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The EU Neighbourhood Competence under Article 8 TEU**

Abstract

Since the Treaty of Lisbon, the European Union is formally instructed to “develop a special relationship with neighbouring countries” (Article 8 TEU). While this express mandate partly codifies past EU engagement, particularly through the European Neighbourhood Policy, it introduces several noticeable novelties in the way in which the Union conceives of, and develops its policy towards its vicinity. Envisaged as a EU ‘neighbourhood competence’ with a value-promotion objective and a mandatory nature, it epitomises the EU as normative power. Yet, despite the strong constitutional instruction of the TEU, and the profound changes in the region, the actual engagement of the Union (and its Member States) towards the vicinity has not profoundly changed. It is argued that the EU neighbourhood policy appears to be affected by the disadvantages of its constitutionalisation, and incapable of reaping the latter’s benefits in terms of compelling the EU institutions and Member States to act forcefully.

1 Introduction

Since the entry into force of the Lisbon Treaty, the European Union (EU) has been formally instructed to “develop a special relationship with neighbouring countries” (Article 8 TEU). While this express mandate partly codifies past EU engagement with its neighbours, particularly in the context of the European Neighbourhood Policy (ENP), it introduces several noticeable novelties in the way in which the EU conceives of, and develops its policy towards its vicinity. In particular, Article 8 establishes an express EU ‘neighbourhood competence’ which is formulated in mandatory terms. Confirming its all-encompassing scope, the new Treaty provision also adjusts the purpose of the Union’s neighbourhood policy and the methodology to attain it. As it will be argued below, such innovations may contribute to the cohesion of the EU neighbourhood policy. At the same time, it will be

suggested that, despite its general ambition to enhance the coherence of the EU external action, the Treaty of Lisbon also appears to have disrupting effects on the institutional framework of the EU external action in general, and on the EU policy towards its neighbours, in particular.

2 The EU obligation to develop a “special relationship with neighbouring countries”

(i) *An EU express competence*

The Treaty of Lisbon introduced an express legal basis for the EU to develop “a special relationship” with its neighbours. While textually identical to Article I-57 of the defunct Treaty establishing a Constitution for Europe (TCE) where it finds its origins, Article 8 TEU was placed in a very different section of the founding treaties. Article I-57 was included in Part I of the TCE containing all the fundamental provisions of the EU constitutional order,

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and was the sole article of a specific Title entitled “The Union and its Neighbours”, that preceded the Title on Union Membership (Title IX), to which it was thus related. By contrast, Article 8 TEU is inserted in the Common Provisions of the Treaty on European Union.¹ Hence, the new neighbourhood legal basis is no longer structurally linked to the enlargement provision, still located in the Final Provisions of the TEU (Article 49 TEU). Nor is it formally included in the specific sections of the Treaties relating to the external action of the Union, namely Title V TEU, and Part V TFEU.

Whether this relocation is an *accident de parcours* in the drafting of the Lisbon Treaty, or a deliberate choice of the 2007 IGC remains debatable. To be sure, its new home in the Common Provisions colours the meaning of the competence it encapsulates, the nature of the policy it envisages, as well as its function.

In particular, the inclusion of the specific legal basis in the TEU, yet outside the chapter on the Common Foreign and Security Policy, entails that the neighbourhood policy should not be affected by the pillar-politics deriving from the recurrent distinction between the CFSP and non-CFSP powers of the Union (cf Article 40 TEU). It thereby consolidates the *comprehensive* character of the neighbourhood policy, as conceived and developed pre-Lisbon. In this sense, the 2004 strategic document of the European Commission emphasised that the ENP is “a comprehensive policy integrating related components from all three ‘pillars’ of the Union’s present structure”,² which offers “a means for an enhanced and more focused policy approach of the EU towards its neighbourhood, bringing together the principal instruments at the disposal of the Union and its member States. [It was also conceived] to further advancing and supporting the EU’s foreign policy objectives” (emphasis added).³ To be sure, the Commission underscored the full accordance of the ENP with the goals of the 2003 European Security Strategy whereby the EU’s “task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations”.⁴

Moreover, its location outside the provisions of the treaties on the “EU external action” suggests that the neighbourhood competence is conceived as a policy with both *internal and external* dimensions. Its all-encompassing character might indeed explain why it is not expressly set out in the catalogue of competence included in the TFEU. To be sure, its inclusion in the *Common Provisions* of the TEU means that the objective of the EU’s special relationship with its neighbours is mainstreamed into other policies of the Union. In practical terms, it entails that EU institutions ought to take account of the neighbourhood policy’s aims when exercising Union competences, for instance in elaborating the EU’s transport, energy, environment policies, in the development of the internal market and, naturally, in the enlargement process. Such a constitutional integration of neighbourhood aims in the policy making of the Union, if effective, can significantly contribute to furthering the consistency of the EU’s action in general, and towards its neighbours in particular.

(ii) A formal EU obligation to engage

Not only does Article 8 TEU formally provide an express competence to “develop a special relationship”, its *mandatory* formulation by the use of “shall” entails the Union is under an obligation to develop such a relationship.

In that, the exercise of the neighbourhood competence differs significantly from that of enlargement. The activation of the accession procedure enshrined in Article 49 TEU is wholly determined by the applicant state’s compliance with a set of eligibility conditions, set out in Article 49 TEU and articulated in the so-called “Copenhagen criteria”. Indeed, the Union is not obliged to trigger the accession procedure, but may choose to do so if the applicant is deemed to fulfil EU conditions. In the case of the competence of Article 8 TEU by contrast, the *decision to engage* or not with the neighbours is *not* subject to conditions (save the somewhat ambiguous requirement that the countries concerned must be a neighbour of the EU), but compulsory. Only the *modalities* of that engagement, i.e. of the actions undertaken, are

¹ For an elaborate and insightful discussion on this point, see S. Blockmans, ‘Friend or Foe? Reviewing EU Relations with its Neighbours Post Lisbon’, in P. Koutrakos (ed.), *The European Union’s External Relations A Year After Lisbon*, CLEER Working Papers 2011/3, 113.

² European Commission, Communication on the European Neighbourhood Policy – Strategy Paper ; COM(2004) 373 at 6.

³ Ibid, at 8.

⁴ European Security Strategy, *A secure Europe in a better world*, Brussels, 12 December 2003, at 8.

function of the behaviour of the country concerned. In that, the neighbourhood competence could be likened to common policies, such as agriculture, transport or the common commercial policy, which all involve a strong EU mandate to act.

As a legal basis establishing an express mandate for an EU engagement with its neighbours, Article 8 TEU formally integrates the neighbourhood policy in the EU constitutional framework. While this may have positive consequences in terms of substantive coherence as suggested above, it may also entail a degree of formalism in policy-making that may challenge coordination between various institutional actors.

In particular, in constitutionalising the neighbourhood competence, the Treaty adds *constraints* on the development of a policy which, thus far, had been incremental and flexible, thanks notably to the fact that it was forged outside the Treaty framework, on the basis of soft law instruments.⁵ As a new express competence, its exercise is more constrained in that it should fully comply with the structural and procedural principles of the EU legal order, such as conferral, subsidiarity, proportionality, and consistency. In the same vein, the exercise of the EU neighbourhood competence might become subject to competence struggle among institutions, as we shall see below.

The flip side of the coin is that the neighbourhood competence is *more constraining* as a result of its inclusion in the institutional system of the EU, in as much as inaction on the part of the Union could lead to possible proceedings before the European Court of Justice, the way failures to develop common policies were in the past sanctioned by the Court. Moreover, the exercise of the EU neighbourhood competence requires from both institutions and Member States a higher degree of compliance with the measures thereby adopted, and a mutual duty of cooperation to ensure the fulfilment of the Union objectives thereof.

3 A special relationship with a finalité

Indeed, Article 8 TEU establishes a Union's neighbourhood competence with a *finalité*: the envisaged

'special relationship' is aimed at establishing "*an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation*". While partly resonating the objectives of the existing ENP, Article 8 TEU appears to refine the ultimate purpose of the Union's neighbourhood policy (i) by articulating the foundations of the area it is purported to establish. It also changes the methodology to achieve this aim (ii).

(i) A refined purpose

By including an explicit reference to "the values of the Union" as the foundation of the future area of good neighbourliness, Article 8 TEU is moving away from the language hitherto employed in most ENP strategic documents. The latter rather referred (as they continuously do) to "shared values" or "common values", if not to international standards. In other words, Article 8 TEU encapsulates a normative shift in the EU policy towards the neighbours even if, admittedly, the "shared values" discourse was a fig leaf to the Union's promotion of its own principles. In that, Article 8 is more consistent with the genuine EU interest: it affirms, if not confirms the EU as normative power in the region, acting in coherence with its own political foundations, in line with the general prescription of Article 3(5) TEU.⁶

(ii) An adjusted methodology

Alongside the normative shift incarnated by the reference to EU values, Article 8 TEU envisages a partial departure from an approach based thus far on conditionality. While it has been argued that the provision "impedes the Union from entering into a special relationship with neighbouring countries refusing to commit themselves to the values of the Union",⁷ such a reading does not appear to fit entirely with the terminology of the said article. As suggested earlier, Article 8 TEU binds the EU to engage with the neighbours, precisely with a view to asserting its own values.

That the EU engagement is conceived as mandatory indeed coincides with the strategic interest the Union has in a stable and prosperous neighbourhood, as conspicuously acknowledged in the 2003 European Security Strategy.

⁵ Further, see B Van Vooren, 'The European Neighbourhood Policy as a Case-Study for Soft Law in EU External Relations' (2009) 34 *European Law Review* 696.

⁶ According to Article 3(5) TEU, "In its relations with the wider world, the Union shall uphold and promote its values and interests...".

⁷ See D. Hanf, 'The ENP in the light of the new "neighbourhood clause" (Article 8 TEU)', *College of Europe, Research Paper in Law - Cahiers juridiques* No 2 / 2011; P Van Elsuwege & R Petrov, 'Article 8 TEU: Towards a New Generation of Agreements with the Countries of the European Union?' (2011) *European Law Review* 688.

As it has been suggested elsewhere,⁸ this neighbourhood-security nexus makes conditionality partly inappropriate inasmuch as the EU cannot passively wait that the states in its vicinity comply with political and economic conditions before eventually engaging, if its own security is at stake. Article 8 TEU points towards the development of an active *policy* of reform and transformation of the neighbouring states, in line with its own values and interests (Article 21 TEU). In that, Article 8 TEU is a *neighbouring state-building policy*, involving the whole array of EU instruments.

Having said this, conditionality is not excluded from the neighbourhood policy based on Article 8 TEU. While engagement is conceived as compulsory, the way in which the EU engages with a particular neighbour is significantly coloured by the situation on the ground. Indeed, Article 8 TEU is remarkably unspecific as regards the actual form of the ‘special relationship’. The provision is thus formulated so as to accommodate the multiplicity of instruments that have so far been carved out: *viz.* unilateral initiatives (e.g. ENP, ENPI), bilateral (e.g. association or partnership agreements), multilateral (UfM, EaP), in view of the plurality of the neighbours concerned. It also accommodates the diversity of views as regards the ultimate purpose of the neighbourhood competence: *viz.* alternative or preparation for membership. Such an undefined character makes it possible to adapt the Union’s engagement to the particular circumstances of the country concerned, with a view to influencing its development, towards the ultimate political *finalité* of the policy, namely the establishment of an area of stability, based on the values of the Union.

4 An expectation-implementation gap?

In the light of the above, it may be suggested that in principle, Article 8 TEU has the potential to contribute to furthering consistency in the EU policy towards its neighbours. In substantive terms at least, the competence conferred to the Union permits it to develop an all-encompassing policy, inasmuch as it is the first and only policy to be included in the Common Provisions of the TEU. In practice however, various elements suggest that the benefits of Article 8 TEU, in terms of providing a legal basis for pursuing a coherent policy towards EU neighbours, remain to be reaped.

In effect, the Treaty of Lisbon has had disrupting effects on the governance of EU external affairs in general, and of the ENP in particular. While the latter was essentially Commission-driven until the Lisbon Treaty, its development and management has thereafter been divided most notably between the Commission and the European External Action Service, without clear allocation of tasks between the two. The European Council and its President are also getting increasingly involved in the shaping of the Union’s relations with its neighbours, and so is the European Parliament, while the rotating presidency remains active.

Often presented as a template for coherent EU external action, the ENP is thus less well-integrated post-Lisbon, than it was under the previous dispensation. In effect, new needs for inter-institutional coordination have surfaced since the Treaty entered into force. A potent illustration of the ensuing complexity in the governance of the EU neighbourhood policy is the 2010 Council Decision on the functioning and organisation of the EEAS, and particularly its Article 9(5), which envisages the involvement of both the Commission and the EEAS for the programming of ENP funds. Indeed, while the Commission includes a specific Commissioner for the neighbourhood, the latter has been deprived of its specific ‘neighbourhood’ staff who, formerly based at the Commission’s DG RELEX, has been transferred to the EEAS.

New policy initiatives as regards the neighbourhood therefore require tight coordination, notably but not only, between the Commission and the EEAS, and so does the management of the policy on the ground, notably at the level of EU delegations. Coordination and cooperation appear all the more pressing given that the multiplicity of actors has led to diverging EU approaches to the neighbourhood. Hence, the European Council stresses the contribution of the ENP to fulfilling the Union’s economic interests (see the European Council conclusions of October 2011), whereas the Commission points to further conditionality by reference to international standards while toning down the EU value promotion (See Communications of 2011). At the same time, Member States have been pursuing their own agenda towards EU neighbours, particularly in the context of the Arab Spring, sometimes through military means. This diversity of approaches indicates that the

⁸ M Cremona & C. Hillion, ‘L’Union fait la force? Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy’ (2006). *European University Institute Law Working Paper* No 39/2006.

benefits of the unified normative framework established by Article 8 TEU remains to be secured.

To be sure, the institutional actors of the EU neighbourhood policy appear to underestimate – when they do not simply ignore the new neighbourhood competence of the Union – and the objectives thereof. For instance, the 2011 Joint Communication of the Commission and High Representative displays a failure to draw on the full potential of the new EU competence.⁹ In effect, and quite remarkably, Article 8 TEU, namely the constitutional foundation for the establishment and development of the policy, is hardly mentioned in the 20-page document. It is only evoked once, yet not to articulate its potential, but as a way to include a harmless reference to Article 49 TEU in the document. Indeed, a growing discrepancy is appearing between the policy as conceived in Article 8 TEU, and as envisaged in the context of the ENP, notably in terms of its normative foundations and objectives (the same holds true for the Eastern Partnership and the Union for the Mediterranean). To put it simply, the objectives of Article 8 TEU are far more ambitious than those of the ENP as set out for example in the Joint Communication of May 2011.¹⁰ While the latter foresees increasing differentiation within the vicinity, and restraint in the approach, Article 8, as suggested above, establishes a robust transformative mandate.

5 Concluding remarks and recommendations

This paper has discussed the post-Lisbon constitutional framework within which the EU is to develop its policy towards the vicinity. It has exposed some potential benefits offered by the new legal basis in terms of its possible contribution to enhancing the coherence of the overall policy, and has shed light on some of its limitations notably in terms of coordination among the institutional actors involved.

By constitutionalising it, the Lisbon Treaty has modified the *nature* of the Union's neighbourhood policy, particularly in view of the mandatory language it contains. By locating it in the Common Provisions of the TEU, the treaty drafters have given a considerable prominence to neighbourhood policy in the Union's action, confirming its all-encompassing dimension and endowing it with a bold *finalité* by reference to EU values.

However, the reality check is somewhat humbling. The actual commitment of the Union (and its Member States) following the entry into force of the Lisbon Treaty has remained circumspect, despite the strong constitutional mandate given by the TEU and the profound changes in the region, which both call for a new and ambitious engagement. In that, the policy appears to be affected by the disadvantages of its constitutionalisation (viz. less flexibility, and contamination by post-Lisbon institutional politics) without reaping the latter's benefits in terms of compelling the EU institutions and Member States to act forcefully.

In the light of the above, the following recommendations could be considered:

1. The Commission should produce (possibly jointly with the EEAS) a Communication exposing the full potential of Article 8 TEU, akin to what is often done when the EU is endowed with a new competence. Such a communication would inform the discussion among institutional actors as to what the EU is expected to achieve through its neighbourhood competence, not only in relation to ENP countries, but more generally in relation to bordering states. The overall coherence of EU action in its vicinity could thus be made more conspicuous and effective.
2. The compulsory and all-encompassing engagement of the Union in its neighbourhood, as foreseen in Article 8 TEU, should also become much more prominent in the political discourse, notably at the level of the Commission/HR initiatives. In practice, this means that the “special relationship” ought not to be reserved to those neighbours that meet EU conditions; it must also be developed in relation to those neighbours that fail to comply with EU values precisely in order to promote the latter. Thus, beyond sanctions, interactions with civil society should be further enhanced.
3. *Mainstreaming* of the EU neighbourhood policy objectives should be actively practiced by the Commission (and where relevant by the HR/EEAS) as EU policy initiator, most notably in areas that have a direct bearing on EU interaction with its vicinity: namely energy, transport and environment.

⁹ Joint Communication of the Commission and High Representative, *A New Response for a Changing Neighbourhood. A review of European Neighbourhood Policy*, COM(2011) 303, Brussels, 25 May 2011.

¹⁰ Ibid. See also Joint Communication of the Commission and High Representative, *Delivering on a new European Neighbourhood Policy*, JOIN(2012) 14, Brussels, 15 May 2012.

4. Action based on the EU neighbourhood competence ought to retain a significant room for soft law instruments (eg strategic documents, action plans) to permit adaptability and flexibility of the policy, and to keep recurrent “pillar-politics” at bay.
5. Coordination and cooperation among EU actors, notably between the EEAS and the Commission, should be strengthened to ensure better coherence in the overall approach, generally to frame the development of the neighbourhood policy, and more specifically to streamline the management of relevant

programmes and to ensure consistent monitoring of the neighbours’ transformation. In the future, consideration should be given to appointing the Commissioner for Neighbourhood (and Enlargement) also as deputy to the High Representative for Foreign Affairs and Security Policy. The double-hatted incumbent would thus head and be assisted by the whole network of services in charge of the neighbourhood policy, including the geographical Managing Directorates concerned. Such integration would beef up the EU’s capacity to take initiative, in line with the strong mandate of Article 8 TEU.

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