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THE EUROPEAN COMMISSION AND THE ESTABLISHMENT OF THE EUROPEAN NEIGHBOURHOOD POLICY: A CASE-STUDY FOR INSTITUTIONALIST ANALYSIS?

Abstract: *Despite the mushrooming literature on the European Neighbourhood Policy (ENP) and its numerous problems, little attention has been given to the analysis of its origins. Upon examining the scholarship, two contending explanations emerge regarding the policy's formulation stage. While one perspective maintains that the policy was influenced by the European Commission's past experience, the other highlights how the policy was affected by the European Commission's desire to expand its powers vis-à-vis other European Union (EU) actors. Against this backdrop, this paper first seeks to frame both perspectives in theoretical terms. Then, through process-tracing analysis and elite interviews, it aims to determine which theoretical model not only better explains the structure of the Neighbourhood Policy, but also evaluates the nature of the interaction between European Union Member States and the European Commission throughout the policy's formulation stage. In doing so, the paper seeks to expand our knowledge of the ENP's genesis, as well as highlight the efficacy of institutionalist analysis of the European Neighbourhood Policy.*

Keywords: European Commission, delegation, European Neighbourhood Policy, principal-agent, historical institutionalism

INTRODUCTION

The European Neighbourhood Policy (ENP) is one of the most aspiring foreign policy endeavours the EU has ever launched. Its geographical scope includes 16 countries from Eastern Europe, Southern Caucasus, North Africa, and the Middle East,¹ and covers almost every field of cooperation between the EU and a third country –

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¹ Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine.

among which are Political Dialogue, Justice and Home Affairs, Common Foreign and Security Policy, and the Internal Market. The policy's vision "involves a ring of countries, sharing the EU's fundamental values and objectives, drawn into an increasingly close relationship, going beyond co-operation to involve a significant measure of economic and political integration."²

Given its ambitious objectives, its significance in defining the EU's role in the neighbourhood, and the fact that it is still a policy "in progress", it comes as little surprise that the ENP has attracted the attention of numerous EU scholars. Still, there is one overarching motif that is present in most ENP studies; that is, the excessive focus on the EU's problems in implementing the policy. Weak incentives, vague objectives, and the strange mixture of partners are just a few problems mentioned so as to describe EU's failed attempts to influence its surroundings. Consequently, policy, legal, and theory-guided ENP contributions typically aim to identify the ENP's flaws, measure its (in)effectiveness, offer solutions, or present future scenarios.³

Nonetheless, I argue that despite the ENP's problems playing such a prominent role in the existing literature, it is rather surprising how little attention has been paid to the early days of the ENP's development. Here I do not refer to the reasons behind the creation of the policy⁴ but rather to the decision-making process and policy considerations that influenced the way the ENP was designed.

Which considerations guided the European Commission's (Commission) decision to construct the ENP in such a way? To what extent did the Commission and EU Member States (MSs) cooperate during the evolution of the policy? And how can we evaluate the interaction between both actors and its effect on the ENP formulation process? These are important questions that need further elaboration.

² European Commission, *European Neighbourhood Policy – Strategy Paper*, 12 May 2004, COM(2004) 373 final, available at: <https://eur-lex.europa.eu/EN/legal-content/summary/neighbourhood-policy-strategy-paper.html#:~:text=This%20document%20maps%20out%20the%20next%20steps%20in> (accessed 30 August 2024).

³ E.g. S. Blockmans, *The Obsolescence of the European Neighbourhood Policy*, Centre for European Policy Studies, Brussels: 2017; M. Emerson, G. Noutcheva, N. Popescu, *European Neighbourhood Policy Two Years on: Time indeed for an ENP Plus*, Centre for European Policy Studies, Brussels: 2007; C. Hillion, *The EU neighbourhood competence under Article 8 TEU*, Policy Paper No. 69/2023, available at: <https://institutdelors.eu/wp-content/uploads/2020/08/euneighbourhoodart8teu-hillion-ne-jdi-feb13-3.pdf> (accessed 30 August 2024); A. Hyde-Price, *A 'tragic actor'? A realist perspective on 'ethical power Europe'*, 84(1) *International Affairs* 29 (2008); D. Kochenov, *New developments in the European Neighbourhood Policy: Ignoring the problems*, 9 *Comparative European Politics* 581 (2011); S. Lavenex, *EU external governance in wider Europe*, 11(4) *Journal of European Public Policy* 680 (2004); M. Leigh, *The European Neighbourhood Policy: A Suitable Case for Treatment*, in: S. Gstohl, E. Lannon (eds.), *The Neighbours of the European Union's Neighbours: Diplomatic and Geopolitical Dimensions Beyond the European Neighbourhood Policy*, Routledge, London: 2015, pp. 203–226; T. Schumacher, *The EU and its Neighbourhood: The Politics of Muddling Through*, 58(1) *Journal of Common Market Studies* 187 (2020); K. Wolczuk, T. Gamkrelidze, A. Tyushka, T. de Waal, *Formulating Proposals for a More Effective Engagement with Neighbourhood Regions*, ENGAGE, Barcelona: 2024.

⁴ In other words, why (for security reasons, substitute for enlargement, etc.) did the EU launch the policy? Essentially, this topic has been covered extensively by the existing literature.

After all, if it is a common practice to criticise the ENP, should we not pay more attention to the time-period in which the policy was planned and to the interaction between the actors responsible for its design?

Principally, the literature on the subject offers two prominent views of the ENP's formulation stage. On the one hand, scholars argue that the way the Commission designed the ENP was based on its previous experience in managing enlargement. On the other hand, others suggest that the ENP was influenced by the Commission's bureaucratic self-interest to strengthen and expand its role vis-à-vis EU actors in the intergovernmental-protected domain of EU foreign policy.

Against this background, this article sets out to conceptualise both standpoints in theoretical terms. Next, based on process-tracing and triangulation of data sources,⁵ it seeks to scrutinise the efficacy of both theoretical models in explaining the ENP's design as well as the actors' interaction during the ENP formulation stage. In so doing, the article not only contributes to our understanding of the early days of the initiative, but also to the theoretical body of literature on the ENP, which so far has been dominated by policy-oriented studies – in the words of Kratochvíl and Tulmets: “Only a handful of authors have so far tried to couple the research on the policy to the theoretical debates in the field of international relations and EU studies.”⁶

Following this introduction, the remainder of the article is structured as follows. The first part presents the theoretical framework of this article. The second part examines the emergence of the policy and its scope. Thereafter, the third part elaborates on the ENP's design, while the fourth part focuses on the Commission's negotiations with ENP partners. The article ends with some concluding remarks.

1. THEORISING THE ENP FORMULATION STAGE

As aforementioned, the literature surrounding the ENP accentuates two explanations concerning the initiative's formulation stage. For the purpose of this study, the formulation stage begins in January 2002 when the British Secretary of State raised the idea of establishing a policy towards Eastern Europe and triggered the process that led to the launch of the ENP.⁷ It subsequently ends in May 2004 when the ENP Strategy Paper was introduced.⁸ Now, how can we frame both standpoints in theoretical terms?

⁵ The data for this study was collected from official EU Communications, secondary sources, and elite interviews.

⁶ P. Kratochvíl, E. Tulmets, *Constructivism and Rationalism in EU External Relations. The Case of the European Neighbourhood Policy*, Nomos, Baden-Baden: 2010, p. 9.

⁷ J. Straw, *EU's relationship with its future neighbours following enlargement (Ukraine, Belarus and Moldova)*, Letter 7703/02, 2002/04, available at: <https://data.consilium.europa.eu/doc/document/ST-7703-2002-INIT/en/pdf#:~:text=Reform%20momentum%20in%20Ukraine%20and%20Moldova%20is%20uncertain> (accessed 30 August 2024).

⁸ European Commission, *supra* note 2.

1.1. The ENP through a historical institutionalist lens

Various analysts⁹ indicate that the ENP's design was inspired by the Commission's vast experience in dealing with enlargement and pre-accession policies. Correspondingly, the ENP's strong resemblance to past policy templates has led scholars to apply Historical Institutionalism (HI) to their analyses. Principally, HI is one school of thought (together with Sociological Institutionalism and Rational Choice Institutionalism) situated under the umbrella of new institutionalism.¹⁰ Generally speaking, new institutionalists emphasise the importance of institutional values and argue that we cannot separate formal institutional rules from their normative context.¹¹ While placing the analytical focus on the polity, the presumption of new institutionalists is "that the polity structures the inputs of social, economic and political forces and has a consequential impact on the policy outcome."¹² Thus, central to new institutionalism is the belief that institutions, as actors in their own right, affect outcomes and shape actions.¹³

In their attempt to develop explanatory arguments concerning policy outcomes, HI scholars maintain that not only do institutions matter, but that the time factor and macro-context are also of great importance. HI scholars see the relationship between institutions and agents as more than just functional-based interaction, and thus posit that "by shaping not just actors' strategies (as in rational choice), but their goals as well (...) institutions structure political situations and leave their own imprint on political outcomes."¹⁴ Moreover, HI studies are "not just looking at the past, but [are] looking at processes over time."¹⁵

⁹ C. Gebhard, *The ENP's Strategic Conception and Design. Overstretching the Enlargement Template?*, in: R. Whitman, S. Wolff (eds.), *The European Neighbourhood Policy in Perspective – Context, Implementation and Impact*, Palgrave Macmillan, Hampshire: 2010, pp. 89–109; J. Kelly, *New Wine in Old Wineskins: Policy Adaptation in the European Neighbourhood Policy*, 44(1) *Journal of Common Market Studies* 29 (2006); A. Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?*, 12(2) *The Columbia Journal of European Law* 383 (2006).

¹⁰ P. Hall, R. Taylor, *Political Science and the Three New Institutionalisms*, 44(5) *Political Studies* 936 (1996), p. 936.

¹¹ S. Bulmer, *The Governance of the European Union: A New Institutional Approach*, 13(4) *Journal of Public Policy* 351 (1998).

¹² *Ibidem*, p. 369.

¹³ M. Aspinwall, G. Schneider, *Same menu, separate tables: The institutionalist turn in political science and the study of European integration*, 38(1) *European Journal of Political Research* 1 (2000). See also G.J. March, J.P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78(3) *The American Political Science Review* 734 (1984), p. 734.

¹⁴ K. Thelen, S. Steinmo, *Historical Institutionalism in Comparative Politics*, in: S. Steinmo, K. Thelen, F. Longstreth (eds.), *Structuring Politics: Historical Institutionalism in Comparative Analysis*, Cambridge University Press, Cambridge: 1992, p. 9.

¹⁵ P. Pierson, T. Skocpol, *Historical Institutionalism in Contemporary Political Science*, in: I. Katznelson, H.V. Milner (eds.), *Political Science: State of the Discipline*, W.W. Norton, New York: 2002, p. 698.

In the context of continuity, deeply embedded in historical institutionalist thought is the notion that institutions are resistant to change. Therefore, a key concept in HI is path-dependence, whereby “[o]nce actors have ventured far down a particular path (...) they are likely to find it very difficult to reverse course.”¹⁶ Path-dependence processes are usually stimulated by self-reinforcing positive feedbacks that create incentives for institutions to stick with existing policies.¹⁷ These positive feedbacks for a particular policy choice are exactly why HI pays so much attention to time, as “[r]elative timing, or sequence, matters because subsequent self-reinforcing processes (...) transform the consequences of later developments.”¹⁸

Finally, concerning institutional change, HI tends to divide historical events “into periods of continuity punctuated by ‘critical junctures’, i.e., moments when substantial institutional change takes place thereby creating a ‘branching point’ from which historical development moves onto a new path.”¹⁹ Still, some HI scholars posit that it is insufficient to examine institutional change solely through the lens of “critical junctures” and “path-dependence”. Instead, it is argued that “[t]here is nothing automatic about institutional stability” as “institutions require active maintenance (...) in response to changes in the political and economic environment in which they are embedded.”²⁰ Accordingly, Streeck and Thelen²¹ identify various strategies/mechanisms that institutions and policymakers could utilise in order to generate gradual transformative change in an environment dominated by status-quo bias.

In light of the aforementioned, we need to provide some theoretical predictions concerning the ENP formulation stage. First, we envisage that the formulation stage was affected by path-dependence processes. Therefore, we can predict that the Commission, influenced by positive feedbacks, will create a policy that has a close resemblance to previous successful policies. Moreover, we can expect that path-dependence processes will not only affect the Commission’s policy choices, but also its behaviour throughout the formulation process. Still, we can also assume that the Commission, beyond the somewhat passive impact of path-dependence, will be more active in using different strategies in order to adapt to the new realities following the emergence of the new policy.

¹⁶ *Ibidem*, p. 700.

¹⁷ P. Pierson, *Politics in Time: History, Institutions, and Social Analysis*, Princeton University Press, Princeton: 2004.

¹⁸ Pierson, Skocpol, *supra* note 15, p. 701.

¹⁹ Hall, Taylor *supra* note 10, p. 942.

²⁰ W. Streeck, K. Thelen, *Introduction: Institutional Change in Advanced Political Economies*, in: W. Streeck, K. Thelen (eds.), *Beyond Continuity: Institutional Change in Advanced Political Economies*, Oxford University Press, Oxford: 2005, p. 3.

²¹ *Ibidem*. See also J.S. Hacker, P. Pierson, K. Thelen, *Drift and conversion: hidden faces of institutional change*, in: J. Mahoney, K. Thelen (eds.), *Advances in Comparative-Historical Analysis*, Cambridge University Press, Cambridge: 2015, pp. 180–210.

1.2. The ENP through a principal-agent lens

Some ENP scholars²² posit that the ENP was constructed by the Commission in a way that accords with its interests and aspirations for a greater role in EU foreign policy. Yet, ENP contributions usually do not offer a theoretical framework for this standpoint. Thus, I maintain that Principal-Agent (PA), as an institutional approach with a strong focus on actors' interests and power relations, allows us to evaluate the ENP's development and scrutinise the interaction between the Commission and the MSs.

The PA theory was conceived in the study of economics²³ and was firstly applied to political science to examine American politics.²⁴ Essentially, PA revolves around the relationship between principals and agents. This relationship is defined as a situation in which "one, designated as the agent, acts for, on behalf of, or as representative for the other, designated the principal, in a particular domain of decision problems."²⁵ PA, as a theoretical framework strongly associated with the rational choice school of thought, views this relationship as functional. As such, there are various reasons why principals choose to engage in a relationship with an agent, *inter alia* to reduce transaction-costs, enhance the credibility of policy commitment, improve the efficiency of the decision-making process or shift blame for unpopular decisions.²⁶ For instance, in the context of transaction-costs and decision-making, principals could delegate competences since they lack information or technical expertise. As Mark Thatcher and Alec Sweet²⁷ explain: "[a]gents are expected to develop and employ expertise in order to produce, or help principals produce appropriate public policy."

²² E. Johansson-Nogués, *The EU and its neighbourhood: an overview*, in: K. Weber, M. Smith, M. Baun (eds.), *Governing Europe's Neighbourhood: Partners or Periphery?*, Manchester University Press, Manchester: 2007, pp. 21–35; J. Pelerin, *The ENP in Interinstitutional Competition – An Instrument of Leadership for the Commission?*, in: D. Mahncke, S. Gstöhl (eds.), *Europe's Near Abroad: Promises and Prospects of the EU's Neighbourhood Policy*, Peter Lang, Brussels: 2008, pp. 47–67.

²³ M. Berhold, *A Theory of Linear Profit-Sharing Incentives*, 85(3) *Quarterly Journal of Economics* 460 (1971), pp. 460–482; S. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63(2) *The American Economic Review* 134 (1973).

²⁴ D. Epstein, S. O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38(3) *American Journal of Political Science* 697 (1994); M.D. McCubbins, R.G. Noll, B.R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3(2) *Journal of Law, Economics, & Organization* 243 (1987).

²⁵ Ross, *supra* note 23, p. 134.

²⁶ M. Pollack, *Delegation, agency, and agenda setting in the European Union*, 51(1) *International Organization* 99 (1997); J. Tallberg, *Delegation to Supranational Institutions: Why, How, and with What Consequences?*, 25(1) *West European Politics* 23 (2002); M. Thatcher, A. Stone Sweet, *Theory and practice of delegation to non-majoritarian institutions*, 25(1) *West European Politics* 1 (2002).

²⁷ Thatcher, Stone Sweet, *supra* note 26, p. 4.

PA's initial standpoint views the agent as an opportunistic actor that tries to pursue its interests rather than the interests of its masters.²⁸ In so doing, the agent will attempt to use different strategies and exploit different advantages to achieve its goals. Consequently, the principals might face problems (i.e., "agency losses"), as the agents' shirking could "enact outcomes different from the policies preferred by those who originally delegated power."²⁹

With that in mind, the principals try to avoid agency losses by establishing various control mechanisms before (*ex-ante*), during (*ad-locum*) and after (*ex-post*) the act of delegation. First, *ex-ante* control is put in place before the delegation act and associated with matters of agency design and various administrative procedures.³⁰ Second, *ex-post* control refers to on-going control mechanisms. Following Mathew McCubbins & Thomas Schwarz,³¹ *ex-post* mechanisms are usually categorised as "police-patrol oversight" (active and direct monitoring) or "fire-alarm oversight" (third parties' monitoring). Third, the *ad locum* control mechanism is exerted by the principals during the delegated act. Put differently, it is "not deployed before or after the agent executed the delegated task, but simultaneously with the fulfilment of this task."³²

Now the question arises as to how PA's assumptions can be applied to the ENP. First, I conceptualise the relationship between the Commission and the MSs as a PA relationship, where the Commission is the agent in charge of designing the policy while the MSs act as principals. Second, based on the PA's standpoint concerning agency behaviour, we should expect that during the ENP formulation stage the Commission would attempt to use various strategies while pursuing its own interests. In this context, we also assume that the Commission, as a supranational institution, is not only a competence-maximiser but also an integrationist agent, as it seeks "to increase [its] own competences and more generally the competences of the European Union."³³ In the subsequent parts of the article, I explore whether the analysis verifies both HI and PA's assumptions with respect to the initiative's formulation stage.

²⁸ D. Kiewiet, M. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process*, University of Chicago Press, Chicago: 1991.

²⁹ Epstein, O'Halloran, *supra* note 24, p. 699.

³⁰ *Ibidem*.

³¹ M. McCubbins, T. Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 American Journal of Political Science 165 (1984).

³² T. Delreux, B. Kerremans, *How Agents Weaken their Principals' Incentives to Control: The Case of EU Negotiators and EU Members in Multilateral Negotiations*, 32(4) Journal of European Integration 357 (2010), p. 361.

³³ M. Pollack, *The Engines of European Integration – Delegation, Agency, and Agenda Setting in the EU*, Oxford University Press, Oxford: 2003, p. 35. See also G. Garrett, G. Tsebelis, *An Institutional Critique of Intergovernmentalism*, 50 International Organization 269 (1996).

2. THE ENP AS A COMPETENCE BOOST

The first issue to be inspected is related to the emergence of the initiative and its general scope. Essentially, various studies maintain that the Commission used the ENP to expand its own competences. Rosa Balfour,³⁴ for example, posits that “[t]he ENP represents an attempt by the Commission to muscle its way into EU foreign policy.” Similarly, Dimitry Kochenov argues that the ENP helped the Commission “to justify and consolidate its role in the shaping of EU foreign policy.”³⁵

Additionally, while the initial discussions regarding the initiative focused on Eastern Europe (Belarus, Moldova and Ukraine³⁶), the Commission’s President, Romano Prodi, underlined the need “to address the whole band of regions around the Union, stretching from the Maghreb to Russia.”³⁷ As such, Johansson-Nogués³⁸ contends that it was the Commission that “significantly broadened a previously modest policy into a strategy, insisting on a creation of a ‘ring of friends’ around the EU-23’s outer border.” By the same token, Dov Lynch³⁹ claims that ENP’s geographical scope was expanded “at Prodi’s insistence, it would seem”, whereas Federica Bicchì⁴⁰ asserts that “it was apparently him [i.e., Prodi] that took the front of the stage in spearheading the inclusion of the Mediterranean countries.”

Finally, several scholars maintain that the Commission managed to take control over the ENP because the MSs were preoccupied with other matters and did not pay much attention to the emerging policy. Johansson-Nogués,⁴¹ for example, posits that the General Affairs and External Relations Council (GAERC) “only gave cursory treatment to the new neighbourhood initiative. Accession negotiations with the Eastern candidate countries were at a decisive stage and took precedent

³⁴ R. Balfour, *Promoting human rights and democracy in the EU’s neighbourhood: tools, strategies and dilemmas*, in: R. Balfour, A. Missiroli (eds.), *Reassessing the European Neighbourhood Policy*, EPC, Brussels: 2007, p. 15.

³⁵ D. Kochenov, *The European Neighbourhood Policy: Pre-Accession Mistakes Repeated*, in: E. Tulmets, L. Delcour (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood*, Nomos, Baden-Baden: 2008, p. 12.

³⁶ See e.g., Straw, *supra* note 7; 2421st Council meeting (General Affairs and External Relations), Luxembourg, 15 April 2002.

³⁷ R. Prodi, *Europe and the Mediterranean: Time for Action*, Speech at UCL Université Catholique de Louvain-la-Neuve, EuroMed Report, 26 November 2002. See also R. Prodi, *A Wider Europe – A Proximity Policy as the Key to Stability*, Speech at the Sixth ECSA-World Conference, 5 December 2002, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_619 (accessed 30 August 2024).

³⁸ Johansson-Nogués, *supra* note 22, p. 26.

³⁹ D. Lynch, *The new Eastern Dimension of the enlarged EU*, in: J. Batt, D. Lynch, A., Missiroli, D. Triantaphyllou (eds.), *Partners and Neighbours: A CFSP for a Wider Europe*, European Union Institute for Security Studies, Brussels: 2003, p. 49.

⁴⁰ F. Bicchì, *European Foreign Policy Making toward the Mediterranean*, Palgrave MacMillan, Hampshire: 2007, p. 177.

⁴¹ Johansson-Nogués, *supra* note 22, p. 25.

over most other matters.” In the same vein, William Wallace⁴² argues that the MSs were “[p]reoccupied with tying up the last elements of the accession package [and] there was little willingness to look beyond.”⁴³

Against this backdrop, it could be argued that the emergence of the ENP and its broad geographical scope were a result of agency shirking. In other words, as an opportunistic and competence-maximiser agent, the Commission tried to gain a stronger foothold in EU foreign policy by substantially expanding a modest call to engage with some Eastern neighbours, and created a grandiose plan to transform the entire EU’s neighbourhood with itself at the centre.

Moreover, the Commission was able to shape the ENP according to its preferences by exploiting the MSs’ low level of attention. This argument can be expressed in terms of “political salience”, i.e., “the significance, importance and urgency that an actor ascribes to a certain issue on the political agenda.”⁴⁴ In this respect, one could point out that during the GAERC meeting in April 2002, the policy was not high on the list of priorities (point no. 9), whereas topics like enlargement and illegal immigration were given a higher priority.⁴⁵

Notwithstanding the above, the evidence gathered in this study portrays a rather different picture than what is suggested by PA’s assumptions on agency’s opportunistic behaviour. What’s more, it seems that HI is better suited to offer a more comprehensive account on the Commission’s interest in securing a leading role in the ENP. As such, I tend to agree with Simon Hug,⁴⁶ who argues that rational choice institutionalism “presents the clearest definition of preferences and the weakest assumptions about preferences.”

First, the analysis of EU Communications prior to the ENP formulation stage provides evidence that the topic of the EU’s neighbourhood was discussed within the EU long before January 2002, which marks the official beginning of the formulation stage. Referring to the MSs, the significance of the EU’s periphery was already acknowledged in the Council of the European Union’s report in 1998. In the report, the Council identified Ukraine, Russia, and the Mediterranean region as regions of significance and affirmed that “it is there that the EU has the greatest

⁴² W. Wallace, *Looking After the Neighbourhood: Responsibilities for the EU-25*, Notre Europe, Paris: 2003.

⁴³ See also Bicchi, *supra* note 40; Pelerin, *supra* note 22.

⁴⁴ K. Oppermann, *Salience and sanctions: a principal-agent analysis of domestic win-sets in two-level games – The case of British European policy under the Blair government*, 21(2) Cambridge Review of International Affairs 179 (2008).

⁴⁵ 2421st Council meeting (General Affairs and External Relations), Luxembourg, 15 April 2002. See also European Council and the Council of the European Union, *Copenhagen European Council, Presidency Conclusions*, available at: <https://www.consilium.europa.eu/media/21225/72921.pdf#:~:text=The%20European%20Council%20welcomed%20the%20presentation%20by%20President> (accessed 30 August 2024).

⁴⁶ S. Hug, *Endogenous Preferences and Delegation in the European Union*, 36(1/2) Comparative Political Studies 41 (2003), p. 44.

long-term common interests and the greatest need for coherence and effectiveness.”⁴⁷ Also, in June 1999 the European Council⁴⁸ highlighted “the importance of all these regions to the European Union, not only as partners in its external relations but also for the stability and security of our continent and its immediate neighbourhood.” As for the Commission, not only was the idea to combine the Eastern and Southern neighbourhoods on the Commission’s agenda before 2002,⁴⁹ but EU officials also confirmed that there was pressure from the Southern EU members (and Sweden⁵⁰) to include the Mediterranean countries in the policy.⁵¹

Therefore, instead of seeing the ENP and its scope as a case of agency shirking, it might be more accurate to view this situation as a case where the agent fulfilled its task. Specifically, since the ENP does not fall under the Commission’s exclusive right of initiative (following Arts. 22 and 34(2) of the Treaty on European Union), the Commission performed its duties as a soft/informal agenda-setter that has “the capability to provide policy proposals upon request”⁵² and sets the agenda “by constructing ‘focal points’ for bargaining.”⁵³ Put differently, the Commission offered a solution that was more in line with the aggregated preferences of all principals. What’s more, since the Commission needed the unified approval of the Member States, the combination of East and South was the only option available to move the initiative forward. In this regard, one could also refer to Bart Van Vooren’s view on the Commission’s use of soft instruments during the ENP’s conceptualisation phase.⁵⁴ He suggests that these instruments aimed to initiate and steer discussions among MSs rather than propose legally-binding instruments/legislation. Furthermore, it could also be argued that the principals’ *ex-ante* control mechanisms (i.e., legal and administrative procedures) were

⁴⁷ *Report to the European Council, ‘Common Strategies*, 8 December 1998, document 13943/98.

⁴⁸ Cologne European Council, *Conclusions of the Presidency*, p. 27, available at: https://www.europarl.europa.eu/summits/kol1_en.htm#:~:text=The%20European%20Council%20met%20in%20Cologne%20on%203 (accessed 30 August 2024).

⁴⁹ E.g. European Commission, *Agenda 2000: For a stronger and wider Union*, Brussels, 15 July 1997, COM(1997) 2000 final; European Commission, *The Commission’s Work Programme for 2002*, Brussels, 5 December 2001, COM(2001) 620 final.

⁵⁰ In March 2002, Sweden expressed the need to re-examine the relations with the entire neighbourhood (Russia and the Mediterranean). See A. Lindh, L. Pagrotsky, *EU’s relationship with its future neighbours following enlargement*, Letter 7713/02, 8 April 2002.

⁵¹ EU interviews 4 and 9; unless otherwise stated, all statements by EU officials are based on the author’s interviews in Brussels which were conducted between June 2012 and February 2013 (all files with the author). See also G. Edwards, *The Construction of Ambiguity and the Limits of Attraction: Europe and its Neighbourhood*, 30(1) *Journal of European Integration* 45 (2008); R. Zaiotti, *Of Friends and Fences: Europe’s Neighbourhood Policy and the Gated Community Syndrome*, 29(2) *Journal of European Integration* 143 (2007).

⁵² N. Klein, *European Agents out of Control? Delegation and Agency in the Civil-Military Crisis Management of the European Union 1999–2008*, Nomos, Baden-Baden: 2010, p. 50.

⁵³ Pollack, *supra* note 33, p. 50.

⁵⁴ B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence*, Routledge, London: 2012, pp. 185–191.

effective as the agent was aware that it cannot offer a geographical scope that would be against the will of its principals.

These arguments are supported by EU officials, who explain that “[w]e, as the Commission, didn’t take sides and try to offer a solution in the form of a policy for both South and East”⁵⁵ and “there was a need to extend the geographical scope in order to have everyone on board”;⁵⁶ and that “the combination of East and South was just a pragmatic solution.”⁵⁷

Moving on to the second point – that is the Commission’s interest in expanding its powers – although HI does not entirely reject the assumption that institutions might be competence-maximisers,⁵⁸ “[h]istorical institutionalists are typically suspicious of functional explanations.”⁵⁹ Instead, HI underscores the importance of time, process, and overarching context to the analysis of policy outcomes. Therefore, I posit that HI provides a more comprehensive and context-based view on the Commission’s perspective regarding the emergence of the initiative.

Principally, following the key role the Commission played during the accession process, the Commission viewed itself as an important actor in EU foreign policy. Indeed, while the Commission might not possess much power in accession negotiations, it still has a major influence inasmuch as “[u]nlike the Member States, the Commission is engaged in all stages of the enlargement process.”⁶⁰ Along similar lines, a Commission official clarified that “when it came to ‘real’ foreign policy impact of the EU in the last decade, the power lay with the Commission.”⁶¹

At this point, the issue of sequence and timing comes into play. John Ikenberry⁶² posits that “[w]ithin formal organizations, individuals seek to preserve their mission and responsibilities, often in the face of a radically changed environment.” Paul Pierson⁶³ continues this line of thinking by stating that “political actors must anticipate that their political rivals may soon control the reins of government.” Essentially, the time-period when the ENP was designed (i.e., 2002–2004) was a time when

⁵⁵ EU interview 4.

⁵⁶ EU interview 1; EU Interview 6.

⁵⁷ EU Interview 2.

⁵⁸ P. Pierson, *The Path to European Integration: A Historical Institutional Analysis*, in: W. Sandholtz, A. Stone Sweet (eds.), *European Integration and Supranational Governance*, Oxford University Press, Oxford: 1998, pp. 27–58.

⁵⁹ Pierson, Skocpol, *supra* note 15, p. 708. See also K. Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan*, Cambridge University Press, Cambridge: 2004.

⁶⁰ U. Diedrichs, W. Wessels, *The Commission and the Council*, in: D. Spence, G. Edwards (eds.), *The European Commission*, John Harper Publishing, London: 2006, p. 231.

⁶¹ Kelly, *supra* note 9, p. 31.

⁶² G.J. Ikenberry, *The Rise, Character, and Evolution of International Order*, in: O. Fioretos, G.T. Falleti, A. Sheingate (eds.), *The Oxford Handbook of Historical Institutionalism*, Oxford University Press, Oxford: 2016, p. 543.

⁶³ Pierson, *supra* note 17, p. 43.

the last stages of the 2004 enlargement were finalised. Hence, the timing was right for the Commission as it came about “when the conclusion of accession negotiations threatened to narrow its domain and so undermine its relative institutional strength.”⁶⁴ What’s more, the Commission’s Wider Europe Task Force, which was responsible for developing the ENP, consisted of EU officials with a strong enlargement background. This group of experts not only had a cohesive view of how to construct the EU’s external relations, but also sought to find new policy areas (as the enlargement was finalised) where they could offer their expertise and enjoy considerable autonomy.⁶⁵

Against this backdrop, “*conversion*” could be used as an effective strategy for institutions to confront new realities (e.g., changes in power relations) that threaten their powers. In the process of conversion, “[i]nstitutions are not so much amended or allowed to decay as they are redirected to new goals, functions, or purposes.”⁶⁶ In the case explored herein, the emergence of a new policy allowed the Commission “to continue playing a significant, and perhaps even stronger, role in external affairs.”⁶⁷

Lastly, with respect to the argument that the Commission exploited the MSs’ lack of attention, I posit that this explanation lacks merit. True, the ENP was a relatively low priority on the Council’s agenda in 2002. Yet, the situation appears quite different in the later stages of the formulation process, particularly after the publication of the Commission’s first Communication on the ENP, the Wider Europe Communication.⁶⁸ Clearly, the Communication attracted a wide range of reactions from the MSs and the matter was high on the agenda during the the GAERC meeting in March⁶⁹ and April 2003.⁷⁰

Furthermore, according to EU officials the initiative was discussed at great length within Council’s Working Groups and on the COREPER level. For example, an EU official asserts that “[t]he MSs were always involved (...) before and during (...)

⁶⁴ Magen, *supra* note 9, p. 396.

⁶⁵ *Ibidem*; G. Vobruba, *Expansion without enlargement – Europe’s dynamism and the EU’s neighbourhood policy*, EUROZINE, 28 September 2007, available at: <https://www.eurozine.com/expansion-without-enlargement/> (accessed 30 August 2024).

⁶⁶ Streeck, Thelen, *supra* note 20, p. 26.

⁶⁷ Kelly, *supra* note 9, p. 32. In her analysis, J. Kelly (*see also* Magen, *supra* note 9) uses organisational management theories to describe the Commission’s adaptation abilities. Principally, J. Kelly argues that the Commission, in the face of a threat to its powers, was trying to safeguard (or even expand) its important position in EU foreign policy (i.e., *domain offense*) by replacing existing domains with new ones (i.e., *domain creation*).

⁶⁸ European Commission, *Wider Europe: Neighborhood: A New Framework for Relations with our Eastern and Southern Neighbours*, Brussels, 11 May 2003, COM(2003)104 final.

⁶⁹ 2496th Council meeting (General Affairs and External Relations), Luxembourg, 19 March 2003, second item.

⁷⁰ 2502nd Council meeting (General Affairs and External Relations), Luxembourg, 14 April 2003, first item.

through meetings, working groups, and informal discussions,”⁷¹ while another official recalls that “[t]here were endless discussions in the Council regarding the resolutions and many discussions in the working groups.”⁷² Thus, also in this context it could be contended that the agent was well aware that it was being closely monitored (i.e., *ex-post* control mechanisms) by its principals.

3. THE COMMISSION AND THE ENP’S INSTITUTIONAL STRUCTURE

The second matter to be examined in this study is the ENP’s institutional design. In this case, HI could provide us with rather valuable insights. Essentially, historical institutionalists assume that path-dependence processes will cause institutions to be resilient to change. As such, they “tend to be conservative and find ways of defending existing patterns of policy.”⁷³ Additionally, as a result of self-reinforcing positive feedbacks, “original choices are likely to figure heavily in the current functioning of the institution.”⁷⁴ Thus, actors seek “to entrench institutional arrangements that perpetuate their advantages into the future.”⁷⁵

It is evident that numerous aspects proposed by the Commission originated from its enlargement and pre-accession experience. Among the similar instruments and methodologies, one could draw attention to the conditionality and socialisation principles; the reliance on soft law frameworks such as Action Plans and Progress Reports; the content and structure of the ENP Action Plans; the inclusion of programs like Twinning and TAIEX; and the monitoring procedures.⁷⁶ Furthermore, the fact that the Wider Europe Task Force was mostly composed of enlargement experts “led to some direct mechanical borrowing from enlargement experiences.”⁷⁷ An illuminating example in this regard is that “in the very early in-house ENP drafts, the name of a recent candidate state would sometimes accidentally appear”.⁷⁸ EU officials also admitted that “they sometimes just ‘copied and pasted’ the documents

⁷¹ EU interview 5. See also A. Nervi, *The Making of the European Neighbourhood Policy*, Nomos, Baden-Baden: 2011.

⁷² EU interview 8.

⁷³ B.G. Peters, J. Pierre, D.S. King, *The Politics of Path Dependency: Political Conflict in Historical Institutionalism*, 67(4) *The Journal of Politics* 1275 (2005), p. 1276.

⁷⁴ Pierson, Skocpol, *supra* note 15, p. 709.

⁷⁵ Ikenberry, *supra* note 62, p. 550.

⁷⁶ EU Interview 4; N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis*, Hart Publishing, London: 2014, pp. 34–94; Gebhard, *supra* note 9; Kelly, *supra* note 9; Magen, *supra* note 9.

⁷⁷ Kelly, *supra* note 9, p. 32.

⁷⁸ *Ibidem*, p. 33.

they had been dealing with in the framework of the enlargement.”⁷⁹ Given this state of affairs, one could conclude that the ENP’s design was extensively affected by the Commission’s path-dependence from enlargement, or in the words of an EU official: “[t]here is nothing new in the ENP except packaging.”⁸⁰ In fact, the Commission’s reliance on its previous experience was not only evident in its policy choices but also on a declaratory level, as the Commission’s President stated: “I admit that many of the elements which come to my mind are taken from the enlargement process.”⁸¹

This analysis further reveals how the success of enlargement had an overwhelming impact on the decision to structure the ENP following the enlargement template. Accordingly, we can find numerous references to the enlargement success (in HI terms, self-reinforcing positive feedbacks) in EU Communications and official speeches. For instance, Prodi⁸² stated that “[l]asting and sustainable stability in the European region, has been the crowning achievement of the European Union”, and “[w]e should recognise that this success creates legitimate expectations in the EU’s future neighbours.” Similarly, in its Wider Europe Communication, the Commission maintained that “enlargement has unarguably been the Union’s most successful foreign policy instrument”,⁸³ while the ENP Strategy Paper underlined that “[t]he objective of the ENP is to share the benefits of the EU’s 2004 enlargement with neighbouring countries.”⁸⁴

Finally, the Commission’s aspiration to safeguard the key role it played in enlargement, while copying the enlargement’s success to the new policy, could also explain why the Commission decided to design the ENP following the enlargement template and not, for example, following the Euro-Mediterranean Partnership (EMP) template.

Essentially, the EMP is considered to be the main point of reference when discussing EU-Mediterranean relations pre-ENP, since it represented the “first real attempt for the EU to engage in a region as collective actor.”⁸⁵ The EMP was launched at the Barcelona Conference in November 1995 with the aim of protecting European interests. The enormous economic gap between the Community and the Mediterranean neighbours – with their high unemployment rate, organised crime, and terrorism – were all viewed as sources of instability that could spill-over to Europe.⁸⁶ Still, it is rather evident that since its establishment the EMP has

⁷⁹ E. Tulmets, *Experimentalist governance in EU’s external relations: The cases of enlargement and of the European Neighbourhood Policy*, Conference on “experimentalist governance” University of Madison, Wisconsin, 20–22 April 2007, p. 11.

⁸⁰ Kelly, *supra* note 9, p. 41.

⁸¹ Prodi, *supra* note 37, p. 3.

⁸² *Ibidem*, p. 2.

⁸³ European Commission, *supra* note 68, p. 5.

⁸⁴ European Commission, *supra* note 2, p. 3.

⁸⁵ Nervi, *supra* note 71, p. 61.

⁸⁶ R. Hollis, *Europe and the Middle East: Power by Stealth?*, 73(1) *International Affairs* 15 (1997); C. Spencer, *The EU and Common Strategies: The Revealing Case of the Mediterranean*, 6(1) *European Foreign Affairs Review* 31 (2001).

failed to reach its objectives.⁸⁷ More importantly, since the EMP was mainly based on intergovernmental cooperation, and thus the Commission, in contrast to the MSs (e.g. France and Spain), has never taken the role of a policy entrepreneur in its relations with the Mediterranean countries.⁸⁸ According to an EU official, the idea to reformulate the EMP never came up as an option since it was “untouchable” and “although it was obvious that the EMP is a failure, it was protected by the member states as their thing.”⁸⁹

Summing up, HI offers strong arguments as to how and why path-dependence processes influenced the way the Commission structured the ENP. Yet, I agree with Guy Peters and others⁹⁰ that “[i]t is not sufficient to say that patterns persist; to be effective a theory should be capable of linking outcomes with actors and with the process that produced the outcomes.” In the same vein, Thelen⁹¹ maintains that “institutional survival depended not just on positive feedback, but on a process of institutional adjustment.” Evidently, beyond the impact of path-dependence on the way the Commission structured the ENP, we can clearly see that the Commission was indeed active while using two kinds of strategies, namely *conversion* and *layering*.

Concerning the strategy of conversion, it was previously mentioned that institutions, while facing a changing environment, will attempt to direct existing policies to serve new ends. This process, however, “requires active reinterpretation”⁹² of how those policies, rules, and instruments can be reused or remodelled to fit new purposes. In the context of the ENP, “European policy elites came to perceive enlargement not only as a tremendous success story, but also as a proven instrument of EU foreign policy whose methodologies could be adapted and used again.”⁹³ In this respect, Prodi⁹⁴ stated that: “[t]he goal of accession is certainly the most powerful stimulus for reform we can think of. But why should a less ambitious goal [i.e., enlargement reforms without membership perspective] not have some effect?” Finally, a senior EU official recalls that “we really thought that what was working with candidate countries will work with the ENP partners.”⁹⁵

In a similar vein, it is also evident that the Commission used the strategy of institutional *layering* while designing the ENP. The strategy of layering “involves the

⁸⁷ E.g. E. Baracani, *From the EMP to the ENP: New European pressure for democratisation? The case of Morocco*, 1(2) *Journal of Contemporary European Research* 54 (2005); M. Pace, *Norm Shifting from EMP to ENP: The EU as a Norm Entrepreneur in the South?*, 20(4) *Cambridge Review of International Affairs* 659 (2007). See also European Commission, *supra* note 68.

⁸⁸ Bicchi, *supra* note 40, p. 182.

⁸⁹ EU Interview 4.

⁹⁰ Peters, Pierre, King, *supra* note 73, p. 1284.

⁹¹ Thelen, *supra* note 59, p. 34.

⁹² Hacker, Pierson, Thelen, *supra* note 21, p. 185.

⁹³ Magen, *supra* note 9, p. 398. See also Ghazaryan, *supra* note 76, p. 74.

⁹⁴ Prodi, *supra* note 37, p. 4.

⁹⁵ EU Interview 4.

grafting of new elements onto an otherwise stable institutional framework.”⁹⁶ Thus, institutions can “sell” the new (and often rather marginal) amendments without creating a strong opposition, as those modifications do not diminish existing policies or substantially change the status-quo.⁹⁷ In the case of the ENP, layering is connected to the Commission’s proposal to make the ENP Action Plans (APs) the key instrument in the policy. According to the Commission, the APs “should be political documents – drawing together existing and future work in the full range of the EU’s relations with its neighbours.”⁹⁸ Therefore, the APs are structured as political roadmaps guiding the relationship between the EU and ENP countries. Importantly, it was foreseen that the ENP’s legal basis would be based on existing rather than new institutional frameworks. Hence, while the focal point of path-dependence and conversion analysis with respect to the EU is enlargement; in the case of layering we need to look at the existing institutional relationship between the EU and ENP partners.

In a nutshell, the ENP does not establish new legal institutional ties between the EU and its neighbours, but relies instead on existing international agreements, i.e., Association Agreements (AAs) for the Southern neighbours and Partnership and Cooperation Agreements (PCAs) for the Eastern neighbours (based on Arts. 216-219 of the Treaty on the functioning of the European Union). As a result, the ENP also does not establish new institutions to govern the initiative, and the policy is being implemented and monitored within the framework of the AAs’/PCAs’ institutions (i.e. Councils and Committees). Against this background, we could argue that in order not to destabilise the existing institutional relationship, the Commission proposed that the ENP (and its APs) would function as an additional layer. What’s more, this kind of proposal does not require any significant adjustments and thus should not be conceived as a threat to all the shareholders (EU institutions, MSs, and ENP partners).

That said, it is important to mention that while HI provides us with valuable insights concerning the ENP’s institutional structure, its analysis focuses to a large extent on the Commission, while little heed is taken of the Commission’s relationship with the MSs. In this regard, I agree with Jeandesboz⁹⁹ that the extensive focus on the Commission’s path-dependence “downplays the variety of agents and games being played around the ENP.” Therefore, it is worthwhile to examine how a PA-based account can provide us with complementary explanations.

Essentially, some studies contend that the Commission proposed to structure the ENP in a way that allowed it to situate itself in a pivotal role vis-à-vis other EU

⁹⁶ Thelen, *supra* note 59, p. 35.

⁹⁷ Streeck, Thelen, *supra* note 20, p. 23.

⁹⁸ European Commission, *supra* note 68, p. 16.

⁹⁹ J. Jeandesboz, *Labelling the ‘Neighbourhood’: Towards a Genesis of the European Neighbourhood Policy*, 10(4) *Journal of International Relations and Development* 387 (2007), p. 404.

actors (the MSs and the European Parliament). In so doing, the policy's cross-pillar characteristics, mechanisms, and procedures are being used as key examples to exhibit and enhance the Commission's actions and competences.

First, the Wider Europe Communication¹⁰⁰ put forward plans for cross-pillar co-operation with neighbouring countries. The proposal's cross-pillar characteristic – i.e., going beyond the Community's exclusive competences – is rather remarkable, even if one considers the preliminary status of the Communication.¹⁰¹ Furthermore, the Commission has placed first pillar issues (“a stake in the EU's Internal Market”) at the forefront of the new initiative. This manoeuvre could be viewed as a way for the Commission to blur the distinction between internal and external policies, thus enabling it to expand its powers in a policy area which has traditionally been dominated by intergovernmental cooperation.¹⁰² As such, it could be argued that the agent tried to use the strategy of “issue-linkage” – a “conscious effort (i.e., a strategy) to connect different issues”.¹⁰³ In the EU, this strategy is utilised by both the European Parliament¹⁰⁴ and the Commission¹⁰⁵ with the aim of expanding their powers in policy areas where they do not possess formal competences.

Second, as previously mentioned the ENP (and its APs) do not have a legal basis, as the ENP is based on existing legal agreements between the EU and ENP partners. Consequently, the APs' non-legislative characteristic benefits the Commission as the APs are not subject to the co-decision process, thus giving more power to the Commission vis-à-vis other EU Institutions.¹⁰⁶ In this vein, Lior Herman¹⁰⁷ maintains that “the Commission is more powerful and is less dependent (...) as it is negotiating an already-existing and agreed-upon agreement.” Moreover, the fact that the APs are based on the Commission's proposals entails an important role for the Commission, since it “becomes the key agenda-setter in the EU's bilateral relationship with each neighbouring country.”¹⁰⁸

Notwithstanding the foregoing, I maintain that the Commission's choice to rely on soft law instruments and formulate the APs as political documents rather than international and legally binding agreements could also be attributed to the fact that “agents like

¹⁰⁰ European Commission, *supra* note 68.

¹⁰¹ Pelerin, *supra* note 22, p. 51.

¹⁰² *Ibidem*, p. 61.

¹⁰³ G. Tsebelis, *The power of the European Parliament as a conditional agenda-setter*, 88(1) *The American Political Science Review* 128 (1994), p. 138.

¹⁰⁴ *Ibidem*.

¹⁰⁵ A. Krause, *The European Union's Africa Policy: The Commission as Policy Entrepreneur in the CFSP*, 8 *European Foreign Affairs Review* 221 (2003).

¹⁰⁶ Pelerin, *supra* note 22, pp. 61–62.

¹⁰⁷ L. Herman, *The European Neighbourhood Policy: An Action Plan or Plan for Action?*, 11(3) *Mediterranean Politics* 371 (2006).

¹⁰⁸ Pelerin, *supra* note 22, p. 51.

the Commission may rationally anticipate the reaction of their principals.”¹⁰⁹ In effect, the APs could be viewed as a simple and economical solution, and therefore a very appealing policy instrument not only for the MSs but also for EU institutions and potential partners.

In this context, the scholarly literature focusing on the legal aspects of the ENP could offer further insights into this argument. Specifically, many contributions delve into the legal foundation of ENP norms and principles, as well as the legal evolution of the ENP, considering actors such as the European External Action Service and the European Parliament, upgrades of agreements, and Treaty Articles.¹¹⁰ A notable example is the debate surrounding the significance of Art. 8 TEU – the “neighbourhood clause”. That said, contributions focusing on the ENP’s formulation stage and the soft law characteristics of the ENP, particularly regarding the APs, provide concrete explanations for the Commission’s decisions regarding the legal status of the APs.

For instance, compared to the long process of negotiating and signing mixed agreements,¹¹¹ the APs need only to be approved by a Council decision. In this respect, Ghazaryan¹¹² adds that “[t]he mixed nature of such agreements would have introduced a major brake on the progress of the policy, as their negotiation, signature and ratification would have required a few years.” By the same token, Cremona and Hillion¹¹³ maintain that “the non-legally binding nature of the ENP (...) prevents long competence discussions and ‘pillar politics’ from stalling and undermining policy development and coherence.” Moreover, as no new agreements are being concluded, there is no need to establish new institutions to govern the relationship between the EU and ENP countries. Another advantage is that since the MSs were

¹⁰⁹ Pollack, *supra* note 33, p. 59.

¹¹⁰ M. Comelli, *Article 8 TEU and the Revision of the European Neighbourhood Policy*, in: L. Rossi, F. Casolari (eds.), *The EU after Lisbon*, Springer, Vienna: 2014, p. 267; C. Hillion, *Anatomy of EU norm export towards the neighbourhood: The impact of Article 8 TEU*, in: R. Petrov, P. Van Elsuwege (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union*, Routledge, London: 2014, p. 13; S. Majkowska-Szulc, K. Wierczyńska, *European Neighbourhood Policy and EU Enlargement*, in: A. van Aaken, P. d’Argent, L. Mälksoo, J.J. Vassel (eds.), *The Oxford Handbook of International Law in Europe*, Oxford Academic, Oxford: 2023; R. Petrov, P. Van Elsuwege, *Article 8 TEU: towards a new generation of agreements with the neighbouring countries of the European Union?*, 36 *European Law Review* 688 (2011); P. Van Elsuwege, G. Van der Loo, *Continuity and change in the legal relations between the EU and its neighbours: A result of path dependency and spill-over effects*, in: D. Bouris, T. Schumacher (eds.), *The Revised European Neighbourhood Policy: Continuity and Change in EU Foreign Policy*, Palgrave Macmillan, London: 2017, p. 97.

¹¹¹ For instance, the negotiation process of mixed agreements involves rather high transaction-costs as the cross-pillar nature of the agreements and the lack of clear negotiation procedures require very close cooperation between and within EU Institutions.

¹¹² Ghazaryan, *supra* note 76, p. 57.

¹¹³ M. Cremona, C. Hillion, *L’Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security policy*, European University Institute, San Domenico di Fiesole: 2006, p. 12.

rather indecisive as to the level of integration they were willing to commit to, the AP's non-binding characteristics allow them to agree on high standards for cooperation while eventually deciding in which policy areas they are willing to proceed with.¹¹⁴ Therefore, the lack of legal basis puts the Commission in an inferior (rather than superior) position, since it does not have the legal competences to force the MSs to implement the APs. Finally, similar to the situation when the Commission had to combine the Southern and Eastern neighbourhoods to attract the support of all MSs, one can also argue that the principals' (*ex-ante*) control over the agent was effective. In the words of a Commission official: "We didn't give the document a legal basis because it will be bureaucratically impossible to pass it."¹¹⁵

Viewed against this background, the analysis of ENP's design demonstrates the functional considerations behind the Commission's decision to use the APs as the main instrument of the policy. But at the same time, it questions the PA's assumptions that the key reason for the agent to structure the policy in this way was to gain a better position vis-à-vis its principals.

4. MSS – COMMISSION CONFLICT DURING THE NEGOTIATIONS WITH PARTNER COUNTRIES

The last topic scrutinised in this study is the conflict between the Commission and the MSs during the final months of the ENP formulation stage. The key event mentioned in this context concerns the negotiations on the APs that were held in early 2004 between the partner countries and the Commission. Essentially, the APs are the result of negotiations between the EU and ENP countries. In their analyses, scholars often attribute the growing involvement of the Council in the ENP to the MSs' discontent with the Commission's behaviour during the negotiations – a dissatisfaction that led eventually to the freezing of the negotiations.

Principally, three key issues were unacceptable to the MSs. First, the MSs were agitated because the Commission initiated negotiations without receiving a mandate from the Council. Second, the MSs felt that the Commission was withholding information from them regarding the content of the meetings. Third, once the negotiations' topics became known to the MSs, they accused the Commission of overstepping its competences by discussing second and third pillar (intergovernmental) issues with partner countries. Consequently, the MSs decided to freeze the negotiations and assigned representatives from the High Representative Office and the EU Presidency to be present in the negotiations once they resumed.¹¹⁶

¹¹⁴ Ghazaryan, *supra* note 76, p. 57; Van Vooren *supra* note 54, pp. 193–194.

¹¹⁵ EU interview 7.

¹¹⁶ Jeandesboz, *supra* note 99; Nervi, *supra* note 71; Pelerin, *supra* note 22; Zaiotti, *supra* note 51.

Scrutinising this situation through a PA lens, one could argue that the principals suffered from one of the most common problems in PA relationships, that is, informational asymmetries.¹¹⁷ In the ENP case, it would seem that the agent enjoyed a favourable position concerning informational asymmetries, as it was able to hide that it was negotiating with partners behind the principals' back. In response, the principals decided to establish an *ad locum* control mechanism in the form of MSS' representatives sitting with the Commission in the negotiations.

Still, Commission's personnel had a rather different view regarding the suspension of the negotiations. In fact, "to the Commission, it came as a big surprise (...) we saw our role just like in accession, that we had freedom to be active."¹¹⁸ Other EU officials support this statement by maintaining that "the Commission thought it could act freely like during the enlargement"¹¹⁹ and "with enlargement the member states didn't have any problem that the Commission took charge."¹²⁰ In this respect, the interviewees might have been referring to the first stage of accession, i.e. the screening process. This process "is carried out jointly by the Commission and each of the candidate countries [and] allows the latter to familiarise themselves with the *acquis* and, subsequently, to indicate their level of alignment with EU legislation and outline plans for further alignment."¹²¹

What's more, the Commission did not consider the talks with ENP partners as official negotiations but rather as an "exchange of views."¹²² In this context, Van Vooren¹²³ adds that Commission officials avoided the use of the term "negotiations", with the objective of reinforcing "the idea that the Commission was not negotiating a binding international agreement." To this end, numerous interviewees emphasise that the APs are not subjected to Art. 300 TEC (now Arts. 216 and 218 TFEU).¹²⁴ The Commission's standpoint maintained that since the APs do not have the legal status of an international agreement, it did not need MSS' mandate to talk to partners. As explained by Commission's officials: "[t]he member states thought that the Commission needs a mandate although there was no point. It is not an international agreement,¹²⁵ and [t]he Commission doesn't have to get a mandate from the member states in order to negotiate something which doesn't have a legal

¹¹⁷ Pollack, *supra* note 26; Tallberg, *supra* note 26.

¹¹⁸ EU interview 11.

¹¹⁹ EU interview 3.

¹²⁰ EU interview 1.

¹²¹ European Commission, *Screening of the acquis*, available at https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/screening-acquis_en (accessed 30 August 2024).

¹²² EU interview 3.

¹²³ Van Vooren, *supra* note 54, p. 193.

¹²⁴ Art. 300 TEC stated that in case of international agreements, the Commission needs the authorisation of the Council in order to open the negotiations.

¹²⁵ EU interview 3.

basis”;¹²⁶ adding that “the drafting of the action plans was seen as a technical and bureaucratic exercise of the Commission.”¹²⁷

In light of the above, it seems that the key problem was not necessarily opportunistic behaviour that caused agency shirking. Instead, the agent’s behaviour could be attributed to its extensive path-dependence from previous tasks. In this regard, the Commission’s path-dependence is not related to specific choices it made while designing the ENP. The focus here is rather on the fact that during the negotiations, the Commission was operating on “enlargement mode.” As a result, its path-dependence might have led to the misunderstanding regarding the exact status of the APs and the role of the Commission and the MSs in the negotiations. In this context, the conflict between the Commission and the MSs could be connected to the Commission’s conversion strategy, as “[t]he redirection of institutional resources that we associate with conversion may occur through political contestation over what functions and purposes an existing institution should serve.”¹²⁸ At any rate, it is evident that despite some tensions between the Commission and the MSs following the freezing of negotiations, not much time elapsed before the negotiations continued; the APs were finalised; and the ENP was officially launched. EU officials elucidate that “the issue was solved fairly quickly”¹²⁹ and “we sat with the MSs and clarified the things that needed to be clarified.”¹³⁰

Finally, although the MSs exerted *ad locum* control once the negotiations resumed, the quick resolution of the conflict and the launch of the ENP shortly afterwards might suggest that the presence of MSs’ representatives in the negotiations did not lead to any changes in the APs. That is to say, if the APs had changed (in scope/content) following the presence of MSs’ officials in the negotiations, it could have been argued that the Commission had indeed shirked. In this regard, EU officials confirmed that although MSs’ representatives joined the negotiations, it was a matter of being present at the table rather than providing input.¹³¹

CONCLUSIONS

The objective of this study was to examine two prominent explanations regarding the ENP formulation stage. The first explanation (based on PA) contends that the Commission used its position as the policy designer to increase its powers. It was able to do so by expanding the geographical and institutional scope of the policy, taking advantage of MSs’ lack of interest in the policy and hiding information from

¹²⁶EU interview 2; EU interview 8.

¹²⁷EU interview 10; EU interview 6.

¹²⁸Streeck, Thelen, *supra* note 20, p. 26.

¹²⁹EU interview 11.

¹³⁰EU interview 5.

¹³¹EU interview 2; EU interview 8.

the MSs. Alternatively, the second explanation (based on HI) underscores how the Commission's path-dependence (from enlargement) was *the* key factor influencing the Commission's policy choices and behaviour.

Against this background, this study aimed to evaluate which theoretical framework provides better explanations for the evolution of the policy. Examining the data generated by the process-tracing analysis, some conclusions can be drawn.

First, the research highlights the efficacy of institutional approaches in providing a more comprehensive understanding of the ENP's design and origins. With respect to the issues of the emergence of the policy and its scope, both HI and PA are able to encompass the assumption that the Commission might have had some interest in securing and expanding its role in EU foreign policy. Yet, rather than seeing the Commission as a competence-maximiser agent (like in the case of PA), HI provides a more context-based explanations about the circumstances that influenced the Commission's actions. Moreover, the analysis has demonstrated that to improve our understanding of the ENP's origins, there is a need to move beyond the passive/automatic impact of path-dependence highlighted in the ENP literature and to focus more on the various (active) ways the Commission employed to adapt to the new realities following the emergence of the new policy.

In the case of PA, although the findings do not support PA's arguments that the Commission expanded the ENP's geographical scope for its own benefits as well as exploited MSs' lack of attention, it could still be of use in highlighting the Commission's functional considerations in designing the policy, as well as the effectiveness of MSs' control mechanisms. Specifically, the Commission needed to offer a proposal that would attract the support of all MSs. After all, without the unanimous vote of the Council, the ENP would have never seen the light of day.

Insofar as concerns the institutional structure, HI offers persuasive arguments as to how path-dependence processes influenced the Commission in designing the ENP by following the enlargement template. Furthermore, the analysis shows that apart from path-dependence effects, the Commission used various strategies (i.e., conversion and layering) while designing the ENP. Nonetheless, HI seems to overlook aspects related to the Commission's relations with the MSs. In this respect, PA-based explanations suggest that the Commission structured the policy (e.g., the ENP's lack of a legal basis) in such a way that enhances its influence over the ENP. Still, also in this case the analysis revealed that there were not only control mechanisms in place but also numerous functional reasons for the Commission to design the ENP in a way that would appeal to the MSs.

Finally, regarding the conflict between the MSs and Commission during the APs negotiations, it appears at first sight that this is a classic case of agency shirking, as the Commission used its information asymmetries to hide the negotiations from the MSs. However, the research findings provide evidence that support HI-based

explanations to this event. Specifically, path-dependence processes not only affected how the Commission structured the policy, but also had an impact on how the Commission behaved during the negotiations. In this regard, we could also connect the conflict between the two actors with the conversion strategy, as the Commission used its existing procedures to deal with the new policy.

Given those mixed results, I contend that instead of viewing PA and HI as rival approaches that offer different explanations for the policy development, we should be aware of the weaknesses of each approach, while treating both perspectives as complementary to our understanding of the ENP. Thus, one could argue that the study's mixed results strengthen Mark Pollack's¹³² standpoint that rather than viewing HI as a separate approach, we should consider it "as a particular variant of rational-choice theory [and PA] emphasizing the importance of time, feedbacks, sequencing, and path-dependence in the study of politics."

The theoretical implications of this research underline the relevance of functional explanations to explain the ENP's development. Moreover, the research findings question, to some extent, both HI's and PA's assumptions on the Commission's ability, as a single actor, to influence policy outcomes. In addition, this study has also shown that PA's preliminary assumptions on the agency's shirking tendencies were rather inappropriate. Therefore, the research findings largely follow Kassim et al.¹³³ in calling into question the prominent view in the literature (and also within the public sphere) that the Commission is a competence-maximiser and an integrationist institution. The data gathered in Kassim's¹³⁴ seminal study shows that "there is no universal desire for more Europe" and that the Commission's aspiration for more competences is "driven by functional imperatives (...) rather than a generalized or instinctive preference to maximize Commission power."¹³⁵

That said, one could take into consideration another promising path of inquiry that utilises HI's assumptions in order to examine PA relationships; that is integrating the factor of time into PA analysis. Essentially, PA scholars often operate within the broader theoretical framework of rational choice institutionalism while measuring (in quantitative terms) the agent's ability to influence the principals or the principals' ability to control their agent. As such, it could be fruitful to examine (in qualitative terms) how the agent's past experiences with delegated tasks, as well as its previous relationship with the principals, might affect agency behaviour.

¹³² M. Pollack, *The New Institutionalism and European Integration*, Oxford University Press, Oxford: 2008, p. 4.

¹³³ H. Kassim, J. Peterson, M.W. Bauer, S. Connolly, R. Dehousse, L. Hooghe, A. Thompson, *The European Commission of the Twenty-first Century*, Oxford University Press, Oxford: 2013.

¹³⁴ *Ibidem*, p. 122.

¹³⁵ *Ibidem*, p. 281.