217 TFEU it may be argued that the procedure for the conclusion of association agreements will need to be followed. This requires unanimity in the Council and the consent of the European Parliament.

An alternative interpretation is that, given the absence of any procedural guidelines, Art. 8 TEU cannot be used as an autonomous substantive legal basis. The symbolic nature of this provision and its unusual location under Title I 'common provisions' of the TEU seems to point in the latter direction. This would render Art. 8 TEU into a mainly political instrument alongside the substantive legal provisions on EU external action in the TFEU.

#### *Potential application in the EU's relations with the ENP partner countries*

The option of specific agreements to be concluded with the ENP partner countries under the legal basis of Article 8 TEU might be interesting from an EU point of view because it provides for an upgrade of the EU's bilateral relations which is consistent with the conditionality approach of the ENP and, most importantly, creates no false hope as far as accession prospects are concerned. However, the negotiations on a post-PCA agreement with Ukraine reveal that the partner countries are not necessarily interested in such a kind of relationship. From the outset,

the Ukrainian negotiators opposed against the use of the “neighbourhood” label.<sup>41</sup> Only after a period of uncertainty about the legal status of what was diplomatically called an “enhanced agreement”, a Joint Declaration of European Commission President Barosso, the French Presidency and the Ukrainian President Yushchenko adopted on the occasion of the 9 September 2008 EU-Ukraine summit made an end to the speculations when it announced that “the new agreement between the European Union and Ukraine will be an association agreement”.<sup>42</sup>

The initial reluctance on the part of the EU to accept the association formula cannot be disconnected from the discussion about the recognition of the European aspirations of the EU’s eastern neighbours. Notwithstanding the absence of any automatic link between association and accession, certain Member States apparently feared that this would be perceived as a signal towards further enlargement in the future. The ultimate decision to work towards association in September 2008 can be explained by a growing pressure to support the pro-European forces in Ukraine, on the one hand, and the absence of any viable alternative, on the other hand. At that time, Ukraine faced a serious political crisis as a result of disagreements

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<sup>41</sup> C. Hillion, “Mapping-Out the New Contractual Relations between the European Union and its Neighbours: Learning from the EU–Ukraine ‘Enhanced Agreement’”, (2007) 12 EFA Rev. 170. See also R. Petrov “Legal basis and scope of the new EU-Ukraine enhanced agreement. Is there any room for further speculation?”, EUI Working Papers, MWP 2008/17.

<sup>42</sup> Council of the EU, *EU-Ukraine Summit*, 12812/08, 9 September 2008.

within the coalition of the Orange revolution.<sup>43</sup> Moreover, the fate of the Treaty of Lisbon – and by consequence of Article 8 TEU as a potential alternative to formal association – was highly uncertain due to the negative outcome of the first ratification referendum in Ireland. Under those circumstances, the acceptance of negotiations on a proper association agreement seemed a logical step.

Taking into account the frontrunner position of Ukraine in the Eastern neighbourhood, the new initiative on Eastern Partnership, formally launched with the adoption of the Prague Declaration on 7 May 2009, extended the offer of association to all Eastern neighbours. This evolution is remarkable. Whereas the ENP Action Plans, adopted between 2005 and 2007, all refer to the objective of neighbourhood agreements or, in the case of Ukraine, enhanced agreements, the EU now unambiguously accepted that the new legal framework will be based on association. Arguably, this shift in perspective has consequences for the legal basis of the new agreements. Whereas the idea of concluding “neighbourhood agreements” was clearly inspired by Article 8 TEU, the term “association” is related to Article 217 TFEU. Of course, given the similarities between both provisions, it may be argued that the EU can conclude specific

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<sup>43</sup> The internal political crisis in Ukraine began with a dispute between President Viktor Yuschenko and Prime Minister Yulia Tymoshenko over Ukraine’s reaction to the armed conflict between Russia and Georgia that started in early August 2008. Whereas Yuschenko unequivocally supported Georgian President Saakashvili and condemned Russia’s attacks within Georgia, Tymoshenko adopted a more neutral position. The political crisis culminated when the Prime Minister’s Bloc Yulia Tymoshenko voted, together with the opposition parties, a bill to limit the President’s powers. This action resulted in the collapse of the coalition of the Orange Revolution on 16 September 2008.

association agreements on the basis of Article 8 TEU alone.<sup>44</sup> However, the absence of any specific reference to association in the wording of Article 8 TEU and the political interest of at least certain partner countries to be a formal associated country of the Union complicates this option. A potential compromise, satisfying the EU's interest in developing a specific type of neighbourhood relationships and the partner countries' ambition to become – or to remain in the case of the southern neighbours – formally associated countries of the Union, might be to seek recourse to the double legal basis of Article 8 TEU and Article 217 TFEU. This would at least clarify the institutional requirements for the conclusion of this new type of agreements. Whereas the combination of both articles might appear somewhat redundant, the reference to Article 8 TEU reflects the importance of the EU's values as the foundation of the bilateral relationship and indicates that the objective is good neighbourliness rather than (potential) accession. The formal association on the basis of Article 217 TFEU, on the other hand, responds to the neighbours' ambitions and sensitivities.

Whatever the outcome of the negotiations will be, the choice of the legal basis for the new association agreements with the EU's eastern neighbours (Article 8 TEU, Article 217 TFEU or a combination of both) essentially has a political significance. The flexibility of the Treaty provisions implies that the scope of a bilateral agreement is less dependent on its legal basis than on the political will of the EU institutions and Member States to engage in a far-reaching form of integration with a third country. As observed by Steve Peers, "a particular association

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<sup>44</sup> D. Hanf, for instance, argues that Article 8 TEU can be perceived as a *lex specialis* for the conclusion of association agreements with one or several of the EU's neighbouring countries. D. Hanf, "The ENP in the light of the new neighbourhood clause".

agreement might even contain fewer integration objectives than a partnership or co-operation agreement.”<sup>45</sup> Also non-association agreements can contain at least some special privileged links and reciprocal rights. In *Simutenkov*, for instance, the Court of Justice accepted that also certain provisions of a Partnership Agreement are eligible to have direct effect.<sup>46</sup> Moreover, agreements with a comparable content are sometimes concluded under the association formula and sometimes not.<sup>47</sup> Hence, the classification of the EU’s agreements with third countries is mainly a matter of politics, not law.<sup>48</sup> This political connotation is of particular importance in the EU’s neighbourhood relations.

Taking into account that the Union already concluded formal association agreements with the southern ENP states in the past, anything less than association would not be perceived by the eastern ENP countries as an enhancement of their existing contractual relations.<sup>49</sup> For the southern partners, on the other hand, an upgrading of the existing bilateral relations is less obvious. Except for Libya and Syria, those countries already have a functioning association

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<sup>45</sup> S. Peers, “EC frameworks of international relations: cooperation, partnership, association”, in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (London, Sweet & Maxwell: 2000) p. 175.

<sup>46</sup> *Simutenkov* (C-265/03) [2005] E.C.R. I-2579 at [28].

<sup>47</sup> A good example is the Economic Partnership, Political Coordination and Cooperation Agreement with Mexico, which follows to a large extent the association agreement with Chile. See: M. Maresceau, “A Typology of Mixed Bilateral Agreements”, in: C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited. The EU and its Member States in the World* (Oxford: Hart, 2010) p. 22.

<sup>48</sup> S. Peers, “EC frameworks of international relations: cooperation, partnership, association”, p. 175.

<sup>49</sup> C. Hillion, “Mapping-Out the New Contractual Relations between the European Union and its Neighbours: Learning from the EU–Ukraine ‘Enhanced Agreement’”, (2007) 12 EFA Rev 175.

agreement containing reciprocal rights and obligations and the possibility of undertaking activities jointly. Nevertheless, within the context of the ENP, the EU has offered some countries a perspective of further integration. On 13 October 2008, the EU and Morocco adopted a road map towards the establishment of an ‘advanced status’,<sup>50</sup> a status that was also granted to Jordan in 2010 and is now offered to all Southern ENP countries in the context of the new “Partnership for Democracy and Shared Prosperity in the Southern Mediterranean”.<sup>51</sup> The ‘advanced status’ essentially implies a prospect of closer political relations with permanent consultation mechanisms, progressive integration in the EU internal market and enhanced sectoral cooperation. Even though this ‘upgrade’ of the bilateral relations is perfectly possible under traditional association agreements, the conclusion of a new generation of Euro-Mediterranean neighbourhood agreements may make sense for political reasons.<sup>52</sup> This is particularly the case in the wake of the Arab revolutions. In this context, Article 8 TEU and its

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<sup>50</sup> Document conjoint UE-Maroc sur le renforcement des relations bilatérales/ Statut Avancé, Council doc. 13653/08.

<sup>51</sup> This new Partnership is the EU’s response to the Arab revolutions and involves increased support for democratic transition and institution-building; civil society and economic development. See: Joint Communication of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, “A Partnership for Democracy and Shared Prosperity within the Southern Mediterranean”, COM (2011) 200 final, 8 March 2011.

<sup>52</sup> It is noteworthy that on the occasion of the EU-Morocco Summit in Granada (Spain) on 7 March 2010, both partners agreed that “they will continue the process and reflection on the nature and form of the contractual relationship to replace the Association Agreement”. See: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/er/113247.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/113247.pdf).

emphasis on ‘the values of the Union’ as the foundation for contractual relations provides an attractive point of reference to make a clear distinction with the current generation of Euro-Mediterranean association agreements.

#### *Potential application in the EU's relations with the Russian Federation*

In contrast to most ENP partner countries, which are interested in formal association and (far-reaching) integration with the EU, the situation is different for the Russian Federation. In the Medium-Term Strategy for the development of its relations with the EU, Russia explicitly rejected the option of association.<sup>53</sup> Obviously, the political connotation of association, suggesting an asymmetrical relationship between the partners which is based upon a strong conditionality approach and the unilateral approximation to EU rules and policies, is difficult for Russia to accept politically. For the same reasons, Russia refuses to take part in the ENP and prefers a bilateral Strategic Partnership outside the formal ENP framework. This involves a far-reaching programme for the establishment of ‘four Common Spaces’, recently upgraded with a ‘Partnership for Modernisation’, which potentially also offers deep and comprehensive free trade and a visa free regime. In contrast to the ENP, which is characterised by a strict conditionality approach and an asymmetrical nature of the bilateral relations, the EU-Russia Strategic Partnership is based on a more equivocal relationship. As an alternative to an ENP type of Action Plan, the EU and Russia jointly drafted road maps for the implementation of the

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<sup>53</sup> “Medium-Term Strategy for Development of Relations between the Russian Federation and the European Union (2000-2010)”, at: [http://ec.europa.eu/comm/external\\_relations/russia/russian\\_medium\\_term\\_strategy/](http://ec.europa.eu/comm/external_relations/russia/russian_medium_term_strategy/).

Common Spaces agenda.<sup>54</sup>

Remarkably, the Common Spaces road maps avoid references to the one-sided approximation of Russia's legislation to EU standards but use more neutral terms such as 'regulatory convergence' or 'the elaboration of common approaches'. This is an important evolution in comparison to the drafting of the PCA, which explicitly proclaims that "Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the [European] Community".<sup>55</sup> Given Russia's dissatisfaction with this provision as well as the need for an updated bilateral relationship after enlargement, the EU and Russia agreed at their Summit in Sochi (Russia) in May 2006 to develop a new, comprehensive framework agreement. After a series of problems with new EU Member States and after the conflict between Russia and Georgia, the negotiations officially started at the end of 2008.<sup>56</sup> One of the key questions

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<sup>54</sup> The ambition to create four Common Spaces, namely a Common Economic Space; a Common Space of Freedom Security and Justice; a Common Space of External Security and a Common Space of Research and Education, including Cultural aspects, was introduced at the May 2003 Saint-Petersburg EU-Russia Summit. The May 2005 Moscow EU-Russia Summit adopted a single package of road maps with action points for the implementation of the new agenda. For comments, see: P. Van Elsuwege, "The Four Common Spaces: New Impetus to the EU-Russia Strategic Partnership?", in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge: CUP, 2008) pp. 334-359.

<sup>55</sup> Article 55 PCA.

<sup>56</sup> Poland vetoed the planned opening of the negotiations at the November 2006 Helsinki EU-Russia summit in response to Russia's ban on the import of Polish meat. At the following summit meeting, held in Samara on 18 May 2007, EU-Russia relations reached an absolute freezing point. In the light of a long list of tensions and mutual disagreements ranging from the future status of Kosovo, the issue of energy supply to the fate of Russian-speaking

concerns the legal basis of this new contractual relationship. At first sight, Article 8 TEU might be an interesting instrument to upgrade the PCA without entering into a formal association status. However, it remains to be seen to what extent the conditionality approach underpinning the ENP and reflected in Article 8 TEU is acceptable from a Russian point of view. The idea that the relationship is “founded on the values of the EU” may be difficult to reconcile with Russia’s insistence on equal partnership.

Notwithstanding the consensus on an abstract set of common values,<sup>57</sup> the interpretation of those concepts may be different. On several occasions, Prime Minister Putin and President Medvedev argued that the principles of democracy and liberty must be interpreted in line with Russia’s national values, in particular the aspiration to strengthen the minorities in Estonia and Latvia, and in contrast to previous practice, the summit ended without a Joint Declaration. It was only on the occasion of the 26-27 June 2008 EU-Russia Summit in Khanty-Mansiysk that a new atmosphere in the bilateral relationship was perceptible. This gathering, for the first time chaired by the new Russian President, Dmitry Medvedev, and organised under the auspices of Slovenia as the first new EU Member State to hold the Presidency of the EU, formally launched the negotiations for a new Strategic Partnership agreement. Unfortunately, the new enthusiasm quickly received a major blow with the outbreak of the conflict in Georgia in August 2008 and Russia’s unilateral decision to recognise the independence of Abkhazia and South Ossetia. In response, the EU decided at an extraordinary European Council meeting to postpone the negotiations on the new partnership agreement. However, it soon became clear that a long-term postponement of the negotiations was not in the EU’s interest. Accordingly, it was decided to start the negotiations in December 2008.

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<sup>57</sup> For instance, the Road Map for the Common Space on External Security explicitly states that “The EU and Russia share common values, as defined in the Helsinki Final Act as well as in the PCA and other relevant international documents notably respect for international law, including respect for democratic principles and human rights, including the rights of persons belonging to minorities, equality and respect of mutual interests”.

statehood and sovereignty of Russia.<sup>58</sup> This implies, of course, a different reading of the events in Chechnya, South Ossetia or Abkhazia. The diverging perceptions between the EU and Russia are also obvious with regard to the legal protection of Russian-speaking minorities in Estonia and Latvia. Whereas Russia regularly condemns what it calls the discriminatory treatment of the Russian-speaking population in the latter countries, the Union sees no problems and confirms the Member States' full compliance with the EU's values and norms.<sup>59</sup> Hence, the value dimension may become a significant issue for the potential application of Article 8 TEU in the EU's relations with Russia. In any event, the agreement with Russia can be expected to focus more on issues of economic and political cooperation than the envisaged association agreements to be concluded with the Eastern ENP partners, which unequivocally aim at the export of the EU's *acquis*.

#### *Potential application in the EU's relations with the EFTA countries and micro-States*

Despite the observation that Article 8 TEU was conceived to provide a constitutional basis for the ENP and the development of specific bilateral relations with the EU's new neighbours, this Treaty provision also potentially applies to the relations between the EU and its so-called "old neighbours": the EFTA countries and the micro-states. As a result of EU enlargement and the

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<sup>58</sup> R. Petrov, P. Leino, "Between 'Common Values' and Competing Universals: The Promotion of the EU's Common Values through the European Neighbourhood Policy", (2009) 15 E.L.J. 654-671, at 667-670.

<sup>59</sup> P. Van Elsuwege, *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession to the European Union* (Leiden: Martinus Nijhoff, 2008) pp. 404-405.

further deepening of the European integration process, none of those countries can escape a growing pressure to align its legislation to that of the Union. Different models of close cooperation and (partial) integration already exist but it is not to be excluded that Article 8 TEU can play a role in a revision of the current structures.

It is not very clear how Article 8 TEU could add something new to the EEA, which is formally an association agreement providing for the application of the internal market *acquis* and so-called “flanking policies” (such as social policy, consumer protection, environment policy) in the EU’s relations with Norway, Iceland and Liechtenstein.<sup>60</sup> With regard to Switzerland, however, no comprehensive framework agreement exists. The legal relationship is based upon a network of more than 120 bilateral and sectoral agreements without an overarching institutional framework.<sup>61</sup> This construction gradually developed as an alternative to the EEA, which was rejected in a popular referendum, and reflects the status of Switzerland as a very particular neighbour of the Union. However, it appears that the limits of this model of enhanced bilateralism are reached. The absence of a possibility to automatically adapt the

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<sup>60</sup> Agreement on the European Economic Area, *OJ* (1994) L 1/3.

<sup>61</sup> The most important agreements are the Free Trade Agreement signed in 1972, the seven agreements of the so-called “Bilaterals I” (free movement of persons, land and air transport, technical barriers to trade, public procurements, research, agriculture) concluded in 1999 and the “Bilaterals II” concluded in 2004 (Schengen-Dublin treaties, fight against fraud, taxation of savings, statistics, processed agricultural products, pensions, environment, media and a common declaration of intent regarding the association to educational programmes). For an analysis, see: C. Kaddous, “The Relations between the EU and Switzerland”, in: A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge: CUP, 2008) pp. 227-269.

bilateral agreements to evolutions in EU law<sup>62</sup> potentially undermines the uniform application of the *acquis*.<sup>63</sup> Moreover, the existence of multiple Joint Committees complicates the efficient and coherent implementation of the relevant legislation. It is, therefore, no surprise that the option of concluding a comprehensive framework agreement to streamline the existing legal and institutional structure is contemplated.<sup>64</sup> Recently, both the President of the European Council and of the European Commission hinted at the necessity of new institutional structures and also the European Parliament endorsed the idea of concluding “an all-encompassing bilateral agreement to the mutual benefit of Switzerland and the EU”.<sup>65</sup>

Notwithstanding the difficulties to reconcile the EU’s insistence on the (quasi-)automatic implementation of new *acquis* and the Swiss political system of direct democracy, the perspective of a comprehensive framework agreement opens up a potential application of

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<sup>62</sup> A notable exception are the Schengen and Dublin association agreements, which provide that Switzerland accepts the Schengen and Dublin *acquis* as well as their future developments. The refusal to accept future *acquis* may lead, in certain circumstances, to the termination of the agreements.

<sup>63</sup> See: A. Lazowski, “Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union”, (2008) 45, C.M.L. Rev. 1433.

<sup>64</sup> See: R. Schwok, “Towards a Framework Agreement in the Context of New Bilateral Agreements between Switzerland and the European Union”, EUI Working Papers, MWP 2009/10, pp. 125-132.

<sup>65</sup> Remarks by Herman Van Rompuy, President of the European Council, following his meeting with Doris Leuthard, President of the Swiss confederation, Brussels, 19 July 2010, PCE 196/10; Déclaration du Président Barroso au point de presse avec la Conseillère fédérale suisse Micheline Calmy-Rey, Genève, 14 October 2010, Speech/10/558; European Parliament Resolution of 7 September 2010 on EEA-Switzerland: Obstacles with regard to the full implementation of the internal market, P7\_TA-PROV(2010)0300.

Article 8 TEU. This provision could, at least symbolically, mitigate the perception that a new framework agreement is a step towards enlargement or a further erosion of national sovereignty. Of course, the distinction with a traditional association agreement is only political and the choice of a legal basis is a purely internal matter for the Union. In this respect, it is worth recalling that the Bilaterals I with Switzerland are already based on ex Article 310 EC (Art. 217 TFEU). Even though the formal association of Switzerland had never been the subject of the bilateral negotiations, recourse to this legal basis avoided complex internal discussions about competence.<sup>66</sup> The legal implications of this decision should not be exaggerated but it remains a bit odd that a third country can be “associated” without its prior consent. The introduction of Article 8 TEU with the Treaty of Lisbon at least provides an opportunity to clarify the *finalité* and context of the envisaged relationship. This may be important in the context of the political discussions surrounding the organisation of a ratification referendum in Switzerland.

Declaration No. 3 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon clarifies the potential application of Article 8 TEU with regard to the micro-States.<sup>67</sup> It is somewhat ironic that this declaration was included on request of certain micro-States themselves whereas the envisaged target countries of this new type of neighbourhood agreements, in the first place Ukraine and the other eastern neighbours of the Union, always remained very sceptical about this provision.<sup>68</sup> In the preparatory stages of the

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<sup>66</sup> Maresceau, “Bilateral Agreements concluded by the European Community”, 411.

<sup>67</sup> Declaration No. 3 on Article 8 of the Treaty on European Union, OJ (2010) C 83/337.

<sup>68</sup> On the initiative of the micro-states to seek a declaration regarding the neighbourhood clause, see: M. Maresceau, “Les micro-états européens et l’Union européenne: une relation de proximité sous tension?”, in

European Convention, Andorra and San Marino already announced an interest in closer cooperation with the Union. San Marino even suggested a possible application for EU membership.<sup>69</sup> It is obvious that such a scenario would create serious institutional and legal complications for the EU. Hence, a specific form of privileged relationship in accordance to the terms of Article 8 TEU may be an interesting alternative reflecting the peculiar situation of the EU's small-sized neighbours.

## **Conclusion**

The introduction of a special Treaty provision for the development of the EU's relations with its neighbouring countries is closely connected with the establishment of the European Neighbourhood Policy and serves a number of political objectives. First, Article 8 TEU underlines that the Union is interested in privileged relations with its neighbouring countries and lays down the constitutional foundations for the development of the ENP. Second, this Article clarifies that the EU's neighbourhood relations are based upon a policy of conditionality and respect for the EU's values and norms. Third, Article 8 (2) TEU provides an opportunity to conclude a new generation of agreements with the neighbouring countries of the Union. In contrast to Article 217 TFEU, which remains silent on the concrete content and objectives of the established privileged relationship, agreements under Article 8 (2) TEU aim to establish "an

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*Etudes en honneur de Jean-Claude Gautron. Les dynamiques du droit européen en début de siècle* (Paris : Editions A. Pedone, 2004) p. 751, 774-775.

<sup>69</sup> M. Maresceau, "The Relations between the EU and Andorra, San Marino and Monaco", p. 291.

area of prosperity and good neighbourliness". Hence, it may be argued that the introduction of Article 8 TEU essentially aimed to allow for an upgrade of the EU's relations with its East European ENP partners without offering a traditional association agreement. The political connotation between association and (potential) accession, inspired by the experience of the Europe Agreements with the Central and East European countries that acceded to the Union in 2004 and 2007 and the Stabilisation and Association Agreements with the countries of the Western Balkans, explains this differentiation.

The intention to offer a new type of European neighbourhood agreements as an alternative to ordinary association agreements faces a number of practical obstacles. Apart from the uncertain procedural requirements for the application of Article 8 TEU, it appears that the neighbouring countries are not interested in such a formula. Ukraine, in particular, strongly opposes any reference to the term "neighbourhood" or "neighbouring country" in the context of the ENP. Moreover, the special relationship envisaged under Article 8 lacks exclusivity. It is not at all clear what kind of specific benefits it offers to neighbouring countries in comparison to traditional association or even partnership agreements. The strong focus on conditionality and the vague reference to "good neighbourliness" make this new type of agreement not very attractive either. Finally, it remains to be seen to what extent the objective of creating "reciprocal rights" would allow the neighbouring countries to contribute effectively to the development of the bilateral relationship.<sup>70</sup>

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<sup>70</sup> N. Bobitski , "Do Ut Des? The Need for True Reciprocity in the European Neighbourhood Policy" (2008) 13 EFA Rev. 449-472.

Rather than providing a new type of integration arrangement, which stops short of enlargement but goes beyond existing forms of partnership and association, Article 8 TEU only institutionalises the ambiguity that also characterises the ENP.<sup>71</sup> The introduction of a legal basis for concluding specific agreements with the neighbouring countries of the Union is essentially the result of a rhetorical exercise. This is clearly illustrated in the case of Ukraine and the initial reluctance on the part of the Union to negotiate a proper association agreement. The ultimate decision to negotiate full-fledged association agreements with all Eastern Partnership countries renders the original intention of Article 8 TEU virtually redundant. It is, however, not to be excluded that this provision is used in relation to other neighbours of the Union, such as Russia, Switzerland or the micro-States, which are not necessarily interested in formal association with the Union.

From a legal perspective, the added value of having a specific legal basis for the development of a “special relationship with neighbouring countries” is not very clear because this type of privileged relations can perfectly be established under Article 217 TFEU. Moreover, the codification of the EU’s conditionality approach in its neighbourhood relations does not make a difference either, mainly because Article 3 (5) TEU already lays down that the Union shall uphold and promote its values and interests in its relations with the wider world. Hence, Article 8 TEU is essentially a political provision the significance of which for the practical development of the EU’s neighbourhood relations is questionable.

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<sup>71</sup> D. Bechev, K. Nicolaïdis, “From Policy to Polity: Can the EU’s Special Relations with its ‘Neighbourhood’ be Decentred?” (2010) 48 JCMS 477.

