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SECURITY ASPECTS IN EU EXTERNAL POLICIES

edited by Andrés Delgado Casteleiro and Martina Spornbauer



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**DEPARTMENT OF LAW**

*Security Aspects in EU External Policies*

**edited by ANDRÉS DELGADO CASTELEIRO and MARTINA SPERNBAUER**

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## **Abstract**

This working paper explores issues of security integration in a number of external policies of the European Union (EU), and looks at both security policies *per se* and the security *rationale* contained in other policy contexts. Following a twin-track approach of presenting both a legal and a political assessment respectively, the contributions have been clustered around three themes: energy security and the EU's relations with neighbouring states, the EU's targeted sanctions policy, and security sector reform pursued by the EU in third countries. The first contribution on energy security seeks to clarify the EU's energy dependency on Russia as a security concern and assesses the EU's response, in particular the Energy Charter Treaty, to Russia's strategic use of its new energy monopoly. The second paper focuses on the countries of the European Neighbourhood Policy (ENP) and analyses a number of critiques with respect to energy policy in the context of the ENP. Within the targeted sanctions theme, one contribution discusses the legal complexities with respect to their adoption and implementation in the EU's multilevel structure, whereas the other looks more broadly at their *rationale* and highlights a number of problems related to their strategic use by the EU and the UN. On the last theme, the notion of Security Sector Reform (SSR), the first contribution raises the issue in the context of the Western Balkans. While acknowledging the potential importance of EU leverage through membership conditionality, it argues that – for reasons both endogenous and exogenous to the EU's SSR approach – accession is not an automatic best case scenario for sustainable reform in these countries. The second contribution looks at the EU's SSR strategy in the light of local ownership and the quest for a holistic approach by examining the reframing of some existing policies and the adoption of new instruments and actions under the SSR agenda.

## **Keywords**

Security – EU external relations – energy policy – European Neighbourhood Policy (ENP) – Russia – targeted sanctions – Security Sector Reform (SSR) – conditionality – local ownership – Western Balkans

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## **Foreword**

This working paper is a collection of papers presented at the workshop “Security Aspects in EU External Policies” organized in December 2007 by the EU External Relations Working Group. Created three years ago, this forum intends to foster the EUI’s internal debate on the EU as an international actor from a multidisciplinary approach.

The workshop aimed at discussing a wide range of EU international security topics as a way of celebrating the 5<sup>th</sup> anniversary of the European Security Strategy. To this end, the participants analysed and evaluated current security challenges for the European Union from a legal and political perspective.

Three guest speakers were invited to discuss these issues with EUI researchers, and to adopt the same interdisciplinary approach which characterizes the activities of the working group in general. The diverse background and broad expertise of Steven Blockmans (T.M.C. Asser Institute), Giselle Bosse (University of Maastricht) and Efthymios Costopoulos (European Commission) led to a highly constructive discussion from a trans-disciplinary perspective. We would like to thank them for accepting the invitation and for their rich and insightful comments and remarks.

We are equally indebted to Professor Marise Cremona for her intellectual guidance and financial support, as well as to Anna Coda-Nunziante for her administrative help within the EUI Law department.

Andrés Delgado Casteleiro and Martina Spornbauer





# An Introduction to Political and Legal Aspects of the EU's Security Policies

Steven Blockmans\*

## I. The proliferation of security concerns

The European Union's leap from fifteen to twenty-seven members has consigned the Cold War legacy of separate and hostile camps in Eastern and Western Europe to the shelves of history. For those states not already members of NATO and the EC/EU, the effects of the fall of the Iron Curtain were particularly urgent as they all had to deal with the insecurities of internal transition, some even with disintegration and war. For many Central and Eastern European states, the practical response to these security predicaments has been a movement toward NATO – thereby affirming the transatlantic link to the 'hard' power of the US – and the EU – seen as an effective method to address myriad 'soft' security challenges. The 2004/7 enlargement of the EU has widened the European security community by incorporating twelve new Member States and has thereby contributed to the stability of a large swath of Central and Eastern Europe.

However, some old security concerns have remained and in some cases have been heightened. By the southeastward push of its borders, the Union has imported 'hard' security threats (e.g. the unresolved dispute over Cyprus)<sup>1</sup> and has confronted it more directly with a number of armed conflicts in its neighbourhood (e.g. the South Caucasus and the Middle East). Moreover, the EU's 'big bang' enlargement coincided with a period of international tensions over the war in Iraq, the 'War on Terror', and a proliferation of 'softer' security challenges such as mass illegal immigration, organised crime, and the disruption of the flow of energy resources, to name just a few. In parallel, within the EU, there has been a sense of transition and political tension over the failed EU Constitution, the fate of the Lisbon Treaty, the direction and extent of future EU enlargement, economic and budgetary difficulties, the shape of the Area of Freedom Security and Justice (AFSJ), especially the nature of border security and the direction of police and judicial cooperation in criminal matters (PJCC), and differing visions of the Common Foreign and Security Policy (CFSP), in particular the European Security and Defence Policy (ESDP). The addition of twelve new Member States has impacted on how the EU perceives and tackles these tensions and transitions, thereby shaping the European Union's security role overall.<sup>2</sup>

## II. Aim, structure and methodology of this working paper

This working paper explores how the widening of security concerns, interests and agendas has affected the deepening of security integration in a number of external policies of the European Union.

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<sup>1</sup> For an assessment of some of the legal consequences, see, e.g., N. Skoutaris, "The Application of the *Acquis Communautaire* in the Areas not under the Effective Control of the Republic of Cyprus: The Green Line Regulation", 45 *CML Rev.* (2008).

<sup>2</sup> S. Blockmans, "La nouvelle vague: The Introduction of a More Significant Ost-politik in the EU's Security Policies", in A. Łazowski (ed.), *Brave New World. The Application of EU Law in the New Member States* (The Hague, 2009), forthcoming.

In doing so, the compilation presents a selection of issues related to both security policies *per se* and to the security rationale contained in external policies which have emerged in other contexts. The contributions have been clustered around three themes: (i) security aspects in the EU's relations with neighbouring states (European Neighbourhood Policy and energy relations with Russia); (ii) the targeted sanctions policy of the Union (directed against, *inter alia*, terrorists and rogue leaders); and (iii) security sector reform in third countries. The analysis of each theme follows a 'twin-track approach', presenting both a legal and a political assessment and therefore allowing a more holistic understanding of the issues at stake. Through such an inductive, bottom-up and inter-disciplinary approach, subtle linkages between and existing overlaps in the external strategies, policies and actions of the European Union are revealed. The identification of these linkages and overlaps are instrumental in the European Union's quest for more coherence, consistency and effectiveness in its external security policies.

A point of caution should be raised though. Measuring the success, failure and effectiveness of policy making and concrete actions targeted at creating stability and security on the European continent and farther afield is fraught with difficulties. It is near to impossible to determine to what extent single efforts and approaches have led to positive or negative results at a more general level. Nevertheless, a number of activities and approaches may be ascribed a positive (or negative) influence on developments that have the potential to undermine the stability and security of a situation. It is on the basis of such general perceptions that general conclusions can be drawn and recommendations can be formulated.

### III. The internal vs. external and soft vs. hard divides in EU security policies

A theme which emerges from the contributions to this volume is that the classic distinctions between internal and external security and hard and soft security no longer apply to the analytical framework in which the issues related to these concepts are studied. What we are observing is a merging of the concepts of internal and external security and a shifting emphasis between soft and hard security.

The first point, i.e. that the internal and external security concepts are both trans-boundary in nature, is illustrated by the need to create an internal energy market in order to better define an external policy which ensures the EU's energy security. While it is true that the European integration process has always been a trans-boundary security project, for the first forty years of its existence the EC/EU promoted inter-state security through a system of cross-border networks. External security relations among Member States were turned into 'domestic' EU policies and law. Now, in an era of trans-boundary threats and security challenges, the task of the Union is to defend and boost its security through similar networks beyond the internal-external divide. An unfortunate theoretical development in recent years is the use of concepts and frameworks borrowed from national security research to study issues of supranational security. Consequently, an unhelpful distinction has been made between internal 'de-securitisation' of relations between EU Member States,<sup>3</sup> and an external Common Foreign and Security Policy which has been analysed in the context of internal security dynamics.<sup>4</sup> This division originates in the tradition of territorial security and border defence. In the institutional sense, the division has been cemented into the EU's pillar structure, where the Second Pillar (CFSP) has been set in contrast – politically as well as legally – to the 'internal' security domains of the First Pillar (civil protection, energy, environment, health, etc.) and the Third Pillar (police, border control, etc.). However, the question is to what extent a practical and analytical line between external and internal security can be drawn for an entity set up with the aim to erode borders to enhance inter-state

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<sup>3</sup> See, generally, B. Buzan, O. Waever and J. de Wilde, *Security: A New Framework for Analysis* (London, 1998).

<sup>4</sup> See, generally, R. Ginsberg, *The European Union in World Politics: Baptism by Fire* (Lanham, 2001); and M. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge, 2004).

security. The 2003 European Security Strategy (ESS) declares that 'internal and external aspects are indissolubly linked'.<sup>5</sup> However, the implications of this merger for the EU's protection are hardly reflected in the making and analysis of European Union security institutions, law, policies, and operational planning. It is widely acknowledged that there is great potential in a more efficient combination of the EU's cross-pillar security policies and capacities.<sup>6</sup> In short, the questions of what is inside and outside the Union, and what is external and internal EU security, justifiably arouse academic interest.<sup>7</sup> To a certain extent, this has also been recognised by the Member States when signing the Lisbon Treaty in October 2007: the pillar structure of the Union was partly abolished with the 'communitarisation' of the Third Pillar.<sup>8</sup> Regrettably though, CFSP and the newly called 'Common Security and Defence Policy' remain covered by the intergovernmental method of the EU Treaty.

On the second point raised at the outset of this section, it is clear that, while a lot of (media) attention is devoted to the (problems involved with the) EU increasingly equipping itself for harder-type security missions in higher-risk theatres around the world (EUFOR Tchad/RCA, EUPOL Afghanistan, EULEX Kosovo), the kind of security challenges which it has to deal with more routinely on the European continent have a softer security character (e.g. illegal immigration, organised crime and the disruption of the flow of energy resources). Increasingly though, the distinction between the 'hard' and the 'soft' security nature of EU policies and operations is shifting and, hence, the choice for their legal basis becomes more difficult. This is most strikingly visible in the European Union's Border Assistance Missions (EUBAM) deployed in the EU's neighbourhood and the Security Sector Reform (SSR) missions elsewhere in the world. Whereas the legal basis for EUBAM Moldova/Ukraine was assigned to the First Pillar,<sup>9</sup> EUBAM Rafah was based on the Second Pillar because of the especially dangerous environment of the Gaza Strip.<sup>10</sup> EUSEC RD CONGO, the Union's first SSR mission was designed to provide advice and assistance to the Congolese authorities responsible for security, while also taking care to promote policies compatible with human rights and international humanitarian law, democratic standards and the principles of good governance, transparency and respect for the rule of law.<sup>11</sup> Consultations between the Council and the Commission on the planning of an integrated mission (including a military, a police and a justice component) failed as no compromise could be reached on how to delineate the line of command that could preserve the respective competences of the institutions. As a result, such an integrated mission was never set up.<sup>12</sup> It was only after a joint assessment mission to the DRC that the Council and the Commission presented a joint paper outlining the EU approach to security sector reform. In the end, the military and police component was entrusted

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<sup>5</sup> ESS: *A Secure Europe in a Better World – European Security Strategy*, Brussels, 12 December 2003.

<sup>6</sup> See, e.g., S. Duke and H. Ojanen, "Bridging Internal and External Security: Lessons from the European Security and Defence Policy", 28 *Journal of European Integration* (2006).

<sup>7</sup> See, e.g., G. Lenzi, "Defining the European Security Policy", in J. Zielonka (ed.), *Paradoxes of European Foreign Policy* (The Hague, 1998).

<sup>8</sup> The provisions on the AFSJ/PJCC have been regrouped under the Treaty on the functioning of the European Union (hereinafter: TFEU). The consolidated versions of the Treaty on European Union (hereinafter: new TEU) and the TFEU have been published in *OJ* 2008 C 115/1.

<sup>9</sup> EU BAM Fact Sheet, December 2007, available at <<http://www.eubam.org>>. See F. Hoffmeister, "Inter-pillar coherence in the European Union's Civilian Crisis Management", in S. Blockmans (ed.), *European Union and Crisis Management. Policy and Legal Aspects* (The Hague, 2008), p. 173.

<sup>10</sup> Council Joint Action 2005/889/CFSP of 12 December 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah), *OJ* 2005 L 327/28, Recital 13. Another reason for EUBAM Moldova/Ukraine to be legally based on the First Pillar is that the mission concentrates not only on security-related border and movement issues but also on customs and fiscal matters that are related to Community powers.

<sup>11</sup> Council Joint Action 2005/355/CFSP of 2 May 2005 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC), *OJ* 2005 L 112/20.

<sup>12</sup> G. Grevi, "Pioneering Foreign Policy: The EU Special Representatives", *Chaillot Paper* No. 106, (Paris, 2007), pp. 116-117.

to a Second Pillar mission, EUPOL RD CONGO, while the mandate for the justice component, EUSEC RD CONGO, was based on the First Pillar.<sup>13</sup>

The finding that the classic distinctions between internal-external and soft-hard security policies are blurring has consequences for the attempts of the Union at achieving more coherence and consistency in policy-making and law-making in the European security field.

#### IV. Coherence and consistency in the EU's cross-pillar security policies

The European Court of Justice, with its recent jurisprudence on cross-pillar action and inter-pillar delimitation of external policies,<sup>14</sup> hovers over the contributions to this working paper like a fairy who tries to ensure unity in the Union's policies and actions. As the general issues underpinning this case-law otherwise remain somewhat under-developed, it is worthwhile to pay separate attention here to the prerequisites for internal cohesion and external projection.

The notion of coherence refers to the level of internal cohesion, i.e. the level of institutional coordination within the EU. As such, the principle carries a procedural obligation for the institutions to cooperate with each other.<sup>15</sup> The principle of consistency carries an obligation of result, namely to ensure that no contradictions exist in the external projection of strategies and policies. As noted before, these challenges are not new but have been heightened. The recent enlargements with ten states from Central and Eastern Europe, Malta and Cyprus has complicated decision-making on EU security policies. Also, the Union's new geographical and geopolitical position has brought relations with third countries, especially those on its borders, into sharper focus and has forced the EU to define its international role and responsibilities more clearly.

With the leading principles of coherence and consistency in mind, one may then ask whether the current legal framework is still conducive to the achievement of consensus on any issue, let alone topics as sensitive as security policies, in an EU numbering 27 Member States (or more). While it may be a little early to pass definitive judgment on the impact of the most recent waves of EU enlargement on the effectiveness of decision-making, it is clear that the EU already encountered difficulties reaching consensus on security issues prior to the 2004 enlargement, when it was still composed of 15 Member States. The definition of relations with Russia, for instance, has been an issue on the external relations agenda since its inception. What emerges from the contributions to this working paper is not so much that the latest round of enlargement has created new security problems, but that it has compounded crucial challenges that the EU had been avoiding prior to May 2004.

There is a lingering concern that the seemingly perpetual accession of new Member States, each with their own interests and agendas, will result in greater difficulties in attaining the necessary level of consensus within the decision-making bodies of the Union. While in a veto system such increases do

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<sup>13</sup> Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo) and Council Joint Action 2007/406/CFSP of 12 June 2007 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (EUSEC RD Congo), *OJ* 2007 L 151/46 and /52, respectively. See Hoffmeister, *supra* n. 9, p. 174.

<sup>14</sup> Case C-403/05 *Philippines Border Management* [2007] ECR I-90, Case C-91/05 *Small Arms and Light Weapons*, nyr; and Joined Cases C-402/05 P *Kadi v. Council and Commission* and Case C-415/05 P *Yusuf and Al Barakaat International Foundation v. Council and Commission*, nyr.

<sup>15</sup> Article 3(2) TEU imposes this obligation on the Council and the Commission. Within the framework of the Second Pillar, it is upon the Council to "ensure the unity, consistency and effectiveness of action by the Union" (Article 13(3) TEU).

not seem to really matter, as it only takes one state to block a proposal,<sup>16</sup> the chances of disagreement and delay increase exponentially as the numbers of participants rise, particularly on issues that touch on sensitive national security concerns. Although the increase in numbers of Member States has not, as yet, overtly affected the deepening of the European integration process, particularly in the internal security sphere, it would be unwise to downplay this quantitative element too much. The unsuccessful efforts at defining both internal and external dimensions of a common energy policy are a case in point. The EU faces the challenge to ensure that enlargement does not further disrupt internal cohesion and adds to, instead of detracts from, its ability to externally project security and stability.

## **V. Leadership and decision-making**

Regardless of efforts to converge security policies, without efficient decision-making and/or clear leadership, such efforts may be futile. Leadership is needed to ensure that decisions on, for instance, counter-terrorism or launching ESDP missions are made swiftly and to give clear direction to EU security actions in the operational phase. With increasingly diverse interests and approaches to dealing with security issues, the last waves of enlargement have stretched the sense of solidarity and commonality to the maximum. This is best illustrated in the Area of Freedom, Security and Justice. As a direct result of enlargement, initiatives by old Member States – such as the G5 meetings of the JHA Ministers of France, Germany, Italy, Spain and the UK and the conclusion on 27 July 2005 of the Treaty of Prüm by seven Member States – briefly heralded the renaissance of conducting business among smaller groupings of like-minded states outside the framework of the EU Treaties.<sup>17</sup> Yet, leadership and decision-making within the European Union are potentially the hardest issues to resolve, with already extremely sensitive areas further complicated by enlargement. In particular, the rise in the number of small states spells greater opposition to large state dominance.

Leadership is required at three levels: (i) the political drive to crystallise the idea of a security policy; (ii) the institutional responsibility within EU structures; and (iii) the practical administration of EU policy. The lack of leadership at these levels makes it difficult to decide whether a crisis exists, to then determine the scale of the crisis, and to achieve a consensus on the response. This failure was clearly illustrated by the arguments over a military intervention in Iraq.<sup>18</sup> In addition, without leadership, it will be harder to achieve the reforms needed to close the infamous ‘capabilities-expectations gap’ in the field of EU security policies.<sup>19</sup> However, talk of leadership immediately raises concerns about the emergence of *directoires*.<sup>20</sup> This form of enhanced cooperation consists of a small number of EU Member States, usually the largest and/or most powerful, constituting the core decision-making body. The primary concern is that such a move will marginalise other/smaller Member States. The enlargement of the EU with twelve new Member States has complicated the Union’s political balance. The three biggest EU Member States – France, Germany and the UK – continue to be crucial to the EU’s security policy formulation, as their efforts to spearhead a resolution of the nuclear dispute with

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<sup>16</sup> T. Valášek, “New EU Members in Europe’s Security Policy”, 18 *Cambridge Review of International Affairs* (2005), p. 217.

<sup>17</sup> The Treaty of Prüm has in the meantime been incorporated in the EU’s *acquis*. See *OJ* 2007 C 71/35.

<sup>18</sup> The fault lines that opened up across Europe in 2003 over the war in Iraq were ominous signs for the development of a cohesive CFSP and led to Rumsfeld’s evocation of ‘old’ and ‘new’ Europe. See E. Pond, “The Dynamics of Alliance Diplomacy over Iraq”, *EUI Working Papers*, RSCAS No. 2004/26 (Florence, 2004).

<sup>19</sup> C. Hill, “The Capability-Expectations Gap, or Conceptualising Europe’s International Role”, 31 *JCMS* (1993), and C. Hill, “Closing the Capabilities-Expectations Gap?”, in J. Peterson and H. Sjursen (eds.), *A Common Foreign Policy for Europe: Competing Visions of the CFSP* (London, 1998).

<sup>20</sup> See, e.g., S. Keukeleire, “Directorates in the CFSP/CESDP of the European Union: A Plea for “Restricted Crisis Management Group”, 6 *EFA Rev.* (2001); T. Jäger, ‘Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy’, 7 *EFA Rev.* (2002).

Iran demonstrates. At the next level down, Italy and Spain have been joined by Poland and Romania as medium-sized Member States, demanding a seat at the top table. However, as the majority of new Member States can be classified as ‘small states’, their security sensitivities in decision-making processes have become an even greater issue.<sup>21</sup> Due to their markedly Atlanticist orientation, the new Member States have tipped the internal balance of the EU in that direction. But because there is no talk of a Central European ‘bloc’ – not on the issue of Euro-Atlantic relations, nor for that matter on any other important security policy,<sup>22</sup> they will not want any form of *directoire* to emerge for decision-making on security policies, regardless of what combination of large states that *directoire* may entail.

There is also the issue of unanimity-based decision-making procedures in the largely intergovernmental security policies of the EU, the outcome of which has been made more difficult by the eastern enlargement. The arguments in the European Convention on the Future of Europe and the pre-Lisbon IGC between medium-sized states, such as Poland and Spain, and the largest states, particularly Germany, over the number of weighted votes in the Council and a double-majority voting system exemplify the sensitivities of the issue. This argument also illustrates how wary some of the new Member States are about being dominated by the older and larger Member States. The intergovernmental nature of decision-making does not foster a sense of commonality. Member States may wield (the threat of) their veto whenever they disapprove, when the position taken is contrary to their interests, when external pressure is exerted upon them or when domestic opposition pressurises the government.

It is debatable whether the Lisbon Treaty – if and when it enters into force – will improve both leadership and decision-making in the realm of EU security policies. The introduction of a High Representative of the Union for Foreign Affairs and Security Policy (Article 18 new TEU), while initially controversial,<sup>23</sup> may improve leadership, especially when duly assisted by the European Commission, of which s/he will be one of the Vice-Presidents, and the future European External Action Service (Article 27 new TEU). Then again, much will depend on the High Representative’s *rapport* with the newly created President of the European Council (Article 15 new TEU), who will also be responsible for the external representation of the EU on issues concerning the Common Foreign and Security Policy.<sup>24</sup> The delineation of responsibilities of both personalities is far from clear, at least on the basis of the text of the Lisbon Treaty. In addition, there are two other authorities responsible for representing the Union to the outside world: the rotating Presidency of the Council in configurations other than that of foreign affairs (Articles 16(9) new TEU and 236 TFEU) and the

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<sup>21</sup> A. Wivel, “The Security Challenge of Small EU Member States: Interests, Identity and the Development of the EU as a Security Actor”, 43 *JCMS* (2005).

<sup>22</sup> For an illustrative conceptualisation and categorisation of EU Member States’ positions on Russia-related topics, see M. Leonard and N. Popescu, ‘A Power Audit of EU-Russia Relations’, *ECFR Policy Paper* (London 2007), at 2: “We have identified five distinct policy approaches to Russia shared by old and new members alike: ‘Trojan Horses’ (Cyprus and Greece) who often defend Russian interests in the EU system, and are willing to veto common EU positions; ‘Strategic Partners’ (France, Germany, Italy and Spain) who enjoy a ‘special relationship’ with Russia which occasionally undermines common EU policies; ‘Friendly Pragmatists’ (Austria, Belgium, Bulgaria, Finland, Hungary, Luxembourg, Malta, Portugal, Slovakia and Slovenia) who maintain a close relationship with Russia and tend to put their business interests above political goals; ‘Frosty Pragmatists’ (Czech Republic, Denmark, Estonia, Ireland, Latvia, the Netherlands, Romania, Sweden and the United Kingdom) who also focus on business interests but are less afraid than others to speak out against Russian behaviour on human rights or other issues; and ‘New Cold Warriors’ (Lithuania and Poland) who have an overtly hostile relationship with Moscow and are willing to use the veto to block EU negotiations with Russia.”

<sup>23</sup> For an analysis of the proposal to create an EU Minister of Foreign Affairs, as included in the botched Treaty establishing a Constitution for Europe, see J. Wouters, “The Union Minister of Foreign Affairs: Europe’s Single Voice or Trojan Horse?”, in J.W. de Zwaan, J.H. Jans, F.A. Nelissen and S. Blockmans (eds.), *The European Union, An Ongoing Process of Integration – Liber Amicorum Alfred E. Kellermann* (The Hague, 2004).

<sup>24</sup> J. Werts, “The Unstoppable Advance of the European Council”, in D. Curtin, A.E. Kellermann and S. Blockmans (eds.), *The EU Constitution: The Best Way Forward?* (The Hague, 2005), pp. 300 and 306.

President of the Commission.<sup>25</sup> Future practice will have to show how the new arrangements will work out. This being said, one may sincerely wonder whether the new arrangements will really contribute to enhancing the Union's visibility and to demonstrating greater unity to the outside world.<sup>26</sup>

While the same reservations already apply to the enhanced cooperation provisions, the introduction of 'permanent structured cooperation' in the Lisbon Treaty (on the model of the Battlegroup concept) may allow for a more flexible and – the hope is – a more effective development of CFSP/ESDP in the future.<sup>27</sup> The same applies to the so-called 'Group of the willing' clause, on the basis of which the Council may entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union's values and serve its interests.<sup>28</sup>

As a result of the complete 'communitarisation' of AFSJ/PJCC, there will be a more uniform decision-making regime: more impetus will be given to qualified majority voting and the application of the co-decision procedure with the European Parliament. Apart from an adaptation of the so-called 'constructive abstention' provision,<sup>29</sup> the unanimity principle for decision-making with regard to CFSP/ESDP has been maintained. This means that consensus-building among 27 (or more) Member States should become easier in the field of internal security policies but remain elusive in the field of external security policies.

Leaving aside speculation about the potential of the above-mentioned institutional amendments to the constituent treaties of the EU, the bottom line remains that the willingness of the Member States to act together through 'their' Union is often missing. While pragmatism about the fact that only a united EU can tackle most of the security challenges posed by a globalising world should make the Member States mend their ways, it will depend on vision and political leadership whether they will.

## **VI. Concluding remarks**

Whereas the EU includes the assertion of its own identity on the international scene and the promotion of peace, security and progress in Europe, its neighbourhood, as indeed the world, among its principle mission statements,<sup>30</sup> it has, so far, not excelled in projecting a picture of itself as a strong international security actor. Both as a 'soft power' and in its approach to harder security issues, the EU is often perceived by others as unstable and weak.<sup>31</sup> The EU's image problem has been less related to its scale of efforts than to its inherent structural deficiencies. That is not to say that the efforts developed by the EU could not be strengthened. It goes without saying that, e.g., the extension of unconvincing

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<sup>25</sup> For an analysis of the current theory and practice of this co-habitation, see S. Bunse, P. Magnette and K. Nicolaidis, "Shared Leadership in the EU: Theory and Reality", in Curtin, Kellermann and Blockmans (eds.), *supra* n. 24.

<sup>26</sup> See S. Duke, "Peculiarities in the Institutionalisation of CFSP and ESDP", in Blockmans (ed.), *supra* n. 9, p. 100.

<sup>27</sup> Article 42(6) new TEU. Further modalities concerning this new concept of 'permanent structured cooperation' can be found in Article 46 new TEU.

<sup>28</sup> Article 42(5) new TEU. Further details about this option are to be found in Article 44 new TEU.

<sup>29</sup> The changes in Article 31 new TEU notably concern the situation where one third of the Member States comprising at least one third of the population of the EU abstains from voting. In such a situation the decision shall not be adopted. This is a variant of the present text of Article 23(1) and (2) TEU, which refer to 'one third of the votes' weighted in accordance with Article 205(2) TEC.

<sup>30</sup> See, e.g., the Preamble and Art. 2 of the TEU; the 2003 ESS, *supra* n. 5; and the 2004 Strategy Paper on the ENP: European Commission, *European Neighbourhood Policy, Strategy Paper*, COM (2004) 373 final.

<sup>31</sup> See, e.g., N. Chaban, O. Elgström and M. Holland, "The European Union as Others See It", 11 *EFA Rev.* (2006). For more recent figures and clues, see the ongoing survey coordinated by S. Lucarelli, 'Research Report: The External Image of the European Union', *GARNET Working Paper* No. 17 (Dublin, 2007). A first set of data drawn from the survey was published by L. Fioramonti and S. Lucarelli, "How Do the Others See Us? European Political Identity and the External Image of the EU", in F. Cerutti and S. Lucarelli (eds.), *The Search for a European Identity: Values, Policies and Legitimacy of the European Union* (London/New York, 2008).

(prospects of) benefits, the adoption of ineffective targeted sanctions, and the formulation of weak mandates of ESDP missions should be prevented and amended where already in existence. It is a positive sign that, in the framework of the ENP, for instance, the Commission has indicated to stand ready to develop, together with the Council, further proposals in the field of conflict resolution, using both Community and non-Community instruments.<sup>32</sup> However, the real test of the EU's effectiveness will come at the level of cohesion among Member States. A Union that is divided, and where the biggest countries seek their own selfish interests in bilateral deals with powerful neighbouring states, while the smaller Member States stubbornly block common positions and joint actions to draw attention to their concerns, will achieve little but derision, both at home and abroad. A European Union that unites around clearly defined objectives will stand a much better chance of playing a prominent role on the international scene.

The adoption of the ESS in 2003 has supported the consolidation of the EU's international actorness. By reconfirming the strategic orientation that had developed through the practice of the CFSP and encompassing the whole spectrum of EU external action, the ESS has made it more difficult for Member States to move outside that reference framework, thus promoting consistency in EU security policies. Exactly because the document has proved so evocative, it has remained present in the strategic debates of Member States and has become a benchmark to evaluate EU policy.<sup>33</sup> In that context and in the light of all evolutions which have taken place since its adoption in 2003, in particular the experiences drawn from ESDP missions, the endorsement by the December 2008 European Council of the High Representative's Report on the Implementation of the European Security Strategy – *Providing Security in a Changing World* – should be welcomed with a view to complement the ESS and to improve its implementation.<sup>34</sup> After all, a regular review of the ESS is necessary to force all official actors involved to re-think the European Union's strategic issues, to highlight gaps, overlaps and inconsistencies in the translation of the ESS into sub-strategies, policies and actions, and to show on which issues fundamental strategic choices have yet to be made.

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<sup>32</sup> European Commission, *A Strong European Neighbourhood Policy*, COM (2007) 774 final, Brussels, 5 December 2007, p. 7.

<sup>33</sup> S. Biscop, "The ABC of the European Union Security Strategy: Ambition, Benchmark, Culture", in Blockmans (ed.), *supra* n. 9, p. 72-73.

<sup>34</sup> European Council, Presidency Conclusions, doc. 17271/08 (CONCL 5), Brussels, 12 December 2008, point 30, with reference to the Report of the High Representative laid down in doc. 17104/08 (S407/08) of 11 December 2008. The report was written in full association with the Commission and in close cooperation with the Member States and highlights, for instance, climate change and energy dependence as major security threats.



# EU Energy Security: The Case of Russia

Aaron Matta\*

*'No other country reveals our differences as does Russia'*

EU Trade Commissioner Peter Mandelson

## I. Introduction

Today, 80% of the energy consumed by EU member states is provided by oil, natural gas and coal. The EU imports approximately 50% of its energy needs. That figure is expected to rise to close to 70% by 2030.<sup>1</sup> The EU relies on energy imports mostly from Russia, the Middle-East, North Africa, and Norway. Yet these regions (except Norway) suffer from political instability, the risk of terrorism, or may threaten to use energy as a political weapon. As a consequence there are growing concerns in the EU about the long-term availability of future supplies. The Ukrainian crisis in January 2006 and the Belarus crisis in January 2007 were clear warning for the EU, calling it to take action. As a result, EU Energy Commissioner Piebalgs affirmed that the EU needed “a more cohesive policy on security of energy supply”, and in February 2008 Solana called for a more united, comprehensive approach insisting that now is the time to think and act a bit more as Europeans.<sup>2</sup>

This paper focuses on one of the main aspects of EU external security – the issue of the EU’s energy dependency on Russia, which is the EU’s main source of energy products, but is also a source of numerous political controversies derived from energy. Although Russia has been a reliable energy provider for decades, this paper will show why energy dependency, especially gas dependency from Russia, is becoming a concern for the EU.

The EU’s dependence on Russian energy products in general, and on Russian energy policies in particular, increasingly represents a source of risk to two main intertwined issues within EU policies. First, the creation of an EU Common Market on Energy, and secondly, the EU’s external powers as an international actor. In both of these areas, the Russian approach on energy directly affects Union objectives by exploiting the differences between the various EU member states positions both internally and externally. One can see that it is in Europe where Russian energy policies have the most immediate effect, creating a significant challenge to the EU.

In this paper I will evaluate how imminent this security risk is in these two areas. By doing so I will start by explaining why energy dependency is a security concern for the EU. I will then examine the rise of the new Russian energy monopoly and its strategies towards the EU and later I will analyse the EU internal reactions towards them – with the Presidency Conclusions of March 2007 together with its ‘Energy Policy Action Plan’ and the recent Second Strategic Energy Review with its ‘Energy and

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<sup>1</sup> See Council of the European Union, *Energy Overview*, June 2006.

<sup>2</sup> Speech by Javier Solana (EU High Representative for the Foreign Common and Security Policy) at the Annual Conference of the French Institute of International Relations (IFRI) on February 1, 2008.

Solidarity Action Plan<sup>3</sup> of November 2008 – and external ones – with the EU failed attempts to convince Russia to ratify the Energy Charter Treaty (ECT) and failing on renewing the New Partnership and Co-operation Agreement with Russia. Finally, in my conclusions I will give some suggestions as to how to tackle these issues more effectively.

My main argument is that Russia has been following a very tight script in the energy sector driven mainly by economic as well as political gains. However, it is not to be entirely blamed for the EU's energy dependency problem. While Russia, in its own right, chose high geopolitical aspirations in order to be an independent global superpower and took rational economic choices to increase its energy profits, the EU failed to create a proper united external reaction to its dependency problem. The Union has reacted by concentrating its efforts on internal energy policies while neglecting the external dimension of EU's energy dependency especially with Russia.

## **II. Gas dependency: a concern for the EU**

Unlike other energy products such as coal or oil, gas has some peculiarities that should be taken in to account when speaking about security. The first and most important one is that gas is not easily transported, making of it a regional rather than a global commodity. Secondly, the main growing market for gas is electricity sector in Europe and electricity cannot be easily stored. These two main geographic-technical issues concerning gas differentiate it from other energy products and increase the security risks that such dependency comprises.

The regional character of gas is due to its transportation infrastructure since it can mainly be transported through pipelines.<sup>3</sup> Pipelines, besides bringing the product to the market also physically link the supplier to the consumer, that is, the source region or country to the market region or country, creating as a result a two-way dependency. Here is where the security of supply and security of demand problems start. This regional nature of gas makes the supply and the demand a concern in geographic terms, by this I mean that what matters is not only where the source of supply is located but also where the demand is situated as well. For the EU there are several internal as well as external sources. While the former group includes the UK and the Netherlands, the latter includes Russia, Norway, Algeria, Libya and the Middle East. The British and the Dutch resources are rather limited; Algeria, Libya and the Middle East suffer from political instability and/or risk of terrorism, and Russia is often accused of using energy as a political weapon with its neighbours. And Norway alone cannot fulfil the EU needs. There are additionally some potential candidates in the Caspian Sea region but Russia has acquired great 'energy' control over the region and any connection to this area via pipeline bypassing Russia seems rather distant. It should be taken into account the existing instability of the 'gas corridor' of the Caucasus region that exacerbated due to the recent conflict between Russia and Georgia, which will not be solved in the near future. These issues will be tackled later in this paper.

Another issue that will be explained in the next section is the dominant role of Gazprom in Russian internal and external energy sector, including its links to the Kremlin. This situation encourages the lack of competition and therefore of investment in the energy fields. This is the main reason why the EU is concerned about its gas dependence on Russia since the lack of investment on the fields leads to a decrease in gas extraction while the European as well as Russian demand are rising.

Moreover, gas is the fuel that runs the EU's economy, since it is used to create electricity on which most modern industries rely upon, and since electricity cannot be easily stored energy dependency

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<sup>3</sup> There is another method of transportation, but it is considerably more costly: this is the LNG technology of liquefying and compressing gas to be transported by a tanker. This technology could make gas a global commodity but due to its considerable costs, since it needs two additional stations, one in the region of supply to liquefy and compress the gas to be sent and another one in the region of demand to de-liquefy and de-compress the gas back to its original form. Therefore, pipelines are the preferred option under a certain distance.

increases even more. Additionally, the use of gas as a source of heating for European houses and work places during the winter should also be mentioned. This makes gas consumption quite high during this period. For these specific reasons, gas dependency is a serious matter and should be a concern to the EU. All these circumstances make security of supply an important concern to the EU. By the same token, security of gas supply matters to the EU as much as security of gas demand matters to Russia.

### **III. Russia's political and economic revival**

While in the 90's everybody was talking about Russian dependence on Western credits, now everyone is talking about Western dependence on Russian gas. Russia is back on the global strategic and economic map, and is busy transforming itself from a defunct military superpower into a new energy superpower. Russia has the world's largest gas reserves and is the largest gas producer in the world and the world's largest exporter. It is also the second largest oil exporter. Russia currently provides the EU with 42% of its gas imports (roughly 24% of total gas consumption), 30% of its oil imports and 24% of its coal imports – all of which (coal to a lesser extent) are expected to increase drastically in the future.<sup>4</sup> Some member states are totally dependent on Russian natural gas for their domestic energy consumption. However, Russian economic stability and its political muscle heavily depend on the energy resources monopoly, since its economy has not yet fully diversified.

To better understand the rationale and success of the Russian strategy it is crucial to see the shift of power during the transition from the 'chaotic state under Yeltsin' that inherited a collapsed Soviet Union, to 'Putin's sovereign democracy' that raised a new energy titan.

#### ***A. Putin's energy strategy: to misuse the law internally and divide tactics externally***

After the collapse of the Soviet Union few people in the right positions at the right time got control over the main assets of the state. As a result a new era of oligarchs began developing a 'mafia state' controlled by different clans. The relationship between former President Yeltsin and these oligarchs is a matter for another study, but it is enough to mention here that there was a certain interdependency between the Kremlin and the Oligarchs, since they needed one another in order to protect their interests (particularly during the re-election of Yeltsin).

When former president Putin came to power in May 2000, his main focus was in restoring the power of the state at all cost if Russia was to become a superpower again. The only way to achieve that was by tearing down the gangster system that controlled the country. Putin's main objective was to restore the Russian economic and military might as well as its influence over the Newly Independent States (NIS).<sup>5</sup> To achieve this, Putin had to take back from the oligarchs what they had taken from the state during the Yeltsin era, in particular the pipelines and energy reserves. Berezovskiy's and Gusinsky's asylum in the UK are clear examples of this strategy. But it is with Khodorkovsky and the Yukos trial that Putin set an example to the oligarchs not to mess with politics in Russia. In addition, Putin used tax laws and highly bureaucratic licensing procedures as well as increasing Gazprom influence and even getting control over the media to destroy any sort of internal opposition. In the meantime, Putin centralised power and gave key posts to former KGB colleagues and took control over the state Duma.

Putin's energy strategy can be divided in two parts: first, the restore effective control over the state energy reserves and pipelines infrastructure, particularly in the oil sector, through a selective use of the

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<sup>4</sup> C. Cleutinx and J. Piper, "The EU-Russia Energy Dialogue", in K. Barysh (ed.), *Pipelines, Politics and Power: The Future of EU-Russia Energy Relations* (London, 2008), p.28.

<sup>5</sup> Former republics of the USSR.

Russian legal system; and secondly, the 'divide and rule' tactics (mainly economically but also politically driven) towards the EU and taking control over additional options of supply to Europe.

### *1. Gazprom - a state monopoly de facto & de jure*

One of the chosen instruments by Putin to get the oil assets back to the state was Gazprom<sup>6</sup> (and Rostneft to a lesser extent). Gazprom is the main Russian gas production company and owner of gas transportation monopoly – United Gas Supply System (UGSS), and it is strongly supported by Russian legislation: The 'Natural Monopolies Law'<sup>7</sup> recognizes transportation of gas through pipelines as a natural monopoly and subjects entities involved in such activities to its regulation.<sup>8</sup> The 'Gas Supply Law' amended in 2005<sup>9</sup> gives substantive jurisdiction over natural gas supplies to the federal authorities.<sup>10</sup> Since 2006 the monopoly has *de jure*, although it already existed *de facto*, the right to export gas from Russia thanks to the new 'Gas Export Law'.<sup>11</sup> And finally, the law 'On Subsoil'<sup>12</sup> strictly regulates the licensing regime for exploration and production of oil and gas in Russia. This law restricts the participation of Russian companies controlled by foreigners in auctions for certain fields, categorized as 'strategic'<sup>13</sup> such as the energy sector, having a special significance for the defence and economic security of the state. Additionally, exploration and production is carried out under a 'Production Sharing Agreement' (PSA), governed by the Federal Law "On Production Sharing Agreements" of 30 December 1995.

As regards pipeline transportation, there is no comprehensive federal law or other basic legal act regulating this sphere of energy transportation. The draft Federal Law 'On Major Pipeline Transportation System', passed by the Duma in 1999, has advanced no further. According to the Constitution of the Russian Federation, federal transportation is under the administration of the state. Land legislation is under the joint administration of the Russian Federation and its constituent entities. Thus, a peculiar situation occurs, in which in theory Russian legislation permits any entrepreneur to build pipelines, but in practice this is hardly possible without express government approval which will be seen with suspicious eyes if foreign investors are involved. Moreover, the Russian 'Medium-Term strategy'<sup>14</sup> calls for 'ensuring national interests' and asserts Russia's right to protect sectors of its economy.

Re-nationalisation of the oil reserves was a normal path to follow. Most of the world reserves are on state hands. So Putin did nothing out of the ordinary, what was new was the way and the means used to get it, which was the selective use of the legal system as a crucial instrument of state policies (although this was a peculiarity inherited by the Soviet Union). There are several examples of this: - In the Khodorkovsky and Yukos case mainly tax law was used. Consequently, the oligarch was first fined and then imprisoned on charges of fraud and corruption in relation to the large-scale

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<sup>6</sup> Gazprom was created in 1989 out of the old gas ministry.

<sup>7</sup> Federal Law No. 147-Fz (I) "On Natural Monopolies", 17/08/1995 as amended on August 8, December 30, 2001.

<sup>8</sup> E.g., oil and gas pipelines, railroads, sea and river ports, airports, thermal and electric power plants.

<sup>9</sup> Federal Law No. 69-FZ "On Gas supply in the Russian Federation", 31/03/1999 as amended in 23/12/2005 (The "Gas Supply Law").

<sup>10</sup> Moreover, regulations N 477, 10/09/2004 and N 40, 26/01/2005 of the Ministry of Industry and Energy of the Russian Federation give normative-legal control in the sphere of raw materials (among others).

<sup>11</sup> Federal Law No. 117-FZ "On the Export of Gas", 18/07/2006 (The "Gas Export Law").

<sup>12</sup> Russian Federation Law "On Subsoil" No. 2395-, 1/02/1992, as restated by Federal Law No. 27-FZ, 3/03/1995 amended in 22/10/2006 (The "Subsoil Law").

<sup>13</sup> The term 'Strategic sources' has not yet been legally defined.

<sup>14</sup> Russian response to the "EU Common Strategy on Russia". See unofficial translation in English at: [http://ec.europa.eu/external\\_relations/russia/russian\\_medium\\_term\\_strategy/](http://ec.europa.eu/external_relations/russia/russian_medium_term_strategy/)

privatizations organized under then President Yeltsin, while Yukos was declared bankrupted and forced to auction its assets which were then bought mainly by Gazprom and Rosneft (both entities mainly owned by the state); - Environmental law was used against the Sakhalin II to force Shell sell some of its shares to give control to Gazprom; - In the Kovykta field TNK-BP failed to meet the licence conditions on the production of gas due to Gazprom's monopoly over the pipelines; - On October 2006 the Stockman field was supposed to be auctioned but in the last minute the auction was cancelled under dubious circumstances and Gazprom took over it.<sup>15</sup> The Kremlins tactic was to get control over the reserves through government controlled companies; to determine the depletion policy, the pipeline routes and the downstream contracts, and then to use the international private sector to provide the technology to explore, develop and produce the fields.<sup>16</sup>

Overall, Gazprom's position is a very rational one from the Russian perspective: monopoly control of pipelines and therefore resources in Russia.<sup>17</sup> The main concern for the EU here, and not necessarily for Russia, is whether Gazprom will be able to invest efficiently and in time to meet the increasing EU as well as Russian energy demand.

## *2. The 'Divide and Rule' tactics in Russian energy policy*

After reasserting state control over the Russian hydrocarbon sector, the next logical step was downstream access to markets and to respond to the challenge of potential competitors. The main features of this strategy have been to dominate the main gas routes to Europe and make deals with the alternative sources of supply. Not only because this was economically logical but it also went along very well with Putin political aims to create an independent geopolitical superpower – by enforcing a mixture of economic power and political muscle.

The Ukrainian and Belarusian crises in January 2006 and 2007 respectively (and also later with Moldova) are the main examples of the first feature in action. These countries were profiting if not attempting to manipulate Russia for being transit countries of Russian gas to the EU. This external strategy was taken further by a direct pipeline to Germany through the Baltic Sea (the Baltic Pipeline)<sup>18</sup> – bypassing the Baltic States, Poland and Ukraine. While the problem was economic in nature it included some political aspects as well. Especially when Russia stopped oil supplies to Latvia on 2003 and Lithuania in 2006 through the Druzhba pipeline which obviously originated in something more than simple technical problems.<sup>19</sup> This represents the blatant use of strong-arm tactics in economic disputes.<sup>20</sup> Additionally, the South Stream project earlier this year to take gas across the Black Sea to Italy and the project to create in Austria a gas hub for Europe were put forward, which to some extent competes with or even undermines the EU's attempts to create an alternative supply route from the Caspian region with the Nabucco project. Additionally, Russia made a deal with Hungary for the Blue Stream pipeline, offering Hungary special access to Russian gas in return for

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<sup>15</sup> However, in September 2007 Gazprom understood it could lack the necessary funds, know-how and off-shore experience to deliver in time and brought back foreign energy giants into the deal, including France's Total, US ConocoPhillips and Norway's Statoil-Hydro with 25%, 14% and 10% stake respectively. Gazprom remained with 51% stake.

<sup>16</sup> D. Helm, "The Russian dimension and Europe's external energy policy" (2007), p.26. See at: [http://www.blue-emu.net/publications/Russian\\_dimension.pdf](http://www.blue-emu.net/publications/Russian_dimension.pdf).

<sup>17</sup> T. Romanova, "Energy Partnership – A dialogue in Different Languages", 18 *Russia in Global Affairs* (2007) p. 15 - 22.

<sup>18</sup> In addition Gazprom reached an agreement with the German BASF group on establishing Gasprom's own gas transportation system in Germany.

<sup>19</sup> Russia stopped shipping oil to the Mazeikiu refinery in July 2006, after Lithuania sold it to a Polish company, not the Russian Lukoil who was also bidding. The Russian side has blamed technical difficulties on the Druzhba pipeline but has not responded to Lithuanian offers to help resolve these.

<sup>20</sup> D. Trentin, "Energy Geopolitics in EU-Russia Relations", in Barysh (ed.), *supra* n. 4, p.23.

freedom to invest in local energy networks. These moves aimed at reducing 'problematic' transit countries by moving the pipelines from land to sea, therefore increasing Russian economic gains and political leverage over these countries.

The second feature has been achieved by arranging deals in 2007 with the Caspian countries, such as Kazakhstan and Turkmenistan, to send additional quantities of gas to Europe through the already existing Central-Asian pipeline (of course, passing through Russia), instead of waiting until the Nabucco pipeline is ready. Moreover, Russia, Turkmenistan and Kazakhstan have agreed to build a new gas pipeline around the Caspian Sea.<sup>21</sup> These deals are a big plus for Russia due to the difficulties for Russia to meet the EU member states gas demand. However, Russia can be accused of doing exactly the same thing to the EU that Ukraine or Belarus were doing to Russia by profiting economically for being a transit country.

Additionally, in its relations with the EU, Russia sees the Union as too ambiguous and bureaucratic. Moscow still prefers to do business with the European leaders one-on-one, cutting advantageous bargains with the individual EU countries. The North Stream pipeline project with Germany and the South Stream project with Italy serve as an illustration of such diversity of interests inside the EU itself creating great difficulties to create a common energy market. One of the main issues here derives from the use of Long-Term Agreements which contain a "take or pay" provision by which the customer agrees to pay for a certain minimum amount of gas even when a lesser amount was used. These agreements have a duration between 25 to 30 years. This is so to guarantee the producer and exporter returns on its multibillion dollar investments in major gas export projects, while assuring steady and reliable gas flow for the importer in the long term. Obviously for Russia it makes more sense to cut deals with the European gas giants separately. This is not a problem from the point of view of economic logics. The difficulty is related to the creation of an EU common energy market and a common energy policy. The shared competences of the Commission and the member states have proven to be contradictory when EU external policy has tried to respond unilaterally to Russia. By not recognising the need to adopt a common approach, Europe is being divided – the risk is that, in energy terms, it might be ruled too. Therefore, bilateral arrangements by EU member states are not always the best option since they sometimes neglect other member states. In other words, the Community interest should be taken into account when making bilateral arrangements. At the same time, other member states sometimes abuse of EU solidarity in order to further endorse their frustrations with the Kremlin, which is not helping to the development of the Community relations with Russia. Energy is indeed – besides being the origin of the European Union – one of the missing links without which a significant part of the greater EU integration project may fail; and Russia may use this as leverage. One could only hope Russian tactics to provoke a more cohesive response that would generate a renewed Community sense of integration.

#### **IV. Developments in EU-Russia energy cooperation**

As has been explained, Russia's resources and proximity to Europe make EU-Russian energy cooperation necessary. In spite of representing the 'backbone' of EU-Russian relations, energy also is the main source of dispute in the EU-Russian relationship. It is so simply because, on the one hand, the EU is dependent on Russian gas and, on the other, Russian economy and political muscle depend heavily on the monopoly of energy resources. This situation generates problems for both actors.

For these reasons the EU and Russia have engaged since the 90's in relations using a vast range of legal and political instruments all under one legally binding bilateral umbrella – the Partnership and Cooperation Agreement (PCA – signed in 1994 and in force since 1997). The PCA promoted the entering of Russia into the World Trade Organisation (WTO) and the ratification of the ECT. The

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<sup>21</sup> See BBC News: <http://news.bbc.co.uk/2/hi/asia-pacific/6649169.stm>.

PCA also enumerates fields of cooperation such as the improvement of the quality and security of energy supply as well as formulation of energy policies. It also introduced institutional, legal, fiscal and other conditions necessary to increase energy trade and investment, through the modernization of energy infrastructures, including gas supply and electricity networks, minimizing environmental damage from these activities, and so forth.<sup>22</sup> The PCA also demands legal approximation in different areas, such as competition law.<sup>23</sup>

Furthermore, the EU-Russia Summit held in October 2000 in Paris launched the ‘Energy Dialogue’ which subsequently fell within the Common Economic Space (one of the four Common Spaces negotiated with Russia in 2003; economic, justice and home affairs, external security and cultural issues). This dialogue now includes three thematic groups: strategies and scenarios, market developments and energy efficiency. And although it has been criticized for not having any significant success, if analysed closer one should understand that it is a pragmatic bottom-up approach without big political declarations and aims at identifying key issues of common interests that can be built upon.<sup>24</sup> The energy dialogue has been essential for energy relations between the EU and Russia for example, in the development of the *early warning mechanism*<sup>25</sup> after the Ukrainian crisis, the Russian ratification of the Kyoto Protocol on Climate Change without which Kyoto would not have come into force,<sup>26</sup> and solving competition problems in particular the prohibition of competition-restrictive territorial destination clauses in long-term agreements,<sup>27</sup> among others.

#### ***A. Internal and external responses to the Russian challenge***

Energy security as defined by Morelli is

“the ability to maintain the continuation of supply during periods of excess demand or disruption and the ability to ensure that future energy demand can be met by a combination of indigenous energy sources and the reliable supply and transit of imported energy.”<sup>28</sup>

This definition indicates three main basic challenges for EU energy security. First, how to develop a strong partnership with energy producing and transit regions; secondly, how to utilize existing local energy resources; and thirdly, how to establish an internal system to provide dependable and secure energy supplies to all of Europe. The EU has tried to deal with these problems in three main ways: first internally, by pushing on with liberalisation, competition and interconnections (so called TEN-E) of the energy sector within the common market aiming at a common EU energy policy; secondly, by aiming at creating an ‘External EU Policy on Energy and trying to convince Russia to ratify the ECT; and thirdly, by diversifying energy supplies due to the demand trends to depend less on Russia and promoting energy efficiency. In the following I will evaluate the EU’s internal and external reactions to the security of supply problem.

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<sup>22</sup> See Art. 65 (2) of the PCA.

<sup>23</sup> See Art. 55 of the PCA.

<sup>24</sup> See Cleutinx and Piper, *supra* n. 4, p. 31.

<sup>25</sup> At the Mafra Summit in October 2006 the Commission and Russia agreed to create an ‘*early warning mechanism*’ to identify supply and demand problems and permit Russia and the EU to be prepare to minimise the impact of any disruptions in the short, medium and long term.

<sup>26</sup> Russia ratified the Kyoto Protocol on November 182004 (entering into force the 16 February 2005).

<sup>27</sup> These clauses were part of the long-term contracts that prohibited the European companies from selling Russian gas supplies that exceeded their demand on to other EU countries.

<sup>28</sup> V. L. Morelli, *The European Union’s energy Challenges*, CRS Report for Congress, September 11, 2006.

### 1. High expectations for an internal market on energy

Since energy products are not dealt with within the Common Market,<sup>29</sup> it has been difficult to create a common response to this challenge. There have been several attempts to solve this problem; the first one was the proposal of two joint directives of the European Parliament and the Council of Ministers, one on electricity and the other one on gas during the 1990's. These only came into force in 1996<sup>30</sup> and 1998,<sup>31</sup> respectively, (replaced by new directives on electricity<sup>32</sup> and gas<sup>33</sup> in 2003), and provided common rules for regulating internal EU market for natural gas and electricity, specifying terms and conditions for liberalisation of these markets. These directives achieved liberalisation, but not competition. The Commission tried liberalisation without first implementing any structural reform of the energy market, thus leaving a gap between the gas infrastructures and competition on energy trade.<sup>34</sup> The result of this was a concentration of the energy market in a few European energy giants similar to Gazprom, such as E.ON, ENEL or ENI. In essence these giants were increasing competition in the national markets but at the same time were eliminating competition at the European level. Moreover, any other attempts to create an internal energy market have been critically opposed mainly by France (for its nuclear energy policy), Germany (for the North Stream Pipeline), and Italy (for the South Stream Pipeline).

In this sense too much 'energy' was wasted on an internal agenda in bilateral relations within the EU without taking into account the external factor of energy security. Later attempts to deal with this problem that included the external factor was the "European Strategy for Sustainable, Competitive and Secure Energy" or 'Green Paper' in 2006 to respond to these challenges. The green paper called for a 'Common European response.' However, the fact that the 2006 Green Paper was 'green' and not 'white,' and short too, reflected the lack of political traction energy policy still held and was not much of an advance on the earlier 2000 Green Paper: both diagnosed the problem of security of supply, but neither delivered a step change in policy.<sup>35</sup> The Council Conclusions of May 2007 were quite ambitious in respect to tackling energy and climate change concerns by calling for EU solidarity between Members States and for diversification, transparency and effective crisis response mechanisms. However, these ambitious objectives are yet to be delivered. The Council Conclusion of May 2008 further stressed the need to develop the external dimension of the 2007-2009 Energy Policy for Europe. The recent Second Strategic Energy Review of November 2008 stressed the need to replace the TEN-E instrument by a new one – the Energy Security and Infrastructure Instrument to complete the Internal Energy Market. The strategy also stressed the need to consolidate the main energy principles to be based into law with the New Agreement with Russia replacing the PCA. Therefore, only until now has the EU taken a sober high-level position to launch a common approach to create an EU Common External Policy.

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<sup>29</sup> There is no specific chapter on energy in the founding treaties of the EU, besides Euratom which is no longer in force. However, if ratified the Lisbon Treaty does include energy issues.

<sup>30</sup> Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, *OJ* 1997 L 027/20.

<sup>31</sup> Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, *OJ* 1998 L 204/1.

<sup>32</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ* 2003 L 176/37 and Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment Text with EEA relevance, *OJ* 2006 L 033/22.

<sup>33</sup> Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJ* 2003 L 176/57.

<sup>34</sup> See Helm, *supra* n. 16, p.42.

<sup>35</sup> *Ibid.*



## 2. The Energy Charter Treaty's failure as a EU external policy

Trade in energy products is not dealt within the WTO framework. The ECT was meant to deal specifically with energy trade based on a free-trade regime. In addition, it also was created to bring former communist countries into the Western fold, encouraging investment from the West to re-invigorate and modernise energy investment in the East, and thereby secure supplies of energy from the East to Europe. After a free trade-regime, the second major pillar of the ECT is investment. The third pillar is the transit regime with the Transit Protocol, which is a mixed legal-persuasive pressure on governments to facilitate transit. The ECT also has other soft-law obligations such as non discriminatory access, fair competition, environment, energy and efficiency.

Russia, followed by Norway (for similar reasons), fall into the category of energy producing countries that have signed but have not ratified the ECT.<sup>36</sup> Russia's reasons for not ratifying the ECT differ. Some Russian scholars accuse the ECT of being under the EU's influence. Since the Energy Charter and the Energy Charter Treaty were drawn up with the direct participation of the European Commission, it is claimed that the ECT is controlled by it.<sup>37</sup> However, although the EU originally supported the ECT as part of its strategy towards the ex-communist countries and its energy security needs, the increasing memberships from non-EU countries this de facto ownership is in doubt.

The real reasons for Russia not to ratify the ECT are several. The two main reasons are related to transit regimes. The first one is concerned with the link between transit and internal transportation tariffs (article 7.3) that would force Gazprom to allow transit shippers to use its pipelines at the same discount tariffs that apply to the (Gazprom affiliated) companies that transport Russian gas domestically.<sup>38</sup> The second one is concern with the 'regional economic integration organisations' or REIO clause (article 20 of the draft Transit Protocol)<sup>39</sup> by which only energy flows that cross the entire REIO area should be considered 'transit', and not those that cross only the territory of individual member states.<sup>40</sup> This means that once Russian gas makes it to the EU territory, its flow throughout the different member states territory would not constitute transit and be covered by the EU *acquis*. Russia rightfully argues that this would affect its long-term contracts and therefore increase commercial risk, but neglects the fact that the EU territory is something more than member states. Perhaps if the EU was capable of creating a common internal market in energy would Russia change its view. Evidently, at this point these two provisions represent a solution for the EU, not for Russia. However, Russia provisionally applies the ECT to the extent that it is consistent with Russia's legislation following Article 45(1) of the ECT which states that: "Each signatory agrees to apply this Treaty provisionally pending its entry into force ... to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." And obviously Russia's is doing this due to its utility. An additional problem for Russia is that its economy has not fully developed further from the energy sector making the state power too reliant on its energy monopoly, which is being used also as its main revenue and powerful political muscle to regain influence internationally and regionally, particularly in the post-Soviet space which leads to continuous political tensions.

There create several problems following from this situation. First, as stated in several occasions by former Russian president Putin and new President Medvedev, Russia will not ratify the ECT in its current form mainly for the reasons stated above. Second, it could be difficult to substitute the ECT with a bilateral arrangement between the EU and Russia. Some practitioners argue that there are legal and political problems in order to reproduce, let alone re-negotiate, the provisions on investment

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<sup>36</sup> The US, Canada and Australia did not sign the treaty.

<sup>37</sup> T. Romanova, "Energy Partnership – A dialogue in Different Languages " (2007) 18 *Russia in Global Affairs*, 15 - 22.

<sup>38</sup> A. Konoplyanik, "Regulating Energy Relations: Acquis or Energy Charter?" in Barysh (ed.), *supra* n. 4, p. 108.

<sup>39</sup> According to the ECT a REIO constitutes an organization constituted by states to which they have transferred competences over certain matters a number of which are governed by this treaty.

<sup>40</sup> See Konoplyanik, *supra* n. 38, p. 112.

protection and investor-state arbitration as well as logical and conceptual problems in including detailed provisions on transit. I would say it is rather a question of political will, although one should acknowledge that putting its 51 member states on the negotiating table once more is a complicated thing to do. Therefore, so far the EU strategy to convince Russia to ratify the ECT has shown to be ineffective. Nevertheless, the Commission is seeking – mainly through the already mentioned energy dialogue with Russia – for alternative ways to regulate the energy sector and its security of supply. It remains only two options: to add some suitable principles and provisions on this respect in the New Agreement with Russia (which is being negotiated at present) only if it's legally binding; if this is not possible, to sign a separate sectoral agreement (like textiles and steel agreements) to the New Agreement. The best option which both sides agree upon is the inclusion of an energy heading in the Economic chapter of the New Agreement that would include provisions with common principles on security of energy of supply and demand, transport, transit, diversification, third party access, efficiency and technology.

## V. Conclusions

Energy is without any doubt the backbone for the EU's as well as Russia's future economic stability and a key aspect in their relations. The fact that Russia's existing pipelines are directed towards the West (including the ongoing North and South Stream projects) confirm the fact that the EU will continue to play an important role in Russia's long-term energy strategy and vice versa. Thus, Russia is likely to continue to be Europe's primary supplier of gas for the indefinite future. To construct an overall common energy policy with a common external strategy directed especially at Russia will be critical for the EU.

Russia has pursued a rational strategy to maximise its economic and political leverage over the European market.<sup>41</sup> This not only was an economic strategy but a specific policy clearly linked to the superpower ambitions of Russia. In fact, Putin strategies aiming at restoring order in the Russia house after the mess originated from the collapse of the Soviet Union with the help of Gazprom and 'legal nihilism' have shown to be extremely effective. However, there is a growing debate questioning Putins's quasi-authoritarian approach, in particular whether he has gone too far with it. Medvedev's promises to fight corruption and continue reform after being elected had alleviate this idea to some extent, but certain moves such as the disproportionate reaction in the recent conflict with Georgia last August and his move to prolong the presidency term in November have brought back some of these concerns.

Regardless of this, the present 'energy' situation leaves the EU with two main dilemmas. On the one hand, to avoid influence in the EU energy sector by a monopoly controlled by the Russian Government on a country-to-country basis. And on the other hand, to achieve a common EU external energy policy coordinating the changing attitudes of 27 separate member states. In the end, the Union's energy vulnerability does not stem from the fact that Russia is such an important gas supplier, but from its own inability to achieve an integrated and flexible gas market. The first step to overcome this problem is to start thinking from the EU perspective and to centralise energy negotiations with third countries. So far the EU has mainly and for far too long tried Russia's ratification of the ECT which has turned into failure. This insistence may have been caused by the fact that the Commission has being tied up with no other possibilities due to reluctance of some member states to give up energy sovereignty to the EU.

The main task for the Commission is to convince EU member States, in particular Germany, Italy and France (since they have so far only aimed at protecting and increasing their national strategic advantages rather than the EU objectives as a whole), to give some of its national control on energy to

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<sup>41</sup> See Helm, *supra* n. 16, p. 51.

the EU in order to increase cooperation at the EU level. Although this has proven to be a very difficult task this is the only solution if a common energy market is to evolve. A first step should be to unify the independent energy regulators into a single EU energy body. The new Energy Security and Infrastructure Instrument proposed by the recent Second Strategic Energy Review of November 2008 may give some new hopes for the completion of the Internal Energy Market. And hopefully the Council Conclusion of May 2008 will bring new political will from the member states to develop the external dimension of the 2007-2009 Energy Policy for Europe based on solidarity. Additionally, an issue that should be tackled in economic and regulatory terms would be the transformation of strategic gas storage into a profitable enterprise by providing some sort of mechanism to develop this area which economically has no real incentives in its present form.

Moreover, in order to avoid further monopolization and partitioning of the EU energy market, the European Commission could be granted the right to pre-approve big energy deals on long-term contracts and pipelines concluded between the EU and foreign energy companies.<sup>42</sup> It should investigate dubious deals between Russian and EU companies. The EU should create an internal code of conduct on energy deals and guidelines on long-term contracts and forthcoming mergers undermining attempts to diversify energy supplies. The Second Strategic Energy Review tackles some of these issues. Additionally, the use of available dispute settlement mechanisms under International Arbitration such as the UNCITRAL rules (United Nations Commission on International Trade Law) and ICSID rules (autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States) should be critical.<sup>43</sup> Russia is also party to over 50 'Bilateral Investment Treaties' which provide for arbitration in different institutions at the claimant's option. The EU also has the legislative tools at its disposal to prosecute companies like Gazprom or Transneft for their monopoly power. In fact, the European Commission's Directorate-General for Competition has already used its antitrust laws to prosecute Microsoft and block a proposed merger between General Electric and Honeywell. It is well within its authority to do the same to Gazprom, which is not a simple business monopoly, but a state-owned strategic one.<sup>44</sup> In the end, the EU should aim at having clear rules of the game based in transparency and reciprocity.

Finally, the New EU-Russia Agreement should also tackle these issues. The existing PCA was signed after the collapse of the Soviet Union, when Russia was a weak state and was desperately in need of aid. This situation has changed drastically and Russia will not accept a submissive approach. The first logical step is to radically change the approach and treat Russia as an equal partner. This should be done by recognizing the Russian rational choices in its energy strategy, even if this is such difficult to digest for the Commission. The best way to prove this is by convincing Russia as well as the member states to deal on an EU level when making energy deals. Ultimately, without a unilateral approach on energy towards Russia any EU objectives to create a common market on energy or even becoming a global political power risks manipulation from the Russian side.

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<sup>42</sup> M. Leonard and N. Popescu, "A Power Audit of EU-Russia Relations" Policy Paper, European Council on Foreign Relations, ECFR/02 November 2007, p.5

<sup>43</sup> The USSR signed the New York Convention 'on the Recognition and Enforcement of Foreign Arbitral Awards' on 24 August 1960 (in force since 22 November 1960).

<sup>44</sup> Z. Baran, "Developing a Cohesive EU Approach to Energy Security", p. 165. At: <http://www.isdp.eu/files/publications/books/0802energysecurity-11-Baran.pdf>



# **Integrating the Union's Energy Policy into its European Neighbourhood Policy: Added-Value or Emulating its Deficiencies?**

Bart Van Vooren\*

## **I. Introduction**

This paper analyses a number of critiques formulated in relation to the burgeoning comprehensive European Energy Policy in the context of the European Neighbourhood Policy (ENP). More specifically, a core critique of the Union's energy policy states that it is insufficiently focused on supply-side energy security, while paying too much attention to the market-governance and environmental aspects of this policy field. This assessment is based on the hypothesis that the attractiveness of the Union's regulatory approach decreases as the third country's importance in energy export increases and with it so does its political assertiveness.

It is argued that in the context of the Union's neighbouring countries this argument holds with regard to Algeria, Libya and Russia, but that for other ENP partner countries such is true only to a limited extent. The three countries this paper will pay particular attention to are Egypt and Azerbaijan, because of their central importance as transit and/or producing countries.

## **II. The EU's energy & neighbourhood policies: market governance vs. geopolitics?**

The 2006 Commission Green paper on an Energy Strategy for Europe declares that the challenge in ensuring Europe's energy security in the 21<sup>st</sup> century lies in 'balancing sustainable development, competitiveness and security of supply';<sup>1</sup> three principles which have come to underpin all internal and external aspects of the 'comprehensive' European Energy policy.

The first principle, sustainability, essentially relates to tackling climate change and limiting greenhouse gas emissions, in addition to improving energy efficiency and increasing the use of renewable energy sources. This strand of the Union's energy policy not only seeks to alleviate environmental concerns, but also aims to decrease Europe's dependence on energy imports through internal energy savings (demand-side security).<sup>2</sup> The second and third principles, competitiveness and security, are generally addressed under the guise of 'completion of the Internal Energy Market.' Many policy initiatives sail under the colours of market completion, but in a nutshell its rationale is that a truly competitive single European electricity and gas market would, firstly, bring down prices through a level playing field;<sup>3</sup> secondly, it would boost growth and competitiveness of European industries

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<sup>1</sup> Endorsed by the European Council, Presidency Conclusions 23/24 March 2006, Document 7775/1/06 REV 1; Commission Green Paper, *A European Strategy for Sustainable, Competitive and Secure Energy*, COM (2006) 105 final, Brussels, 8 March 2006, p. 4.

<sup>2</sup> *Ibid.*, pp. 10-11.

<sup>3</sup> *Ibid.*, pp. 6-7.

through greater transparency and stability; and thirdly, it would improve security of supply through increased solidarity between the Member States against physical risks (natural disasters, terrorism, ...) and political risks (supply disruptions).<sup>4</sup>

The Union's energy policy based on these three principles has been the target of a double critique: firstly, it has been said that there is an imbalance in the prioritisation between sustainability, competitiveness, and security of supply; and secondly, it has been brought into question whether the external dimension has in fact received sufficient attention in the pursuit of these objectives.

Both critiques are very much intertwined, and are the point of departure of this paper. With regard to the internal versus external aspects of EU energy policy, the Commission is of the opinion that "the effectiveness and coherence of the EU's external energy policy is dependent upon the progress with internal policies, and in particular, the creation of the internal market for energy."<sup>5</sup> Haghighi has argued that the assumption that 'creating an efficient internal energy market in the expectation that such a market would eventually lead to a secure framework for energy supply' is exactly the problem, noting that such measures as the electricity or gas directives did 'not refer explicitly to ... the importance of assuring a steady flow of energy from outside the Community'.<sup>6</sup>

The second critique, then, is that when the EU did address external aspects of energy security, it has been excessively one-sided in focusing on internal market objectives and climate change, thus neglecting the 'foreign policy dimension' of energy security.<sup>7</sup> Illustrations of this market governance approach are plenty, such as the Energy Community Treaty which aims to create a common regulatory space on a pan-European scale, thus implying market harmonization and integration, and the exportation of rules on energy transit, trade, environment, etc.<sup>8</sup> Additionally, there is the ambition of developing an EU-Maghreb electricity market and the EU-Mashrek gas market, and finally the Union's broad support for the Energy Charter Treaty also signals the 'rule-based' approach to EU energy security.

Combining both critiques, it has been argued that the Union's external energy policy is overly concerned with the extra-territorialisation of what can be termed a 'market-governance approach,' and that this overemphasis on one of the three principles in the external dimension of EU energy policy is one of its most serious shortcomings. Thus, it has been questioned whether the Union's regulatory approach is at all attractive to transit and/or producing states? The goal of this paper is to investigate this issue in the context of the European neighbourhood, by looking at the stance of three neighbours which have concluded an ENP Action Plan with the Union; and three countries without such an ENP Action Plan.

Having been discussed broadly in many fora, at this point in time the ENP requires little introduction. In 2003, following a joint letter from Chris Patten and Javier Solana, and in step with the European Security Strategy of that year, the Commission proposed in its Wider Europe Communication "that the EU should aim to develop a zone of prosperity and a friendly neighbourhood – a 'ring of friends' –

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<sup>4</sup> *Ibid*, p.8. All three principles are also reflected in the "Strategic EU Energy Review" which the Commission proposed so as to ensure that the Member States' respective reliance on gas, coal, biofuel, atomic energy, etc (the energy mix) takes into account all three basic pillars of EU energy policy: sustainability, competitiveness, and security of supply.

<sup>5</sup> *Ibid*, p. 14.

<sup>6</sup> S. Haghighi, *Energy Security: The External Legal Relations of the European Union with Major Oil - and gas-supplying countries*, (Oxford, 2007), p.181.

<sup>7</sup> R. Youngs, *Europe's External Energy Policy: Between Geopolitics and the Market*, *CEPS Working Documents* (2007), p. 9-11, and Haghighi, *supra* n. 6, p.182.

<sup>8</sup> The Treaty establishing the Energy Community was signed on 25 October 2005 in Athens by the European Community and then nine Contracting Parties from South East Europe. The Treaty entered into force on 1 July 2006.

with whom the EU enjoys close, peaceful and co-operative relations.”<sup>9</sup> In a speech entitled ‘a hard look at soft power’, External Relations Commissioner Benita Ferrero-Waldner captured the essence of the Neighbourhood Policy as follows:

“Throughout that region we are leveraging the EU’s attractive power to deepen our relations and encourage our neighbours in their path towards economic and political reform. We do that by offering deeper political and economic relations with us to those who make the most progress in reforms.”<sup>10</sup>

The rationale that underlies the ENP is thus that of the Union being a ‘pole of attraction’ in the Neighbourhood, exerting soft power through a policy that is built on joint ownership and a commitment to common values, backed by financial and other incentives based on the European Neighbourhood and Partnership Instrument.<sup>11</sup>

Procedurally, relations are conducted on the basis of a contractual agreement (Association Agreement or Partnership and Cooperation agreement), through the institutions that they set up (Association or PCA Council with its various committees). In this legal-institutional context, the EU and the partner country then jointly agree an ENP Action Plan, which substantially fleshes out these contractual agreements, and sets out their common commitments towards political and economic reform and rapprochement of the partner country with the EU. The Countries that have signed up to this Action Plan format are: Ukraine, Moldova, Armenia, Azerbaijan, Georgia, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority and Tunisia. Other neighbours that the ENP also intended to cover have, for a number of reasons, either rejected the ENP altogether (Russia), or have not concluded an Action Plan (Belarus, Syria, Algeria and Libya).

Being thus presented with an external Energy Policy that is being critiqued for its all too strong emphasis on market integration so as to secure energy security, and a Neighbourhood Policy that is at the apex of projecting Europe’s soft power abroad, this paper analyses the extent to which this negative assessment of EU energy policy is represented in the ENP, i.e. the extent to which insufficient attention has been paid to the foreign policy elements of energy security, in favour of the ‘market governance’ approach. Note however that this paper will focus solely on the *bilateral* track of EU relations with third countries, although it must be acknowledged immediately that “by its very nature this policy [...] needs to be pursued through both bilateral and multilateral approaches. [...]”<sup>12</sup> Consequently, there will be no particular mention of the Baku Initiative, the Black Sea Synergy, or the extension of the Energy Community Treaty. As regards the latter, it is of course evident that bilateral cooperation in exporting the *acquis* fits into the broader picture of future possible accession to this regional treaty framework. (For example, Ukraine)

The next section shall first focus on three neighbouring countries with which the Union has not developed ‘normal’ ENP relations signified by the absence of an ENP Action Plan (Algeria, Libya and Russia); and subsequently on two energy producing ENP partners with which the EU has concluded such a document, Egypt and Azerbaijan.

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<sup>9</sup> European Commission, *Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbors*, COM(2003) 104 final, Brussels, 11 March 2003, p. 4. Also, *ESS: A Secure Europe in a Better World – European Security Strategy*, Brussels, 12 December 2003, pp. 7-8.

<sup>10</sup> Benita Ferrero-Waldner European Commissioner for External Relations and European Neighbourhood Policy "The European Union and the world: a hard look at soft power", Columbia University, New York, 24 September 2007

<sup>11</sup> G. Meloni, *Wider Europe: the influence of the EU on neighbouring countries: the case of Russia and Ukraine* (Florence, 2007), p. 338.

<sup>12</sup> Non-Paper Expanding on the Proposals contained in European Commission, *Strengthening the ENP*, COM (2006) 726 Final, Brussels, 4 December 2006, p. 15. [Hereafter: Non-paper on Thematic Dimension].

### III. EU energy policy in the ENP: an evaluation

#### A. EU neighbours without an ENP action plan

Studying the Union's neighbours' readiness to accept the three central objectives of EU energy policy cannot be limited to those countries with which an Action Plan has been concluded, as the ENP's absentees are indeed some of the most significant energy producers in the Union's neighbourhood. In 2005, *Algeria* accounted for 3.6% of the EU-27's oil imports, while *Libya* supplied the EU-27 with 8% of its crude oil; and as regards gas needs of the EU-27, *Libya* accounted for 1.9%, and *Algeria* for a crucial 20.6% of the Union's gas imports in that year.<sup>13</sup> Having opted for a 'strategic partnership' rather than the ENP, *Russia's* share in the EU-27's oil imports stood at 29.9% and its gas imports at 45.1% in 2005.

While *Russia's* rebuff of the Neighbourhood Policy will receive further attention in Aaron Matta's paper, *Algeria's* attitude is equally illustrative. In a contribution highly critical of *Algeria's* reforms, Stein has argued that while actions such as *Algeria's* ratification of the Association Agreement in 2005, or its reforms limiting the power of the state-owned gas and oil company might seem to suggest that *Algeria* is keen to cooperate with the EU, this is true solely because of *Algeria's* 'myopic defence of self-interests' rather than a true interest in the EU's offer.<sup>14</sup> Essentially, the Union has lost much of its leverage to affect regulatory reforms in *Algeria* following, firstly, the relative failure of the Barcelona process, secondly, the maturing economy and decreasing dependency on revenue from gas exports, and thirdly, Europe's growing dependency on *Algerian* exports.<sup>15</sup> Observers have thus noted that *Algeria* has implemented little or none of the reforms pursued both by the Barcelona Process and now by the Association agreement, and that it only signed that agreement in 2001 to support its bid into the WTO. It must be noted however that a Memorandum of Understanding on energy is being negotiated between the Union and *Algeria*, though little is known on its content.

*Libya* is equally absent from the ENP, given that a contractual agreement within which to frame the relations with the Community is as of yet absent. Given the thawing of EC-*Libya* relations since the lifting of EU sanctions in 2004, informal talks followed, and recently – February 2008 – the Commission has proposed a negotiating mandate for a 'framework agreement' with this country, with at its core the establishment of a free trade agreement.<sup>16</sup>

Consequently, in the face of *Russia's* rejection of the ENP,<sup>17</sup> *Algeria* having no interest in an ENP Action Plan,<sup>18</sup> and the relations with *Libya* only having taken off after 2004, the potential of the (ENP's) rule-of-law-based market governance approach in the face of 'hard' energy security assertiveness is indeed questionable right from the outset.

The following graph supports this assertion. It charts crude oil imports into the EU-27 between 2000 and 2006, focusing on countries of origin. The countries included are firstly, the ENP partner countries which are oil producers; secondly the three ENP absentees named above; and thirdly, for comparative purposes, imports from OPEC in that time period.

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<sup>13</sup> EU Energy and Transport in figures, Statistical pocketbook 2007/2008, p. 32.

<sup>14</sup> I. Stein, "EU Energy Policy vis-à-vis Algeria: Challenges and Opportunities", 11 *The Bologna Centre Journal of International Affairs* (2008), pp. 97-110. For example, the signature of the Association agreement in 2001 has been linked to garner support for *Algeria's* bid to enter the WTO.

<sup>15</sup> *Ibid.*, pp. 105-106.

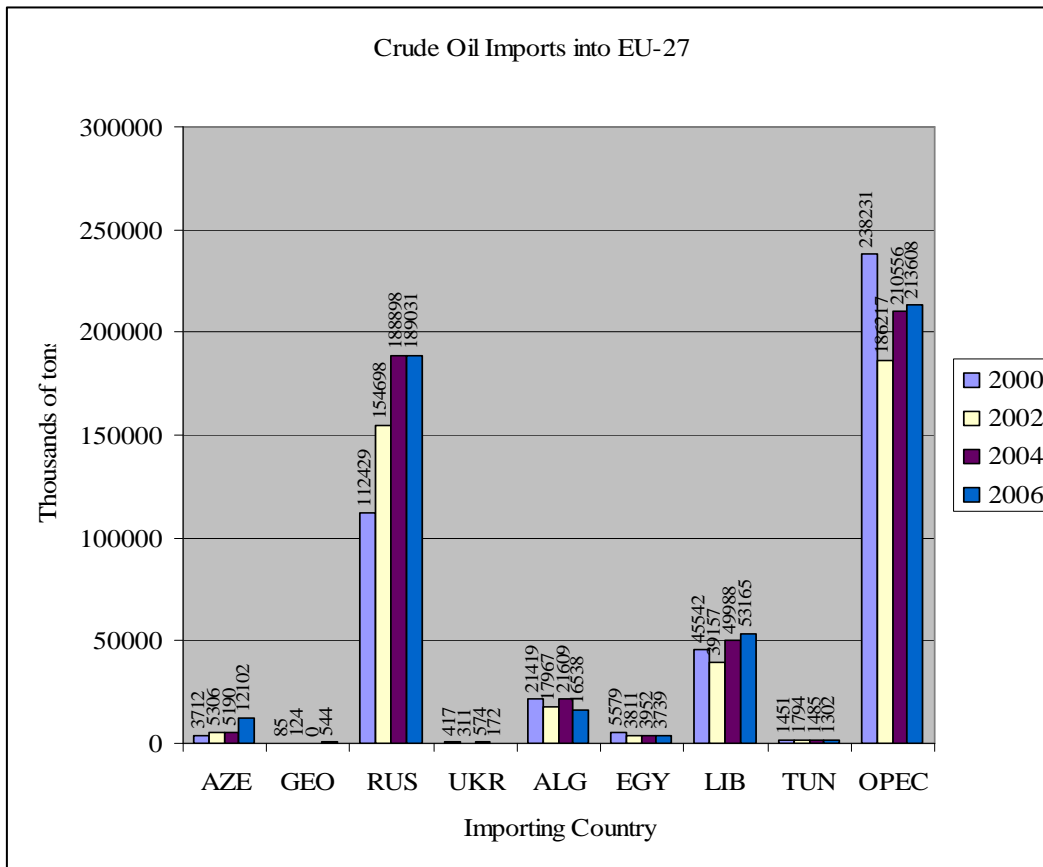
<sup>16</sup> Press Release of 27/02/2008, "Libya: Commission proposes negotiating mandate for a Framework Agreement", IP/08/308.

<sup>17</sup> Although nevertheless included in the European Neighbourhood and Partnership Instrument.

<sup>18</sup> M. Emerson, "European Neighbourhood Policy Two Years on: Time indeed for an 'ENP Plus'", *CEPS Policy Briefs* (2007), p. 32.



Graph 1: Crude Oil Imports into the 27 Member States of the EU. (EU-27)



Source: Eurostat & OECD

This graph implies that there is a high negative correlation between the development of ‘normal ENP relations’ (existence of an Action Plan) with a neighbouring country and the EU-27’s level of dependency on that country’s energy imports. Although correlation does not necessarily imply causality, other studies have convincingly argued that at least Russia and Algeria are indeed highly assertive because of their important role as energy producers.<sup>19</sup> Consequently, with regard to these ENP absentees, in its pursuit of supply-side energy security through market governance, the Union’s ‘apolitical’ offer is of limited interest to producing countries who are keen on exerting the political influence they draw from the EU-27’s dependency on their hydrocarbon resources.

Thus, accepting that a greater or diminished dependence on the country’s energy imports will indeed influence the relations with the Union for the most significant of the EU-27s energy importers, the next sections seek to uncover the extent to which this is true in relation to other countries participating in the ENP. As Graph 1 shows, the next most important importing countries are Egypt and Azerbaijan, with especially the latter being of growing importance both as an energy transit and producing country.

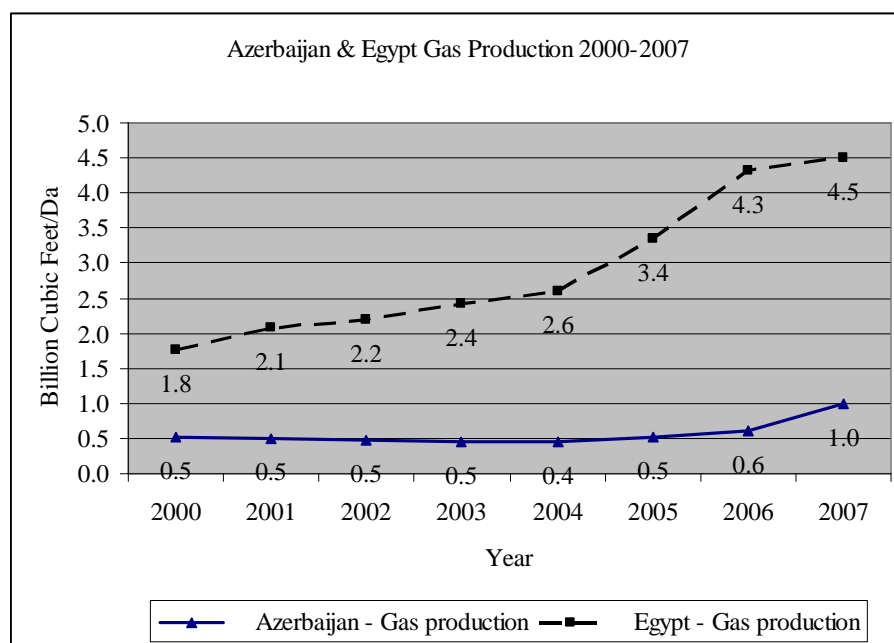
<sup>19</sup> See Notes 6, 7 and 14.

**B. EU Neighbours with an ENP Action Plan**

*1. Overall commitment to EU Energy Objectives*

In its non-paper on adding a thematic dimension to the ENP, the Commission identified the following neighbouring countries as energy *transit* countries: Morocco, Tunisia, Southern Caucasus, Ukraine, Moldova and Belarus, while it identified as energy *suppliers*: Algeria, Egypt, Libya, Azerbaijan, and Russia.<sup>20</sup> For the purposes of this paper the emphasis will lie on Egypt and Azerbaijan given that these countries both have the role of transit - (Suez, BTC/BTE pipelines, etc.) and producer country. Additionally, as shown by Graphs 2 and 3, the energy production of these countries is steadily growing, and is projected to grow further in the coming years:<sup>21</sup>

Graph 2: Evolution of Azeri & Egyptian Gas Production 2000 - 2007.

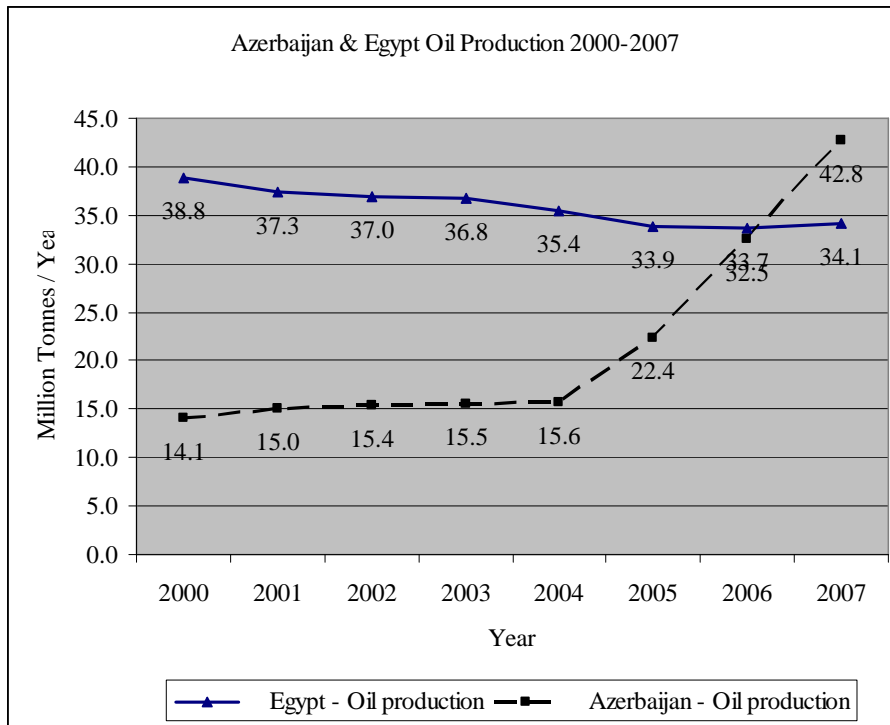


Source: British Petroleum - Statistical Review of World Energy 2008

<sup>20</sup> Non-paper on Thematic Dimension, *supra* n. 12, p. 15.

<sup>21</sup> Energy Information Administration, Country reports on Egypt and Azerbaijan. Accessible on [www.eia.doe.gov](http://www.eia.doe.gov) [Last Accessed, June 25<sup>th</sup>, 2008].

Graph 3: Evolution of Azeri & Egyptian Oil Production 2000 - 2007.



Source: British Petroleum - Statistical Review of World Energy 2008

In the light of these two graphs could one expect that Egypt and Azerbaijan might show greater reluctance towards the Union's market governance approach when compared to the other ENP partner countries, as with Russia or Algeria?

In order to provide an initial answer to this enquiry, the following table represents the 'statements of purpose' of the energy sections of all twelve Action Plans concluded with ENP countries. The table allows a textual comparison of the willingness the respective country to sign up to the three principles of the EU's energy policy, and on its face seems to be in line with the overall trend.<sup>22</sup>

<sup>22</sup> The acronyms respectively stand for: The Palestinian Authority (PA), Israel (ISR), Jordan (JOR), Egypt (EGY), Tunisia (TUN), Morocco (MOR), Moldova (MOL), Ukraine (UKR), Armenia (ARM), Azerbaijan (AZE), Lebanon (LEB), Georgia (GEO).

Table One: Overall Energy Cooperation Objectives

	P	I	J	E	T	M	M	U	A	A	L	G
	A	R	R	Y	N	O	O	R	R	Z	E	E
Energy policy convergence...	N	N	N	N	N	N	N	N	Y	Y	N	N
...towards EU energy policy objectives	N	N	N	N	N	N	N	N	Y	N	N	N
Preparation of an updated energy policy converging towards EU energy policy objectives.	N	N	N	N	N	N	Y	N	N	N	N	N
Adoption of an overall energy policy converging towards EU energy policy objectives	N	N	N	N	N	N	N	Y	N	N	N	N
Cooperate in the development of an overall long term energy strategy converging towards EU energy policy objectives.	N	N	N	Y	N	N	N	N	N	N	N	N
Take steps to adopt an updated overall energy policy converging towards EU energy policy objectives.	N	N	Y	N	N	N	N	N	N	N	N	N
Co-operation on energy policy	N	Y	N	N	N	N	N	N	N	N	N	N
Step up energy cooperation with a view to gradual convergence, taking account of the characteristics of the Tunisian market, towards the objectives of EU energy policy	N	N	N	N	Y	N	N	N	N	N	N	N
Strengthen Moroccan energy policy at national and regional level	N	N	N	N	N	Y	N	N	N	N	N	N
Develop a long term energy strategy converging towards EU energy policy objectives	N	N	N	N	N	N	N	N	N	N	Y	N
Elaborate and implement a coherent long-term energy policy converging gradually with the EU energy policy objectives including security of energy supply;	N	N	N	N	N	N	N	N	N	N	N	Y

Source: Own Compilation of ENP Action Plans

It is notable that Azerbaijan in its Action Plan simply states ‘energy policy convergence’ without a reference to the Union’s energy objectives; it thus appears unwilling to commit itself to the Union’s approach to energy security. In the Moroccan and Israeli Action Plans too, there has been no such inclusion.

Egypt does have a reference to the Union’s energy objectives, although only ‘in the long term’, and not insignificantly, the wording of the initiative starts with ‘cooperate’ on energy policy convergence, rather than a more clear cut ‘adopting’ of EU energy policy objectives. This wording can be explained by the fact that it implies more reciprocity in the development of EU-Egypt relations, and very much fits in the broader context in which Egypt is generally quite assertive towards the Union. Note that Tunisia and Israel too have preferred a reference to more reciprocal cooperation. Turning to Ukraine and Georgia, important transit countries for Russian gas and Caspian basin gas/oil respectively, one sees fairly clear-cut commitments to align themselves with EU policy objectives.

Consequently, on the basis of this highly succinct qualitative assessment the initial hypothesis holds: Given that Egypt and Azerbaijan are the two most important energy producing countries in the ENP, the initiatives with this country will be either more balanced for both parties, or will not mention convergence towards EU policy objectives at all. Nevertheless, a limited broad policy statement might be contradicted by the actual substance of cooperation, and consequently, to what extent is the strategic importance of energy resources represented when 'looking under the hood' of the ENP Action Plans? Stated differently, although Azerbaijan might not want to sign up to a broad commitment on its future policy convergence towards EU objectives; and Egypt wants more reciprocity in this regard, below the surface might lie significant legal and political rapprochement?

So as to come to more precise conclusions in testing the hypothesis, an all-encompassing analysis of the twelve Action Plans energy sections is required, as well as including any other relevant documents governing bilateral relations. The following sections seek to achieve this goal through quantifying the contents of the ENP Action Plans' energy sections and MoU's, and linking them to the relative importance of energy producing countries in the neighbourhood. The next section outlines the methodology followed evaluating the strength and commitment of the ENP partner in the EU's relations.<sup>23</sup>

## *2. Quantifying the ENP Action Plans' Energy Sections: Methodology*

The approach followed for a more in-depth analysis of the energy initiatives in the ENP is a textual comparison and subsequent quantification of all the 'Energy' sections of all twelve ENP Action plans. These sections are essentially one or two pages in the Action Plan (of some 35 pages on average), containing a list of initiatives the EU and the ENP partner pursue in their relationship. These initiatives are political, non-legally binding commitments serving to flesh out the article on energy cooperation contained in the underlying contractual agreement, the implementation of which can be linked to certain elements of conditionality. Consequently, some initiatives can be considered 'stronger than others', depending on their more bland or broad diplomatic language, or less or more concrete references to EU or international standards.

The quantification of these initiatives was done on a scale from 1 to 5, with one being the lowest and five being the highest. To be more concrete, in order to evaluate the 'strength' of a certain measure a dual criterion was used:

In the first instance, the 'starting value' was set on the basis of an *evaluation of the verb or introductory words used in the initiatives*, on the 1 to 5 scale. This includes such statements as 'explore the possibility of; exchange information on; undertake steps to; develop cooperation; adopt; strengthen; implement; accede to; explore possibilities of; approximate; harmonize with'. These formulations are considered as initially representative of the strength of a given initiative because they signal the political commitment a partner country. However, it is insufficient to come to a conclusive valuation of the initiatives' content, given the complexity of some formulations, as well as diverse content following the initial wording. Hence, so as to set the final value a second criterion was applied, namely an evaluation of the *actual content of the proposed measure*.

Three examples on the basis of table above on overall policy convergence can illustrate this approach:

- Ukraine: 'Adoption of an energy policy...' given its firm wording is accorded a starting value of 3/5, whereas the second part '...converging towards EU energy policy objectives' leads to a final valuation of 4/5.

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<sup>23</sup> ENP Action Plans are a useful source of comparison for several reasons. Firstly, they have a relatively high level of uniformity in presentation, making comparison possible and relevant. Secondly, they outline political intent of both the Union and the partner country, as well as serving to flesh out the energy cooperation article of the underlying contractual agreement.

- Egypt: ‘Cooperate in the development of an overall long term energy strategy’ is accorded a starting value of 2/5 given that cooperation implies a weaker commitment in terms of results and is only focused on the long term. The reference ‘towards EU energy policy objectives’ then leads to final valuation of 3/5.

This method has three immediate potential weaknesses: firstly, the subjectivity of such an exercise, secondly, the potential irrelevance of linguistic differences, and thirdly the fact that the Action Plan is not the sole focus of EU-ENP Partner relations.

So as to alleviate the first concern, the ‘exercise’ of valuation and calculating has been conducted twice with the support of another researcher, and so as to assuage the problem of linguistics, it must be noted that the graph is based on around 200 initiatives across 12 Action Plans. It is thus submitted that with such a relatively large number of separate initiatives, minor linguistic differences have not skewed the broader trend that emerges.<sup>24</sup>

One third and final caveat is that for Ukraine and Azerbaijan, aside from the ENP Action Plans, their relations are governed by two Memoranda of Understanding. However, a close reading of both MoU’s reveals that the formulations and content – from the perspective of the methodology outlined above – is generally in step with the strength and initiatives of the ENP Action Plans, and where differences do occur, these have been incorporated following that same methodology outlined above.

As regards *Ukraine*, it can be argued that the additional document serves to concretize the planning for policy convergence in the form of ‘roadmaps’, clarifying some of the conditionality that underlies the Union’s relations with this country, which is particularly true for eventual Ukrainian accession to the Energy Community Treaty.

The picture is somewhat different with *Azerbaijan*, in that on certain points this MoU expands the Action Plan, and following the dual methodology of quantifying the initiatives, in fact strengthens it in the favour of EU objectives, such as for example through establishing a ‘strategic partnership’ between the Union and Azerbaijan.<sup>25</sup> Consequently, where appropriate, the ‘strength value’ of the ENP Action Plan initiative with Azerbaijan would be revised to accord with any further concretization the MoU might have given.

In the following subsection the results of this exercise will be outlined in a first graph, and subsequently cross-referenced with the oil and gas productiveness of the respective ENP countries, so as to reach final conclusions on the hypothesis posited above.

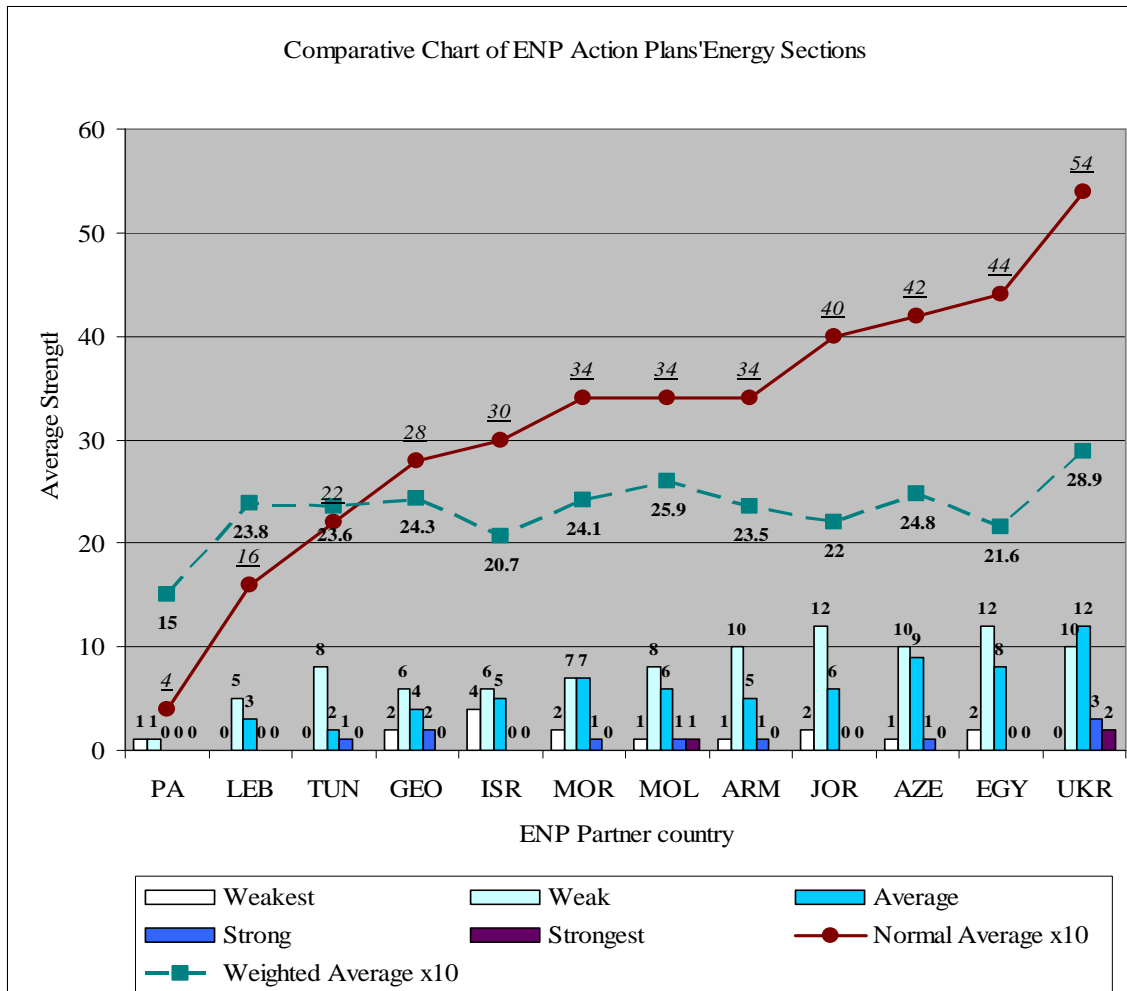
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<sup>24</sup> Additionally it must be noted that generally the Commission is the institution which sets the agenda of the meeting with the third country as well as proposing the text to be negotiated, and consequently when the initiative has been ‘downgraded’, such can certainly be seen as an outcome of the bilateral negotiation process.

<sup>25</sup> Note that the Azerbaijani Action Plan and MoU were signed on the same day, 4 November 2006.

3. Quantitative analysis of differentiation in energy cooperation

Chart 1: Differentiation in the ENP Action Plans' Energy Sections



Source: Own Compilation of ENP Action Plans

This comparative chart shows three distinct elements: firstly, the absolute amounts of initiatives of a given strength, represented by the five bars in the chart. Secondly, the normal average ('mean') of the initiatives, thus taking into account the amount of initiatives in a given ENP Action Plan as an indicator of the strength of the relations with that ENP partner. (Represented by the full line) Thirdly, the graph contains the weighted averages of the initiatives, thus focusing solely on the strength value of the initiatives, but not incorporating the amount of initiatives as a relative factor.

When focusing on the normal average strength of the initiatives in the energy sections of the ENP action plans, one sees that Azerbaijan, Egypt and Ukraine are at the top end of the spectrum while the Palestinian Authority, Tunisia and Georgia lie at the bottom end of the spectrum. Recall that the hypothesis was that energy producing countries derive greater assertiveness from their status, and that this would be reflected in more limited and less strong energy sections in the Action Plans. With regard to Egypt and Azerbaijan, it is in fact the opposite. The graph shows that Azerbaijan, an increasingly relevant energy supplier in the Union's neighbourhood as graphs 2 and 3 have shown, has

indeed quite an elaborate set of strongly formulated initiatives in its energy relations with the Union. The same conclusion holds with respect to Egypt.

When eliminating the number of initiatives in the Action Plan as a factor of relevance, and focusing solely on the content of energy cooperation initiatives (weighted average); the picture changes somewhat. The dotted line in the graph, which thus represents solely the overall strength of the measures in the Action Plans, shows that Azerbaijan remains the third strongest action plan out of all twelve, while Egypt has significantly dropped to the third lowest place out of all twelve.

This thus implies that while Egypt may have many initiatives, their formulation and content is almost the weakest of all Action Plans. More specifically, the Egyptian action plan has fewer concrete references to EU energy objectives (security of supply, environment, market principles); and additionally the document wraps its initiatives in less strict expressions such as ‘take steps to’ or ‘explore the possibility of’ rather than ‘Develop’ or ‘Adopt.’ Consequently, for this country, the chart shows that it does indeed have less enthusiasm to accept the EU’s objectives in its energy policy, although such is not necessarily causally linked to its growing position as an energy producer. What can arguably account for the limited strength of the Egyptian AP’s energy section is the broader reluctant stance on the part of the Egyptian government towards the ENP, which ‘does not appreciate the idea of political conditionality.’<sup>26</sup> Consequently, the findings in the energy context are explained not (solely) by assertiveness flowing from EU energy dependency, but simply reflects the overall trend: To paraphrase one observer on the stance of Egypt towards the ENP: “Egypt is 5000 years old, the European Union is 50 years old; it is the EU who should listen to Egypt and not vice versa.”<sup>27</sup>

As regards Azerbaijan, on both accounts this country has one of the strongest energy sections, whether it is content and amount, or content alone. The final section below seeks to highlight some of the reasons that might explain the findings in relation to this country. On the one hand it is logical that the EU would want to cooperate with this country given its growing importance, explaining the breadth of the energy section and the MoU; on the other hand it does counter the initial hypothesis that the greater the energy production, the lower cooperation would be.

A final word on the results of Ukraine is also in place. There too, it is apparent that this country has extensively engaged the Union in the field of energy, both as regards scope and depth of initiatives. Arguably, this can be explained by the fact that this country is generally seen as the ‘most willing’ partner in this policy, and has indeed been identified as ‘the most vocal state in the neighbourhood proclaiming its desire to join the EU.’<sup>28</sup>

#### *4. Energy Security: The prime focus in EU- Azerbaijani Relations*

The reason why the hypothesis did not hold for Azerbaijan, it is argued, lies exactly in the fact that the Union did respond to the critique that too little attention has gone to supply-side energy security, and too much has gone to market extension. Indeed, in the MoU and the AP concluded with Azerbaijan, while certainly including the ‘gradual convergence towards the principles of the EU market,’ the Union has in fact very much focused on supply security and transit security – even to the detriment of the market governance approach. This argument is supported by the next chart which represents a topical strength analysis of the initiatives of the Azerbaijani AP and MoU:

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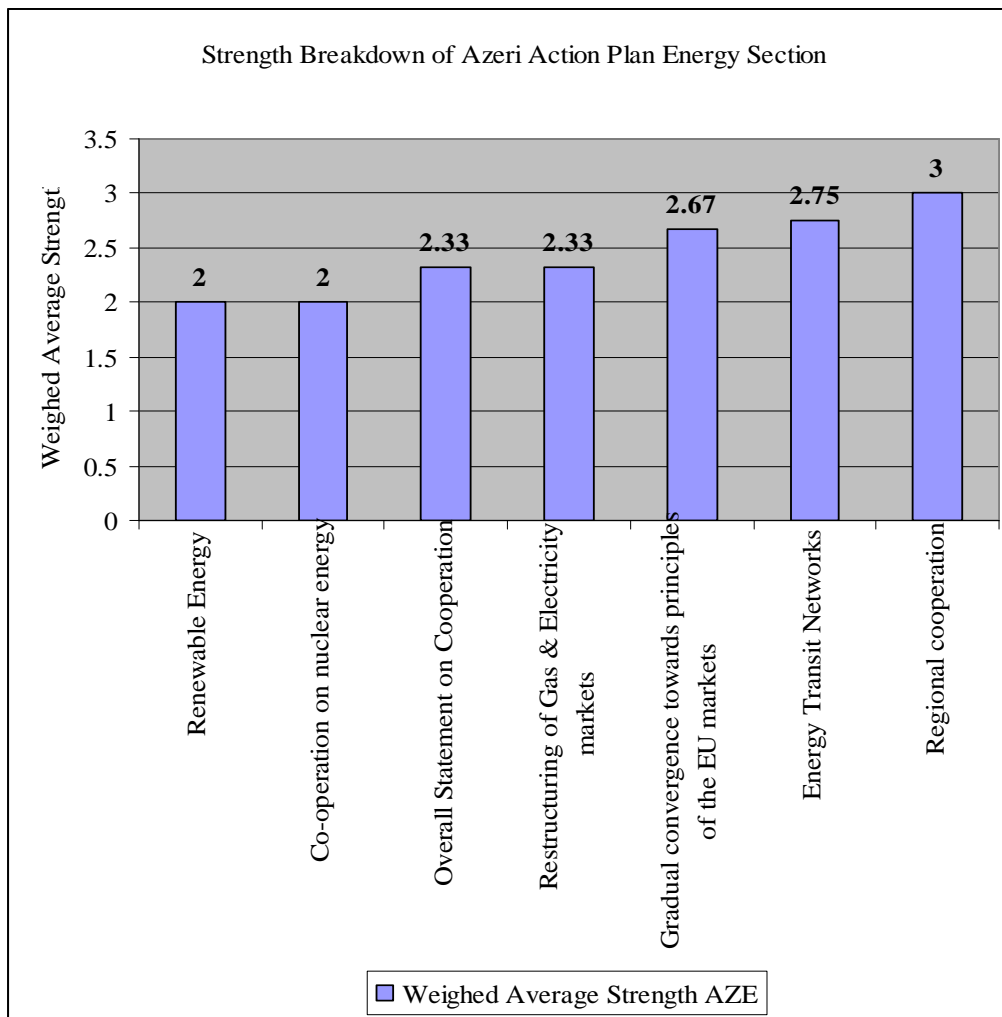
<sup>26</sup> See Emerson, *supra* n.18, p. 27.

<sup>27</sup> Source on file with author.

<sup>28</sup> See Emerson, *supra* n. 18, p. 26.



**Chart 2: Topical Strength Analysis of the Azeri Action Plan's energy Section**



*Source: Own Compilation on the Basis of Azeri Action Plan & MoU.*

This graph shows that in the relations with Azerbaijan, the focus lies on the security of supply (development of Shah Deniz gas field), the security of the energy transit networks (BTC and BTE pipelines) as well as regional cooperation (Baku Initiative, Black Sea), and much less (20 per cent) on renewable energy as well as somewhat less (13.4 per cent) on energy market restructuring inside Azerbaijan.

Consequently, in setting up the ‘strategic energy partnership’ with this country, environment and free market principles have received noticeably less attention in favour of supply-side security. While this result is significant from the perspective of the Union’s ‘value-based approach’ to external relations in face of geopolitical realities, it does serve to attenuate the critique on that approach which underpinned the hypothesis of this paper.

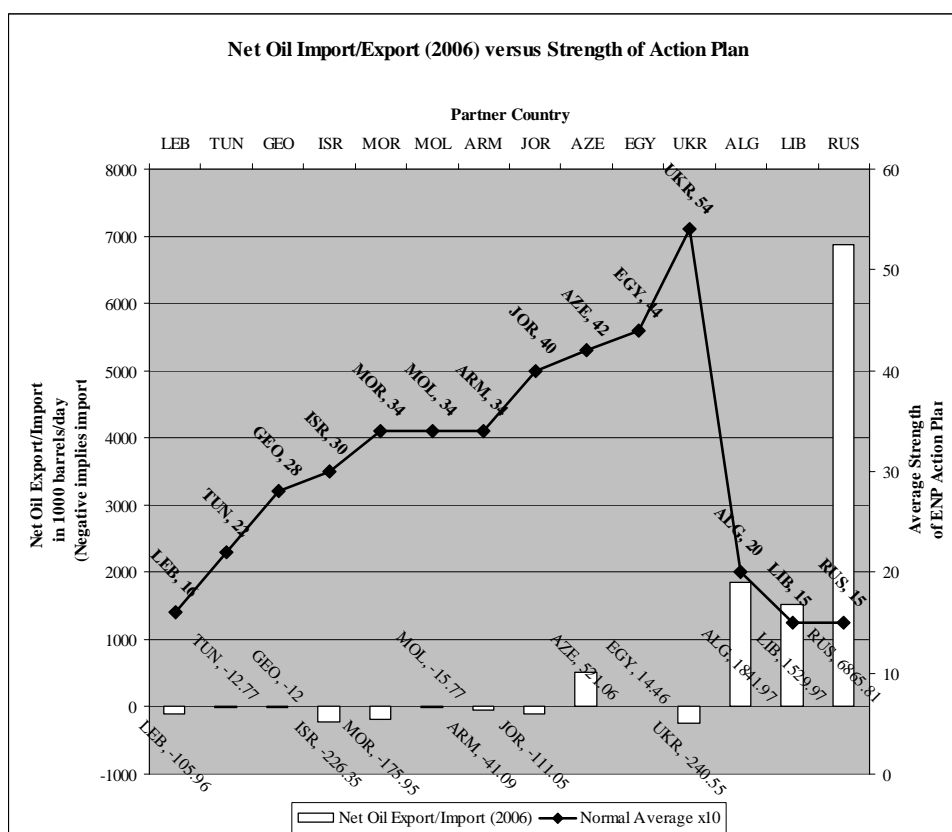
The Commission progress reports of 3 April 2008 further support these findings.<sup>29</sup> In the document focusing on Azerbaijan specifically, four paragraphs are dedicated to energy cooperation, the content of which is mirrored in the ENP sectoral progress report of the same date. In the dedicated country report, the text is almost entirely dedicated to the country’s role as an energy transit and producing

<sup>29</sup> European Commission Staff Working Document, *Progress Report Azerbaijan*, SEC(2008)391, Brussels, 3 April 2008.

country, and only in the fourth paragraph does the commission note some evolutions on electricity tariffs and improved ‘bill collection’. The Azerbaijan progress report further notes that the flow of commercial oil has commenced through Baku-Tbilisi-Ceyhan pipeline since 2007, that gas production from the Shah Deniz field started up, and that the Baku-Tbilisi-Erzurum gas pipeline was put into operation.<sup>30</sup> In opposition, on renewable energy, one will not find much in the progress report except for the fact that “The country increasingly puts emphasis on the development of renewable energy sources” and that it has “further implemented the state programme on the use of alternative and renewable energy”.

Consequently, it can be concluded that in the EU-Azerbaijani relations, supply-side energy security has indeed not been neglected, but that on the contrary it is the prime focus of energy cooperation with this ENP Partner. Evidently these findings should be put in perspective, given that the Union is much more dependent on other countries not included in the ENP than it is on Azerbaijan or Egypt. Indeed, in 2007 Azerbaijan was only responsible for 1.1% of the world’s oil production, while Egypt accounts for only 0.9%. For gas production, Azerbaijan accounted for 0.3% and Egypt produced 1.6% of total world natural gas. Graph 4 below serves to illustrate this.

Graph 4 – Strength of ENP Action Plan Energy Section versus net Oil Import/Export<sup>31</sup>



Source: United States Government Energy Information Agency & Own Compilation on the basis of ENP Action Plans.<sup>32</sup>

<sup>30</sup> Ibid, p. 14.

<sup>31</sup> Two clarifications to this graph are necessary. Firstly, it should be noted that Egypt is in this graph a relatively small net exporter of oil. However this has grown since then, and is projected to grow extensively in the near future. However, 2006 are the most recent export figures publicly available. Secondly, in this graph, the relations with Algeria have been valued as ‘20’, due to the ongoing negotiations for an energy Memorandum of Understanding, whereas Libyan and Russian relations have been valued as ‘15’ mainly for comparative purposes.

#### **IV. Concluding remarks**

This paper has thus shown that increased assertiveness of an energy producer is a significant factor to be taken into account in the face of the Union's rule-based approach to energy security, but that with the less important producing countries this is much less of an explanatory factor. In the case of Azerbaijan, the EU has succeeded in achieving a well adjusted approach to reflect supply-side security, not neglecting the competitiveness and environment prongs but certainly not letting them overshadow the energy security aspect of its foreign policy.

Consequently, the true test-case for the EU's three-pronged approach to energy security will lie not in the Neighbourhood Policy, but in the outcome of the new agreement to be negotiated between the EU and Russia. It was no coincidence that the June 2008 high-level meeting which launched these talks took place in Khanty-Mansiysk, the 'oil-capital' of Siberia.<sup>33</sup>

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<sup>32</sup> <http://www.eia.doe.gov/> [Last accessed, June 26, 2008].

<sup>33</sup> See Euobserver.com: EU and Russia try to inject energy into mutual ties: <http://euobserver.com/?aid=26397>.



# The Implementation of Targeted Sanctions in the European Union

Andrés Delgado Casteleiro\*

## I. Preliminary remarks

Economic sanctions can be defined as the exercise of pressure by one state or a coalition of states to produce a change in the political behaviour of another state or group of states.<sup>1</sup> However, since the beginning of the 90's this approach towards sanctions has shifted. Although one of the objectives of sanctions continues to be the change in the behaviour of a State, the way to tackle that problem is no longer constrained to putting pressure on the State through general economic measures, such as trade embargoes, but through specific measures designed to tackle specific sectors or people. These new type of sanctions are so-called "targeted sanctions" and are intended to avoid the "collateral" damages often caused by trade sanctions.<sup>2</sup> Such measures, which range from sectoral embargoes, to visa bans or the freezing of financial assets, are designed to move the pressure from the whole state, including the civil society, to the people directly responsible. As the representative of Canada in the United Nations Security Council explains, these so-called smart sanctions may be used "*not only against abusive national decision-makers, but also against terrorists, rebel movements, modern-day warlords and other non-State actors that perpetuate or profit from human suffering.*"<sup>3</sup> Sanctions seem no longer to be envisaged only as a way of obtaining a certain conduct from a State but also as a basic instrument in the war against international terrorism. Thus, targeted sanctions are configured as one of the fundamental International Law instruments for the maintenance of international peace and security, regardless of the origin of the threat (States or non-State entities).

The European Union (EU) has not escaped this trend in international sanctions. On the contrary, it has fully embraced it. Alongside traditional economic sanctions, the EU's strategy uses this kind of sanctioning frequently, even when they are not implementing any United Nations Security Council Resolutions (UNSCR). More specifically, the EU has developed an interesting practice in relation to the use of this targeted sanctions against individuals, especially under its anti-terrorism policy, which is demonstrating some of the deficiencies of the EU's constitutional architecture.

This paper focuses on the implementation of these targeted sanctions against individuals within the EU's multilevel structure, and which are the main struggles that the EU encounters when implementing these sanctions. Although there is plenty of literature surrounding targeted sanctions against individuals,<sup>4</sup> little has been said about the legal basis of the issue. On what grounds can the EU

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<sup>1</sup> P. Koutrakos, *Trade, Foreign Policy & Defence in EU Constitutional Law* (Oxford, 2001), p. 50.

<sup>2</sup> A. W. De Vries, "European Union Sanctions Against the Federal Republic of Yugoslavia from 1998 to 2000: A Especial Exercise in Targeting", in D. Cortright and G. Lopez, *Smart Sanctions: Targeting Economic Statecraft* (Oxford, 2002), p. 86.

<sup>3</sup> UN Security Council. Fifty-fifth year. 4218<sup>th</sup> meeting. 17 of April 2000. S/PV.4218. p. 25.

<sup>4</sup> See, among others: C. Eckes, "Judicial Review of European Anti-Terrorism Measures-The Yusuf and Kadi Judgements of the Court of First Instance", 14 *European Law Journal* (2008). P. Eeckhout, "Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit", 3 *European Constitutional Law Review* (2007). T. Anderson, I. Cameron and K. Nordback, "EU Blacklisting: The Renaissance of Imperial Power, but on

adopt sanctions against individuals? Which is the rationale for choosing one legal basis over another? The choice of the appropriate legal basis has constitutional significance,<sup>5</sup> not only does it determine the scope of EU competence, or indicate the decision-making process for the adoption of the legislation,<sup>6</sup> it also casts light on the way certain policies work. How should sanctions against terrorist be understood? Should they be considered as an issue of International Security and Foreign Policy? Or should they be considered as matter of Internal Security?

The paper is divided into three parts. First, it analyses the actual EU legal framework to see to what extent the provisions enshrined in the Treaties regarding sanctions can also be used as the legal basis for targeted sanctions against individuals. The second part of the paper examines the implementation practice carried on by the EU. In this respect a focus on the different subjects targeted by the EU through sanctions, and secondly the current litigation in this regard within the European Court of Justice (ECJ) and the Court of First Instance (CFI) will be analysed. The third part of the paper offers some conclusions on the topic as well as it briefly examines the future of the EU sanctioning practice as envisaged in the Lisbon Treaty.

## II. EU sanctions legal framework

### A. Sanctions as a cross-pillar issue.

As some authors have pointed out, sanctions have been an area

“where there is an overlap between foreign policy and action in the commercial field; it is an area where the policy reason for action falls outside Community competence but the means of achieving that policy include measures falling within Community.”<sup>7</sup>

Thus, the imposition of economic sanctions has been traditionally a cross-pillar issue, covered by the Second Pillar—first with European Political Co-operation (EPC),<sup>8</sup> and now with the Common Foreign and Security Policy (hereafter CFSP)<sup>9</sup>—the First Pillar, and the Third Pillar. Within the CFSP, sanctions are taken on the basis of article 15 of the TEU:

“The Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.”

Common positions lay down an obligation on the Member States to conform their national policies to the Common Positions. However, what are the effects of this instrument? Can they be considered legal instruments insofar as they regulate rights and obligations of citizens? Or are they political acts stating paths of action for the Member States? The legal character of the Common Positions as a whole remains uncertain. A Common Position is a political act that is not supposed to produce of itself legal

(Contd.) \_\_\_\_\_

a Global Scale”, 14 *European Business Law Review* (2003). M. Nettesheim, “U.N. Sanctions Against Individuals - A Challenge to the Architecture of European Union Governance”, 44 *CML Rev* (2007). J. Santos Vara, “El Control Judicial de la Ejecución de las Sanciones Antiterroristas del Consejo de Seguridad En la Unión Europea”, 15 *REEI* (2008).

<sup>5</sup> Opinion 2/00 (*re Cartagena Protocol*) [2001] ECR I-9713, para. 5.

<sup>6</sup> P. Koutrakos, “Legal Basis and Delimitation of Competence”, in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford, 2008), p. 198.

<sup>7</sup> I. Macleod, I. D. Hendry and S. Hyett, *The External Relations of the European Communities: a Manual of Law and Practice* (Oxford, 1996), p. 352.

<sup>8</sup> An analysis of this practice can be found in Koutrakos, *supra* n. 1, pp. 49 – 66.

<sup>9</sup> As it will be shown, some of the measures adopted in the Common Position which adopts smart sanctions against individuals fall outside the Community competence, requiring the Member States to implement this measures.

effects in relation to third parties.<sup>10</sup> However, the Court has also recognized that there are certain types of Common Position that because of their content they *are really intended to produce legal effects in relation to third parties*.<sup>11</sup> Therefore, as Eeckhout argues, especially in the context of sanctions, Common positions have a legislative character, mainly due to the fact that the implementation of sanctions has as a main consequence the breaking-off of economic relations between the EU and the sanctioned State or individual.<sup>12</sup> This breaking-off of economic relations may entail the prohibition of companies operating in the EU to enter into any kind of business with companies of the sanctioned State.<sup>13</sup> Hence, based on the legal character of the Common Positions imposing sanctions, the necessity of conforming national policies is stronger than with other Common Positions which address more general topics.<sup>14</sup>

### ***B. Legal basis for the implementation of smart sanctions within the EC***

Common Positions establishing sanctions against Third States envisage the necessity of Community action and of the Member States, due to the distribution of competence between the EC and the Member States.

Given the necessity of Community instruments to implement the certain sanctions adopted within the CFSP, the Treaty Establishing the European Community (hereafter TEC) envisages two provisions which serve as the bridge between both pillars. The first provision, Article 301, reads as follows:

“Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.”

As can be seen, the *ratio materiae* of the provision goes beyond the usual scope of sanctions – traditionally constrained to trade measures – by making a reference to economic relations.<sup>15</sup> Although “*economic relations*” is a broad concept, not all sanctions can be adopted on the basis of this article. There are sanctions which do not have an economic rationale behind them (e.g. visa bans), so they must be implemented by other subjects. In the specific case of the visa bans they would be implemented by the Member States.

Furthermore, Article 301 clearly follows *ratio personae* the past practice of the EPC by speaking of “countries”. Given this, Article 301 would not seem to be the most appropriate legal basis for the implementation of sanctions targeted to other subjects different from States. However, as it will be shown that, in practice, the EC has broadened the concept of State, in order to apply it also to nationals of the sanctioned state.

Moreover, regarding the scope of this provision *ratio personae*, not all countries can be subject to sanctions; these include only third countries (not EU Member States) and subsequently individuals linked with that State. Thus, the implementation of a Common position adopting sanctions against EU nationals with no international link would not be implemented through article 301; it should be done

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<sup>10</sup> P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, 2004), p. 404.

<sup>11</sup> Case C-355/04 *Segi et al* [2007] ECR I-01657, para. 54.

<sup>12</sup> P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, (Oxford 2004), p. 404.

<sup>13</sup> Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-03953, para. 14.

<sup>14</sup> See, e.g., Council Common Position of 21 October 2002 on Rwanda and repealing Common Position 2001/799/CFSP, *OJ* 2002 L 285/3.

<sup>15</sup> P. Koutrakos, *EU International Relations Law* (Oxford, 2006), p. 432.

instead through the Third Pillar.<sup>16</sup> In practice, this situation often refers to internal terrorism. From this perspective, the legal basis to adopt those provisions would be articles 29 and 31.1 TEU.<sup>17</sup> The second provision enshrined in the TEC regarding sanctions is Article 60.1:

“If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.”

Nor does the second provision seem to be an appropriate legal basis for these targeted sanctions insofar as it merely configures itself as *lex specialis* of Article 301. How then does the EC implement those targeted sanctions which overcome the traditional concept of State?

### III. EC implementation of targeted sanctions against individuals

Notwithstanding this lack of a better legal basis within the TEC, the EC has made an attempt to differentiate between two different groups of sanctions *ratio personae*. One group is formed by all those sanctions aimed on one form or another to States. The other group is related to sanctions to fight international terrorism.

#### A. Targeted sanctions against individuals linked with a third State

Regarding the first type of targeted sanctions, which aim at third States' decision-makers, the EC has used a dual legal basis for the adoption implementing measures. The regulations are based on articles 301 and 60.1 TEC. In principle, there should not be any problem regarding this group of sanctions, since, although they are targeted against individuals, they belong to the sanctioned State bureaucracy. For instance, as a consequence of the violations of international electoral standards and the crackdown on civil society and democratic opposition in the context of the 19 March 2006 Presidential elections by Belarusians' authorities, the EU decided to sanction Belarus by applying restrictive measures to those responsible for the violation of international electoral standards.<sup>18</sup> The sanctions targeted the individuals directly responsible by laying down a list identifying them.<sup>19</sup> This list included individuals like the President of Belarus to Judge of the Moscow district of Minsk.<sup>20</sup> This example shows how targeted sanctions can be used as a way to tackle those directly responsible for the conduct the EU seeks to be changed in a Third State, while at the same time trying to diminish the effect of the sanctions on civil society.

However, as was mentioned in the beginning,<sup>21</sup> targeted sanctions do not only apply to State's decision makers, but also to: 1) entities which or persons who physically controlled part of the territory of a

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<sup>16</sup> P. De Cesari, "The European Union", in G. Nesi (ed.), *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* (Hampshire, 2006), pp. 207 - 229.

<sup>17</sup> Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP, *OJ* 2003 L 16/68.

<sup>18</sup> Council Common Position 2006/362/CFSP of 18 May 2006 amending Common Position 2006/276/CFSP concerning restrictive measures against certain officials of Belarus, *OJ* 2006, L 134/45. Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus, *OJ* 2006 L 134/1.

<sup>19</sup> The drafting of lists of people sanctioned is usually referred as Blacklisting and is the most important form of implementing targeted sanctions. See T. Anderson, I. Cameron and K. Nordback, "EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale", 14 *European Business Law Review* (2003), p. 112.

<sup>20</sup> Annex III of Common Position 2006/362/CFSP.

<sup>21</sup> See *supra* n. 4.



third country; and 2) against entities which or persons who effectively controlled the government apparatus of a third country and also against persons and entities associated with them and who or which provided them with financial support.

In relation to the persons who physically controlled part of the territory of a third country, these sanctions are usually adopted in response to an internal conflict.<sup>22</sup> For example, the EU imposed sanctions against the illegal government of Anjouan in the Union of Comoros.<sup>23</sup> The EU was not imposing sanctions to pressure a State but to an illegal government which acted in defiance of the federal government of the Union of Comoros and the African Union. Nevertheless, how does this absence of a sanctioned *State* fit with the scope ratio personae of articles 301 and 60 TEC?

Both the Commission and the Council argue that article 301 and 60 are the appropriate legal basis to the extent that there is a link between the individual targeted and the territory of the third country sanctioned.<sup>24</sup> Thus, the Commission and the Council embrace a broad interpretation of the concept of state, and of its members.

Furthermore, the EU has also applied targeted sanctions against people or entities which controlled the government apparatus of a third country and also against persons and entities associated with them and who or which provided them with financial support. The Council and the Commission are using articles 301 and 60 TEC to individuals who can affect the conduct of a State. In this regard, Regulation 872/2004<sup>25</sup> would be a good example. This regulation which implements a Common position, which implements a UNSCR, imposes the freezing of funds of people who are associated with the ex-president of Liberia. The regulation considers that:

“In view of the negative impact on Liberia of the transfer abroad of misappropriated funds and assets, and the use of such misappropriated funds by Charles Taylor and his associates to undermine peace and stability in Liberia and the region, the freezing of the funds of Charles Taylor and his associates is necessary.”<sup>26</sup>

In the *Minin* case,<sup>27</sup> the CFI has had the opportunity to examine the legality of these particular sanctions against Charles Taylor and his associates. One of the arguments of the claimant was that the

“addressees of measures provided for by Articles 60 EC and 301 EC are third countries. Consequently, those articles do not constitute an adequate legal basis for the purposes of adopting punitive or preventative measures affecting individuals and producing direct effect on them. Such measures do not fall within the Community’s competence.”<sup>28</sup>

This strict interpretation of the ratio personae of article 301 and 60.1 TEC put forward by the claimant was rejected by the CFI. In this regard, the CFI understood that to the extent that

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<sup>22</sup> See, e.g., Council Regulation (EC) No 1705/98 of 28 July 1998 concerning the interruption of certain economic relations with Angola in order to induce the ‘União Nacional para a Independência Total de Angola’ (UNITA) to fulfill its obligations in the peace process, and repealing Council Regulation (EC) No 2229/97, *OJ* 1998 L 215, p. 1.

<sup>23</sup> Council Common Position 2008/187/CFSP of 3 March 2008 concerning restrictive measures against the illegal government of Anjouan in the Union of Comoros, *OJ* 2008 L 59/32. Council Regulation (EC) No 243/2008 of 17 March 2008 imposing certain restrictive measures on the illegal authorities of the island of Anjouan in the Union of the Comoros, *OJ* 2008 L 75/53.

<sup>24</sup> Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union* [2005] ECR II-03649, para. 90.

<sup>25</sup> Council Regulation (EC) No 872/2004 of 29 April 2004 concerning further restrictive measures in relation to Liberia, *OJ* 2004 L 162/32.

<sup>26</sup> *Ibid.*, “Whereas” 3 and 4.

<sup>27</sup> Case T-362/04 *Leonid Minin v Commission of the European Communities* [2007] ECR II-002003.

<sup>28</sup> *Ibid.*, para. 59.

“Charles Taylor and his associates continue to be able to undermine peace in Liberia and in neighbouring countries, the restrictive measures adopted against them have a sufficient link with the territory or the rulers of that country to be regarded as ‘[seeking] to interrupt or to reduce, in part or completely, economic relations with [a] ... third countr[y]’, for the purpose of Articles 60 EC and 301 EC.”<sup>29</sup>

The CFI interprets the concept of third country in a broad sense. Here, sanctions are motivated in favour of the third States not against it. The EU through these sanctions does not seek to influence the behaviour of Liberia; it seeks to impede Charles Taylor from influencing the third Country.

The current EC practice on the implementation of targeted sanctions linked with a State has adopted a broad interpretation of State. Individuals can be subject to restrictive measure from the EC if they can affect in some way a Third State. There is no need to be part of the State bureaucracy, or be part of a *de facto* government; all that is required is the possibility that the individual might influence a State’s behaviour.

### ***B. Sanctions as a counter-terrorism tool.***

As pointed out at the beginning of this paper, targeted sanctions are not limited to the exercise of pressure within the International Community. They are also one of the basic tools of fighting terrorism. Nevertheless, one of the basic characteristics of modern terrorism is that sometimes it has no link with any territory or country.<sup>30</sup> Furthermore, sometimes it is not even international.<sup>31</sup> Common Position 2001/931/CFSP<sup>32</sup> list a series of individuals and entities considered as terrorist and therefore subject sanctions. This list includes not only groups and individuals linked with a third country ( Hamas or the Palestinian Islamic Jihad, e.g.), but also internal terrorist groups like E.T.A., G.R.A.P.O. or the Real IRA. However, the implementation of this Common Position has not followed its unitary view of terrorism. The implementing instruments vary depending on their origin. If the terrorist group has a foreign origin, the implementing measures will be done in the first pillar, regardless of their link with at third State. On the contrary, if the group has an internal origin the implementing measures will be done through the Third Pillar.

The Council has used a triple legal basis for the adoption of targeted sanctions to fight international terrorism. The legal basis used is article 301, 60 and 308 TEC. Article 308 reads as follows:

“If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”

This provision enables the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty, when no specific provisions of the Treaty confer on the Community institutions express or implied powers to act.<sup>33</sup> This use of article 308 TEC tries to fill the gap left by the lack of any link with a territory. Thus, the scope of articles 301 and 60 is not broadened to cover any kind of restrictive measure adopted in a Common Position. The use of article 308 is a consequence of the background on which the first counter-terrorist sanctions emerged. The first

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<sup>29</sup> *Ibid*, para. 72.

<sup>30</sup> Case T-306/01 *Ahmed Ali Yusuf v. Council of the European Union* [2005] ECR II-03533, para. 93.

<sup>31</sup> Case C-355/04 *Segi et al* [2007] ECR I-01657.

<sup>32</sup> Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, *OJ* 2001 L 344/93.

<sup>33</sup> Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union* [2005] ECR II-03649, para. 64.

counter-terrorist sanctions<sup>34</sup> were the continuation of the sanctions imposed against the members of Taliban regime in Afghanistan after its collapse following the armed intervention of the international coalition.<sup>35</sup> The sanctions against the Taliban regime were adopted under articles 301 and 60.1 TEC following the usual practice on this issue. However, after the collapse of the Taliban Regime there was no link with a third Country which would allow the adoption of the sanctions only with those provisions. As a result, article 308 was added.

This use of article 308 remains a disputed issue. In a series of cases regarding counter-terrorism sanctions,<sup>36</sup> the CFI had to consider, among other issues, to what extent a regulation implementing the freezing of assets of certain individuals for counter-terrorist purposes could be adopted under articles 301, 60 and 308 TEC. In this particular case where there is no link between the individual targeted and a State sanctioned, the Court considered that alongside the previous articles, Article 308 was needed.

However, the reasoning of the CFI in this respect does not seem as convincing as might be expected. For the Court, neither article 301 and 60, nor article 308 considered alone constitute the appropriate legal basis, but together they do. Two requisites must be met in order to use article 308 as a single legal basis. The CFI considers that, although the first requisite of article 308 is met, that is, there is no other provision on the TEC that “*gives the Community institutions the necessary power to adopt the measure in question*”, the second prerequisite – the necessity to attain one of the objectives of the Community – was not met with these sanctions.

Therefore, if one of the requisites that permit the functioning of 308 is not met, how does the CFI justify the use of Article 308? It justifies it “*for the sake of consistency*”.<sup>37</sup> Tomuschat welcomed this interpretation as an intelligent answer on the basis that article 301 TEC allows the EC to implement a coherent external policy which, according to Article 3 TEU, should in any event constitute a coherent whole.<sup>38</sup> For the CFI, the requisite of consistency in EU external activities permits the export of EU objectives to the EC so they can be pursued with article 308.

A number of critical remarks can be directed at this reasoning: first, the use consistency is in order to export objectives to the Community Pillar from the other Pillars; and second the consequences of considering article 308 a cross-pillar provision.

In relation to the consideration of consistency as an EC objective, it can be said that the CFI seems to be assuming that the sanctions imposed within the framework of the EU always need an EC implementing measure. However, the practice of CFSP sanctions includes measures not only to be implemented by the EC but also by its Member States, or by the Third Pillar. In fact, all the measures implementing sanctions against internal terrorist are implemented through the Third Pillar.

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<sup>34</sup> Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *OJ* 2002 L 139/9.

<sup>35</sup> Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000, *OJ* L 67/1.

<sup>36</sup> Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-03533. Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union* [2005] ECR II-03649. Case T-253/02 *Chafiq Ayadi v. Council of the European Union* [2006] ECR II-02139.

<sup>37</sup> Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-03533, para. 164.

<sup>38</sup> C. Tomuschat, "Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, judgment of the Court of First Instance of 21 September 2005; Case T-315/01, Yassin Abdullah Kadi v. Council and Commission, judgment of the Court of First Instance of 21 September 2005", 43 *CML Rev* (2006), p. 540.

In relation to the interaction between pillars within article 308, The CFI is establishing, article 308 as a cross-pillar provision. Following this logic, Article 308 could be used to grant competence to the EC to pursue an EU objective. This view would endanger the delimitation between pillars as laid down in article 47 TEU. The interaction between pillars can only happen when there are provisions in the TEC designed to that effect. Article 301 TEC is one of those provisions.

The use of a triple legal basis for the adoption of counter-terrorist sanctions has been recently backed up by the ECJ.<sup>39</sup> However its reasoning differs from that of the CFI. Whereas the CFI considers that 308 can be used to pursue objectives enshrined in the TEU, the ECJ considers that article 308 must be used to complement articles 301 and 60 inasmuch as *these provisions are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument.*<sup>40</sup>

Furthermore, the ECJ also understands that to the extent that the freezing of assets and funds envisaged in the adopted sanctions can affect the operation of the common market, they are *linked to the operation of the common market within the meaning of article 308.*<sup>41</sup>

This interpretation of article 308 safeguards the division between pillars. ECJ's recourse to underlying objectives and links with the common market on one hand denies the expansive effect of the cross-pillar nature of article 301, but on the other, it seems to be establishing the *effet utile* of articles 301 and 60.1 as an objective of the EC. The ECJ assumes that within those two integrated but separate legal orders constituted by the Union and the Community<sup>42</sup> there is no other way of achieving the objectives pursued by those provisions. Moreover, the ECJ claims that by not extending the scope of articles 301 and 60 to subsume individuals, the objectives pursued by it mainly implement CFSP restrictive measures against third Countries. In order to explain how the efficiency of those provisions would be undermined if the triple legal basis was to be repealed, the Court claims that leaving the implementation to the Member States would affect the functioning of the internal market.<sup>43</sup> This argument had already been consistently rejected by the CFI:

“the implementation of [sanctions against individuals] by the Member States rather than by the Community is not capable of giving rise to a likely and serious danger of discrepancies in the application of the freezing of funds from one Member State to another. First, those resolutions in fact contain clear, precise, detailed definitions and obligations that leave scarcely any room for interpretation. Second, the importance of the measures they call for, with a view to their implementation, does not appear to be such that there is reason to fear such a danger.”<sup>44</sup>

Nevertheless, the ECJ repealed the regulation imposing sanctions on the ground of the violation of the fundamental rights of the claimants.

AG Maduro, in his Opinion on the *Kadi* case,<sup>45</sup> takes a different approach towards article 308. He highlights an underlying tension in the reasoning of the CFI, in his opinion:

“[T]he Court of First Instance construed Article 308 EC as a ‘bridge’ between the CFSP and the Community pillar. However, while Article 301 EC might be seen as a cross-pillar bridge, Article 308 EC surely cannot fulfil that function. Article 308 EC, like Article 60(1) EC, is strictly an enabling provision: it provides the means, but not the objective. Even though it refers to ‘objectives of the

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<sup>39</sup> Joined Cases C-402/05 and C-415/05 *Kadi and Al Barakaat Foundation v. Council*, nyr.

<sup>40</sup> *Ibid.*, para. 226.

<sup>41</sup> *Ibid.*, para. 229.

<sup>42</sup> *Ibid.*, para. 125.

<sup>43</sup> *Ibid.*, para. 230.

<sup>44</sup> Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-03533.

<sup>45</sup> Opinion AG Maduro, Case C-402/05 *Kadi v. Council and Commission*, 16 January 2008.

Community', these objectives are exogenous to Article 308 EC; they cannot be introduced by Article 308 EC itself."<sup>46</sup>

Thus, the AG argues that it is not possible to use article 308 TEC to fill the lacuna of the TEC on counter-terrorism sanctions. It cannot work as cross-pillar clause. He claims that this type of targeted sanctions could be adopted under articles 301 and 60.1 TEC only. Thus, AG Maduro claims that:

"economic relations with individuals and groups from within a third country are part of economic relations with that country; targeting the former necessarily affects the latter. To exclude economic relations with individuals or groups from the ambit of 'economic relations with ... third countries' would be to ignore a basic reality of international economic life: that the governments of most countries do not function as gatekeepers for the economic relations and activities of each specific entity within their borders."<sup>47</sup>

Although this interpretation of the scope of article 301 would allow the EC to continue to implement sanctions against international terrorism, it broadens too much the scope of article 301 and 60. However, article 301 and 60 are exceptional provisions and must be interpreted in a restrictive way. On one hand they are exceptional from a substantive point of view. Both provisions envisage the possibility of adopting restrictive measures. On the other, article 301 TEC, is an exception to article 47 TEU. Articles 301 and 60 cannot be broadened in such a way to include everyone in its wording (Maduro's view), but neither can be interpreted in a way that endanger the division between pillars (CFI's view).

Given this, perhaps the provisions on sanctions envisaged in the TEC are not the most appropriate legal basis for the fight against terrorism. The international element is emphasized when it should be the terrorist element the central focus of the measures. Moreover, this discussion on the legal basis for terrorist actions opens a bigger question on the effectiveness of these measures as counter-terrorist tools. On one hand, attending the high degree of conflictive surrounding the imposition of sanctions,<sup>48</sup> it could be argued that sanctions are proven to be effective, insofar as funds and assets are being frozen. On the other hand, the outcome of some of the judgements on the topic shows their ineffectiveness since the applicants are obtaining their annulment.<sup>49</sup> Thus, if counter-terrorist sanctions are not entirely effective and their legal basis is not the most appropriate for this kind of measures, this could mean that they are not the best counter-terrorist tool.

From this perspective, the freezing of assets and funds should be one of the measures to be adopted through police and judicial cooperation based on the objective of combating and preventing terrorism of article 29 TEU, in an instrument like a decision (article 34.2 c) TEU). Nevertheless, the use of Title VI TEU for the freezing of assets would deny the possibility for the individuals affected to claim for the annulment of the decision, although they could challenge it on the national courts, and indirectly by the ECJ with preliminary rulings.<sup>50</sup> This denial of the possibility of directly claiming for the annulment of the sanctions may increase the problems of effective judicial protection of the individuals that of sanctions against individuals present.<sup>51</sup> The freezing of funds for an unlimited time

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<sup>46</sup> Opinion AG Maduro, Case C-402/05 *Kadi v. Council and Commission*, 16 January 2008, para. 15.

<sup>47</sup> *Ibid*, para. 13.

<sup>48</sup> More than 40 cases have been lodged in the ECJ and CFI register since 2001 on sanctions against individuals.

<sup>49</sup> Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* [2006] ECR II-04665. Case T-229/02 *Osman Ocalan acting on behalf of Kurdistan Workers' Party (PKK) v. Council of the European Union*, nyr.

<sup>50</sup> See Article 35 TEU.

<sup>51</sup> See, e.g., T. Anderson, I. Cameron and K. Nordback, "EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale", 14 *European Business Law Review* (2003). P. Eeckhout, "Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit", 3 *European Constitutional Law Review* (2007).

and in conditions where it appears to be no adequate means for him to challenge the assertion that he is guilty of wrongdoing<sup>52</sup> is a really dangerous side effect of the EU Counter-terrorist policy which should be avoided.

#### IV. Concluding remarks: Lisbon and beyond

Articles 301 and 60 TEC cease to exist with the new Treaty reform. Instead, the articles 215 and 75 will be their replacements. Article 215 envisages that:

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

This provision in its first paragraph practically replicates the wording of actual article 301; nevertheless, paragraph two is completely new. It looks like the aim of this paragraph is to give a concrete legal basis to sanctions against individuals. Thus, the EU adapts its Treaty to the new trend and developments on sanctioning. *Ratio personae*, the provision adopts a broad conception of the subjects of the sanctions, including individuals, even if they are not linked with a third country.

However, this clear effort towards the clarification of the sanctions' legal basis is accompanied by article 75:

“Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.[..]”

On one hand, this provision would be *lex specialis vis- a -vis* article 215. All counter-terrorist sanctions would go through 75 and all the state-linked sanctions would go through the first paragraph of 215. This effort must be welcomed for adding to the clarity and consistency of EU-counter terrorist policy. Regardless of the origin of the threat, the same measures would be applied to combat terrorism.

In relation to the issues of judicial protection and targeted sanctions the following Declaration was made within the Treaty of Lisbon:

“The Conference recalls that the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure.”<sup>53</sup>

This declaration jointly read with paragraph 3 of the new provisions shed some light on this last issue of the clash between fundamental rights and targeted sanctions. By virtue of these articles the implementation of sanctions against individuals will have to take into account the fundamental rights of the individual sanctioned, in particular his and her right to be heard, and effective judicial protection.

(Contd.) \_\_\_\_\_

J. Santos Vara, "El Control Judicial de la Ejecución de las Sanciones Antiterroristas del Consejo de Seguridad En la Unión Europea", 15 *REEI* (2008).

<sup>52</sup> Opinion AG Maduro, Case C-402/05 *Kadi v. Council and Commission*, 16 January 2008, para 47.

<sup>53</sup> Declaration on Articles 61 H and 188 K of the Treaty on the Functioning of the European Union, *OJ* 2007 C 306/258.

In conclusion, the modifications of Lisbon try to reflect the current practices and trends on the implementation of sanctions, and specially targeted sanctions against individuals, while at the same time trying to put end to some of the undesired effects that targeted sanctions may have.





# **When Theory Meets Practice: The Shift from Comprehensive to Targeted Sanctions**

Mikael Eriksson\*

## **I. Introduction**

Over the years, international actors like the European Union and the UN Security Council have struggled immensely to come up with alternative policy instruments to deal with threats to international peace and security. One of the more politically celebrated tools of these has been the establishment and refinement of targeted EU and UN sanctions. The 1990s also saw a large upsurge of their use. While for example during the period between 1945 and 1990, the UN Security Council only established two sanctions regimes (on Rhodesia and on South Africa), the immediate post-1990s period saw the establishment of numerous different sanctions regimes imposed all over the world.<sup>1</sup> In addition, if we account for the many autonomous sanctions programs established by the European Union, there were many more sanctions regimes established.<sup>2</sup>

However, the shift to targeted sanctions has in recent years confronted both the EU and the UN with a number of tough political challenges. Despite a complete reformation of the sanctions tool, a number of negative and unintended consequences have followed, something not at all anticipated. Why? As will be argued in this brief essay, one reason for such weaknesses is that there has been an overly optimistic conviction in what targeted sanctions can achieve. While many times proposed as able to provide universal remedy, targeted sanctions are often used to confront practical problems that are too complex politically to solve.

## **II. The shift to targeted sanctions**

The renewal of the sanctions instrument coincided with the end the Cold War, and resulted in a new type of sanctions debate. This debate was characterised by a shift from comprehensive to targeted sanctions.<sup>3</sup>

The shift from comprehensive to targeted sanctions, at least in part, originated in the negative experiences of the comprehensive UN sanctions program applied on Iraq in the early 1990s.<sup>4</sup> The sanctions regime imposed on Iraq, which lasted for almost a decade, caused severe suffering for the

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<sup>1</sup> Almost 30 sanctions regimes can currently be identified.

<sup>2</sup> A list of ongoing sanctions programs can be found at UN and EU Commission websites.

<sup>3</sup> This transformation is also well summarised by Cortright and Lopez: D. Cortright, G. Lopez, J. With Wagler, R. W. Conroy and J. Dashti-Gibson, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder, 2000). See also: D. Cortright and G. Lopez, *Smart Sanctions: Targeting Economic Statecraft* (Oxford, 2002). M. Doxey, *United Nations Sanctions: Current Policy Issues* (Dalhousie University Center for Policy Studies, 1999). J.M. Farral, *United Nations Sanctions and the Rule of Law* (Cambridge, 2007).

<sup>4</sup> S/RES/0661 (1990) 6 August 1990.

Iraqi population, and particularly on its children. These unintended effects consequently provided good ammunition for those who sought later a complete re-consideration of the sanctions instrument and the strategic way it was introduced.<sup>5</sup> Because of the widespread criticism of the Iraqi sanctions, policy-makers, both in the UN and in many western capitals, looked for new ways to improve the sanctions tool. The aim was to restore credibility to the sanctions tool. For instance, in response to the humanitarian impact of sanctions in Iraq, the ambassadors of China, France, the Russian federation, the UK and the US wrote that the Security Council “should be directed to minimize unintended adverse side effects of sanctions on the most vulnerable segments of targeted countries”.<sup>6</sup> In order to re-establish the credibility of the sanctions instrument, the idea of *intelligent* sanctions, which later became *smart* and *targeted* sanctions were introduced. Thus, from having been comprehensive in nature, targeted sanctions nowadays encompass many different types of restrictive measures including travel bans, assets freeze, arms-embargoes, trade sanctions, flight bans, restrictions of admissions, diplomatic sanctions, boycotts, and sanctions on rough diamonds, and timber etc.<sup>7</sup> In short, then, the shift from comprehensive sanctions to targeted sanctions was designed to solve the problem of unintended consequences.

### III. The rationale of targeted sanctions

In the post-Cold War era, states were particularly plagued by three kinds of threats: civil wars, terrorism and organized crime. Behind many of these threats stood charismatic leaders and organised pressure groups. By imposing targeted sanctions on the leadership of these kinds of entities, i.e. on leaders of armed groups and rouge states, international collective security actors such as the UN and the EU aspired to achieve decisive impact on the development of peace and security. By focusing on individual government leaders, organised groups and networks, and restricting their political power, entire conflict complexes would be dissolved.

An important reason for why the EU and the UN seemed to have accepted a change of focus – from states to political decision-making, was the notion that it would become easier to demand political responsibility from particular decision-makers, as opposed to asking for “State compliance” more broadly. By issuing so-called “blacklists” or “name-and-shame lists” of targets posing a particular threat to the international community or to their own citizens, actors like the EU and the UN Security Council have tried to deter, undermine, and change unwanted political behaviour. More specifically, by issuing lists, the sender can more effectively hold targets politically and legally responsible those entities involved in violations of human rights, failures of governance and the posing of a threat to international peace and security. Thus, rather than pursuing the logic of collective punishment, which comprehensive sanctions programs often led to, listed entities would be held personally for their political deeds.

### III. The strategic use of targeted sanctions

However, while strategic targeting of individuals posing a security threat to the international system has received much attention at the EU and UN level, the idea of “targeting” is not new. In fact, the

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<sup>5</sup> This debate however was also augmented in an article in the *Lancet*, which published seemingly higher figures on child mortality than was actually the case, a figure that later had to be revised and republished (P. Wallenstein, M. Eriksson and C. Staibano, *Routes to Democracy in Burma/Myanmar: The Uppsala Pilot Study on Dialogue and International Strategies*, (Uppsala 2004), pp. 17-18).

<sup>6</sup> Letter to the president of the UN Security Council S/1995/200.

<sup>7</sup> For a good introduction to the use of smart sanctions, see D. Cortright and G. Lopez, *Smart Sanctions: Targeting Economic Statecraft* (Oxford 2002).

specific idea of targeted sanctions can be traced back to the First- and Second World War as part of a broader and strategic economic warfare rationale. In fact, the British government brought about the first official list of targeted entities during the World War 1 as a way to prevent individuals and companies from trading with enemies regardless where they were located in the world.<sup>8</sup> This kind of economic warfare was later picked up by the U.S. government during World War 2 (Trading with the Enemy Act).<sup>9</sup> Today, the same kind of strategic rationale can also be said to underlie the logic of targeted sanctions, especially if considering the use and boosting of the instrument by the U.S. government in connection to the aftermath of 11 September 2001.

In classical theory on military strategy, such application of sanctions would follow the idea of pre-emption, where such action is adopted by a sender to influence a group to do something which is not in its political and economic interest. Moreover, at the heart of a pre-emptive strategy also lies an attempt to act in such an offensive manner that disarmament of a number of threats can take place before these develop into a potential crises or conflict.<sup>10</sup> The interpretation of targeted sanctions under such a strategy could also help explain why the anti-terrorism sanctions also caused a number of unintended consequences (mainly the U.S. administration) following September 11 as one wanted to defuse potential threats of a number of terrorist organisations.<sup>11</sup> This also meant that legal concerns had to give way, at least initially, to more strategic concerns. Part of the strategic rationale of pre-emptive actions can also be found in the “National Security Strategy of the United States of America” (2002): “It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit that option. We cannot let our enemies strike first.”<sup>12</sup>

However, as noted by Heisbourg (2004), the Bush doctrine of pre-emption and prevention is problematic as it leaves room for different interpretations.<sup>13</sup> Prevention on the other hand is a more long-term process. It is a set of actions undertaken with regard to a defined set of problems before they develop into a crisis. While pre-emption rests on the assumption that the target has the capacity to gain superior status in relation to the sender (late action), prevention assumes that target is always in an inferior position (early action). Pre-emption takes the situation from peace to war, while prevention takes action to secure peace.<sup>14</sup> Nowadays, prevention is also closely connected with methodologies to deal with the outbreak of war and armed conflicts.<sup>15</sup> However, pre-emption and prevention is obviously not the only strategic rationale of targeted sanctions. Targeted sanctions can also work by deterrence, compellence, compliance and coercion, etc.

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<sup>8</sup> F. Stenhammar, *Riktade FN sanktioner och rule of law i folkkräkten* (Stockholm, 2008), p. 295.

<sup>9</sup> This history is also noted on US Official sanctions website (OFAC).

<sup>10</sup> The logic of pre-emption can be explained by looking at for instance the rationale of the Israeli decision to attack the Iranian Osirak reactor, in 1981. This attack was made to ensure that Iran would not be in position to attack Israel in the future (instead of reaching such a situation, Israel decided to act in such way that this potential threat could be undermined).

<sup>11</sup> For a good introduction, see T. J. Biersteker and S. Eckert (eds.), *Countering the Financing of Terrorism* (New York, 2007).

<sup>12</sup> US Government. *National Security Strategy of the United States of America* (2002).

<sup>13</sup> F. Heisbourg, "A Work in Progress: The Bush Doctrine and Its Consequences ", 26 *The Washington Quarterly* (2003), pp. 81-83.

<sup>14</sup> See, e.g., L. Freedman, "Prevention, Not Preemption", in A. T. J. Lennon and C. Eiss (eds.), *Reshaping Rouge States: Preemption, Regime Change, and U.S. Policy toward Iran, Iraq, and North Korea* (Cambridge, 2004), pp. 39-40.

<sup>15</sup> A. Ackermann, "Idea and Practice of Conflict Prevention", 40 *Journal of Peace Research* (2003). M. S. Lund, *Preventing Violent Conflicts: Strategy for Preventive Diplomacy* (Washington, 1996).

Thus, this approach could also explain why the Bush administration, the main introductory enforcer of targeted sanctions (anti-terrorism sanctions) at the Security Council level, was more concerned with strategic *political* effects, than *legal* concerns of possible unintended consequences.<sup>16</sup> In this particular realm the aim in introducing such “anti-terrorism sanctions” was to undermine potential terrorist activities.

#### IV. Current problems of targeted sanctions

The developments and theoretical refinement of targeted sanctions have not come without problems. On the contrary, while actors like the UN and the EU have tried to get away from the unintended consequences that followed comprehensive sanctions, similar problems still to some extent haunt targeted sanctions. Not only are targeted sanctions causing human rights problems for the target, but also political- institutional and legal side effects for the sender. Moreover, targeted sanctions seem to cause also several side effects following different restrictive measures. This has also invited a significant number of urgent expert meetings to assess and further refine its capacity to target more precisely, providing it with a number of policy recommendations.<sup>17</sup> For example, targeted arms embargoes may have contributed to a change in local security dynamics in a way that is was not always planned or controlled for by the sender;<sup>18</sup> that targeted sanctions have led to possible job loss in Myanmar,<sup>19</sup> Liberia,<sup>20</sup> and the former Yugoslavia following financial sanctions, and targeted commodity sanctions (i.e. restrictions in trade with particular natural resources like timber and rough diamonds); and that targeted sanctions may have contributed to increased economic distress for the general population of Zimbabwe following a reluctance on the part of investors to place money in Zimbabwe as a result of such measures.<sup>21</sup> Yet most pressing however has been the many negative and unintended human rights consequences following personal sanctions (i.e. where targeted entities have been subjected by financial sanctions (assets freeze) and travel bans. A number of problems have been found in the in the area of listing and de-listing.<sup>22</sup>

Following the inclusion of individuals and organisations on sanctions lists, a number of human rights objections have been raised, especially following the anti-terrorism sanctions, but also for other

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<sup>16</sup> See for instance the 1373 Committee of the Security Council Committee 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities which have de-listed a number of previously listed entities. A number of these entities, although listed, had no involvement with al-Qaeda, for example Abdirisak Aden (see “Individuals, groups, undertakings and entities that have been removed from the Consolidated List pursuant to a decision by the 1267 Committee” (www.un.org). Information retrieved on 12 August 2008.

<sup>17</sup> For good entry point see www.smartsanctions.se.

<sup>18</sup> D. Tierney, "Irrelevant or malevolent? UN arms embargoes in civil wars", 31 *Review of International Studies* (2005).

<sup>19</sup> P. Wallensteen, M. Eriksson and C. Staibano, *Routes to Democracy in Burma/Myanmar: The Uppsala Pilot Study on Dialogue and International Strategies* (Uppsala, 2004).

<sup>20</sup> House of Lords, 2006-07.

<sup>21</sup> M. Eriksson, *Targeting the Leadership of Zimbabwe: A Path to Democracy and Normalization?* (Uppsala, 2007).

<sup>22</sup> See, e.g., T. Anderson, I. Cameron and K. Nordback, "EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale", 14 *European Business Law Review* (2003 ). A. Bianchi, "Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion", 17 *European Journal of International Law* (2007). T. J. Biersteker, Targeted Sanctions and Human Rights, *Annual Meeting of the International Studies Association* (San Francisco, 2008). T. J. Biersteker and S. Eckert (eds.), *Countering the Financing of Terrorism* (New York, 2007). T. J. Biersteker and S. Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (Providence, 2006). I. Cameron, "UN Targeted Sanctions, Legal Safeguards and the ECHR", 72 *Nordic Journal of International Law* (2003). I. Cameron, "European Union anti-terrorist blacklisting", 3 *Human Rights Law Review* (2003).

political sanctions more in general.<sup>23</sup> While targeted sanctions has been considered a credible political tool for achieving a behavioural change of listed entities, its codification into institutional and legal practices has not yet reached a satisfactory level of rigidity, which has caused problems of imprecision (most notably regarding *due processes* of those targeted). What also needs to be noted is that the political strategy of targeted sanctions has become interlinked with the legal aspects of targeting. In fact one could argue that the policy of targeting has increasingly come to collide with legal realities. The need on the one hand to be able to confront threats to international peace and security strategically and to safeguard legal rights of those targeted, now pose a great challenge for political scientists. The overall question is why the shift from comprehensive sanctions to targeted sanctions has continued to haunt the instrument when the theoretical foundation seems so right. One argument is that theory is seldom easily translated into practice.

## V. When a political strategy meets real world problems

Despite how well targeted sanctions may work in *theory*, a policy such as targeted sanctions cannot escape the test of how well it is likely to handle concrete and complex social problems when put into practice. In fact, it seems that current sanctions theory as well practice seems to neglect or underestimate the complexity of challenges that implementation of targeted sanctions has to face when dealing with crisis and conflicts in the real social world. Many times there seems to be an overreliance on an understanding of social reality based on causal laws. However, this pose a fundamental problem by the fact that causal law can never be fully controlled for.<sup>24</sup> Not only do targeted sanctions have to confront problems linked to institutional- and legal challenges in the adoption and implementation phase (in terms of resources, capabilities, negotiated outcomes, political will, bureaucratic hinders, etc.), but also problems of how to ensure sanctions implementation (and impact). This, however, requires ownership, coordination, resources, flexibility, continuous assessments, political will, enforcement capacities, systematic re-thinking etc.; in all, many aspects that collective security actors like the EU and UN does not always have or use in harmony.<sup>25</sup> On the contrary, the use of targeted sanctions often seems more of a routine of policy than a sensible response to a particular problem. Consider for instance the case of the EU's sanctions implemented against the Burmese leadership for its failure to respect fundamental principles of human rights.

In late October 1996, the EU imposed travel bans against the ruling SLORC elite.<sup>26</sup> The measure provided for a ban on entry visas for senior members for the SLORC and their families; a ban on entry

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<sup>23</sup> A distinction could be made between targeted sanctions applied against potential terrorists and targeted sanctions applied against state-officials (politicians). While the restrictive measures remain the same for the two kinds, i.e. travel ban and assets freeze, the resources and political to enforce the sanctions have generally been higher for the former.

<sup>24</sup> For a good introductory point on this issue, see M. Kurki, *Causation in International Relations: Reclaiming Causal Analysis* (Cambridge, 2008).

<sup>25</sup> This is not to say that these aspects are not there, but that they seem underestimated and emphasised at times and not constantly, as it should. Consider for instance the operation it takes for peacekeeping missions to operate. Sanctions enforcement programs do not come as close at all if comparing commitment, resources, political will, etc.

<sup>26</sup> The Common Position 1996/635/CFSP included a number of reasons for imposing targeted sanctions: "The European Union is concerned at the absence of progress towards democratisation and at the continuing violation of human rights in Burma/Myanmar. It deplores, in particular, the practice of torture, summary and arbitrary executions, forced labour, abuse of women, political arrests, forced displacement of the population and restrictions on the fundamental rights of freedom of speech, movement and assembly. It condemns the detentions in May and September 1996 of members and supporters of the National League for Democracy (NLD). It calls for the immediate and unconditional release of all detained political prisoners. The NLD and other legitimate political parties, including those from ethnic minorities, should be allowed to pursue freely their normal activities. It calls on the SLORC to enter into meaningful dialogue with pro-democracy groups with a view to bringing about national reconciliation." Common Position 1996/635/CFSP of 28 October 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union on Burma/Myanmar, *OJ* 1996 L 287/1.

visas for senior members of the military and the security forces and their families; and the suspension of high-level bilateral governmental visits to Burma/Myanmar. In this first episode of holding specific targets accountable for their actions, no specific list of names was issued. Instead, a more general provision for whom to target was included in the decision. On November 15, 1997 however, the EU renewed its sanctions position in order to reflect the fact the SLORC had been dissolved and replaced by the State Peace and Development Council (SPDC).<sup>27</sup> Again, in late April 2000, the EU agreed to strengthen the restrictive measures against the regime by imposing an assets freeze.<sup>28</sup> The table below indicates the number of junta leaders subjected to sanctions over the years.

<b>Table. 1. Myanmar</b>	<b>Total number</b>	<b>Travel ban</b>	<b>Assets freeze</b>
<b>EU Sanctions decisions</b>			
1996-10-28			
1997-04-29			
1997-10-20			
1998-04-27			
1998-01-26			
1998-10-26			
1999-10-11			
2000-04-26	140	140	140
2000-05-22	140	n/a	140
2000-10-09			
2002-04-22			
2003-04-28	115	115	115
2003-06-20	269	269	269
2003-12-22	178	178	178
2004-04-26	178	178	178
2004-04-26	179	n/a	179
2004-10-25			
2004-10-25			

<sup>27</sup> Council Decision 1998/107/CFSP of 26 January 1998 amending Common Position 96/635/CFSP on Burma/Myanmar, *OJ* 1998 L 32/13.

<sup>28</sup> Council Common Position 2000/346/CFSP Council Common Position of 26 April 2000 extending and amending Common Position 96/635/CFSP on Burma/Myanmar, *OJ* 2000 L 122/1.

<b>Table. 1. Myanmar</b>	<b>Total number</b>	<b>Travel ban</b>	<b>Assets freeze</b>
2005-02-21			
2005-02-22			
2005-04-25	390	390	390
2005-04-28	390		390
2006-04-27	392	392	390
2006-05-29	392		392
2007-04-23	379	379	379
2007-04-27	386		386

As can be seen, a number of restrictive measures have been imposed against the leadership in the attempt to achieve a change in behaviour. The question is what such measures have achieved, and perhaps even more important, do such measures affect the leadership in the way the sending actor had anticipated in the first place? While the EU has increased the number of individuals targeted with sanctions (assets freeze and travel ban) year by year, human rights conditions are as bad as before. Armed conflicts still remain in pockets all over the country. Another question is if the particular measures put in place have made any significant impacts.<sup>29</sup>

Part of the reason why targeted sanctions do not achieve more impact, one could argue, is that despite the fact that the theory would imply it, targeted sanctions do not always operate according to the logics of causality, as was noted above. It is simply not enough to assume that the adoption of an EU sanctions law will materialize to such extent that the target is coerced into changing its behaviour. On the contrary there are many different variables playing into such realizations. Even if one could “calculate” with causality, there are simply too many variables operating that would prevent a full-proof sanctions strategy. For example, the target may not be informed that he or she has been put on the sanctions list, the countries in the region may not want to implement the policy, the target may easily evade the sanctions policy and therefore not bother to comply, the target may have learnt that there is not credibility of the sanctions law and therefore see no need to abide by it, and finally the target may find that the sender does not enforce sanctions (for example by tracking money or preventing him or her to travel across countries despite a travel ban). In fact, one could argue that the only certainty that exist about sanctions is that sanctions always will remain an imprecise tool for what it thrives to accomplish. This is also one reason as to why targeted sanctions are likely to face problems of unintended consequences. Thus, one could make the point that targeted sanctions, while logic in theory, have evident problems in realizing success, when confronted with a complex social reality.<sup>30</sup>

The question of sanctions effectiveness has also been a long-standing issue in sanctions research, especially with the classical scholarly work by Gary Hufbauer, Jeffrey Schott, and Kimberly Ann Elliot’s large-N study on sanctions *Economic Sanctions Reconsidered* published originally in 1985

<sup>29</sup> For instance, it is yet to see how much assets have been frozen.

<sup>30</sup> Typical in this case is the method of scoring of success and failure based upon what sanctions by themselves are said to have achieved in a particular country without recognition and taking into account many other social processes (see G. C. Hufbauer, K. A. Elliott and J. J. Schott, *Economic Sanctions Reconsidered: History and Current Policy* (Washington, 1985).

with the updated version in 2007.<sup>31</sup> The study evaluated 115 sanctions cases between 1914-1990 and found that success in 40 cases or 34 percent of the total. However, this data has been much criticized and the rate of success is usually considered much less.<sup>32</sup> Moreover, this early sanctions database did not capture the kind of targeted sanctions that are currently in force. The refinement and adaptation of targeted sanctions that we experience today is likely to change the “success-failure” map-of sanctions. Thus, while evaluation studies have been focused on sanctions more in general, systematic studies on targeted sanctions have been done.<sup>33</sup> A reason for this is that the little data available on the impact of targeted sanctions has until now been rather difficult to access, as several sanctions regimes are still ongoing. The debate on sanctions efficacy, and how to measure impact, is likely to continue.

Yet, while this rather critical view may seem somewhat alarming and off-putting, this is not to imply that one should give up on further improvements of the sanctions instrument (which the Interlaken process on financial sanctions-, the Bonn-Berlin process-, and the Stockholm Process on the Implementation of targeted Sanctions were set to do),<sup>34</sup> but to acknowledge that refinements should not be made on the expense of improving basic enablers for sanctions implementation which may be more necessary, and that expectations should remain realistic of could actually be realized. Moreover, it needs to be implicit that rather than merely engaging in subtle questions such as procedural issues of listing and de-listing, one needs to tackle the more profound and underlying questions which enables “effective” sanctions, such as if targeted sanctions stand a chance in having an impact at all, both when it comes to affecting listed targets as well as to contributing to resolving conflicts (as was for instance illustrated with the Burma/Myanmar case). Such more profound questioning could be: do targeted financial sanctions on certain Talibans’ operating in the most unwelcoming terrain of Kandahar (Afghanistan) really inflict any harm or annoyance or do they prevent this target from further engaging in unwelcoming activities? Do sanctions achieve what they promise to entail? Is there enough transparency? Which international and regional bodies are most suitable for ensuring implementation (and what kind of resources do they need?).

To conclude, while targeted sanctions having initially received much attention by scholars and practitioners for what it can accomplish, recent practice have returned attention to the sender and its management of the sanctions system as well as its perception of what it can achieve and what it is all about. More specifically, it seems that the current EU and UN targeted sanctions practice have come to reveal an emerging incongruity of intentions. While on the one hand there still seems to be a will among member states to continue to use and expand practice of targeted sanctions in different parts of the world, there is also, on the other hand, growing suspicion. Again, how do we evaluate targeted sanctions today, given that the international community has moved away from comprehensive sanctions? How can we ascertain that targeted sanctions achieve what is expected? What are the more profound challenges that enable sanctions effectiveness?

## VI. Final remarks

Generally understood by practitioners and scholars as a last resort before further military options, the shift away from comprehensive to targeted sanctions was thought to get rid of unintended consequences once and for all. Yet, while targeted EU and UN sanctions have become one of the more

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<sup>31</sup> Recently, the sanctions data-bank was up-dated to cover targeted sanctions (2007).

<sup>32</sup> See, e.g., R. Pape, "Why Economic Sanctions Do Not Work", 22 *International Security* (1997).

<sup>33</sup> See e.g., D. Cortright, G. Lopez, J. With Wagler, R. W. Conroy and J. Dashti-Gibson, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder, 2000). C. Portela, *The Efficacy of Sanctions of the European Union: When and Why do they Work?* - Ph.D Thesis (Florence, 2008). G. C. Hufbauer, K. A. Elliott and J. J. Schott, *Economic Sanctions Reconsidered* (Washington, 2007).

<sup>34</sup> See [www.smartsanctions.se](http://www.smartsanctions.se).



novel tools to promote conflict resolution in instances of armed conflict and international crisis, there are still a number of substantial challenges that lie ahead. As discussed in this paper, the targeted sanctions of recent years have resulted in several concerns. First, the strategic use of targeted sanctions falls back on different premises which effect sanctions use. These overall strategies have to be taken into account when trying to assess how sanctions work and not work. In this paper, I have exemplified how targeted sanctions have been implemented with a pre-emptive rationale when issuing black-lists following the so-called “War on Terror”. This strategic rationale falls back on a broader strategic warfare rationale applied during the First- and Second World War, where strategic concerns seemed more important than negative legal concerns. This however, is only one of many strategic rationales operating in conjunction with sanctions. Secondly, listing practices have had several early unintended effects, especially regarding decision-making practices, dissemination of information, effectiveness, etc. While targeted sanctions were expected to deal with early implementation problems, it is now accepted that they seem to embed unintended consequences. Most notably, the practice of listing and de-listing has led to a number of court cases where designated targets have even come to challenge the system. This has probably caused a number of states to refrain from further designations. However, unintended effects have also been notable in relation to other forms of targeted sanctions, such as when implementing arms embargoes, commodity sanctions, etc. Finally, scholarly attention has in recent years been dominated by policy studies seeking to, on the one hand, promote the policy of sanctions by providing recommendations for refinements and corrections, and on the other hand by legal studies questioning to a much greater extent the malfunctioning of the system. These and similar challenges are yet to be addressed, but might lead to a sanctions policy that both aims as well as targets correctly. As been argued here, the problem of unintended effects of targeted sanctions seems to be connected to a more fundamental understanding of what sanctions can realize in theory and what it is able to accomplish in practice. Targeted sanctions entail a complicated process where theory meets practice. Too often, however, there seems to be exaggerated expectations about what the tool can achieve. More problematic is that theory and practice seem to underestimate the complex social environment the policy is set to operate in. Oftentimes there seems also to be an over reliance on causality, or an over-simplification of the social complexity of the causal relationships that exists and shapes a policy outcome. All these factors together call for a profound reconsideration of targeted sanctions ontology, which has been lost in the shift from comprehensive to targeted sanctions.



# Security Sector Reform in the Western Balkans: Challenge to EU Membership Conditionality

Martina Spornbauer\*

## I. Introduction

This paper assesses the European Union (EU)'s Security Sector Reform (SSR) concept and its implementation in the context of the accession of the Western Balkan countries from a legal perspective. While the importance of EU membership leverage is acknowledged, it argues that accession is neither an automatic best case scenario nor a panacea for the reform of the security sector in the candidate and potential candidate countries that face the double post-conflict post-authoritarian challenge for reasons that are both endogenous and exogenous to the EU's competences and approaches in the security sector policy field.

Such an assessment requires consideration of several discrete issues. One may ask, for instance, whether membership conditionality functions as a corrective to EU institutional fragmentation. In other words, does the enlargement process, operationalised through pre-accession assistance based on a stringent conditionality approach, bridge the coherence gap between European Commission-led first pillar and the Council-led second pillar measures? How important is the reciprocation between coherent and effective policy making in this field and the EU's determination to shoulder overall responsibility channelled through EU membership conditionality? And what is the nature of the SSR-related principles and elements that are subject to this conditionality? At the same time, a further issue needs to be addressed: namely, how can local ownership be ensured through a process whereby both the elements and the sequence of the reform steps are determined by conditions whose attainment is accompanied financially and rewarded by further approximation? Due to space constraints, not all of these central questions can be addressed comprehensively but some preliminary answers will be provided by following a two-fold structure that is conducive to addressing the dimensions here identified.

The paper proceeds as follows. First, an attempt will be made to shed light upon EU internal cross-pillar legal complexities for SSR related programmes. While having only recently adopted the notion into its external policies' discourse, the EU has in fact been carrying out programmes in this respect for some time. Its involvement has developed on the one hand under the umbrella of the European Security and Defence Policy (ESDP) missions under the second pillar, and through development assistance of the European Community (EC) as in the EU's first pillar, on the other. Under the latter, there are a wide range of programmes – both in terms of thematic and geographical coverage – that have recently been extended explicitly to cover stabilisation efforts. Consequently, EU involvement in SSR is characterised by a disorderly division of competences, strong institutional disagreement and often thorny issues of coordination.

Second, the legal nature of some SSR related principles and norms will be analysed. Instead of discussing these matters on a purely abstract level, reference will be made to EU membership conditionality in the framework of the Stabilisation and Association Process (SAP). In fact, the normativity of SSR is not by coincidence addressed in the context of enlargement. All relevant

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principles are of a particular normative nature in a policy context that is accurately described as one of “internalisation,” within which conditionality as a strategy of reinforcement by reward dominates the process. Indeed, in the post-conflict framework of the Western Balkans, the EU’s SSR concept is embedded in the logics and dynamics of accession, complemented by ESDP elements.

The ‘Security Sector’ and ‘Security System Reform’ have increasingly become buzzwords among international donors involved in post-conflict peace-building and reconstruction.<sup>1</sup> There appears to be a widespread recognition that “the transformation of security institutions so that they play an effective, legitimate and democratically accountable role in providing external and internal security” is an essential prerequisite for long-term stability and prosperity of a country.<sup>2</sup> The security institutions referred to are those “which have authority to use, or to order the use of force, or threat of force, to protect the state and its citizen, as well as those civil structures that are responsible for their management or oversight.”<sup>3</sup> The concept of transition and reform of this system is correspondingly large. Indeed, if one draws upon the OECD-DAC definition of the security system or sector,<sup>4</sup> as do both the Council (Secretariat) and the European Commission in their respective concept papers on SSR, not only are

“core security actors (e.g. armed forces, police, gendarmerie, border guards, customs and immigration, and intelligence and security services) and justice and law enforcement institutions (e.g. the judiciary, prisons, prosecution services, traditional justice systems)”

included, but also

“security management and oversight bodies (e.g. ministries of defence and internal affairs, financial management bodies and public complaints commissions) and even non-statutory security forces (e.g. private security companies, guerrilla armies and private militia).”<sup>5</sup>

## II. Challenges of compartmentalisation to a proclaimed holistic approach

Security Sector Reform, if conceptualized and implemented holistically, lies at the intersection of the security and development agendas and is accompanied by a renewed and now explicit acceptance of the so-called security – development nexus.<sup>6</sup> It is safe to submit that the EU, next to the UN perhaps, is

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<sup>1</sup> SSR has evolved in the development assistance context as a tool of good governance, and has then - via post-authoritarian countries - entered the realm of post-conflict reconstruction. In all contexts, there is a stronger pressure today for coordination within a multilateral framework, using transparent and universally accessible standards. For an overview over the evolution of the concept, see for instance A. Bailes, “Introduction: The EU and Security Sector Reform”, in D. Spence and P. Fluri, *The European Union and Security Sector Reform* (London, 2008). On SSR as a “good governance” tool, see also European Commission, *Governance and Development*, COM(2003) 615 final, Brussels, 20 October 2003.

<sup>2</sup> Clingendael Institute, “Towards a Better Practice Framework in SSR: Broadening the Debate”, *International Alert Occasional Paper* (2002).

<sup>3</sup> D. Blease, “NATO and the EU within the Western Balkans: Partners or Rivals in Security Sector Reform?” Paper presented at UACES conference 2007 and on file with the author. Original reference listed as M. Chalmers, “Security Sector Reform in Developing Countries: An EU Perspective”, *Safer World Report* (2006), p. 6.

<sup>4</sup> Development Assistance Committee (DAC), *Security System Reform and Governance, Policy and Practice* (2004) OECD - Guidelines and Reference Series.

<sup>5</sup> European Commission, *A Concept for European Community support for security sector reform*, COM(2006) 253 final, Brussels, 24 May 2006, and Council of the European Union, *EU Concept for ESDP Support to Security Sector Reform (SSR)*, Brussels, 13 October 2005.

<sup>6</sup> The policy documents generally refer to the need to integrate security and development programmes and emphasise their interconnectedness. The Communication ‘Governance and Development’ speaks of ‘Security [as] key to regional stability, poverty reduction and conflict prevention’. According to the European Security Strategy, “security is the first condition for development”. ESS: *A Secure Europe in a Better World – European Security Strategy*, Brussels, 12

among the few international organizations enjoying full capacity to address all issues at stake in the notorious post-conflict “transition gap” generally, and SSR specifically. Nonetheless, its added value in having such a “broad range of civilian and military instruments which are able to support SSR activities”<sup>7</sup> at times appears as one of its major constraints to turn the acknowledgement that “there can be no sustainable development and eradication of poverty without peace and security”<sup>8</sup> into comprehensive practice.

The European Union is not a unitary actor for the implementation of this broad range of instruments. From its perspective as a “tripartite”<sup>9</sup> organisation in matters of external policies, the SSR’s cross-cutting policy field is paralleled by a cross-pillar competence allocation. Indeed, the respective SSR concepts – of the Council of the EU and the European Commission – reflect the different nature of each institution, and demonstrate that the measures in this field are not subject to identical decision-making procedures and institutional logics.

On the one hand, the provisions on Development Cooperation and Cooperation with Third Countries, Articles 177 and 181a of the EC Treaty,<sup>10</sup> provide the general legal basis for the EC to pursue SSR-related measures in third countries. Their precise material scope however is contested. The European Court of Justice (ECJ) held that Article 177 EC Treaty

“admittedly [...] refer[ed] not only to the sustainable economic and social development of those countries, [...] but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms.”<sup>11</sup>

This does not in itself clarify whether the contribution “to the general objective of developing and consolidating democracy, the rule of law, [...] and] respect of human rights” constitutes a separate, independent objective or whether it is subordinated to the social and economic development objectives. In the recent *SALW judgment*,<sup>12</sup> Article 177 EC Treaty has been further clarified. Henceforth, in order to fall under this provision, a measure must, at least indirectly, be linked to economic and social development objectives.<sup>13</sup> This view does not contradict well-established case law according to which development objectives can be ‘broad in the sense that it must be possible for the measures required for their pursuit to concern various specific matters.’<sup>14</sup>

(Contd.) \_\_\_\_\_

December 2003. European Commission, *Governance and Development*, COM(2003) 615 final, Brussels, 20 October 2003.

<sup>7</sup> European Union, *Council Conclusions on a Policy Framework for Security Sector Reform, Meeting of the General Affairs Council* (Luxembourg, 2006).

<sup>8</sup> Joint statement of the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the European Commission on European Development Policy, “The European Consensus”, *OJ* 2006 C 46/1.

<sup>9</sup> External policies evolve from an interaction between the CFSP-Union, the European Community and the Member States. In this paper, the term ‘European Union’ denotes the European Union as a whole, that is the European Communities as supplemented by the Common Foreign and Security Policy and the cooperation on police and criminal matters (commonly referred to as II and III pillar). If it acts only under the II Pillar, the term CFSP-Union will be used.

<sup>10</sup> The treaty provisions in this paper refer, unless otherwise indicated, to the current treaties: The Treaty on the European Union (TEU) and the Treaty establishing the European Communities (ECT). The future treaty provisions as amended by the Treaty of Lisbon will be referred to in their consolidated version, namely the Treaty on European Union (TEU Lisbon) and the Treaty on the Functioning of the European Union (TFEU).

<sup>11</sup> Case C-403/05 *Philippines Border Management* [2007] ECR I-9045, para. 56.

<sup>12</sup> Case C-91/05 *Small Arms and Light Weapons*, nyr.

<sup>13</sup> The policy objectives are not “limited to measures directly related to the campaign against poverty”, however, it is “none the less necessary, if a measure is to fall within that policy that it “contributes to the pursuit of that policy’s economic and social development objectives.” *Ibid*, para. 67.

<sup>14</sup> Case C- 268/94 *Portugal v. Council* [1996] ECR I-6177, para. 37.

Such a position appears to imply that EC SSR-related measures cannot pursue security as a primary objective.<sup>15</sup> They may only do so in addition, and not necessarily completely subordinated, to the social and economic development objectives in the realm of development assistance – or alignment with the *acquis* in the accession context. The Commission in its policy document consequently emphasises the eligibility of a wide spectrum of SSR activities for Official Development Assistance (ODA), which encompasses all civilian SSR aspects, as well as activities in relation to democratic and civilian control of the military, including financial and administrative management of defense issues.

Indeed, the Community's technical and financial assistance in SSR is best captured in the notion of institution- or capacity-building. The issues just raised for EC SSR competence also become apparent with regard to the way in which this institution-building is tied to the objectives and fields of its financial instruments, particularly the Instrument for Pre-accession Assistance (IPA),<sup>16</sup> the European Neighbourhood and Partnership Instrument (ENPI),<sup>17</sup> the Development Cooperation and Economic Cooperation Instrument (DCECI)<sup>18</sup>, and the Instrument for Stability (SI).<sup>19</sup> While the IPA constitutes the main basis in the accession context, the SI provides for an obvious starting point for SSR in general.

Complementary to all other instruments, it provides for the adoption of "Exceptional Assistance Measures," limited to 18 months, "in a situation of crisis or emerging crisis," in order to "preserve, establish or re-establish the conditions essential to the proper implementation of the Community's development and cooperation policies."<sup>20</sup> The SI undoubtedly constitutes an important legal basis for SSR related technical and financial assistance to, *inter alia*, the establishment and the functioning of interim administrations, as well as support for the development of democratic, pluralistic state institutions, for international criminal tribunals and the various mechanisms of transitional justice, and explicitly foresees "support for good governance and law and order, including non-military technical cooperation to strengthen the capacity of law enforcement and judicial authorities."<sup>21</sup>

Yet, the SI primarily ensures the continuity of (long-term) external assistance in unstable situations. Arguably, such long-term presence on the ground is indeed crucial for the sustainability of reforms in the security sector – a fact that is rightly underlined in the EC SSR concept. Such long-term institution-building assistance, as mentioned, finds a legal basis in any other of the financial instruments, i.e. in the context of the Western Balkans – the IPA. The European Commission needs to ensure that the concrete fields of its institution-building are in line with the respective instrument's explicit and implied objectives. With respect to the predecessor of the DCECI, Regulation No 443/92 for instance, the ECJ underlined that

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<sup>15</sup> It has been made very clear the Court of First Instance that "safeguarding international peace and security is not *per se* pursued by the EC Treaty." Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union* [2005] ECR II-3649, para. 154.

<sup>16</sup> Regulation (EC) 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), *OJ* 2006 L 210/82.

<sup>17</sup> Regulation (EC) 1638/2006 of 24 October 2006 laying down general provisions establishing a European Neighborhood and Partnership Instrument, *OJ* 2006 L 310/1.

<sup>18</sup> Regulation (EC) 1905/2006 of 18 December 2006 establishing a financing instrument for development cooperation, *OJ* 2006 L 378/ 41.

<sup>19</sup> Regulation (EC) 1717/2006 establishing an Instrument for Stability, *OJ* 2006 L 327/1.

<sup>20</sup> Unlike its predecessor the Rapid Reaction Mechanism (RRM), the SI is not limited to unstable situations, as it may also be used in stable conditions to address specific global and trans-regional threats, such as terrorism and organized crime. Regulation (EC) 381/2001 of 26 February 2001 creating a rapid-reaction mechanism, *OJ* 2001 L 57/5.

<sup>21</sup> Art. 3 of Regulation (EC) 1717/2006, *supra* n. 19.

“support for the national institutions of developing countries does not constitute an end in itself, but an instrument for strengthening their capacity to administer development policies and projects in the [respective] fields on which that regulation confers particular importance.”<sup>22</sup>

For the IPA, the primary objective is institution- building with the purpose of strengthening compliance with the Copenhagen criteria and of fostering approximation with the *acquis communautaire*.<sup>23</sup> The interpretation of the EC financial instruments’ objectives is therefore particularly significant in SSR as a cross-pillar context.

Turning then to the CFSP-Union and its legal basis for SSR related measures, one needs to refer to the objectives of “preserving peace and strengthening international security” and “developing and consolidating democracy and the rule of law” contained in Article 11(1) and to Article 17 (2) TEU which provide a legal basis for the “Petersberg” humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.’ They are implemented by military and civilian ESDP missions, but also various other measures that legally take the form of Joint Actions on the basis of Article 14 TEU, accompanied by implementing decisions. Civilian ESDP missions, although not expressly covered by the wording of Article 17 TEU, enjoy an explicit “political” basis with the 2000 Feira European Council Conclusions, where four priority fields of civilian action in crisis management were identified. Three of them, namely police, the strengthening of the rule of law, and the strengthening of civilian administration directly relate to SSR. It is interesting to note here that the ESDP SSR concept, although identifying the same contexts for SSR assistance – stable countries, countries in “a transition and stabilization phase” and post-conflict countries – seems to make the (welcomed) suggestion that ESDP activity in SSR is particularly relevant “in the absence of a partner government in a crisis situation or in the immediate aftermath of a conflict.”

It has thus become apparent that both the EC Treaty and the TEU confer the power to adopt SSR-related measures. Given the identical definitions of the notion, these competences *prima facie* overlap and thus raise a number of difficult issues; issues which are legally complex against the background of the EU’s pillar architecture. As a matter of fact, it is extremely difficult, if not impossible, to always situate a concrete SSR-related measure on the basis of a TEU or EC Treaty provision(s) and thus in either the Council’s or the Commission’s realm. This would indeed require its identification as a “security” or a “development” measure based on its “aim and content” according to the European Court of Justice’s “centre-of-gravity approach”.<sup>24</sup> It seems as if the GAERC Council Conclusions, which were adopted with the intention of providing an overall policy framework for SSR, could do nothing but fall short of providing a set of guidelines on how to approach the pillar divide. The conclusions states – repeating the ESDP concept – that

“a case-by-case analysis based on a situation specific approach is always needed to assess whether any proposed activities are most appropriately carried out through ESDP or Community action or a combination of both with the objective of ensuring effective and coherent EU external action in this area.”<sup>25</sup>

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<sup>22</sup> Case C-403/05 *Philippines Border Management* [2007] ECR I-9045, para. 61.

<sup>23</sup> The IPA contains five components, namely transition assistance and institution building, cross border cooperation, regional development, human resources development, and rural development. As the latter three are reserved for candidate countries in preparation for the Structural and Cohesion Funds, the emphasis in the IPA is on institution building with the purpose to strengthen compliance with the Copenhagen criteria.

<sup>24</sup> According to this approach, developed under the Community pillar, “the choice of legal basis for a [Community] measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure”. In a cross-pillar context, the Court first used this approach in the *Environmental Sanctions Case*, Case C-176/03, *Commission v. Council* [2005] ECR I-7879, para. 45.

<sup>25</sup> European Union, *supra* n. 7.

Yet, even such an analysis is difficult, as the following paragraphs illustrate.

First, an SSR-related measure could simultaneously pursue EC and CFSP-Union objectives, as exemplified by the security – development nexus. However, it is not necessarily possible to identify one objective as merely “incidental” to the other. Second, in terms of content, there is no fundamental difference between the CFSP-Union and the Community initiated SSR related measures. According to the Council Secretariat, “ESDP support to SSR in a partner state will apply to an ESDP action which will take the form of advice and assistance to the local authorities (executive, legislature and judiciary).” Does this description not resemble EC financial and technical assistance for institution-building?<sup>26</sup> A good illustration of overlapping SSR substance of Community and CFSP-Union initiatives is provided by the first Rule of Law Mission, EUJUST Themis<sup>27</sup> in Georgia between July 2004 and July 2005. Based on the objective of “consolidating democracy and the rule of law,” it aimed at supporting the reform of the criminal justice system in respect of local ownership. With the mission consisting solely of a Head of Mission and a small number of advisors,<sup>28</sup> it could be directly compared to public sector reform assistance implemented by contracted experts under the (Community) TACIS Regulation.<sup>29</sup> Undoubtedly, EUJUST Themis could have been pursued as a Community programme.

Being aware of the limits of its “centre-of-gravity” approach, the ECJ indirectly accepted an overlap between the pillars.<sup>30</sup> In fact, it used the general priority rule for Community measures over Union measures contained in a joint reading of Articles 1, 2, 3 and 47 TEU<sup>31</sup> as a “watertight” delimitation rule between the pillars. In other words, “if an action could be undertaken on the basis of the EC Treaty, it must be undertaken by virtue of that Treaty.”<sup>32</sup> Arguably, the Court could interpret these provisions differently.<sup>33</sup> In any case, the fact remains that Article 47 TEU only contains a rule on how to avoid legal inconsistencies and not on how to manage policy coherence in compliance with legal competence provisions. One might then, and rightly so, expect the political institutions to compensate the Court’s pillar purity approach with efforts to achieve pillar synergy. Indeed, they are under a primary legal obligation to do so with the Treaties stipulating principles of cooperation and complementarity. In this respect, Article 3 TEU contains an obligation to ensure coherence across all

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<sup>26</sup> A pertinent parallel can be drawn to the content of the contested measure in the *SALW* case. It offered financial contribution and technical assistance in order to set up the Light Weapons Unit within the ECOWAS Technical Secretariat and to convert the SALW Moratorium into a Convention. This is a great many similarities to institution-building assistance, which indeed was in preparation by the Commission in the framework of the Cotonou Agreement (Article 11(1)). The ECJ, while acknowledging that there may be some measures, such as the grant of political support for the moratorium or even the collection and destruction of weapons, that fall rather within CFSP through the objective of promoting international cooperation, stated that the decision to “make funds available and to give technical assistance to a group of developing countries in order to draft a convention is capable of falling both under development cooperation policy and the CFSP.” Case C-91/05 *Small Arms and Light Weapons*, nyr, para. 105.

<sup>27</sup> Council Joint Action 2004/523/CFSP of 28 June 2004, *OJ* 2004 L 228/21.

<sup>28</sup> This aspect is given considerable importance by Hoffmeister. See F. Hoffmeister, *Inter-pillar coherence in the European Union’s Civilian Crisis Management*, in S. Blockmans (ed.), *European Union and Crisis Management. Policy and Legal Aspects* (The Hague, 2008).

<sup>29</sup> Regulation (EC) No 99/2000 of 29 December 1999, *OJ* 2000 L 12/1.

<sup>30</sup> Case C-91/05 *Small Arms and Light Weapons*, nyr, para. 108.

<sup>31</sup> According to these provisions, the Union is founded on the European Communities, and supplemented by the second and third pillar policies. One of its objectives is to maintain in full and build on the *acquis communautaire*. At the same time, nothing in the TEU is to affect the EC Treaty.

<sup>32</sup> See, e.g., Opinion AG Mengozzi in Case C-91/05 *Small Arms and Light Weapons*, para. 116.

<sup>33</sup> Namely not as a delimitation rule, i.e. as a rule governing the allocation of the legal base but as a conflict-prevention rule, such that (for example) if conflict were to emerge between a CFSP act and a Community measure, the Community norm would prevail. See M. Cremona, “Coherence through Law: What difference will the Treaty of Lisbon make?” in C. Portela and K. Raube (eds.), “Revising Coherence in EU Foreign Policy”, 3 *Hamburg Review of Social Sciences* 11 (2008) p. 21.



aspects of Union external action, and Article 10 stipulates the duty of loyal cooperation, which applies to both the Member States and the institutions.

Does therefore the accession context provide a fertile ground for a holistic implementation of SSR related measures despite deep institutional fragmentation? The enlargement policy appears as a transfer of the European Union's governance playing field beyond its borders<sup>34</sup> and thus necessarily functions by membership conditionality at its very centre. Designed as a 'strategy of reinforcement by reward' and orchestrated by the European institutions and above all the European Commission, the conceptualization and implementation of EU membership conditionality stands in a reciprocal (mutually influencing) relationship also to Security Sector Reform in the candidate and potential candidate countries of the Western Balkans.

### III. Challenges of direct interference and conditionality to an approach involving local ownership

The enlargement context *prima facie* appears to be a policy context particularly conducive to a coherent and effective cross-pillar implementation of EU involvement in Security Sector Reform. First, the European Union is prepared to assume primary responsibility for candidate and potential candidate countries – now the Western Balkans – and to provide important resources. Second, responsibility and resources are coupled with the necessary leverage, based on a stringent conditionality approach. Third, in this context, one institution may be described as the leading institution – if not *de iure* then at least the *de facto*: the European Commission. Given the fact that its analysis provides the basis for any assessment of compliance with the Copenhagen criteria and approximation with the *acquis* and thus of overall progress towards EU membership, the Commission is the linchpin of all policy fields covered by the enlargement process.

Yet, despite these arguments endogenous to the EU's (membership conditionality) approach to SSR, the countries of the Western Balkans, in particular Bosnia and Herzegovina (BiH), and Kosovo, represent the prime examples of an international trusteeship or administration with direct legislative and executive powers by the international community whose extensive use in the security sector questions the EU's reform strategies as exogenous parameters.

In addition, these considerations taken together cast serious doubts on a SSR principle highlighted by both the Commission and the Council: local ownership. The Council, for instance, does so implicitly by referring to sustainability of the reforms when it talks about "sustainable institutions through ensured democratic oversight, transparency and accountability in accordance with internationally recognised values and standards". The Commission, on the other hand, refers in a simple but affirmative manner to "nationally/regionally owned processes".<sup>35</sup>

With EU membership conditionality lying at the centre of the SAP and thus SSR in these countries, the key and comprehensive reference point for benchmarking, monitoring and assessing progress are

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<sup>34</sup> F. Schimmelfennig and U. Sedelmeier, "Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe", 11 *Journal of European Public Policy* (2004), p.664.

<sup>35</sup> Council of the EU, *supra* n. 5, p. 10. European Commission, *supra* n. 5, p. 7. At the same time, the Council sees the "clear affirmation by the EU of its values, principles and objectives as well as consultation with local authorities at all stages" as a means "to make local ownership possible", an approach which is fairly questionable. Yet, it is certainly coherent with the Council conceptualisation of local ownership, namely the "appropriation by the local authorities of the commonly agreed objectives and principles." It even considers the active support of the implementation of the SSR mission's mandate, as part of the local authorities' commitment to actions on the ground, as an element of local ownership.

the Copenhagen criteria,<sup>36</sup> in particular the first and third. Under the first criterion, the candidate countries are required to ensure the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. Under the third, the so-called *acquis* criterion, the candidate countries are meant to develop the full “ability to take on the obligations of membership.”

Even if only Croatia and Macedonia are candidate countries as such, the use of the term EU membership or accession conditionality is justified for all Western Balkan countries as “potential candidate countries”. The SAP, moreover, is a policy based on “graduated” (membership) conditionality, and responds to the particular needs and challenges of these countries. Indeed, post-conflict transition, the need for broader state-building and a general situation of insecurity have led to an adaptation<sup>37</sup> of the accession conditions as known from previous enlargement rounds, both in terms of content and procedure. The requirements of ‘regional cooperation, good neighbourly relations [...], and respect for international obligations, such as co-operation with the UN International Criminal Tribunal for the former Yugoslavia’ constitute such an adaptation.<sup>38</sup> The way in which conditionality operates more openly throughout the pre-accession process furthermore demonstrates a procedural modification. The potential candidate countries are subject to European Partnerships<sup>39</sup> and consequently are working towards *acquis* compliance, even in the absence of contractual ties through a (Stabilisation and) Association Agreement. Moreover, the introduction of an additional negotiation chapter, entitled “Fundamental Rights and Judiciary” allows for issues which were previously addressed under the political Copenhagen criterion and whose respect was thus a pre-requisite for the start of negotiations, to now be brought up later but also continuously during the negotiations as such. In addition, monitoring and assessment practices have become more accurate with precise benchmarks determining the opening (and closure) of individual negotiating chapters.<sup>40</sup>

The Copenhagen criteria have undergone a progressive legalisation, which is partly related to this procedural adaptation. This development has been initiated through prescription by the European Council and institutionalised by the accession strategy. At this stage, the Copenhagen criteria present themselves as “quasi-legal”<sup>41</sup> or at least legally enforceable<sup>42</sup> requirements. Consequently, the European Council has effectively supplemented Article 49 TEU by declaring that accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required. The accession provision as amended by the Treaty of

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<sup>36</sup> Referred to in Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries, *Towards the Enlarged Union*, COM (2002) 700 final, Brussels, 9 October 2002.

<sup>37</sup> This has been termed “partial reinterpretation” by Dowling. See A. Dowling, “EU Conditionality and Security Sector Reform in the Western Balkans”, in D. Spence and P. Fluri, *The European Union and Security Sector Reform* (London, 2008), p. 175.

<sup>38</sup> European Commission Staff Working Document, *Kosovo under UNSCR 1244 Progress Report*, SEC (2007) 1433, Brussels, 6 November 2007.

<sup>39</sup> Based on Council Regulation (EC) 533/2004 on the establishment of European partnerships in the framework of the stabilisation and association process, *OJ* 2004 L 86/1.

<sup>40</sup> On this and post-accession conditionality, see M. Spornbauer, “Benchmarking, Safeguard clauses and Verification mechanisms – What’s in a name? Recent developments in pre- and post-accession conditionality and compliance with EU law”, 3 *Croatian Yearbook of European Law and Policy* (2007).

<sup>41</sup> C. Hillion, “Enlargement of the European Union: A Legal Analysis”, in A. Arnall and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford, 2002), p. 409.

<sup>42</sup> Important in this respect are above all the Accession Partnerships that find their equivalence in the European Partnerships of the SAP and the corresponding national Action Plans through the financial assistance offered was made dependent on their performance related to meeting the Copenhagen criteria. For a discussion of these instruments, see K. Inglis, “The Europe Agreements compared in the light of their pre-accession reorientation”, 37 *CML Rev* (2000) and H. Grabbe, “A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants”, *EUI RSCAS Working Papers*, RSCAS No. 99/12 (Florence, 1999).

Lisbon, confirms the legal nature of the Copenhagen criteria by providing that “the conditions of eligibility agreed upon by the European Council shall be taken into account.”<sup>43</sup>

Undoubtedly, there is an interaction between the EU’s membership criteria and its SSR concept, both substantively<sup>44</sup> and procedurally. Through the procedural adaptation and legalisation, the EU’s SSR principles that figure among the first Copenhagen criterion are raised from the policy-document to the legally enforceable level. These include, *inter alia*, good governance aspects (therein democratic control, civilian oversight, accountability and transparency), compliance with internationally recognised values and standards and finally cooperation with other international organisations.<sup>45</sup> The SSR-related elements falling under the *acquis* criterion, originating mainly in the external dimension of the area of freedom, security and justice (AFSJ) – while already being of a normative nature – equally benefit from better monitoring and assessment through precise benchmarking.

Some of these SSR-related principles and elements figure, although in an imprecise manner, in the accession reference documents – especially the Progress Reports<sup>46</sup> – under the political criterion or in the section entitled “European standards”. As such, they are subject to priority-setting in the European Partnerships. Improvement of border control, accountability of police services, civilian oversight of the military, and parliamentary oversight of defence and security structures occupy a central place in both Enlargement Strategy and Progress Reports.<sup>47</sup> The 2006 Progress Report for BiH under the heading “Democracy and the Rule of Law” contains – next to “Constitution,” “Parliament,” “Government,” and “Public Administration” – a specific part on “Judicial Reform” and, most importantly, “Civil Military Relations,” replaced in the 2007 Report by “Civilian Oversight of the Security Forces.” The Progress Reports for Kosovo follow the same structure, omitting however a section on “Civil Military Relations.”

In addition, in the Bosnia Report, the section on public administration contains explicit reference to “Police Reform” which thereby figures independently from the political criteria under “European Standards” and thereby under “Justice, Freedom and Security”, where the conclusion by the federal state of BiH of an Agreement on Policy Restructuring among the constituent entities of the federal state of BiH in October 2005 is emphasised. It was said to be in line with the principles outlined by the European Commission (*sic!*): legislative and budgetary competences at state level, no political interference with operational policing and functional police areas.<sup>48</sup> In fact, police reform dates back to the SAA Feasibility Study, where it figures among the 16 requirements,<sup>49</sup> and was subject to the EU’s

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<sup>43</sup> Article 49 TEU as amended by the Treaty of Lisbon.

<sup>44</sup> See, e.g., D. Law and O. Myshlovska, ‘The Evolution of the Concepts of Security Sector Reform and Security Sector Governance: the EU Perspective’ in D. Spence and P. Fluri (eds.), *The European Union and Security Sector Reform* (London, 2008).

<sup>45</sup> See, e.g., D. Law (ed.), *International Organisations and SSR* (Litverlag, 2007). These principles are deduced from the two SSR concepts, the European Security Strategy and the Agenda 2000.

<sup>46</sup> The Progress Reports of 2006 and 2007 for the countries of the Western Balkans are European Commission Staff Working Documents, annexed to European Commission, *Enlargement Strategy and Main Challenges 2006 – 2007*, COM(2006) 649 final, Brussels, 8 November 2006.

<sup>47</sup> See Law and Myshlovska, *supra* n. 44, p. 19.

<sup>48</sup> In fact, the major obstacle is the entity authorities’ insistence on policing remaining entity competence and on functional police areas being determined by ethnic boundaries and not technical criteria. See International Crisis Group, ‘Bosnia’s Stalled Police Reform: No Progress, No EU’ (2005) *Europe Report* 164, at 12 –14. In December 2007 the HRSG/EURS and in April 2008 (16<sup>th</sup>) the Bosnian parliament approved the police reform. Consequently, in June 2008 the SAA with BiH was signed. See [www.diplomatie.gouv.fr](http://www.diplomatie.gouv.fr).

<sup>49</sup> European Commission, *Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union*, COM(2003) 692 final, Brussels, 18 November 2003.

first-ever ESDP mission, the EU Police Mission in BiH (EUPM).<sup>50</sup> Established to continue the work of the UN International Policy Task Force, it was mandated to raise Bosnian standards of policing by “monitoring, mentoring and inspecting” in four priority areas, namely institution-and capacity-building at management level, combating organized crime and corruption, developing financial viability and sustainability and promoting accountability. The European Community provided funding for training and equipment.<sup>51</sup>

This appears to be a prime example of EU conditionality ensuring an effective and coherent approach. In fact, rather, it represents an exception, and in addition a very limited one.<sup>52</sup> Indeed, the effectiveness of EU conditionality in the security sector in particular is seriously undermined by the use of the so-called Bonn Powers<sup>53</sup> of the High Representative of the UN Secretary General (HRSG), a position that was merged in 2002 with the EU Special Representative (EUSR). Essential parts of the military reform were thus imposed, as were the law on a state-level court to address inter-entity and war crimes, and the new Criminal and Criminal Procedural Codes after the initiation of a “reinvigorated judicial reform strategy” in May 2002.<sup>54</sup>

The European Commission acknowledges this in a general manner in its SAA Feasibility Study, noting that “decisions taken in the context of the Bonn powers have been instrumental in achieving reforms that might otherwise have been delayed or never effected.” Paradoxically, the use of the Bonn Powers did not decrease despite an increased emphasis on EU membership conditionality and thus, already then, raised “questions about BiH’s ability to sustain a SAA.” At the same time, this externally-driven process needs to be confronted with the policy commitment of local ownership, as the number and nature of these decisions reflect a persistent BiH unwillingness or inability to make progress under domestic procedure.

Kosovo is another interesting case in this respect, having a difficult legacy of the applicable-law question and neglect of the law enforcement sector during the early years of the international administration. While most government functions were transferred to the provisional Kosovo state authorities under the Constitutional Framework in November 2001, the justice and police sectors remained under the control of the international community via UNMIK pillar I.<sup>55</sup> Then, under the Ahtisaari “Comprehensive Proposal,”<sup>56</sup> it was envisaged that most of UNMIK’s remaining competences would be handed over to the government of Kosovo while the double-hatted International Civilian Representative (ICR)/EUSR would nonetheless have clearly defined and renewable executive powers. He may

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<sup>50</sup> Council Joint Action 2002/210/CFSP concerning the European Union Police Mission to Bosnia and Herzegovina, *OJ* 2002 L 70/1.

<sup>51</sup> See T. Mühlmann, “The police mission EUPM in Bosnia”, in M. Merlingen and R. Ostrauskaité (eds.), *European Security and Defence Policy – An Implementation Perspective* (London, 2008), p. 48.

<sup>52</sup> In fact, the HRSG initiated the first steps toward making comprehensive police restructuring a reality in July 2004 by establishing the Police Restructuring Commission (PRC), made up of international and domestic public security official, and whose work resulted in a proposal for state policing structures. See M. Doyle, “Too Little, Too Late? Justice and Security Reform in Bosnia and Herzegovina”, in C. T. Call (ed.), *Constructing Justice and Security after War* (Washington, 2007), p. 247.

<sup>53</sup> In December 2007, Bosnia’s Peace Implementation Council decided to empower the HR to use “his final authority in theatre regarding the interpretation and implementation of the Peace Settlement in order to facilitate the resolution of any difficulties as previously mentioned by making binding decisions”.

<sup>54</sup> See Doyle, *supra* n. 52, p. 250.

<sup>55</sup> C. Rausch, “From Elation to Disappointment – Justice and Security Reform in Kosovo”, in Call, *supra* n. 52.

<sup>56</sup> UNSC S/2007/168 Add.1.

“take corrective measures to remedy [...] any actions taken by the Kosovo authorities that the ICR deems to be a breach of this settlement, or seriously undermine the rule of law [...] Such corrective measures may include, but are not limited to, annulment of laws or decisions adopted by Kosovo authorities.”<sup>57</sup>

The EC/EU involvement in Kosovo, having started well before 1991, supported UNMIK by shouldering responsibility for economic reconstruction under UNMIK pillar IV, and in the framework of “Community Assistance for Reconstruction, Development and Stabilisation (CARDS)”, and gradually shifted from reconstruction proper to institution-building and the rule of law.<sup>58</sup> EULEX, the planned ‘integrated Rule of Law Mission to Kosovo’, is expected to work on the basis of the Ahtisaari proposal, despite the continued existence of an UN mission.<sup>59</sup>

#### IV. Concluding remarks

Clearly, local ownership in the justice and law enforcement sector, despite being a constant reference point in EU and indeed other international organisations’ discourse, has yet to become a reality.

Apart from the direct legislative and executive powers of the international community in the security sector in BiH and Kosovo, that necessarily stand at odds with a holistic reform agenda and in particular the local ownership principle, the ability of the European Union as an individual actor in implementing a coherent SSR agenda based *inter alia* on local ownership is also not without difficulties – even in the accession context where EU membership conditionality potentially works as a bridge between the pillars.

While there are strong arguments for the Commission to play a leading role – as much as it does generally in an enlargement context – for all SSR-related measures in order to facilitate their holistic and horizontally coherent implementation, one equally needs to recognize the limits of such an approach if taken at too broad a level.

The imbalance between the pillars in terms of integration, for instance, complicates coordination between them, and the CFSP-Union’s intergovernmental decision-making system reduces the capacity of the Council to adapt to the Commission’s projects and policies.<sup>60</sup> Furthermore, coherence with ongoing or planned EC measures is often assumed rather than explored, if the Council – as it mostly happens – is under the pressure of being required to produce a swift result and a political signal in response to a crisis.<sup>61</sup>

It appears then as if the Council indeed had no other choice but to emphasise the case-by-case analysis as to whether an SSR measure is best carried out in the Community or in the CFSP-Union framework, or indeed through a combined effort. Yet, in such a scenario, the European Commission might best ensure ‘case-by-case’ coherence in an enlargement context. After all, it follows an institutional and functional logic to anticipate the Commission’s role as guardian of the treaties, pursuant to which it needs to guarantee the effectiveness of EU law. This argument is particularly pertinent for SSR related elements that fall under the *acquis* criterion but also plays – in view of the increasing legally

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<sup>57</sup> *Ibid*, Article 2, Annex IX on the mandate of the ICR, (c).

<sup>58</sup> M. Karnitschnig, “The United Nations and the European Union in Kosovo – The Challenges of Joint Nation-Building”, in J. Wouters et al. (eds.), *The United Nations and the European Union* (The Hague, 2006), p. 338.

<sup>59</sup> See paragraphs 2 and 3 of Article 2, Annex IX. Thus, the intriguing issue will be the relationship between the ICR and EULEX, especially as there is a clear reluctance for some elements of EULEX to come under the direct authority of the ICR.

<sup>60</sup> P. Doelle and A. Gouzée De Harven, “Security Sector Reform: a Challenging Concept at the Nexus between Security and Development”, in D. Spence and P. Fluri, *The European Union and Security Sector Reform* (London, 2008), p. 51.

<sup>61</sup> C. Gourlay, “Civil- Civil Co-ordination in EU crisis management”, in A. Nowak (ed.), “Civilian crisis management: the EU Way”, 90 *European Institute for Security Studies Chaillot Paper* (2006) p. 105.

enforceable character of also the first Copenhagen criterion – a role for the broader SSR related principles. Furthermore, the EU membership conditionality's underlying *rationale* of protecting present and future integration achievements and aims first and foremost relates to the continuous effective implementation of the Treaties and thus indirectly its guardian.

In this respect, the current conceptualization and implementation of EU membership conditionality is certainly coherent and justified, thus also for the reform of the security sector. Yet, at the same time, there is a danger that the European Union puts its very foundations as a community of law based on the effective adoption and implementation of common rules at risk if it neglects local ownership and therefore an ensured sustainability of reforms particularly in this sector which includes law and law enforcement. The promotion of an early compliance with the *acquis* and rapid institution-building through the combination of direct legislative and executive powers by the representative of the international community with EU membership conditionality needs to be balanced with genuine nationally-owned reforms. The fact that the HR is merged with the position of the EUSR in the potential candidate countries of the Western Balkans might be helpful in this respect. It is also important to ensure the continued and direct involvement of the European Commission in the field of Security Sector Reform in the candidate and potential candidate countries.

# The European Union and Security Sector Reform: From Words to Action?

Antoine Vandemoortele\*

## I. Introduction

The need to reform the security structure of a country in transition or in a post-conflict situation has long been recognized as a key component of democracy assistance and peace building programmes.<sup>1</sup> During the Cold War, however, each security sector (military, police, rule of law, etc.) was considered independently and was to be reformed on its own according to criteria of efficiency.<sup>2</sup> The new post-Cold war environment, and the evolution of peace operations and democracy assistance programmes, both in number, scope and complexity, together with the lessons learned from this new wave of interventions, has brought with it a need to conceptualize security reform in a more holistic manner, and with democratic principles in mind.<sup>3</sup> In this context, the concept of security sector reform, with its emphasis on a holistic view of security reform in order to make the security apparatus more efficient, democratic and accountable, made its way from a policy principle to a practical implementation strategy, both within national donors and international organizations (Brzoska 2003). As such, security sector reform has developed, since the mid 1990s, into a major component of post-conflict reconstruction and assistance in transition towards democracy.<sup>4</sup>

Furthermore, the EU has developed its own SSR strategy, most notably through the production of a Commission SSR concept and an ESDP Paper for Support on SSR activities in 2005 and 2006. Both through ESDP missions (RDC Congo, Guinea-Bissau) and the work of the Commission (DG Relex, DG Development, EuropeAid, DG Enlargement), the EU has begun to operationalize and implement its SSR strategy. The European Union has thereby become an important actor in the field of security sector reform, particularly in the civilian dimension, including border guard management, police, rule of law and prison reforms.

However, despite the growing recognition that the EU is a key element of such interventions, the empirical record is mixed, and varies in terms of its geographical focus, the context in which these reforms operate, and the specific sectors to be reformed. Understanding this discrepancy between “words and deeds” thus appears a key issue in order to promote better, more efficient SSR programmes.

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<sup>1</sup> C. T. Call, “Competing donor approaches to post-conflict police reform”, (2002) 2 *Conflict, Security and Development*. M. Barnett, “Building A Republican Peace: Stabilizing States after War”, 30 *International Security* (2006).

<sup>2</sup> M. Brzoska, “Introduction: Criteria for evaluating post-conflict reconstruction and security sector reform in peace support operations”, 13 *International Peacekeeping* (2006).

<sup>3</sup> A. Bryden, “From Policy to Practice: the OECD's Evolving Role in Security System Reform”, 22 *DCAF Policy Paper* (1997), p. 26. D. Spence and P. Fluri (eds.), *The EU and Security Sector Reform*, (London, 2008).

<sup>4</sup> D. M. Law, “Taking Stock, Moving Forward”, in D. M. Law (ed.), *Intergovernmental Organisations and Security Sector Reform* (Munster, 2007). A. J. Bellamy, “Security Sector Reform: Prospects and Problems”, 15 *Global Change, Peace and Security* (2003).

This paper addresses this issue by presenting a preliminary evaluation of the way in which the European Union has developed its SSR strategy and how it has started to implement it in post-conflict countries and countries in transition towards democracy.

As such the objective of this paper is to highlight both the conceptual and practical dimensions of the EU SSR strategy and analyze its potential and limits with a view of providing some guidelines for future development in this domain.

The paper first presents some key definitions and background information on the SSR and the EU in Section I. The origins and content of security sector reform is described and the role of the EU is presented in greater detail. This initial section also presents the main analytical framework by discussing two key elements of SSR implementation that needs to be addressed to have functioning reforms: local ownership and the holistic approach<sup>5</sup>.

The next section then analyzes the record of the EU in these two dimensions by focusing on three types of SSR activities undertaken by the EU: the reframing under the SSR of some already existing policies, the integration of other policies to bring them in line with SSR principles, and the creation of entirely new instruments and actions that emerged directly from the SSR agenda. This categorization best frames the EU's SSR strategy as a continuum rather than a dichotomous pre/post-SSR strategy. This evaluation is made both in regards to the discourses and documents of the EU, on the one hand, and the practice and implementation record on the other.

The third section summarizes the findings of this preliminary review and highlights some limits of the EU's SSR strategy as well as provides some guidelines for future development of the role of the EU in this domain.

## II. Understanding security sector reform: conceptual development and EU strategy

### A. What is security sector reform?

The concept of security sector reform (SSR) was developed after the end of the Cold War as a possible way to making it more efficient in addressing post-conflict reconstruction and issues of good governance. It was first used in public in 1998 by the then-UK Minister of International Development, Clare Short, to highlight the changing nature of development challenges and policies in the post Cold War era. This reconceptualization of security imperatives and development policies was put on the agenda by the OECD Development assistance Committee (OECD-DAC) with the document published in 1996 "Shaping the 21<sup>st</sup> Century: The contribution of Development Co-operation". The SSR can be defined as a comprehensive framework aimed at the broad democratic transformation of security after conflict has stopped (OECD-DAC). SSR programmes seek to address the effective governance of security in post-conflict and transition environments by transforming the security institutions within a country in order for them to take a more efficient, legitimate and democratic role in implementing security.<sup>6</sup> This includes the democratic control of the military, the redesign of civil-military relations and the professionalization of security services and the judiciary system. In short, this approach seeks nothing less than the reinstitutionalization of the military, police, political and judiciary sectors to foster both internal (citizens) and external (state) security, notably through the full control of state's borders.

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<sup>5</sup> There are other important challenges of SSR, including donor coordination – and in the case of the EU inter institutional cooperation – and the need to be responsive to the reform context. However, for reasons of space and scope, the first dimension, more concerned with the EU itself and not the relation between the EU and the target country, and the second, which can be dealt with in part in relation to local ownership, are left out of this paper.

<sup>6</sup> A. Schnabel and H.-G. Ehrhart (eds.), *Security Sector Reform and Post-Conflict Peacebuilding* (Tokyo 2005).



The Organization for Economic Co-operation and Development (through the Development Assistance Committee, referred to as OECD-DAC), which is a key actor in trying to foster the conceptual debates on security sector reform<sup>7</sup>, has targeted four sectors to be transformed as part of SSR policies: i) core security actors (police, armed forces, border guards, security services), ii) security management bodies (political institutions such as the ministries of defence and internal affairs), iii) justice and law enforcement institutions (judiciary, prisons, traditional justice systems) and iv) non-statutory security forces (private security companies, guerrilla armies).

As Brzoska noted,<sup>8</sup> the practice of reforming different aspects of security was not new, but there was a need to find a term, and define the principles underlying it, for a plethora of phenomena and activities related to reform of the sector of society charged with the provision of security. As such, all the components of the security sector agenda already existed when Short presented the term in public in 1998. What was new with the use of the SSR is the normative understanding that underpinned what a good security should look like, alongside a merging of security and development in transition and post-conflict environments.

Today, the SSR agenda has become quite broad, but still retains its normative focus on the good governance of security and the principles guiding a “good and democratic” security sector. This emerging consensus on key normative principles can be summarized with the proposed SSR Decalogue of norms,<sup>9</sup> which provides for an excellent overview of the norms of SSR.<sup>10</sup> This Decalogue serves to highlight the principles guiding the operational dimension of SSR policies including accountability, transparency and democratic rules within the main security sectors, a national security strategy that highlights the democratic principles of security management, and a focus on security forces that are efficient, inclusive and responsive to the needs of the population.

### ***B. What is the EU SSR strategy?***

To understand the implementation strategy employed by the European Union and their outcomes, it is necessary to take a step back and look at the construction and development of the EU’s SSR strategy.

In Europe, the United Kingdom was the initial leader in the SSR domain.<sup>11</sup> In order to implement its SSR strategy, the UK government created in 2001 two funding pools, the Africa Conflict Prevention Pool and the Global Conflict Prevention pool, that were integrated across the Foreign and Commonwealth Office (FCO), the Department for International Development (DFID) and the Ministry of Defence (MOD). The most visible SSR programme conducted by the UK was in Sierra Leone starting in 1999. The UK has also promoted a comprehensive EU SSR strategy with a

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<sup>7</sup> The OECD has released three key publications to promote SSR: *Helping prevent violent conflict* (2001), *Security system reform and governance* (2005) and *The OECD DAC Handbook on SSR: Supporting Security and Justice* (2007). Starting in 2007, the OECD has also begun to shift its emphasis from the conceptual promotion of SSR to the promotion of SSR implementation. This culminated in the publication of a practical handbook on SSR, a series of training workshops on SSR (ongoing) and in-country consultation activities and practices in the field of SSR (this project begun in 2007 and includes work in Bolivia, Burundi, Central African Republic and Guinea-Bissau). See [http://www.oecd.org/document/19/0,3343,en\\_2649\\_34567\\_40016723\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/19/0,3343,en_2649_34567_40016723_1_1_1_1,00.html) (Last visited 21 November 2008).

<sup>8</sup> M. Brzoska, "Introduction: Criteria for evaluating post-conflict reconstruction and security sector reform in peace support operations" 13, *International Peacekeeping* (2006), p. 3.

<sup>9</sup> See Law, *supra* n. 4, p. 248.

<sup>10</sup> O. Myshlovska, “Overview and Typology of IGO Norms for Security Sector Reform and Governance”, in Law, *supra* n. 4.

<sup>11</sup> See Clare Short’s speech which was the first public use of the SSR concept. “Security, Development and Conflict Prevention”, Speech at the Royal College of Defence Studies, London, 13 May 1998.

workshop in November 2005 when it held the EU presidency.<sup>12</sup> Today, the EU is taking a more proactive approach and has become a leader in SSR.<sup>13</sup> Following the European Security Strategy in December 2003,<sup>14</sup> the Council of the European Union adopted an EU Concept for ESDP Support to Security Sector Reform in November 2005<sup>15</sup>. This document highlights the aim of SSR activities under the ESDP, the internal division of labour expected between the Council and the Commission and the modalities and plan of action concerning the implementation of SSR. This was followed by a similar exercise by the Commission in its document “A concept for European Community Support for Security Sector Reform” in May 2006<sup>16</sup>. Finally, the Council adopted in June 2006 a policy framework that aimed at combining both approaches to SSR into an operational code of conduct<sup>17</sup>. The EU, within the framework of its ESDP crisis management operations (rule of law missions in Iraq and Georgia, police missions in Bosnia-Herzegovina, Palestine, Macedonia and Congo and security sector reform assistance in RDC), has positioned itself as a key actor (in terms of financial resources, personnel involved and political will) involved in the promotion of the debate on security sector reform. It is the world’s largest official development assistance (ODA) donor in the world.<sup>18</sup> Through the new (2007-2013) Instrument for Stability mechanism, the Commission has budgeted 100 million euros for crisis response, compared to a 30 million pool in the previous Rapid Reaction Mechanism in 2006. It has deployed over 11 000 personnel throughout its ESDP missions and it has the political objective, at least in its near abroad, to become the de facto leader in SSR.<sup>19</sup> It is also one of the most ambitious actors in the implementation dimension focusing on the entire dimension of SSR and not only on specific parts of the SSR process (defence reform and NATO for example).

Both documents, the Council and the Commission papers on SSR, share the same principles. They closely reflect the norms, objectives and definitions adopted by the OECD.<sup>20</sup> The Commission mentions four objectives, in accordance to the OECD-DAC guidelines: holistic approach, local ownership, gender mainstreaming and respect of internationally agreed norms<sup>21</sup>. The Council paper describes three principles: local ownership, respect for democratic norms and coherence with other EU external action instruments<sup>22</sup>. Later the document adds that a coordinated and holistic approach is a central component<sup>23</sup>.

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<sup>12</sup> “Developing a common security sector reform strategy for the EU”, Post Seminar Workshop organized by the UK Presidency, European Commission, Saferworld and International Alert, 28 November 2005.

<sup>13</sup> M. Sedra, “European Approaches to Security Sector Reform: Examining Trends through the Lens of Afghanistan”, 15 *European Security* (2006).

<sup>14</sup> The ESS explicitly mentions security sector reform programmes and notes that these should be “part of a broader institution building” strategy. ESS: *A Secure Europe in a Better World – European Security Strategy*, Brussels, 12 December 2003.

<sup>15</sup> Council of the European Union, *EU Concept for ESDP support to Security Sector Reform (SSR)*, Brussels, 13 October 2005. Hereafter called “Council document”.

<sup>16</sup> European Commission, *A Concept for European Community support for security sector reform*, COM(2006) 253 final, Brussels, 24 May 2006. Hereafter called “Commission document”.

<sup>17</sup> European Union, *Council Conclusions on a Policy Framework for Security Sector Reform* (Luxemburg, 2006).

<sup>18</sup> D. M. Law and O. Myshlovska, “The Evolution of the Concepts of Security Sector Reform and Security Sector Governance: the EU perspective”, in Spence and Fluri, *supra* n. 3, p. 13.

<sup>19</sup> *Ibid.*

<sup>20</sup> O. Myshlovska, “Overview and Typology of IGO Norms for Security Sector Reform and Governance”, in Law, *supra* n. 4.

<sup>21</sup> See Commission document, *supra* n. 16, p. 14, see in particular note 12.

<sup>22</sup> See Council document, *supra* n. 15, pp. 4 and 7.

<sup>23</sup> *Ibid.*, pp. 11 and 14.

In terms of its implementation record, the European Union declares that it is undertaking SSR activities in over 70 countries<sup>24</sup>. On closer examination, however, it is possible to distinguish between three aspects of the EU's SSR policies: the reframing under SSR of some already existing policies, the integration of other policies to bring them in line with SSR principles and the creation of entirely new instruments and actions that emerged directly from the SSR agenda. With this new look at the EU's SSR policy, it becomes possible to see that despite some clear progress in this field, the EU has not completely transformed itself and remade the entire scope of its activities in the democracy assistance and post-conflict reconstruction to bring them under the SSR guidelines. A more accurate portrait is that the EU has steadily increased its SSR activities and has tried to foster SSR as a vital tool for its democracy promotion activities. This distinction between the three kinds of EU SSR activities will be used in Section II to analyze the range of implementation practices developed by the EU.

### ***C. What are some important challenges to SSR?***

SSR, especially in the post-conflict context,<sup>25</sup> is a very challenging endeavour as it includes the redesign of a whole set of security institutions and involves an important number of actors, both locally and internationally. On the institutional side, there are issues surrounding the best ways to achieve democratic and efficient security sectors, the need to have an holistic approach that spans the range of institutions involved in the provision of security and, in the case of the EU, bureaucratic and inter-institutional arrangements need to be developed and logistic and competence issues have to be resolved. On the personnel side, the main challenges include local ownership and ways to have local actors participate and buy-in the reform process, the need for international actors to be responsive to the local context and the issue of donor coordination between different international organizations or states. For reasons of space, in this paper I select two challenges, one related to institutions and one that deals with actors, as a first-cut analysis of how the EU responded to these challenges in the implementation phase of its SSR strategy: the need for a holistic approach and the dilemma of local ownership. The issue of holistic approach can also help us understand some aspects of the bureaucratic process of SSR, while the local ownership dimension can be related to the local context of the reform issue. In the next paragraphs, I define in greater detail each challenge.

The concept of local ownership stems from ideas in development circles about the need to ensure that peace building and democracy promotion activities are aimed at empowering local communities and encouraging local participation. In 1996 Chesterman argues that

“the formal embrace of the language of ownership by the multilateral development community came in the policy document ‘Development Partnerships in the New Global Context’, adopted by the OECD'S Development and Assistance Committee (DAC) in May 1995”<sup>26</sup> and later enshrined in the DAC document ‘Shaping the 21<sup>st</sup> century’.

In terms of SSR policies, advocating and promoting local ownership is a key principle recognized by the OECD in its publications on SSR and accepted by the EU as a key principle of its SSR activities (see Commission and ESDP concept for SSR). The UN has also promoted local ownership in the context of peace operations<sup>27</sup>. Yet, defining and implementing local ownership is much more difficult.

There is thus a growing recognition, close to a consensus, that local ownership is an essential issue in democratization assistance in general and that SSR is part of this trend, at least conceptually, toward

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<sup>24</sup> See Commission document, *supra* n. 16, p. 5.

<sup>25</sup> G. Peake, E. Scheye and A. Hills, “Conclusions”, 8 *Civil Wars* (2006), pp.251 - 252.

<sup>26</sup> S. Chesterman, “Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations”, 1 *Journal of Intervention and Statebuilding* (2007), p. 7.

<sup>27</sup> Report to the Secretary General, “Securing Peace and Development: the role of the United Nations in supporting security sector reform”, A/62/659 – S/2008/39, 23 January 2008.

acknowledging the need for more ownership. Not surprisingly, NGOs have been the most active in not only promoting but also acting upon the principles of local ownership.<sup>28</sup> Think-tanks and other political foundations have begun to embrace this notion, but the way that these lessons on local ownership have been learned and implemented remain little understood. International organizations and governments have tended to talk the talk, but with little systematic real life engagement with local ownership.<sup>29</sup>

However, despite this emerging consensus, little has been said about the move from policy principle to actual implementation and the variations between the ideas and practice of local ownership. There are some ad hoc, case study analyses to be found, but none engage both the principle and the practice of local ownership in a systematic fashion. Brzoska (2006; 11) mentions that

“currently, the security sector reform debate reflects a disparity characterized by a long list of general recommendations of what could and should be done, on one side, and a shorter list of concrete suggestions based on a thorough analysis of the problems in a particular post-conflict situation on the other side.”

The paradox of local ownership that emerges from this discussion is that local ownership is seen as essential in principle, yet remains an elusive target in the implementation phase. The challenges of local ownership that international face are thus related to the kind of local actors to involve, the timing of ownership, the means and resources through which ownership is practiced and applied. It is thus best to understand local ownership as both a process and as an outcome. It is a process because local ownership needs to be constantly updated and redone during the operation to maximize local participation and it is an outcome in the sense that it is the end point, the exit strategy for international actors.<sup>30</sup> Understanding how local ownership is seen and implemented within the EU's SSR activities will provide more data on potential ways of resolving the challenges of local ownership.

On the other hand, the need to have an holistic view is also a key part of SSR and one of the reasons behind the development of a SSR concept. It reflects the lessons learned in the development and security communities about the need to address the security sectors as a whole in order to be effective. A simple example can illustrate this. If a police reform has been successfully implemented, there will be less corrupt and inefficient police officers and more criminals will be arrested and brought to justice, and eventually be put in jail. Yet, if the judiciary has not been reformed, those criminals can bribe their way out. If they fail to do so, a dysfunctional prison system might be their other way back on the streets. The recognition that each security sector is linked to one another is again widely accepted in principle, but remains lacking in its practical implementation in a similar way as the local ownership dilemma.

The challenges of an holistic approach are thus of a different nature. They concern institutional dynamics, such as cooperation between different international organizations or governments, within different departments of a single country or, in the case of the EU, between member-states, the Council and the Commission. Understanding how the EU addresses these institutional challenges is the second goal of this project.

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<sup>28</sup> Through the Initiative for peacebuilding, <http://www.initiativeforpeacebuilding.eu/>, 10 civil society organizations are helping to build EU capacity in this domain.

<sup>29</sup> See Chesterman, *supra* n. 26.

<sup>30</sup> J. Narten, "Post-Conflict Peacebuilding and Local Ownership: Dynamics of External - Local Interaction in Kosovo under United Nations Administration", 2 *Journal of Intervention and Statebuilding* (2008). Chesterman, *supra* n. 26. R. Caplan, "After Exit: Successor Missions and Peace Consolidation", 8 *Civil Wars* (2006).

### **III. Implementing SSR: challenges and EU responses**

The first two sections presented general views and information on the conceptual development of SSR and the challenges associated with its implementation, alongside a more detailed analysis of the role of the EU in this domain. This section provides a preliminary analysis of the way the EU has responded to two challenges of SSR, local ownership and holistic approach issues, concerning three types of EU SSR activities. As mentioned before, the Commission in its SSR document notes that it is involved in over 70 countries,<sup>31</sup> while the EU has also over 20 ESDP missions in 14 countries.<sup>32</sup> These approximately 70 countries constitute the complete universe of cases in which the EU is active in crisis management, post-conflict reconstruction and security sector reform. However, not all of these cases have received the same support and attention and not all ESDP missions fall under SSR activities. The development of an EU SSR strategy should then be seen as a continuum, and it should be noted that the EU has a) reframed some activities to fit with its new SSR strategy b) integrated policies to match the development of an SSR framework of c) created new instruments to adequately reflect the practice of SSR. How each of these SSR activities fared in relation to the two challenges under study is the question I turn to in the next paragraphs.

#### ***A. Reframing existing strategies***

Two elements of the various EU activities that have been reframed in order to fit within the current SSR agenda are the pre-accession strategies found in the CARDS and IPA programmes and the police missions under ESDP.

Firstly, the CARDS (Community assistance for reconstruction, development and stabilisation) and the IPA (Instrument for Pre-Accession) programmes represent the main EU tools for dealing with candidate and potential candidate countries in South Eastern Europe.<sup>33</sup> However, both CARDS and IPA are conceived using a project-specific approach, with specific tailored projects addressing issues ranging from justice reform to social development, and including democratic stabilisation and environment policies for each targeted country. In short, these programmes are both wider than security sector reform oriented projects, but they work without the coordinated sectors dimension that is central to SSR.

Related to ESDP and police missions, the Council, in its SSR concept paper, acknowledged that these are “not specifically for SSR”, but that they contribute to SSR commitments (p. 10). This represents a

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<sup>31</sup> In the African, Caribbean and Pacific region, the EC is involved in “at least” the following countries: Angola, Benin, Burkina Faso, Burundi, Cameroon, Comoros, Dominican Republic, Democratic Republic of Congo, Eritrea, Fiji, Guinea Bissau, Equatorial Guinea, Guinea Conakry, Haiti, Ivory Coast, Jamaica, Kenya, Liberia, Madagascar, Malawi, Mauritius, Mozambique, Niger, Nigeria, Republic of Congo, Rwanda, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sudan, Somalia, Chad, Togo, Vanuatu and Uganda. In the Western Balkans, the beneficiaries are Albania, Bosnia-Herzegovina, Croatia, Serbia, Montenegro, Kosovo and the Former Yugoslav Republic of Macedonia. In Eastern Europe and Central Asia, the target countries are Armenia, Azerbaijan, Belarus, Moldova, Georgia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine and Uzbekistan. In the Middle East and Mediterranean region, the recipients are Algeria, Egypt, Jordan, Morocco, Tunisia, the Palestinian Authorities and Yemen. In Asia, Afghanistan, Indonesia, Laos, Nepal, the Philippines and Vietnam receive Community support. Finally, in Latin America, Colombia, El Salvador, Guatemala, Mexico, Nicaragua, Panama and Uruguay received SSR support. This list summarizes the Annex I of the Commission document, *supra* n. 16.

<sup>32</sup> These missions are or were located in the following countries. In Africa: Guinea-Bissau, DR Congo, Chad, Sudan. In the Balkans: Kosovo, Bosnia-Herzegovina and the Former Yugoslav Republic of Macedonia. In the Middle East: Iraq, Palestinian Authorities. In the Caucasus and Eastern Europe: Georgia and Ukraine-Moldova. In Asia: Afghanistan and Indonesia (Aceh).

<sup>33</sup> The IPA covers the period 2007-2013 and officially replaced the CARDS programme, which covered the 2000-2006 period. See Council Regulation (EC) 1085/2006 – for the IPA – and Council Regulation (EC) 2666/2000 – for CARDS.

clear example of policies that are neither new nor integrated, but that the EU nevertheless puts in the same categories of SSR achievements.

However, both these policies subsumed under SSR suffer from this non-integrated practice relating to local ownership and holistic approach. On the need for an holistic approach, it is clear that as these policies are project-focused for CARDS/IPA or sector-specific in the case of ESDP missions, they do not reflect the engagement with a cross-sector approach. As to local ownership, it is clear that issue of conditionality and norms/best practices limit the range of possible engagement with local actors. The latter case of norms/best practices being imposed upon from a top-down perspective is evident in the context of the Bosnian police restructuring, where international pressure and a large footprint to European norms of best policing means had important effects on the process of reform and the adoption of the new police laws by the Bosnian Parliaments in April 2008.<sup>34</sup>

### ***B. Integrating policies***

A second way of dealing with SSR in the context of the EU is to integrate a series of existing activities under a single framework which best puts into action the principles and norms of SSR. A recent example of this is the new Instrument for Stability. The Instrument for Stability (IfS) is a financial instrument for the European Commission activities in crisis and post-crisis management adopted in 2007 which aims to address security and development related issues through both short and long term commitments.<sup>35</sup>

In the case of the IfS, it is clear that the normative underpinning of norms and the local ownership/holistic approach factors are taken into consideration. As such, it provides for a more strategic way of dealing with existing policies while developing a new global concept for security and development, in this case SSR. In particular, the organized crime dimension reflects a concern for a more holistic approach in addressing this rule of law dimension. The question of local ownership is more difficult to assess, but it is evident that it lags behind compared to the cross-sector dimension.

### ***C. Developing new instruments for SSR***

A third and final aspect of the implementation of EU SSR activities is the creation of new SSR specific policies. For example, the EU has created and launched ESDP missions that focus on SSR: two missions in DRC and one in Guinea-Bissau. EUPOL RD Congo deals with police reform activities while the EUSEC mission (European Union Security Sector Reform Mission in Congo) provides for military assistance.<sup>36</sup> The focus on military and police reform in DRC is complemented in the justice sector by a Commission initiative in 2005 on a justice audit mission. In Guinea-Bissau, the EU SSR mission was launched in 2008 for an initial period of 12 months and with the objective of assisting local authorities in the implementation of the National Security Sector Reform Strategy.<sup>37</sup>

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<sup>34</sup> T. Muehlmann, "Police Restructuring in Bosnia-Herzegovina: Problems of Internationally-led Security Sector Reform", 2 *Journal of Intervention and Statebuilding* (2008).

<sup>35</sup> Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability, *OJ* 2006 L 327/1.

<sup>36</sup> Respectively Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo), *OJ* 2007 L 151/47, and Council Joint Action 2005/355/CFSP of 2 May 2005 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC), *OJ* 2005 L 112/20.

<sup>37</sup> Council Joint Action 2008/112/CFSP of 12 February 2008 on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU), *OJ* 2008 L 40/11.

On the issue of an holistic approach, it is clear that it represents a clear focus for the new Guinea-Bissau, with its focus on implementing the National Strategy and the role of local authorities and civil society in this process. In the case of the DRC, this cross-sector focus is also present in theory, but problems have plagued the mission up to a point where 2007 was described as lost year for SSR.<sup>38</sup> Melmot also concludes that many problems that affect DRC SSR programmes stem from its image as an imported tool by the EU and other international actors, and it fails to accommodate the diversity of local actors' perspectives and objectives in the domain of security. While, it is too soon to analyze in-depth the Guinea-Bissau, two mixed signals can be singled out to map out some of the contours of this SSR process. First, EU assistance for SSR is set within the context of the National Strategy which was adopted in November 2006 by the national government and thus seems a promising point in the direction of more local ownership. However, the key benchmark for evaluating SSR should not only be seen within the context of adopting policy documents, but also, and more importantly, in their implementation processes. In this regard, the decision by the EU to postpone the initial report, due 6 months after the launch of the mission in May 2008, until February 2009 raises some questions about the speed and effectiveness of the process. It would be premature to judge this mission at the moment, but these two elements will need to be taken into consideration for later analysis.

#### **IV. Reflections on the practice of SSR: a preliminary evaluation of the EU role**

Following this presentation of the EU SSR record, which due to the novelty of the EU SSR policies should be considered only a preliminary analysis, I conclude with a short discussion of the merits and limits of the implementation practices of the EU.

Although there are several other elements that influence the processes and impacts of SSR programmes, such as EU-UN cooperation, local context, donors' interests and resources, I have attempted to illustrate that two key dimensions are local ownership and holistic approach/cross-sector coordination and that they have been widely acknowledged in EU policies and documents. Yet, what I have also tried to demonstrate is the extent of the gap between words and action or, put slightly differently, the degree to which these concerns for local ownership and cross-sector coordination have been put into practice and in the implementation processes of EU SSR activities.

Three comments on the degree and extent of this gap are in order to conclude this paper. They concern respectively the i) difference between a variety of EU SSR activities; ii) difference between local ownership and holistic approach challenges; iii) the way forward.

First, while there is a general trend in EU efforts in dealing with local ownership and holistic coordination, the impacts vary depending on the type of EU strategy: a reframed policy, an integrated policy and new policies. In the case of reframing, little attention has been paid to these challenges and the gap remains. For the new policy instruments, despite the efforts deployed, the difficulties in implementing SSR, particularly in Congo, and addressing local ownership are still present. This might be due to the context of the reforms, but it is also in part attributable to the design of these policies. Surprisingly, however, the policies that were integrated such as the Instrument for Stability proved to be more adequate tools in closing these gaps between policy and practice. Some of the factors that might explain this is a close attention to local ownership and holistic approach issues, but within a context of existing policies where EU actors have a good deal of experience and knowledge and can adapt and tailor the policies to the normative underpinning of SSR.

Secondly, there is evidence on the ground, for example in the attempts at SSR in DRC and Guinea-Bissau, to tackle more effectively the cross-sector dynamic. In the two cases, military, justice and

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<sup>38</sup> S. Melmot, *Candida au Congo: L'échec annoncé de la réforme du secteur de sécurité (RSS) - Focus Stratégique* (Paris, 2008), p. 31.

police reforms were taken into consideration while implementing the processes of SSR. This stands in contrast with the issue of local ownership which has not been addressed as thoroughly in practice, even though it remains an important rhetorical commitment. Two factors might account for this discrepancy. First, dealing more effectively with cross-sector coordination requires a change in the design of policy instruments, which is much easier than the change of approach and mentality that is needed to interact, understand and work with local actors. Secondly, as a rhetorical commitment, local ownership is well understood and used, but as a practical strategy, the concept does not have a clear meaning. With whom should the EU and international actors engage in transition and post-conflict environments, how should they do it? These questions, and many others, have not yet been answered, and as long as the meaning of what it is to do local ownership practically, and the costs, consequences and impacts of these international-national-local interactions are not understood, local ownership will remain an elusive target.

Finally, on the issue of the road ahead, I have mentioned several times that due to the recent focus on SSR in EU policy documents and practice, a full evaluation or analysis could not be undertaken. Nevertheless, the merits and limits of the EU SSR implementation strategy can be summed up in two lessons. First, a better understanding of local ownership and what it entails is needed. The EU can draw on its experience and expertise with local NGOs as a starting point for these more bottom-up dynamics of SSR. Secondly, better tools for ongoing evaluations of SSR processes, in order to see the problems as soon as possible, are a cost-effective and efficient way of dealing with the many pitfalls and challenges that will inevitably surface during the implementation. The new tool for in-mission evaluation, the programmatic approach, adopted by EULEX in Kosovo is a step in that direction.<sup>39</sup>

In other words, a key concern to bridge the gap between words and action remains adaptation to the context, the type of policies and the needs and diversity of actors involved. This is indeed a complex strategy, but as the European Union moves forward as an actor in world politics it will need to face these challenges, and adaptation will be essential.

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<sup>39</sup> <http://www.eulex-kosovo.eu/?id=27> (Last consulted November 21 2008).