

PRINCIPLES FOR THE IMPLEMENTATION OF A GOVERNANCE FACILITY UNDER ENPI

This note intends to define the principles for implementing the Governance Facility as announced in the December 2006 Communication on Strengthening the European Neighbourhood Policy.

1. BACKGROUND

The European Neighbourhood Policy Strategy Paper¹ indicates that “*the privileged relationship with neighbours will build on mutual commitment to common values principally within the fields of the rule of law, good governance, the respect for human rights, including minority rights, the promotion of good neighbourly relations, and the principles of market economy and sustainable development.*” It then states: “*The level of ambition of the EU’s relationships with its neighbours will take into account the extent to which these values are effectively shared.*”

The European Neighbourhood and Partnership Instrument², in its article 2.1, clearly indicates that Community assistance shall “*encourage partner countries’ efforts aimed at promoting good governance ...*”. In addition, in article 7, it underlines the need to take into account the level of ambition of the European Union’s partnership with a given partner, progress towards implementing agreed objectives, including on governance and on reform, in determining the level of allocation for each country programme.

The programming exercise for the period 2007-2010 has thus already taken into account the need to increase funds for partners making progress towards implementing agreed objectives, in particular concerning governance and reform. The Transparency International corruption index is among the criteria used in establishing ENPI country allocations. Thus the Governance Facility discussed here constitutes an **additional** recognition for efforts undertaken in this area.

The Commission proposed to go further in encouraging neighbouring countries in their reform processes by proposing, in its December 2006 Communication³, a Governance Facility “*intended to provide additional support, on top of the normal country allocations, to acknowledge and support the work of those partner countries who have made most progress in implementing the agreed reform agenda set out in their Action Plan. In line with an assessment of progress made in implementing the (broadly-defined) governance aspects of the Action Plans, this funding would be made available to top-up national allocations, to support key elements of the reform agenda; this will help reformist governments to strengthen their domestic constituencies for reform*”.

¹ European Neighbourhood Policy Strategy Paper COM (2004) 373, 12.05.04

² Regulation (EC) N° 1638/2006 of the European Parliament and the Council of 24 October laying down general provisions establishing a European Neighbourhood and Partnership Instrument.

³ Strengthening the European Neighbourhood Policy COM (2006) 726, 04.12.06

Beyond what has been announced in the framework of the ENP, the design of the Governance Facility needs also to take into account the work being undertaken by the Commission regarding the promotion of governance in a broad sense, particularly the Commission's August 2006 Communication on Governance in the European Consensus on Development⁴ and the corresponding Council Conclusions⁵. This Communication recalls that governance has become a priority in many donors' aid programmes and that there is a growing consensus on the relevance of a broad approach to this issue. Governance, as described in that Communication, includes: respect of human rights and fundamental freedoms, support for democratization processes, respect for the rule of law and access for all to an independent justice system, access to information; a government that governs transparently and is accountable to the relevant institutions and electorate; human security; management of migratory flows; effective institutions; access to basic social services; sustainable management of natural and energy resources and of the environment; and the promotion of sustainable economic growth and social cohesion in a climate conducive to private investment.

The Governance Facility described in the present non-paper builds on the concept of a Democracy Facility that was launched in the 2003 Commission Communication⁶ on *"Reinvigorating EU actions on Human Rights and Democracy with the Mediterranean Partners"*. At the Euro-Mediterranean 10th Anniversary Barcelona Summit in November 2005, the Chairman noted that partners had made a commitment to *"strengthen democracy, expanding participation in political life, public affairs and decision making, and further promoting gender equality, to enhance respect for all human rights and fundamental freedoms, including freedom of expression in accordance with their international obligations, to continue maintaining and ensuring the independence of the judiciary and expand access to justice to all. In this context the EU will establish a substantial financial Facility to support willing Mediterranean partners' in carrying out their reforms, taking into account that successful reforms must develop from within the societies of the region"*. This Facility was introduced for Mediterranean countries in 2006 and two countries benefited from an increase in their annual allocation from the last year of the MEDA budget. However, to date no equivalent mechanism has been put in place for our Eastern Neighbours.

2. GOVERNANCE ASPECTS OF THE ACTION PLANS

The 2006 ENP Communication indicates that to identify which countries would benefit from the Governance Facility, the progress made in implementing the (broadly-defined) governance aspects of the ENP Action Plans will be assessed. In fact, "governance" is central to the content of the Action Plans. In each Action Plan there is a specific chapter entitled *"Enhanced political dialogue and reform"* under which horizontal aspects of Democratic Governance are covered. In addition, governance-related elements can be

⁴ COM (2006) 421, 30.08.06

⁵ General Affairs and External Relations Council, 16 October 2006, Conclusions of the Council and the Representatives of the Governments of the Member States meeting within the Council on the Governance in the European Consensus on Development: Towards a harmonised approach within the European Union

⁶ COM (2003) 294, 21.05.03

found in each of the other five chapters of each Action Plans. Some examples of governance-related priorities are:

- strengthening democratic practices, respect for human rights and the rule of law, and tackling corruption;
- establishing sound economic management based on market-economy principles and transparency;
- introducing reforms in the area of trade, the internal market and regulation, including reforms in the area of competition policy, intellectual property, public procurement and action against customs fraud;
- cooperation in fiscal, judicial, police and border-management matters aimed at tackling fraud and tax evasion, money laundering, and terrorism. Cooperation in the management of migratory flows, illegal migration and fight against trafficking of human beings;
- introducing sectoral reforms (transport, energy, information society, environment, etc.) in order to improve management and encourage the authorities to account for their decisions to those they administer;
- developing contacts between communities, developing human resources and strengthening civil society.

This illustrates that the broad approach described in the Commission Communication on Governance is applied in the frame of the ENP Action Plans and argues for taking some account of all six chapters of the Action Plans. However, in measuring progress in governance there will be a clear emphasis on the “core” governance issues: democratic practice, respect for human rights and fundamental freedoms and the rule of law.

3. ELEMENTS FOR THE DEFINITION OF ALLOCATION CRITERIA

The key role of the Action Plan:

The link between progress in the implementation of the ENP Action Plans and the Governance Facility announced in the 2006 ENP Communication implies that the allocation criteria should be based on the Action Plans and their implementation. Indeed, the key role of the Action Plans was already announced in the 2004 Communication, and partners are aware that *“the level of ambition of the EU’s relationships with its neighbours will take into account the extent to which these values are effectively shared”*.

In using the Action Plans as a tool for assessing country performance and deciding on allocations, a number of principles must be borne in mind:

(1) Objectivity

Action Plans do not always provide quantifiable indicators of the achievement of priorities. Sometimes the objective is for the partner to ratify an international convention or to adopt a law, but this is rather the exception than the rule. In general, the priorities are formulated in a more general manner, such as for example: “promote role of the private sector in the media”. Therefore, although the Action Plans provide an objective

basis for assessing progress in various governance-related areas, this cannot be reduced to a mechanical ‘ticking off’ exercise. The assessment will incorporate a number of quantitative and qualitative elements in order to provide a basis for a sound political judgement (see below, under **quantification of allocation criteria**). It will make use, as appropriate, of analytic tools developed by the Commission in the context of other initiatives for the promotion of governance.

(2) Comparability

Each Action Plan follows the same structure of six chapters, but the number of more detailed objectives and level of ambition these objectives express varies from partner to partner. Indeed, certain partners are reluctant to address human rights and democratisation issues, and the fact that some Action Plans are more ambitious than others needs to be taken into account in the evaluation process. More than the number of objectives, it is the depth of the reforms envisaged in the Action Plans that will help to determine each partners’ level of ambition for reform.

(3) Progress versus level of attainment

It must be recognised that the ENP partners have significantly different starting points as regards governance. Consequently, allocations from the Governance Facility should reward the **progress** that is achieved (even if governance in absolute terms may remain weak) while also taking into account the overall level of governance achieved. The Country Progress Reports are suited for this purpose as Action Plans are valid for 3 to 5 years and progress can be measured through successive reports. It also permits taking account of any regression in the fulfilment of some objectives.

(4) Effective implementation

While stated policy intentions and legislation will be significant considerations, actual implementation will be the most important benchmark for measuring progress. Reform takes time, often going beyond the time frames of the Action Plans. Therefore not only completed reform towards better governance should be covered, but also steps towards such reform, in so far as these steps appear sustainable.

Allocations from the Governance Facility may need to take into account exceptional circumstances not reflected in the Progress Reports. For example, if governance in a particular partner country deteriorates after the assessment period, to the extent that an allocation to this country would be contrary to the actual objectives of the Facility, there shall be a discretionary possibility not to allocate the funds to that country. Such an exception shall be duly explained in the assessment and allocation document for that year.

(5) Recognition of achievement

A number of partners have been reluctant to establish ENP Action Plans precisely because of the conditionality aspects that these entail. For this reason, in communicating decisions relating to the Governance Facility, it will be essential to concentrate on the achievements of the best performers.

(6) Transparency

The Commission will communicate to partners the *principles* according to which Governance Facility allocations are made. In addition, the present paper is being posted on the web.

The Commission's *assessment* of the progress made by partners in the area of governance is similarly made public through the publication of its annual Communication and accompanying Progress Reports. These also indicate to partners the governance areas that, in the view of the Commission, remain to be addressed.

Relative importance of different criteria:

In view of the paramount importance of democratic practice, respect of human rights and fundamental freedoms, and the rule of law, basic progress in these areas is an essential criterion (*conditio sine qua non*) for receiving an allocation under the Governance Facility. Reforms leading to improved governance in other areas, such as economic governance, would not, by itself, be considered sufficient.

Within these broad categories, specific attention will be given to the reforms that have been explicitly singled out as priorities in the Action Plans, insofar as these are related to governance.

Quantification of allocation criteria:

Action Plan objectives, including those related to governance, are generally not quantified, nor can their fulfilment be assessed in a binary, 'yes/no', manner. Consequently, no numerical scoring exercise will be conducted. Indeed, the Commission services consider that the complex and multi-faceted nature of governance in the ENP partner countries is not amenable to a scoring exercise. Numerical indices produced by international organizations and NGOs will be consulted and annexed to the Progress Reports to supplement the assessment of the Action Plans done by the Commission services.

Geographical scope:

The Governance Facility should be available only to countries having signed an ENP Action Plan as this is the main commitment of partners towards reform. As a developed economy, Israel would not be eligible for extra funding and thus is excluded from the Facility. It is therefore not assessed. Most ENP countries have now signed an Action Plan. The countries currently not having signed an Action Plan are: Algeria, Belarus, Libya and Syria. Governance issues are, of course, relevant for the latter countries, and it should be noted that they are eligible for other measures for the promotion of democracy and human rights.

Funding:

The size of the Governance facility for the period 2007-10 is set, indicatively, at €50 million, representing 43 % of the funds being put in reserve to finance the new financial mechanisms envisaged in the December Communication. Given the need to respect the overall ENPI allocation, the priority given to increase national envelopes and the need to adequately resource the NIF, it is not possible to allocate larger budgets. As the overall ENPI budget increases overtime, there will be more margin in the latter year of the financial perspective (2011-13).

The allocations should be distributed to a very restricted number of countries (in principle one or two) each year. The top-up of the country allocation would then represent a substantial addition to the baseline annual allocation and therefore constitute a significant political signal. For smaller countries, absorption capacity considerations will need to be borne in mind and, if two or more partners receive an allocation from the Governance Facility in a given year, the relative sizes of the allocations will need to take into account the baseline budgets of the partners concerned. Focusing on a restricted number of countries would provide high visibility. Spreading this amount over a larger number of countries could undermine the signalling effect.

Although maintaining a regional balance is an element to consider, this should not prejudice the choice of Governance Facility beneficiaries.

It should be noted that the baseline country allocations already take into account governance-related indicators.

If, in a particular year, progress on governance in the eligible countries is limited, the Commission reserves the right to reduce the allocation made under the Facility or to make no allocation at all.

4. ALLOCATION CRITERIA

Indicators

The indicators used to assess progress towards good governance cover inputs, process and outputs, that is to say the existence of relevant legislation or equivalent, the institutional mechanisms put in place for its implementation, and the effectiveness and accessibility for citizens of these mechanisms.

The assessment of progress on governance will be made on the basis of the following governance-related issues identified in ENP Action Plans (note: not all of the issues below are addressed in each AP):

Democratic practice, respect of human rights and fundamental freedoms, and the rule of law

- Democracy
 - checks and balances among the legislative, executive and judicial powers;
 - transparency and accountability of institutions;
 - administrative reform, including decentralisation and local government reform;
 - conduct of elections in line with international standards for genuine, democratic elections;
 - pluralist participation in the political process;
 - legislation on political parties (e.g., right to establishment, financial support).
 - civilian control of the military;
 - facilitation of the development and strengthening of civil society.

- Respect of human rights and fundamental freedoms
 - abolition of the death penalty;
 - prevention of torture and other forms of ill-treatment;
 - detention and prison conditions;

- freedom of association (including development and strengthening of civil society); freedom of assembly;
 - freedom of the media and freedom of expression, including access to internet;
 - freedom of thought, conscience and religion;
 - legislative framework on private data protection;
 - fight against discrimination, intolerance, racism and xenophobia;
 - women’s rights; children’s rights;
 - minority rights;
 - rights of disabled people;
 - core labour rights;
 - social rights, including the right to social protection, right to health and the right to education;
 - cultural rights;
 - right to development;
 - the rights of refugees, asylum seekers and migrants;
 - adherence to and effective implementation of the core international human rights conventions and their optional protocols;
 - cooperation with international human rights mechanisms and implementation of relevant recommendations;
 - establishment of effective national human rights institutions;
 - training on human rights (judiciary, civil servants, law enforcement officials, NGOs);
 - ensure international justice through the International Criminal Court;
 - cooperation in international human rights fora.
- Rule of law
 - independence, impartiality and administrative capacity of the judiciary;
 - access to justice for citizens;
 - consistency and predictability of judicial decisions;
 - effective implementation of judgments, especially ECHR judgments (for Eastern partners only);
 - fight against corruption;
 - fight against impunity

Other governance-related issues

- Governance in human security and migration issues
 - fight against terrorism and organised crime, judicial and police cooperation with Member States;
 - fight against trafficking in human beings;
 - procedures relating to asylum seekers and refugees;
 - protection of personal data.
- Economic, regulatory and social governance
 - transparency in the management and control of public finances;
 - transparency and predictability of the regulatory environment;
 - independence of regulatory authorities;
 - rationalisation and simplification of administrative and legal procedures;
 - transparency in privatisation and public procurement;

- antitrust legislation; non-discrimination and transparency in the field of state aids;
- financial services supervision;
- combating customs fraud and corruption;
- access to information;
- access to basic social services;
- environmental governance (including access to information; public consultation and participation in decision making); sustainable management of natural resources.

5. ALLOCATION MECHANISM

The first Country Progress Reports (published as annexes to the 2006 ENP Communication) provided the basis for a first assessment of the progress made by each partner in deciding the annual allocation for 2007. Further tranches of the Facility will be allocated on the basis of the sequence of progress reports for each Action Plan. The Commission expects that, over time, progress reports will become more accurate in particular when addressing Governance related issues. It is suggested to assess the progress in each chapter of the Action Plan since its adoption (in order to gauge the consistency and the sustainability of the reform process), but focussing in particular on positive steps taken during the latest reporting period. As the first chapter “*Enhance political dialogue and reform*” of the Actions Plans is of major importance for the EU, particular attention will be paid to measures and action taken by the partner government in contributing to an improvement, in particular on specific objectives that have been mutually agreed such as, for example: reform the election law or promote the role of the private sector in the media. In summary, the approach consists of assessing both the “level of ambition of the Action Plans” in relation to the specific “starting point” of a country and its progress against “agreed” commitments. The Commission will thus assess and compare “**relative**” rather than **absolute** levels of progress, as usually done by international organisations measuring levels of corruption or other criteria to produce annual ratings. This analysis will indicate which countries should benefit from the Governance Facility in a given year.

This approach has the advantage of providing a global assessment of progress and of being based on the ENP Action Plans, as announced from the beginning. It provides a global picture of the level of progress, reflecting a general trend of the quality of EU relations with the partner and the partner’s willingness to move on all fronts. The criterion of transparency is respected since the Action Plan is agreed with the partner country and public in nature and the Country Progress Report is also a public document.

Country Strategy Papers and Indicative Programmes have already been written in a way that makes allowance for additional funding coming from the Governance Facility. In addition, it is intended that the additional allocations be used to provide additional funding to support already-identified elements of the Government Reform Agenda. Thus there is no need to formally modify the Country Strategy Papers and Indicative Programmes. However, in order for the Commission to be able to identify additional measures to be financed in a given year, include them in the Annual Action Programmes and ensure that funds are committed, it is important that decisions on the beneficiaries of the Facility be taken as early as possible in the year (if not at the end of the previous one).

Eligibility of projects:

The additional funding provided by the Governance Facility would be used to top up existing priorities as described in the National Indicative Programmes (NIP) for the selected partners. NIPs identify actions to support the implementation of the ENP Action Plans and most (if not all) of the planned actions address aspects of governance in one way or another. While the utilisation Governance Facility allocations for the pursuit of governance-related objectives will be encouraged, it will not be a strict requirement. Imposing such restrictions could make the additional funds less attractive to the partner countries and possibly create absorption difficulties.

Of course, the assessment of governance underpinning the Governance Facility allocations in the period 2007-2010 will be a useful input for subsequent programming documents (2011-2013).