

Services of General Interest in the European Neighbourhood Policy

1. Introduction

The services of general interest (SGI) within the foreign relations of the European Union's (EU) have surfaced previously in debates on EU trade agreements.¹ This debate can be extended beyond one type of international legal instrument of the EU to an entire policy embracing different types of legal or quasi-legal instruments.

The European Neighbourhood Policy (ENP) is a cross-Treaty policy initiated in 2003 to offer certain level of integration to the European and non-European neighbours of the EU without an ultimate promise of membership.² Exporting the EU law and values is not a chief objective of the ENP. It is rather a means to an end, which is achieving wider policy objectives of securing a stable and a safe zone around the post-2004 and 2007 enlargement borders of the EU.³ The presumption is that the more the neighbours replicate the EU values, the safer and secure the EU will be. The ENP applies to the Eastern and Southern neighbours with varying intensity as some countries have seemingly advanced in their cooperation with the EU, while others have not agreed on a basic framework of cooperation. Few years following its inception, the ENP has been divided into regional flanks with the Eastern Partnership (EaP) and the Union for the Mediterranean emerging respectively in the East and South through the course of 2008 and 2009.⁴ The EaP promised a more enhanced cooperation with the neighbours in the East,⁵ and it constitutes the subject of the discussion that follows for a number of reasons.⁶ First, the countries concerned are comparable in terms of their legal background stemming from the common Soviet heritage and their participation

¹ See for instance Krajewski 2011.

² The following countries are addressees of the policy (some do not have immediate borders with the EU at present): Ukraine, Moldova, Belarus, Georgia, Armenia, Azerbaijan, Egypt, Algeria, Tunisia, Morocco, Israel, Occupied Palestinian Territories, Syria, Jordan, Lebanon, Libya.

The 'cross-Treaty' nature of the ENP refers to the legal scope of the policy which includes EU competences provided both in the TEU and the TFEU, see Ghazaryan 2014, pp 32, 62, 179

³ For the centrality of security considerations within the ENP see Smith and Webber 2008, p 81; Wallace 2003, p 27; Zaiotti 2007, p 149; Cremona and Hillion 2006, p 24.

⁴ Council of the European Union, Brussels European Council Conclusions of 19-20 June 2008, p 19; Council of the European Union, Brussels European Council Conclusions of 13-14 March 2008, p 19.

⁵ The EaP countries include Ukraine, Moldova, Belarus, Armenia, Georgia and Azerbaijan.

⁶ Belarus is excluded from the analysis of bilateral relations below due to the absence of bilateral documents between the latter and the EU.

in the Commonwealth of Independent States (CIS) which provided models for normative regulation in certain areas.⁷ Although in recent years the organisation envisaged an action on consolidating the legal framework for the provision of healthcare services and social assistance,⁸ it has not been translated into a comprehensive normative approach towards public services. Judging by the constitutions of the countries concerned certain regulation of services of public interest can be expected as they all highlight the social underpinnings of the new legal orders.⁹ However, there is no uniform approach to the concept of ‘public service’ in the countries concerned. While in Armenia this term would be comparable to SGI,¹⁰ in other countries it might be used to denote civil services,¹¹ or administrative services provided by the state. Other notions, such as ‘services of vital importance’ are also used.¹² On the other hand, social services are a more familiar category where specific legislation exists in some EaP countries.¹³

The presence of SGI related regulations in the legal orders of the countries concerned might question the issue of EU intervention in this area. However, despite the existing regulation there is no adequate standard of SGI provision in many vital areas as can be observed from the annual review by the Commission of the progress of the EaP countries. Besides, even though the countries concerned might have developed certain model of providing SGI, the issue of legal approximation is at the centre of the ENP and more so of the EaP, requiring transposition of the relevant *acquis*.

⁷ With the exception of Georgia, the EaP states are part of the CIS. Georgia has withdrawn its membership in 2009.

⁸ Decision on the Conception of Future Development of CIS and the Plan on Central Measures for its Implementation, Council of Head of States of CIS, 5 October 2007, available at <http://www.e-cis.info/page.php?id=3616>.

⁹ Article 1 of the Constitution of Ukraine, 28 June 1996; Article 47 of the Constitution of the Republic of Moldova 29 July 1994; Articles 1, 30.2 and 38 of the Constitution of the Republic of Armenia, 5 July 1995 Preamble and Article 33 of the Constitution of the Republic of Georgia, Constitution of the Republic of Georgia, 24 August 2005; Preamble of the Constitution of the Republic of Azerbaijan, 12 November 1995.

¹⁰ According to Article 2 of the Law on the Public Services Regulatory Commission public services include water, energy and electronic communication services. See also Article 30.2 of the Constitution of the Republic of Armenia.

¹¹ See European Commission, *Implementation of the European Neighbourhood Policy in 2009, Progress Report Georgia*, SEC(2010) 518 final, 12 May 2010, pp 4-5.

¹² Article 33 of the Georgian Constitution mentions ‘services of vital importance’ in the context of strikes.

¹³ Ukrainian Law on Social Services, N 966-IV, 2003; Moldovan Law on Social Service No 123, 2010; Azerbaijan Law on Social Services, 2012. Georgia and Armenia have laws on social assistance from 2006 and 2005 respectively.

The export of EU values and *acquis* early on transpired as the means to the ‘Europeanisation’ of the neighbouring states through the ENP.¹⁴ Ambitious in its scope, the policy aimed to integrate the neighbouring states to the EU in an extensive range of areas without a promise of membership.¹⁵ In view of the ENP’s focus on opening of markets to free trade based on competition, it is apt to ask whether the calls to liberalise the market and trade are accompanied with social underpinnings as it increasingly is the case in the EU.

The debate on the SGI in the EU, in particular the distinct emphasis on the services of general economic interest (SGEI) and service of general non-economic interest, has become prominent within the last two decades. The very terminology used in this area has been one of the sources of complexity,¹⁶ including ‘public services’, ‘social service of general interest’, ‘universal service’ as part of the EU jargon.¹⁷ Although the exclusion of SGI-related services from the scope of the Service Directive 2006 was considered to be an indication of their increasing importance,¹⁸ the Directive was seen to have complicated the terminology further by dividing the into a number of subgroups.¹⁹ Despite referring to these various terms in their particular context in the discussion that follows, they are nevertheless viewed as part of an overarching concept of SGI as an EU-specific term.

Within this context the paper aims to explore the following issues. First, the role of the SGI within EU would be discussed to identify the subject of normative export that can become part of the transposition of the EU’s model of governance. Next, the ENP is discussed to establish the policy-specific avenues for normative export. The role of the SGI is then traced within the policy on the

¹⁴ The term ‘Europeanisation’ is used here in its outwards understanding as an export of ‘forms of political organisation’ of the EU; Olsen 2002, p 924; European Commission, *Communication on a Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final, 11 April 2003, pp 4, 10.

¹⁵ European Commission, *Communication on a Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final, 11 April 2003, p 5.

¹⁶ European Parliament, Committee on Employment and Social Affairs, Report on Social Services of General Interest in the European Union, 6 March 2007; European Parliament, Resolution on the Commission’s White Paper on Services of General Interest, 27 September 2006, para 10.

¹⁷ The Commission avoids using the term ‘public service’ outside the context of Article 93 TFEU; European Commission, *Communication on a Quality Framework for Services of General Interest in Europe*, COM(2011) 900 final, 12 December 2011, pp 3-4.

¹⁸ Sauter makes this observation as regards the SGEI; Sauter 2008, pp 192.

¹⁹ Ross 2007, pp 1058-1059.

basis of the analysis of general policy documents and bilateral cooperation instruments between the EU and EaP partner states. Finally, the paper concludes with a brief summary of findings.

2. Services of General Interest: Identifying the EU model?

The debate on the role of the SGI in the EU currently revolves around the arguably shifting balance between the so called market values and social objectives of the EU. The original EEC was based on market economy with ‘a very limited degree of social-policy-related intervention’ with non-economic policies remaining with the Member States.²⁰ The Rome Treaty made a single reference to the SGEI as an exception from competition rules in Article 90 EEC.²¹ However, even this marginal appearance testified to the special role of these services. Although the SGEI is a supranational concept, the definition of activities that constitute SGEI is left to the Member States,²² subject to the review for manifest error of assessment.²³ There is therefore no communitarian definition of the SGEI which is inter alia explained by their dynamic nature.²⁴ Outside the rules on competition a distinction has been made by the Court of Justice between economic and non-economic interests in relation to the provision of services: the latter group emerged as a legitimate justification for non-discriminatory restriction on free movement.²⁵

2.1. SGI as an EU Value?

The SGI has become much more prominent in the EU through the acknowledgement of the social dimension of the single market.²⁶ The 1996 Commission Communication was first to use the term

²⁰ Semmelmann 2010, pp 519.

²¹ Article 77 EEC made a reference to ‘public service’ in transport area; Treaty Establishing the European Economic Community, 1957. Hennig considers that ‘public service’ in former Article 77 EEC (current Article 93 TFEU) denominates the same idea as SGEI; Hennig 2011, p 191.

²² CJEU, Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para 40.

²³ CFI, Case T-17/02 *Fred Olsen* [2005] ECR II-2031, para 216; CFI, Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, para 165; European Commission, *Communication on Services of General Economic Interest in Europe*, OJ 2001 C 17/ 4, para 22.

²⁴ Sauter 2008, p 175.

²⁵ CJEU, Case C-120/78 *Cassis de Dijon* [1979] ECR 649, para 8.

²⁶ European Commission, *Communication on a Single Market for 21st Century Europe*, COM(2007) 724 final, 20 November 2007, p 3.

of SGI: the latter was presented as an element of the ‘European model of society’,²⁷ and it became part of the future vocabulary of this discourse with a distinction being made between the SGEI and non-economic services of general interest.²⁸ According to Bauby, this development signified a move towards a horizontal approach in departure from previous sector-driven liberalisation.²⁹

Although there is no supranational definition of either SGEI or non-economic services of general interest, certain supranational aspects have been added to the SGI via the specification of the content of such services, or specific groups of services within the SGI or the obligations attached to their provision. For instance the 2000 Commission Communication on SGEI mentions high quality at affordable prices as an attribute of such services.³⁰ The Commission’s 2003 Green Paper on SGI emphasised the concept of universal service established in certain network areas.³¹ The subsequent White Paper referred to the ‘existence of a common concept of services of general interest in the Union’ which includes universal service, continuity, quality of service, affordability, as well as user and consumer protection.³² Soft law has been used also in relation to another group of SGI that is social services of general interest ultimately influencing the modelling and provision of these services in the Member States.³³

Importantly, former Article 16 EC added by the Amsterdam Treaty acknowledged the increasing importance of the SGEI by placing them among ‘shared values’ of the EU. Although it did not per se introduce new exemptions to the previously established rules,³⁴ it divided opinions as to its

²⁷ European Commission, *Communication on Services of General Interest in Europe*, COM(96) 443 final, 11 September 1996, p 1.

²⁸ For instance European Commission, *White Paper on Services of General Interest*, COM(2004) 374 final, 12 May 2004; *Communication on Services of General Interest, including Social Services of General Interest: A New European Commitment*, COM(2007) 725 final, 20 November 2007; *Communication on a Quality Framework for Services of General Interest in Europe*, COM(2011) 900 final, 20 December 2011.

²⁹ Bauby 1999, p 52.

³⁰ European Commission, *Communication on Services of General Economic Interest in Europe*, OJ 2001 C 17/ 4, para 8.

³¹ European Commission, *Green Paper of Services of General Interest*, COM(2003) 270 final, 21 May 2003, para 50-51.

³² European Commission, *White Paper on Services of General Interest*, COM(2004) 374 final, 12 May 2004, para 2.1.

³³ Van de Gronden 2011, p 150.

³⁴ Behrens 2001, pp 470-471.

significance.³⁵ Ultimately, it was perceived to have added a positive connotation introducing the SGEI as a shared value within the EU in difference to their previous negative perception as an obstacle to free trade and competition.³⁶ Thus, already prior to the Lisbon Treaty the SGI have been increasingly referred to as one of the pillars of EU citizenship and part of the European social model.³⁷

Following the reshuffling of EU objectives in the Lisbon Treaty, social and economic considerations both occupy a prominent role therein.³⁸ The current wording of Article 3(3) TEU is seen as an indication that the European integration should not be achieved at the expense of eroding the social systems of the Member States.³⁹ Meanwhile the previous goal of competition has been ousted from the text of the Treaty to Protocol 27 suggesting a shift in the balance of values.⁴⁰ Perhaps, further support for the shifting balance of objectives can be found in the legally binding Charter of Fundamental Rights stipulating a number of provisions related to social protection.⁴¹

Although the term SGI as such does not feature in the main text of the Treaties, the latter features in the title and the text of the Protocol on SGI attached to the Lisbon Treaty under the pressure from the Dutch government.⁴² Article 2 of the Protocol for the first time mentions the concept of SGI in a Treaty context elevating it from secondary legislation to primary.⁴³ The preamble of the Protocol emphasises the ‘importance of [SGI]’ and as such does not amend the pre-existing status of SGI in EU, in particular as regards the Member States discretion when it comes to the SGEI and non-economic services of general interest. The Member States have absolute discretion as regards non-economic services, while in case of economic services their discretion extends to the definition of

³⁵ See on different interpretations of the significance of Article 16 EC Ross 2007, pp 1072-1073; Szyszczak 2011, p 5; Schwintowski 2003, p 372.

³⁶ Ross 2009, p 131; Heritier, 2001, p 829; Ross 2000, pp 28-35.

³⁷ European Commission, *Green Paper of Services of General Interest*, COM(2003) 270 final, 21 May 2003, p 2.

³⁸ Fiedziuk 2011, p 233.

³⁹ Azoulai 2008, p 1337.

⁴⁰ According to article 51 TEU protocols have the same legal value as the Treaties. Semmelmann doubts that this development signifies major practical changes is doubted, as the legislative means to create a social Europe are limited; Semmelmann 2010, pp 521-522.

⁴¹ Chapter IV, Charter of Fundamental Rights of the European Union, *OJ* 2000 C 364/15.

⁴² Bauby 2011, pp 19-36.

⁴³ The reference to secondary legislation means Article 2(2)(a) of the Services Directive excluding SGI from the scope of its application; Fiedziuk 2011, p 233.

the general interest via the imposition of public service obligations on the providers of such services.⁴⁴

Article 1 of the Protocol, together with the case law, has been considered to provide the minimum common supranational criteria or principles for SGEI,⁴⁵ including inter alia respecting the diversity of services, high level of quality, safety and affordability, equal treatment and promoting universal access, upholding user rights. Not only it is said that the principles were established with the Commission's policy in mind,⁴⁶ but they also make appearance as *values* that are applicable also to the SGI according to the Commission.⁴⁷ These values or criteria are therefore common to the SGEI and non-economic services which highlight a unitary basis for the SGI as an overarching concept.

Nevertheless, the delimitation between the two groups of services is far from clear.⁴⁸ The importance of the delimitation is linked to the Member States discretion but also the application of rules on free movement.⁴⁹ The lack of clarity surrounding the delimitation is all the more visible when one considers the definition of social services of general interest used by the Commission.⁵⁰ However, establishing a common definition for SGI would be even more problematic than that of the SGEI as it will not be easy to find a common denominator applicable across various sectors, but also applicable in different areas of law, including EU competition law and free movement rules.⁵¹ On the other hand, the lack of definition of non-economic services has been viewed as causing uncertainty as to their performance.⁵²

⁴⁴ Behrens 2001, p 483.

⁴⁵ CFI, Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, para 172; Ross 2009, p 134-136; Sauter 2008, p 173.

⁴⁶ Van de Gronden 2009, p 261.

⁴⁷ European Commission, *Communication on a Quality Framework for Services of General Interest in Europe*, COM(2011) 900 final, 12 December 2011, p 2.

⁴⁸ Cygan 2008, p 530.

⁴⁹ According to the Court's jurisprudence the non-economic nature of general interest is what makes a difference in terms of derogations from Treaty rules on free movement of trade (economic goals cannot justify restrictions on free movement); Behrens 2001, pp 480-481.

⁵⁰ According to the Commission the social nature of the services does not per se classify the service, which can be both economic and non-economic; European Commission, *Communication on a Quality Framework for Services of General Interest in Europe*, COM(2011) 900 final, 12 December 2011, pp 3-4.

⁵¹ Fiedziuk 2011, p 235.

⁵² Bauby 2011, p 34.

As far as the economic services are concerned, the amended Article 14 TFEU has divided opinions similar to its predecessor Article 16 EC. Some consider that in combination with Article 106(2) and Article 36 of the Charter it shields the SGEI ‘from the full force of the economic rules of the TFEU’,⁵³ while others see its significance in the ‘value statement fulfilling the concept of European Social Model’⁵⁴ and a ‘fundamental principle’ denoting more than a mere derogation from Treaty rules.⁵⁵ On the other hand, the nature and language of Article 14 TFEU does not lead to directly effective rights for EU citizens. Nor does the Charter of Fundamental Human Rights which in its Article 36 ‘recognises and respects access to [SGEI]’ create any new rights.⁵⁶ Article 14 TFEU nevertheless highlights the value dimension to the SGEI specifically.

The various Treaty developments noted above suggest the gradual emergence of the SGI, and specifically SGEI, as an EU value which could be traced in EU foreign policy, including within the ENP, within the value-driven foreign policy framework established by the Lisbon Treaty.

2.2. *Acquis* as a Subject of Normative Export

In addition to the possible projection of the SGI in EU foreign policy as *a value*, their presence in the EU foreign policy can also be considered within the context of promoting EU *acquis*, taking into account the legislative developments of the last two decades regarding the SGEI in network areas.

Despite the adoption by the Commission of certain directives for liberations of former state-owned corporations or monopolies on the basis of Article 106(3),⁵⁷ the opposition by the Member States,

⁵³ Davies and Szyszczak 2011, p 157.

⁵⁴ Bekkedal 2011, pp 92, 98, 99.

⁵⁵ Schweitzer 2011, p 53.

⁵⁶ Fiedziuk 2011, pp 236-237; Cruz 2005, p 178.

⁵⁷ For instance Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, *OJ* 1988 L 131/73; The Commission Decision of 28 November 2005 on the application of Article 86(2) EC (now Article 106(2) TFEU) to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs.

This power of the Commission was confirmed by the Court of Justice in the following cases: CJEU, Joined Cases C-188-190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545; CJEU, Case C-2020/88 *France v Commission* [1991] ECR I-1223 para 14.

the Parliament and the Council resulted in a limited number of acts adopted through this legal basis and led to the liberalisation of relevant sectors with the participation of the Parliament and the Council⁵⁸ The latter group of measures includes *acquis communautaire* in such areas as communications,⁵⁹ energy markets,⁶⁰ and postal services.⁶¹ Most importantly, these measures were adopted not only with the view of market liberalisation but also of securing obligations regarding public service. Liberalising measures have been established also in the area of transportation, although they do not necessarily impose public service obligations.⁶²

In difference with former Article 16 EC, the amended Article 14 TFEU provides for a new legislative competence for the European Parliament and the Council based on the ordinary legislative procedure. It is nevertheless doubted whether any new framework measure would be adopted soon taking into account the Commission's reluctance and its preference for sector-based approach.⁶³ However, if any measure is adopted through this new legal basis, it will become a subject of normative export.

Thus, in addition to the SGI as a value of the EU, one can expect the export of the EU rules on the SG EI, particularly the liberalising and harmonising measures in network sectors, as well rules on

⁵⁸ Schweitzer 2011, p 42; Heritier 2001, pp 843-844; Sauter 2008, p 170.

⁵⁹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communication networks and services (Framework Directive) *OJ* 2002 L 108/33; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), *OJ* 2002 L 108/7; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), *OJ* 2002 L 108/21 and Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), *OJ* 2002 L 108/51.

⁶⁰ 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, *OJ* 2003 L 176/57; 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, *OJ* 2003 L 176/37.

⁶¹ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the involvement of quality of service, *OJ* 1998 L 15/14.

⁶² For instance in the area of air transport, see Prosser 2005, p 205.

⁶³ European Commission, *Communication on a Quality Framework for Services of General Interest in Europe*, COM(2011) 900 final, 12 December 2011, p 5; European Commission, *Communication on Services of General Interest, including Social Services of General Interest: A New European Commitment*, COM(2007) 725 final, 20 November 2007, p 12; European Commission, *Report to the Laeken European Council: Services of General Interest*, COM (2001) 598, s 5-6; European Commission, *Green Paper of Services of General Interest*, COM(2003) 270 final, 21 May 2003, s 40; European Commission, *White Paper on Services of General Interest*, COM (2004) 374 final, 12 May 2004, s 4.1.; Sauter 2008, pp 172-173.

state aid and public procurement and any future secondary legislation adopted on the basis of Article 14 TFEU.

3. The ENP and the export of SGI

In his analysis of universal service provisions in EU trade agreements, Krajewski considers the shift from derogation to a positive obligation within the value-driven framework of EU foreign policy. Similar value dimension is prevalent within the ENP.

Since the Commission, to a certain extent the mastermind of the ENP,⁶⁴ accorded an important role to the SGI within the ‘European model of society’,⁶⁵ devising the ENP in a way to ‘share everything, but institutions’⁶⁶ — as was planned originally — would have implied a positive projection of existing EU rules within the ENP. Because both the original policy documents and the main bulk of the bilateral documents are soft law in nature, one would expect finding more of a value projection rather than derogation which would be more appropriate in hard legal instruments. The following section explores the conditionality as a central element of the ENP with a view of placing the SGI within the latter.

3.1 ENP Avenues for Exporting EU Values and Acquis

As noted above the Lisbon Treaty introduced a number of provisions which have added a value dimension to the pursuit of EU external policy objectives. If one is to consider the ENP within the Treaty framework on the foreign policy, the emphasis on EU values in Article 3(5) and 21 TEU appears to be demanding in terms of entire foreign policy of the EU.⁶⁷ Although Article 21(3) TEU applies the common list of objectives to the EU external action covered by Title V of the TEU and by Part Five of the TFEU (which technically leaves Article 8 TEU on the neighbourhood policies outside its scope), the ENP as a cross-Treaty policy comprising elements from various areas of EU

⁶⁴ For the role of EU institutions within the ENP see Ghazaryan 2012; Ghazaryan 2014, pp 36-53.

⁶⁵ European Commission, *White Paper on Services of General Interest*, COM (2004) 374 final, 12 May 2004, p 4.

⁶⁶ Prodi 2002.

⁶⁷ See Eeckhout in this volume.

foreign action, necessarily has to pursue the objectives in Article 21 TEU.⁶⁸ Besides, Article 8 TEU is itself constructed upon the premise of a value-driven policy: ‘The Union shall develop a special relationship with neighbouring countries ... *founded on the values of the Union* ...’.⁶⁹ In any case, the value dimension of the ENP was present since its initiation due to conditionality being embraced as one the methods of achieving policy objectives.

Conditionality is described as the linking by an international organisation or a state of perceived benefits to another state to the fulfilment of economic and/or political conditions.⁷⁰ Although the ENP was introduced as an alternative to the accession policy, it was elaborated predominantly based on the pre-accession instruments and methodology, including the accession conditionality.⁷¹ Nevertheless, this has been far from a straightforward borrowing not only due to the exclusion of the main carrot, but also due to the manner of setting the conditions for cooperation.

The ENP conditionality can be described as undermined, muted, and non-prioritised. The lack of a membership perspective or other clearly defined incentives is one of the factors which has undermined the policy conditionality for years following its initiation.⁷² The conditionality is non-prioritised as the documents setting conditions for cooperation failed to set a clear set of actions to be achieved within a certain time-frame.⁷³ In this connection the conditionality can also be viewed as muted due to the fact that the accession criteria have been replaced with the concept of ‘shared values’.⁷⁴ The prospect of closer economic integration with the EU depends on the progress in demonstrating shared values.⁷⁵ Making a distinction between *acquis* and non-*acquis* or value

⁶⁸ Ghazaryan 2014, p 32.

⁶⁹ Emphasis added.

⁷⁰ Smith 2005, p 28.

⁷¹ The relationship between the enlargement policy and the ENP has been extensively explored, see for instance Kelley 2006; Magen 2006; Meloni 2007; Balfour and Rotta, 2005.

⁷² Ghazaryan 2014, pp 78-81; Hill and Smith 2005, pp 287-288; Cremona and Hillion 2006, p 39; Missiroli 2004, p 19.

⁷³ Kochenov 2008, p 116; Magen 2006, p 15; Tocci 2007, p 31; Emerson 2005, p 20; Seeberg 2010, p 676.

⁷⁴ Tulumets 2006, p 30.

⁷⁵ European Commission, *Communication on a Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final, 11 April 2003 p 4; European Commission, *European Neighbourhood Policy Strategy Paper*, COM(2004) 373 final, 12 May 2004 (hereinafter ENP Strategy Paper), p 8; On ‘common values’ see further Leino and Petrov 2009.

conditionality, Kochenov attaches fewer expectations to the fulfilment of non-*acquis* conditionality.⁷⁶ The question is where to place the SGI within this dual conditionality?

It can be argued that the discourse on the SGI can be translated to the ENP via both channels of conditionality. First, narrow and wide approaches to value conditionality can be envisaged. If understood narrowly the value conditionality would be based only on Article 2 TEU which defines the EU values to include respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including minority rights. Such narrow reading would exclude the SGI as an EU value. The article however continues to specify that the values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. If one is willing to read into the idea of ‘solidarity’ it might be even possible to link the SGI to Article 2 TFEU values, as some do indeed.⁷⁷ On the other hand, a wider approach is also conceivable where ‘values’ can be understood to include ethical considerations other than those mentioned in Article 2 TFEU. Ultimately, Article 8 TEU on the neighbourhood policy mentions the value basis of the relationship with reference to the ‘values of the Union’ without confining them to Article 2 TEU. Such wide understanding can also include other values of the EU, including at least the SGEI as a ‘shared value’ of the Union in Article 14 TFEU and Article 1 of the Lisbon Protocol on SGI.

Returning to the distinction between value and *acquis* conditionality, the relationship between the two is somewhat problematic. First of all, there is no hierarchy between the two. At the same time, hierarchy might not be deemed essential because it can be argued that *acquis* is based on the EU values. Here it should be noted that the progress of the ENP partners does not solely depend on the adherence to shared values, but also the ‘will and capacity to implement agreed priorities’.⁷⁸ On the other hand, it can be argued that both value and *acquis* conditionality have to be translated to the priorities of cooperation to have any effect utile. The value conditionality would become an abstract notion if it was not included within the priorities of cooperation. Some of the established priorities are not necessarily based on the EU *acquis*, as in many areas prioritised in the bilateral cooperation

⁷⁶ Kochenov 2008, pp 108-110.

⁷⁷ Ross 2007; Wernicke 2009.

⁷⁸ ENP Strategy Paper, p 8.

no *acquis communautaire* exists as such.⁷⁹ They should therefore be deemed to be based on value projection. Thus, the SGI as a value can be traced within the ENP on a rhetorical level, but also within the priorities of cooperation in addition to the relevant *acquis*.

3.2. *The ENP Policy Documents and the SGI*

It is the ENP strategy-setting documents that have laid the ground for exporting EU values and laws in many areas of EU competence. Thus, before turning to the bilateral instruments spelling out the conditions for cooperation, the former should be considered first to identify whether the SGI-related aspects of ‘social Europe’ have been projected onto the neighbourhood, and if so whether they take a form of a derogation or of a positive value projection or *acquis* promotion.

The ENP exists through a wide range of instruments predominantly with no traditional legal obligations, which can be brought under the general concept of soft law, suggesting no binding force per se, although with a possibility of inducing certain practical or even legal effects.⁸⁰

The initial Wider Europe Communication (a rather rhetorical document) referred to striving towards social cohesion, reduction of social division and promotion of social inclusion.⁸¹ More substantively the Communication made reference to the EU *acquis* in transport, energy and telecommunications networks as ‘a well established model’ which the neighbours should replicate. The subsequent ENP Strategy Paper, which narrowed certain policy ambitions following the Council’s intervention,⁸² emphasised the eagerness of the Union to establish dialogue and cooperation ‘on the social dimension’, defined widely to include such issues as poverty reduction, reducing regional disparities, employment, and even reforming national welfare systems.⁸³ Similar to the previous document the Strategy Paper refers to the ambition of connecting the neighbourhood in transport,

⁷⁹ For instance, conflict resolution.

⁸⁰ The main ideas of the ENP were circulated through the conclusions of the Council and the European Council, Commission communications and other policy documents, including papers and non-papers, joint letters, statements, EP resolutions and recommendations. See the definition of soft law in Senden 2005, p 112.

⁸¹ European Commission, *Communication on a Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final, 11 April 2003, pp 3, 8.

⁸² Zaiotti 2007, p 157.

⁸³ ENP Strategy Paper, p 14.

energy, and information society sectors. Subsequent ENP policy and revision documents, although consider various aspects of social policy, do not mention SGI or SGEI.⁸⁴

Following the Arab Spring Revolutions, the ENP has been revised to allegedly respond to new challenges. A ‘more for more’ approach was adopted to reward with more significant benefits those neighbours which distinguish themselves with a fast pace of reform.⁸⁵ In this respect, ‘the more for more’ principle was extended to the areas of energy and transport with a focus on market integration.⁸⁶ The social debate is reflected also in the most recent strategy papers of the ENP, highlighting the importance of a more inclusive economic development,⁸⁷ and even mentioning social cohesion as one of the values constituting the basis for closer cooperation between the parties.⁸⁸ This suggests that the concept of ‘values’ deployed within the ENP is rather fluid and is not restricted to those defined in Article 2 TEU. Besides, the policy documents reveal that the economic liberalisation appears to be accompanied by social considerations, including an agenda for legislative approximation in the network areas. Similar outlook is present within the EaP.

The EaP Communication was meant to signal a step-change in the relations between the EU and its Eastern neighbours. It appeared to reinforce the prospect of new association agreements leading to the creation of a network of FTAs that can eventually evolve into a neighbourhood economic community.⁸⁹ In addition to more intensified cooperation via previously established bilateral track

⁸⁴ For instance the 2006 Communication on Strengthening the ENP mentions the benefits of a multilateral dialogues in network and other areas; European Commission, *Communication on Strengthening the European Neighbourhood Policy*, COM(2006) 726 final, 4 December 2006, p 8. The Communication on *Implementation of the ENP* in 2008 considers the progress made in ‘social reform’, COM(2009) 188/3, 23 May 2009. The Communication on *Taking Stock of the ENP Communication* considers various social policy issues as part of the ENP, COM(2010) 207, 12 May 2010, p 8.

⁸⁵ European Commission/High Representative, *Joint Communication on A New Response to a Changing Neighbourhood: A Review of the European Neighbourhood Policy*, COM(2011) 303, 25 May 2011, pp 2, 8-9, 20-21; European Commission/High Representative, *Joint Communication on Delivering on a New European Neighbourhood Policy*, JOIN (2012) 14 final, 15 May 2012, pp 2-4.

⁸⁶ European Commission/High Representative, *Joint Communication on a New Response to a Changing Neighbourhood: A Review of the European Neighbourhood Policy*, COM(2011) 303, 25 May 2011, p 10.

⁸⁷ European Commission/High Representative, *Joint Communication on Delivering on a New European Neighbourhood Policy*, JOIN (2012) 14 final, 15 May 2012, p 9.

⁸⁸ European Commission/High Representative, *Joint Communication on European Neighbourhood Policy: Working towards a stronger partnership*, JOIN (2013) 4 final 2013, 20 March 2013, p 2.

⁸⁹ European Commission, *Communication on Eastern Partnership*, COM (2008) 823 final, 3 December 2008, p 10. For a more detailed discussion of the Eastern Partnership see Hillion and Mayhew 2009; Ghazaryan 2014, pp 84-94.

the EaP added new fora for multilateral high-level meetings, going beyond ‘classical association’.⁹⁰ Four thematic platforms have been established for a multilateral cooperation in a form of exchange of practice operating through meetings held twice a year at the level of senior officials. The platforms are on democracy, good governance and stability; economic integration and convergence with EU policies; energy security; and contacts between people. Its added value should therefore be sought in its multilateral framework. The objectives for the platform on economic cooperation include taking into account the social aspects of the market, convergence in some network areas, as well as approximation in competition rules.⁹¹

The EaP policy documents similarly envisage legal approximation in network areas inclusive of also the bilateral track.⁹² In a Joint Communication establishing a Roadmap to the EaP summit in 2013, the concept of ‘public services’ featured for the first time in the ENP common policy documents.⁹³ The context is one of establishing a dialogue on labour markets and social policies as part of expected achievements by the summit, to promote exchanges inter alia on ‘social protection and social inclusion policies, involving public services and social partners as stakeholders’. It is noteworthy that the term ‘public service’ found its way to the document despite the Commission’s reluctance to use it in internal context, and because the term is mostly used to denote other services than SGI in the countries concerned as mentioned earlier. One might argue that ‘public service’ is used to denote social services as the context above would suggest. On the other hand, the passage enumerates a number of expected achievements without much elaboration, which can suggest that the reference is made without attaching much significance to it.

It can therefore be summarised that despite certain rhetoric being present on social considerations accompanying the market liberalisation, there is no realistic imposition of the SGI or SGEI as a Union value outside the discourse on the liberalisation of network sectors. To which extent this rhetoric is translated into bilateral instrument is considered next.

⁹⁰ The structural platform consists of meetings of the heads of the states or governments of Eastern partners held every two years and annual spring meetings of Ministers of Foreign Affairs; Hillion and Mayhew 2009, pp 8-9.

⁹¹ Core Objectives and Proposed Work Programme 2009-2011, available at http://eeas.europa.eu/eastern/platforms/docs/platform2_151109_en.pdf.

⁹² European Commission, *Communication on Eastern Partnership*, COM (2008) 823 final, 3 December 2008, pp 9-10.

⁹³ European Commission/High Representative, *Joint Communication on Eastern Partnership: A Roadmap to Autumn 2013 Summit*, JOIN(2012) 13 final, 15 May 2012, p 13.

4. Bilateral Instruments of Cooperation with the EaP States

A few generations of ENP bilateral documents can be envisaged within the bilateral cooperation. Although the ENP established its own instruments, it also inherited the previously concluded with the Eastern neighbours Partnership and Cooperation Agreements (PCAs).⁹⁴ Alongside these pre-ENP documents, Action Plans as the first official ENP bilateral instruments were established with each party. Accession Partnership (to date established only with Ukraine) represent the next generation of ENP bilateral instruments, with the possible Association Agreements to become the latest generation.

4.1. Pre-Association Agreement Instruments

It should be noted that due to the possibility of creating a free trade area the PCAs concluded with Moldova and Ukraine, so called Westerns CIA countries, have been perceived as more advanced in comparison with the PCAs with the South Caucasian countries.⁹⁵ Thus, there are certain distinctions, but also commonalities, between on the one hand the Moldovan and Ukrainian and on the other the South Caucasian PCAs.⁹⁶ Among common features, the PCAs provide for social cooperation as an objective for bilateral relations.⁹⁷ They envisage that the economic reforms should be guided by harmonious social development, while simultaneously providing for cooperation in network sectors, including energy and telecommunications.⁹⁸ Although only transport is mentioned from network sectors among the specific areas for legislative approximation,

⁹⁴ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other, *OJ* 1999 L 239/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other, *OJ* 1999 L 246/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Georgia, of the other, *OJ* 1999 L 205/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other, *OJ* 1998 L 181; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other, *OJ* 1998 L 049; European Commission, *Communication on a Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final, 11 April 2003, p 15; Council of the European Union, Thessaloniki European Council Conclusions, 19-20 June 2003.

⁹⁵ See for instance Article 4, PCA with Moldova; Maresceau and Montaguti 1995, pp 1340-1341; Berdiyev 2003, p 463-464.

⁹⁶ See Ghazaryan 2010, p 225.

⁹⁷ Common Article 1.

⁹⁸ Article 51 EU-Moldova PCA; Article 52 EU-Ukraine PCA; Article 44 EU-Armenia PCA.

other areas as far as the SGEI are concerned would include the rules on competition.⁹⁹ Another notable provision is the common article on postal services and telecommunications, which inter alia mentions enhancing *efficiency and quality of service*.¹⁰⁰ A social cooperation-specific provision, despite its health and employment oriented core, mentions that social reforms should aim at developing methods of protection intrinsic to market economics and shall comprise all directions of social protection.¹⁰¹ While these provisions suggest certain positive obligation imposed on the parties, an article on cooperation in the area of competition special to Moldovan and Ukrainian PCAs provides for a derogation-like clause similar to Article 106(2) TFEU:

*'In the case of public undertakings or undertakings to which [the Parties] grant exclusive rights, the Parties declare their readiness ... to ensure that there is neither enacted nor maintained any measure distorting trade between [the Parties] to an extent contrary to [their] respective interests. This provision shall not obstruct the performance, in law or fact, of the particular tasks assigned to such undertakings'.*¹⁰²

Despite the obvious similarity in the rationale of the Article to that of Article 106(2) TFEU, the terminology of undertakings to which which 'exclusive rights' were granted replaces the 'undertakings entrusted with the operation of services of general economic interest' suggesting flexibility in using relevant terminology. This provision demonstrates that the promise of a closer cooperation in a form of a potential free trade area is accompanied with certain projection of the EU model into the relations with the neighbours concerned.

The key ENP bilateral instruments, the non-binding Action Plans establishing priority areas of cooperation with the majority of the Eastern partners have continued the trend of distinguishing between the Western NCIS and South Caucasian countries.¹⁰³ The Ukrainian and Moldovan Action Plans are much more detailed and extensive in setting the priority agenda. Although the discourse on social cohesion and social policy reform is adopted in all Action Plans,¹⁰⁴ a few aspects can be

⁹⁹ Article 50(2) EU-Moldova PCA, Article 51(2) EU-Ukraine PCA; Article 43 EU-Armenia PCA.

¹⁰⁰ Article 63 EU-Moldova PCA; Article 66 of EU-Ukraine PCA; Article 57 EU-Armenia PCA.

¹⁰¹ Article 71 EU-Ukraine PCA; Article 68 EU-Moldova PCA; Article 60 EU-Armenia PCA.

¹⁰² Article 48(2)(5) EU-Moldova PCA; Article 49(2)(5) of EU-Ukraine PCA.

¹⁰³ Georgia, Armenia and Azerbaijan have originally been excluded from the ENP and were included in 2004; ENP Strategy Paper, pp 10-11.

¹⁰⁴ The Introduction to all Action Plans mentions promotion of social cohesion as one of the objectives of the document. See also Priority Area 2.3 of EU-Moldova Action Plan; Priority Area 21 of EU-Ukraine Action Plan; Priority Area 3 of EU-Georgia Action Plan; Priority Area 3 of EU-Armenia Action Plan; Priority Area 6 of EU-Azerbaijan Action Plan.

singled out in terms of the SGI. The Moldovan and Ukrainian Action Plans establish priorities for legal convergence not only in network sectors of transport, energy and communications, but also on rules of competition and public procurement.¹⁰⁵ Certain features of the SGI do however make a sporadic appearance in the documents. For instance, the Moldovan Action Plan in the priority on information society requires adoption of a comprehensive regulatory framework including *universal service and users' rights*.¹⁰⁶ Although no reference to EU *acquis* is made in this priority area, it is evident that the debate is informed by the basic concepts of the Universal Service Directive 2002/22 in the area of electronic communications.¹⁰⁷ On the other hand, the Ukrainian Action Plan requires the latter to undertake measures to improve social cohesion, including *social services with access for all*.¹⁰⁸ While no sectoral *acquis* exists in this area, it can be argued that the Commission's soft law has influenced the drafting of this priority area, particularly the 2004 White Paper which prior to the establishment of the Action Plan recognised that social services of general interest, based on the principle of solidarity, are 'an integral part of the European model of society'.¹⁰⁹ In addition, the specific references in the individual Action Plans can be claimed to have been reflective of the lacuna that existed in the national legislation of the countries concerned. For instance, although a Law on Social Services existed in Ukraine since 2003, the access to these services was not available to all groups.¹¹⁰

The Action Plans with the South Caucasian countries contain fewer and much more generally phrased priorities.¹¹¹ In comparison with the previously considered Action Plans these documents come across as being more rhetorical in nature, and the following references might be argued to be devoid of legal significance. Although the references serve as evidence to the EU internal debate surrounding the SGI being to a certain extent reflected in the ENP, their location within the documents is rather discouraging. They appear within 'general actions' the status of which is far

¹⁰⁵ See Priority 37, 40, 57, 63 and 67 of EU-Moldova Action Plan; Priority Area 39, 42, 51, 52, 58 of EU-Ukraine Action Plan.

¹⁰⁶ Priority Area 67, EU-Moldova Action Plan.

¹⁰⁷ See for instance the preamble and Article 3 of the Universal Service Directive, *OJ* 2002 L 108/51.

¹⁰⁸ Priority Area 22, EU-Ukraine Action Plan.

¹⁰⁹ European Commission, *White Paper on Services of General Interest*, COM(2004) 374 final, 12 May 2004, p 16.

¹¹⁰ For instance the access for migrants was noted to be problematic even in 2009, European Commission, *Implementation of the European Neighbourhood Policy in 2009, Progress Report Ukraine*, SEC(2010) 524, 12 May 2010, p 13.

¹¹¹ For the criticism of the Action Plans with South Caucasian countries see Ghazaryan 2014, pp 125-140.

from clear. They are neither priorities nor conditions for cooperation: rather a general call for action.

The Georgian Action Plan within its general actions makes provision for health and other social services ‘with access for all’ and affordable healthcare for whole population.¹¹² Similarly the general actions of the Armenian Action Plan provide for the modernisation of public sector to ensure ‘better access to basic services for all’, and improve social cohesion, ‘including social services with access for all’.¹¹³ In relation to health sector reform, the document requires improving ‘access and affordability of services’.¹¹⁴ The concept of ‘universal service’ also makes appearance in the area of communications in the Armenian and Azerbaijani Action Plans.¹¹⁵ The latter also refers to the improved access and affordability of healthcare for entire population.¹¹⁶ These references are notable for a number of reasons. First, they might be suggestive of the EU’s acknowledgment of the lack of regulation in the countries concerned. In line with the Ukrainian and Moldovan Action Plans they also suggest that the Action Plans are necessarily informed by the EU’s internal debate on SGI. While in some areas, such as communications, the language used is directly reflective of the EU *acquis*, in others, such as social services and healthcare, the references to access and quality of services echo the elements of the SGI as defined in soft law, projecting the role of the SGI as an emerging EU value.

Within the instrumental progression of the ENP, the Association Agenda with Ukraine, a so called ‘second-generation’ ENP instrument,¹¹⁷ should be noticed. It was established with Ukraine in 2009 to replace the EU-Ukraine Action Plan and to prepare the ground for the new association agreement,¹¹⁸ by arguably ‘hardening’ the soft law framework of the Action Plan.¹¹⁹ It has a more focused approach towards legislative approximation *inter alia* in network areas. For instance the Agenda mentions the necessity of compatibility of Ukrainian law with the Directive 2003/55/EC

¹¹² S 4.4 and 4.7.2 of General Actions, EU-Georgia Action Plan.

¹¹³ S 4.3 of General Actions, EU-Armenia Action Plan.

¹¹⁴ S 4.7.2 of General Actions, EU-Armenia Action Plan.

¹¹⁵ S 4.6.3 of General Actions, EU-Armenia Action Plan; S 4.6.4 of General Actions, EU-Azerbaijan Action Plan.

¹¹⁶ S 4.7.2 of General Actions, EU-Azerbaijan Action Plan.

¹¹⁷ Van Vooren 2011a, p 203-210.

¹¹⁸ EU-Ukraine Association Agenda, p 2.

¹¹⁹ Van Vooren 2011b, p 169.

liberalising and imposing public service obligations in natural gas sector. This confirms the presumption made that the secondary legislation will be the main export subject via the ENP as far as the SGEI is concerned.

4.2. Association Agreements as the Future Generation of Bilateral Instruments

In terms of instrumental progression, association agreements have been promised to all EaP states with the exception of Belarus. The association agreement containing a Deep and Comprehensive Free Trade Area (DCFTA) was expected to be signed with Ukraine and those with Moldova, Armenia and Georgia were expected to be initiated at the Vilnius EaP summit in November 2013. Due to political pressure from Russia, Armenia declared in September 2013 that it would join the Eurasian Economic Community,¹²⁰ therefore sabotaging the prospect of establishing a DCFTA with the EU. In an even more surprising turn prior to the EaP summit the Ukrainian President declared that the process of concluding the Association Agreement with the EU would be suspended which led to a national uprising.¹²¹ Although the new interim Ukrainian government reversed this decision, the future of the agreement is not yet certain.¹²² Notwithstanding the future events, the leaked draft of EU-Ukraine Association Agreement is indicative of the EU's approach to the SGI in its neighbourhood, as it represents the maximum cooperation offered to any of the neighbours due to Ukraine's previous role as a frontrunner in the region. The agreements with Moldova and Georgia have been negotiated within a rather limited period of time suggesting that the Ukrainian template would have been used for these countries.

The draft agreement has a DCFTA as its component as noted above. A 'comprehensive' FTA refers to liberalisation of trade in both goods and services, while 'deep' FTA entails regulatory approximation and reduction of non-tariff barriers.¹²³ A DCFTA which constitutes a part of the agreement is rather far reaching as in addition to the market liberalisation in all areas it implies also legislative approximation to EU norms and regulations. The membership of the WTO has been a precondition for entering negotiations on the DCFTA, which would suggest that the latter would be reflective of the GATS regime on the liberalisation of services. A cursory examination of the draft

¹²⁰ 'Armenia chooses Russia over EU' *European Voice*, 3 September 2013

¹²¹ 'EU "disappointed" by Ukraine decision' *European Voice*, 22 November 2013.

¹²² 'Ukraine ready to sign association agreement during March EU summit' *Euractiv*, 27 February 2014.

¹²³ Gstohl 2012, p 98.

reveals a significant role for the SGEI. A question to be mindful of here is whether the role of SGEI in the agreement is more reflective of the GATS regime or the EU's internal market model.

Although the general objectives and principles of the cooperation established highlight the economic and political core of the agreement without reference to social cohesion as in the case of the PCAs,¹²⁴ the SGEI occupy a prominent role within the agreement. Not only they make a frequent appearance within the derogations intended to shield domestic policies in a number of areas, but they also feature prominently through positively promoted SGEI-related concepts and approximation agenda. The most scrupulous legislative approximation agenda annexed to the Treaty already promises much in this respect. These two strands are in accordance with the two approaches towards public services found in trade agreements identified by Krajewski. While the first approach excludes specific services from the full impact of the trade agreement, the second aims to regulate certain aspects related to specific services or their provision.¹²⁵

The presence of specific derogations in an agreement is indicative of a balance the parties intend to strike between market liberalisation and non-market considerations.¹²⁶ In many respects the draft Association Agreement is comparable to other free trade agreements concluded but the EU. In line with the EU's previous practice, the agreement provides for general exceptions in Article 141 from the rules on establishment, trade in services and electronic commerce for social security systems or activities connected to the exercise of official authority of each of the parties. This provision is similar to other FTA provisions concluded by the EU in line with GATS I:3(b) and (C), and has been viewed to refer to 'core governmental functions' as opposed to most services of general economic interest.¹²⁷

In relation to services, the proposed EU-Ukraine agreement follows GATS's approach of a positive list regarding the market access and national treatment rule.¹²⁸ In different with GATS, a general exception is made in regards to audiovisual services, which has been the case also in previous trade

¹²⁴ Article 1 and 3 of the Draft EU-Ukraine Association Agreement.

¹²⁵ Krajewski 2011b, p 6.

¹²⁶ Arena 2011, p 494.

¹²⁷ Krajewski 2009, p 206; Krajewski 2003, p 73.

¹²⁸ See Articles 93-94 of EU-Ukraine draft Association Agreement; Krajewski 2009, p 208.

agreements explained by EU's or its Member States' sensitivity in this area.¹²⁹ Cultural services, other than audiovisual services, have not been excluded from the scope of the agreement. The agreement can be compared to other trade agreements concluded by the EU in respect of a horizontal reservation regarding public utilities which are economic activities which may be subject to public monopolies or to exclusive rights granted to private operators. For instance, while EU-Chile FTA provides for a horizontal reservation for the EU from the market access regime for cross-border supply of services in relation to public utilities, the EU-Ukraine draft agreement makes a horizontal reservation to national treatment rule on establishment related to 'public utilities'. Further, the list of commitments on cross-border services is clarified to be without prejudice to the existence of public monopolies and exclusive rights as described in the list of commitments on establishment, therefore referring to public utilities. This is reflective of the EU's horizontal reservations in GATS Schedule except for express exclusion for telecommunication and computer services.¹³⁰

In terms of sector-specific reservations, the following areas concerning SGI can be noted:

- Publicly funded health, social and education services are excluded from the EU national treatment and MFN commitments.¹³¹ As to privately funded education services, nationality conditions may apply, and specific commitments are specified for the majority of the Member States as regards primary, secondary, higher education and other education services.¹³² Similarly, Member-State specific reservations are made for privately funded health and social services.¹³³
- No reservations are made for postal and telecommunication services with the exception that 'service providers in this sector may be subject to obligations to safeguard general interest objectives related to the conveyance of content through their network in line with the EU regulatory framework for electronic communications'.¹³⁴
- The commitments in environmental services are without reservations with an exception of consulting services for cross border trade.¹³⁵

¹²⁹ Krajewski 2011c, p 182.

¹³⁰ Such conclusion was drawn by Krajewski as regards EU-Chile agreement, Krajewski 2009, p 209.

¹³¹ See ANNEX XVI-A.

¹³² See ANNEX XVI-B, s 5 of the list of sub-sectoral commitments.

¹³³ See ANNEX XVI-B, s 8 of the list of sub-sectoral commitments.

¹³⁴ See ANNEX XVI-B, s 2 of the list of sub-sectoral commitments.

¹³⁵ Reservation is related to Mode 1, See ANNEX XVI-B, s 6 of the list of sub-sectoral commitments

So far, this is reflective of the EU's common commercial policy and is comparable to FTAs concluded by the EU.

It has been noted that the scope of GATS exemptions are limited in comparison to the EU regime, particularly with reference to Article 106(2) TFEU.¹³⁶ It is important therefore to look into this issue to identify whether the regime proposed in the Treaty is also reflective of the EU's internal market. First all, it should be mentioned Article 257 is reminiscent of the Article 49 of the Ukrainian PCA noted above. Although it does not refer to the SGEI, it however considers the activity of 'public enterprises' or 'enterprises entrusted with special or exclusive rights' within the Article 106(2)-like language of 'performance obstruction'. Most important however for the rationale of the EU internal market, is the fact that approximation of laws including on Article 106 and its implementing legislation is an obligation under the agreement.¹³⁷ Although the specific measures and their timetable mentioned in Article 256 do not include those related to Article 106(2), the provision includes also approximation as regards 106(2) since the 'competition laws' referred to in the Article are defined to include also Article 106 TFEU.¹³⁸

That the internal market rationale has been projected into the agreement is evident also from further derogation, this time specifically for 'SGEI'. Article 262(4) on state aid provides that undertakings entrusted with the operation of SGEI shall be subject to the general rules, in so far as they do not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

The projection of the internal market rationale is also evident as regard the postal and communication services regarding universal service obligations which the parties are free to define and which will not be considered to be anticompetitive per se.¹³⁹ It should be noted that the concept of a universal service, defined on the basis of EU secondary legislation, constitutes the foundation of the Ukrainian commitments in certain sectors. For instance draft Article 109 defines universal service in postal areas on the basis of the definition in Article 3(1) of the Directive 97/67 on postal

¹³⁶ Steinicke 2012, p 340.

¹³⁷ Article 256 of Draft EU-Ukraine Association Agreement.

¹³⁸ Article 253(2), *ibid*.

¹³⁹ See Article 111 and 120 of Draft EU-Ukraine Association Agreement.

services.¹⁴⁰ Meanwhile the provisions on energy cooperation of the draft agreement adopt the relevant language of the EU secondary regulation, exemplified by ‘public service obligations’ in Article 337. Besides, the general principles of the relevant secondary legislation are specified in the provision referring to ‘access to affordable energy for consumers, including vulnerable groups’.¹⁴¹ The reliance on the terminology of ‘public service’ here demonstrates the positive correlation to the internal regulation of particular services. Article 389 on information society also reflects the elements of SGEI, which is better quality of services and affordable prices. Most importantly, the draft agreement details the plan of legislative approximation which involves the network areas liberalised in the EU, which impose public service obligations on the Member States.¹⁴² This can be argued to be an evidence that the trade component of the proposed association agreement stretches beyond the common commercial policy and indeed reflects an extension of the internal market rationale with its rules as far as the SGEI are concerned.

5. Conclusion

The discussion above reveals that there is certain social accompaniment to the trade liberalisation core of the cooperation offered through the ENP reflective of the value-driven policy framework. Public interest has featured early on in relations with the Eastern neighbours through the provisions of the PCAs, although more intensely with those of the Western CIS countries. While embracing the PCAs, the ENP policy documents also indicate towards the presence of certain social agenda within the policy. Thus, the policy documents, even if only rhetorically, introduce social elements aimed at social cohesion, and poverty reduction in addition to the call for economic liberalisation. While the latter reveals a legislative approximation agenda in network areas, the rhetoric more generally can be argued to be informed by the role of the SGI as an EU value, since in many areas concerned no

¹⁴⁰ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of community postal service and the improvement of quality of service, *OJ* 1998 L 15/14; Article 115(g) does the same for communications sector.

¹⁴¹ See for instance Article 3(2) and (5) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003, *OJ* 2003 L 176/37; Article 3(2) and (3) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003, *OJ* 2003 L 176/57.

¹⁴² Specifically Universal Service Directive, *OJ* 2002 L 108/51; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market and natural gas, *OJ* 2003 L 176/57; 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, *OJ* 2003 L 176/37; Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, *OJ* 1998 L 15/14.

acquis exists as such. This trend has found continuity within the ENP, and has been translated into the instruments of bilateral cooperation.

The Action Plans preserve the rhetoric on social cohesion, but they also invite neighbours attention to the purpose of legislative approximation in network areas (Ukraine and Moldova), as well as to the importance of providing SGI in some areas although without mentioning the term, but referring to such elements of the latter as universality, affordability and quality (Armenia, Azerbaijan, Georgia). Although, such references can be viewed as devoid of practical significance, as the Action Plans with the three South Caucasian countries are rather rhetorical in nature, the rhetoric similar to the general policy documents is informed by the values of the EU. In this respect it should be noted that a more noticeable focus on SGI is present once the cooperation advances into a traditional hard-law based stage. The draft Association Agreement with Ukraine serves as a testimony to this, demonstrating that the internal debate on the SGI and specifically the SGEI has been embraced by the ENP both in a form of a derogation and positive policy promotion. Most importantly, it also demonstrated that draft agreement stretches beyond the GATS regime and projects the EU's own model as far as the SGEI are concerned. Ultimately, the ENP is certainly reflective of the internal developments around the notion of SGI.

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