



ARTICLES

SPECIAL SECTION – THE NEW FRONTIERS OF EU ADMINISTRATIVE LAW: IS THERE AN ACCOUNTABILITY GAP IN EU EXTERNAL RELATIONS?

ADMINISTERING EU DEVELOPMENT POLICY: BETWEEN GLOBAL COMMITMENTS AND VAGUE ACCOUNTABILITY STRUCTURES

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ABSTRACT: The EU Treaties give voice to the strong global role that the EU asserts and illustrate how there would not seem to be many problems of a global scale that the EU would not like to contribute to solving. Managing development policy involves the translation of these extremely broad political objectives into individual projects that receive EU funding. In this process, fundamental political questions are frequently touched upon, and policy mistakes do take place. This *Article* discusses how the administrative procedures used to manage development policy contribute to establishing accountability. In EU documents, reference is frequently made to “ownership” by third countries involved. However, even though some elements of the packages build on negotiations with partners, in practice all key decisions relating to the allocation of money are unilateral EU decisions. “Ownership” in this context refers primarily to a wish that third country actors would embrace the EU agenda as its own and engage actively in its execution. The key challenges emerging from this discussion would seem to relate to unclear accountability relationships, in particular as regards the extraterritorial audience: the beneficiaries of EU assistance. In short, if you repeatedly declare that you plan to save the world, it just may happen that the world will wish to hold you accountable for that commitment.

KEYWORDS: European Union – development policy – accountability – financial audit – participation – developing countries.

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I. INTRODUCTION

The drafters of the objectives of EU development policy cannot be accused of a lack of ambition. According to the Treaties, the EU development policy is, among other things, to “consolidate and support democracy, the rule of law, human rights and the principles of international law”; “preserve peace, prevent conflicts and strengthen international security [...] foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty”; and “encourage the integration of all countries into the world economy”.¹ These objectives are further elaborated in the renewed European Consensus on Development of June 2017, which conveys a commitment to

“[a] life of dignity for all that reconciles economic prosperity and efficiency, peaceful societies, social inclusion and environmental responsibility. In doing so, efforts will be targeted towards eradicating poverty, reducing vulnerabilities and addressing inequalities to ensure that no one is left behind”.²

These are the objectives that are to “guide the action of EU institutions and Member States in their cooperation with all developing countries”.³ While no one is likely to object to such principles, they are too general to guide any policy decisions.

The current world is far from being just, however, it is less clear what the hope for justice should entail in the policies of states that are in a position to affect the world order,⁴ such as the EU, in the absence of moves toward global economic justice.⁵ The European Consensus illustrates the EU vision for a better world and gives voice to the strong global role asserted by the EU. It explains how there would not seem to be many problems of a global scale that the EU would not like to contribute to solving. And yet, if you repeatedly declare that you plan to save the world, it just may happen that the world will wish to hold you accountable for that commitment.

In terms of money allocated for this purpose, this is not an empty commitment. As is well known, the EU and its Member States are the world’s largest official development assistance (ODA) donors. However, as Williams has demonstrated, “by applauding its own status as the largest donor in the world, the EU easily forgets the complexity of economic

¹ Art. 21 TEU.

² Joint Statement of 7 June 2017 by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission on The New European Consensus on Development, *Our World, Our Dignity, Our Future*, www.ec.europa.eu, para. 4.

³ *Ibid.*, para. 6.

⁴ T. NAGEL, *The Problem of Global Justice*, in *Philosophy & Public Affairs*, 2005, p. 113.

⁵ For a scheme creating a Global Resources Dividend, see T. POGGE, *World Poverty and Human Rights. Cosmopolitan Responsibilities and Reforms*, Cambridge: Polity, 2008.

relations that exist between itself and the impoverished countries".⁶ Improving the effectiveness of aid constitutes not only an EU objective, but also a global objective. The EU has a great deal of potential to do good.⁷ The key question relates to managing these ambitions: how can scarce resources be made to stretch to as many as possible. "Value for money" thinking has contributed to shifting focus from activities to results, and tightened conditionality further. This is also visible in the changed approach of the European Court of Auditors (ECA), which increasingly reaches beyond strict legality audits (compliance with applicable laws and regulations) to broader value for money audits.⁸ The demands for greater accountability and control are also linked to the general rise of auditing and internal control in society at large.⁹ Whenever money is being spent, financial accountability becomes crucial. However, the broad objectives of EU development policy make financial accountability difficult to enforce. The recent reports by the ECA highlight a mismatch between policy commitments and the EU's capacity to deliver on them, as well as a lack of internal accountability for implementation of EU commitments, which also shows in their inconsistent application.¹⁰ Many of the concerns raised in these reports relate to administrative procedures that are currently not functioning as they should, and which ultimately hamper the effectiveness of EU policies.

With such broad and political objectives, inconsistency is difficult to avoid. The inconsistency of EU human rights agenda has been a particular source of criticism, and has been traced to major internal weaknesses at EU level.¹¹ Coherence, or the lack thereof, has always been a specific challenge in EU external relations. Art. 208, para. 1, TFEU establishes the objective of Policy Coherence for Development. In development policy, which is an atypical kind of shared competence area,¹² these challenges are

⁶ A. WILLIAMS, *The EU, Interim Global Justice and the International Legal Order*, in D. KOCHENOV, F. AMTENBRINK (eds), *The European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2014, p. 60.

⁷ I have discussed this in particular in *European Universalism? The EU and Human Rights Conditionality*, in *Yearbook of European Law*, 2005, p. 329 *et seq.*; *Between "Common Values" and Competing Universals – The Promotion of the EU's Common Values through the European Neighbourhood Policy* (co-authored with R. PETROV), in *European Law Journal*, 2009, p. 654 *et seq.*; *Politics, Power and Good Intentions in the EU Development Policy*, in N. FERREIRA, D. KOSTAKOPOULOU (eds), *The Human Face of the European Union: Is EU Law and Policy Humane Enough?*, Cambridge: Cambridge University Press, 2016.

⁸ C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, Oxford: Hart Publishing, 2014, p. 49.

⁹ On this development, more generally, M. POWER, *The Audit Society: Rituals of Verification*, Oxford: Oxford University Press, 1999.

¹⁰ See e.g. Evaluation for the Commission, *Evaluation of EU Support to Gender Equality and Women's Empowerment in Partner Countries. Executive Summary*, April 2015, www.ec.europa.eu.

¹¹ See e.g. Evaluation for the Commission, *Thematic Evaluation of the European Commission Support to Respect Human Right and Fundamental Freedoms (including solidarity with victims of repression)*, Final Report, Volume 1, December 2011, www.ec.europa.eu, p. 15.

¹² See Art. 4, para. 4, TFEU: "In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of

magnified. Development projects and programs are in practice implemented in and by third States, with different standards and procedures. This creates particular challenges for accountability and audit, something about which the ECA has repeatedly voiced concerns. These difficulties are further exacerbated by the recent development towards “blending”, a term used to refer to combining EU grants with loans or equity from other public and private financiers.¹³ For example, as regards climate change finance, there are more than 50 international public funds, 45 carbon markets and 6000 private equity funds providing such finance. The Commission and Member States used, in addition to bilateral channels, 22 multilateral channels.¹⁴ In practice, grants from the EU budget, the European Development Fund (EDF) and Member States have been used to leverage loans from European financial institutions and regional development banks, while EU grants have also been combined with market financing. This requires joint programming and coordination between funders, and joint efforts in combating corruption and fraud.¹⁵ As the ECA has pointed out, actions with shared competences between the EU and the Member States result in “fragmented accountability”, since multiple lines of accountability (on both national and EU levels) are involved.¹⁶

Development policy is largely a Commission show. It builds on a structurally unequal relationship between a strong player in a position to set conditions, and many weak players in desperate need of assistance.¹⁷ Managing development policy involves the translation of the extremely broad political objectives of the European Consensus into individual projects that receive EU funding. Decisions are made not only on granting EU assistance, selecting EU preferences and choosing the means of support, but also on withdrawal or non-withdrawal of aid.¹⁸ The Treaties and secondary legislation

that competence shall not result in Member States being prevented from exercising theirs”. On the potential for conflicts in this area, see e.g. M. BROBERG, R. HOLDGAARD, *EU Development Cooperation Post-Lisbon: Main Constitutional Challenges*, in *European Law Review*, 2015, p. 349 *et seq.*

¹³ See Report COM(2015) 578 final of 24 November 2015 from the Commission to the European Parliament and the Council, *2015 Annual Report on the European Union's Development and External Assistance Policies and their Implementation in 2014*, p. 5.

¹⁴ European Court of Auditors, Special Report 17/2013, *EU Climate Finance in the Context of External Aid*, paras 57, 58 and 68.

¹⁵ See e.g. the Cooperation Agreement of 8 November 2011 between the European Anti-Fraud Office and the World Bank's Integrity Vice-Presidency.

¹⁶ European Court of Auditors, *Making the Best Use of EU Money: a Landscape Review of the Risks to the Financial Management of the EU Budget 2014*, www.eca.europa.eu, p. 23.

¹⁷ This is despite the reference that Art. 2 of the Partnership Agreement of 23 June 2000 between the African, Caribbean and Pacific Group of States of the one part and the EU of the other part (Cotonou Convention or Cotonou Agreement) makes to the “equality of the partners and ownership of the development strategies”, “participation” and “dialogue and the fulfilment of mutual obligations” as the “fundamental principles” of the arrangement.

¹⁸ For an example of the last case, see European Court of Auditors, Special Report 4/2013, *EU Cooperation with Egypt in the Field of Governance*, paras 39 and 41, which criticizes the Commission for a

provide additional, but equally broad, objectives and principles. There are few concrete limits, therefore, on how these are to be achieved and, by extension, upon the exercise of Commission discretion. How EU money is distributed and by what criteria is not by any means irrelevant. No matter how large the development budget, choices still need to be made between different sectors and projects.¹⁹ Well-intentioned projects may not only be inefficient in achieving their objectives, but may also turn out to have directly harmful effects.²⁰ Despite genuine efforts in the opposite direction, policy mistakes happen. Many of the choices made in managing EU assistance are in fact deeply political in nature. They involve either grassroots issues or questions of large structural problems.²¹ Ensuring accountability typically requires some sort of objectives, the achievement of which is possible to measure. This problem becomes more difficult the broader these objectives are. However, the EU's policy discretion in advancing its development objectives is so broad that accountability becomes difficult to enforce. For a policy based on strict conditionality, the way in which administrative procedures – both on the EU and on the recipient side – operate is crucial in guaranteeing the credibility of the policy as a whole. These procedures have been subjected to limited study. The lack of studies can partly be explained by reference to the shifted focus from activity or process management to the delivery of results, which emphasizes three key elements: output (what is produced or accomplished); outcome (change arising from the intervention, normatively relating to its objectives); and impact (long-term economic consequences).²² This focus on results instead of procedure might shift attention away from the fact that the way in which activities are completed is likely to influence the outcomes.

Ensuring accountability requires a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.²³ These requirements apply both to accountability *on the side of the EU* (interinstitutional and Member States) but also accountability in relation to *beneficiaries of EU assistance*, a relationship that is largely governed by the international agreements and other international commitments into which the EU has entered in this policy area. The EU Treaties lay down the main accountability framework in the EU: EU citizens are directly repre-

missing link “between its criticism of human rights violations made in the progress reports and the option of reducing or suspending EU assistance”.

¹⁹ S. SEPPÄNEN, *Possibilities and Challenges of the Human Rights-Based Approach to Development*, in The Erik Castrén Institute of International Law and Human Rights, Research Report 17/2005, p. 97.

²⁰ K. SCHMALENBACH, *Accountability: Who is Judging European Development Cooperation?*, in *Europarecht*, 2008, p. 177.

²¹ S. SEPPÄNEN, *Possibilities and Challenges*, cit., pp. 96-98.

²² European Court of Auditors, Special Report 12/2015, *Review of the Risks related to a Results-oriented Approach for EU Development and Cooperation Action*, p. 7.

²³ M. BOVENS, *Analysing and Assessing Accountability: A Conceptual Framework*, in *European Law Journal*, 2007, p. 450.

sented at Union level in the European Parliament; Member State representatives in the Council are democratically accountable either to their national Parliaments, or to their citizens; and the Commission, as a body, is accountable to the European Parliament. The ECA has a role in monitoring financial accountability, including in the area of development cooperation, and also has a role to play in ensuring the political accountability of the Commission through the discharge procedure. In the context of EU funds, the discharge procedure brings financial accountability together with questions relating to policy accountability, since the Parliament may – at least in theory – also consider the implications of how the money has been spent as a part of a broader political accountability framework. However, what is at stake is primarily the accountability attached to the use of EU funds from the funders' perspective. So far, the limits of the accountability mechanisms have been set by these Treaty frameworks, and – as far as EU legislation is concerned – there have been few attempts to enlarge such mechanisms.

A key function of administrative law relates to creating procedural rights that individuals can enforce against the administration. In the case of development policy, the individuals – legal and natural persons and civil society – are often third country nationals and not EU citizens. The relevant questions for enforcing accountability in a more global context reaches beyond both the established accountability structures described above and beyond the EU borders, involving the right of participation of those affected by decisions taken.²⁴ This understanding is gaining more ground, although more in policy than in legal documents. While the European Consensus shows few traces of this way of thinking, the matter is increasingly stressed among International Financial Institutions (IFIs), which often act as co-funders or channels through which EU assistance is directed. According to the European Investment Bank, for example, it is “accountable to the EU Member States as shareholders and institutional policy-setters, to investors who buy the bonds that the Group issues, to the Group’s project promoters as well as to “Project-Affected People(s)”, i.e. people(s) impacted by projects in which the EIB Group is involved, and finally to citizens”.²⁵ Apart from administrative appeal bodies run by the EU institutions, there are limited accountability structures available for third States or third country actors for enforcing accountability. In accountability relationships between public authorities and citizens and civil society – in particular when the situation involves third country actors – the possibility of judgment and sanctions are often lacking, and accountability relations are not clearly demarcated.²⁶

This *Article* discusses the practical implementation of the administrative procedures and auditing in managing the broad commitments given in the context of EU develop-

²⁴ R.W. GRANT, R.O. KEOHANE, *Accountability and Abuses of Power in World Politics*, in *American Political Science Review*, 2005, pp. 39 and 41.

²⁵ See European Investment Bank, *Complaints Mechanism Activity Report 2014*, 2 October 2015, www.eib.org, p. 4.

²⁶ M. BOVENS, *Analysing and Assessing Accountability*, cit., p. 457.

ment assistance and how these procedures contribute to establishing accountability. Participation is not only a value in itself but also a means to achieve better results; therefore, I explore how rights of participation are taken into account in the relevant administrative procedures. One of the key questions becomes whether there are any ways for third countries to affect the distribution of aid, considering the broad procedural and substantive discretion enjoyed by the Commission. After a description of the legal framework, I examine some case law from the CJEU, the European Ombudsman and the institutions' internal audit mechanisms relating to the allocation of EU funds. I then discuss the role of the ECA in the area of development policy and the way in which the European Parliament has reacted to some of the ECA's recent reports relating to development policy. The key challenges emerging from this discussion would seem to relate to unclear accountability relationships, in particular as regards the extraterritorial audience.

II. LEGAL FRAMEWORK

II.1. THE HARD LAW: THE COTONOU CONVENTION AND EU REGULATIONS: MULTILATERAL OR UNILATERAL?

The financing of external actions in general, and in development policy in particular, is governed by the applicable EU and EDF Financial Regulations, the common rules and procedures for the implementation of the Union's instruments for financing external action and by the relevant basic acts. Many of the relevant EU Regulations include provisions of an administrative law character and are therefore interesting for the current study. The legal framework in which accountability should be assessed, however, reaches beyond the EU Treaties and secondary legislation, to the EU's international commitments and post-legislative guidance. In the Special Report 18/2014, the ECA specifically points out the complexity of evaluation, since the EU framework in which the Commission operates includes the financial regulations applicable to the EU budget,²⁷ as well as various Commission Communications.²⁸ The same Special Report notes that EuropeAid's accountability framework also includes the financial regulations applicable

²⁷ Art. 30, para. 4, of Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union (the Financial Regulation).

²⁸ European Court of Auditors, Special Report 18/2014, *EuropeAid's Evaluation and Results-oriented Monitoring Systems*. The Report mentions Communication SEC(2007) 213 of 21 February 2007 to the Commission from Ms Grybauskaitė in agreement with the President, *Responding to Strategic Needs: Reinforcing the Use of Evaluation*; Communication C(2001) 3661 of 12 November 2001 of the President, *Putting Evaluation into Practice within the Commission*; Communication COM(2013) 686 final of 2 October 2013 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening the Foundation of Smart Regulation – Improving Evaluation*.

to the EDF and the other financing instruments supporting the EU's development policy,²⁹ various foreign policy documents of a soft law character including the Paris Declaration, the Accra Agenda for Action and the Busan Partnership Agreement,³⁰ the European Consensus on Development³¹ and the Communication on the *Agenda for Change*.³² In 2015, the EU committed "fully" to the 2030 Agenda, the new global framework to help eradicate poverty and achieve sustainable development by 2030.³³ While it is not possible to study all of these documents in detail, they are all broadly formulated, and as such give fairly limited guidance for ensuring the accountability of day-to-day operations and individual decisions. The new European Consensus speaks about effective and accountable institutions, and "an open and enabling space for civil society, inclusive approaches and transparency in decision-making at all levels",³⁴ but these are not considered in the context of EU institutions or procedures but merely as conditions relating to the recipients of assistance. The following is intended to offer a brief summary of the EU legislative framework relating to programming and financing, which is most relevant for a study of administrative law.

There is a general budgetary framework that applies to programmes funded from the EU budget and these provisions constitute a significant source of administrative law.³⁵ For

²⁹ 10th European Development Fund: Arts 12 and 27, of Regulation (EC) 215/2008 of the Council of 18 February 2008 on the Financial Regulation applicable to the 10th European Development Fund; 11th European Development Fund: Decision 1/2013 of the ACP-EU Council of Ministers of 7 June 2013 adopting a protocol on the multiannual financial framework for the period 2014–20 under the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part.

³⁰ Busan Partnership Agreement for Effective Development Cooperation of 1 December 2011, Fourth High Level Forum on Aid Effectiveness, www.oecd.org.

³¹ The report refers to the older version of the Consensus; Joint Statement 2006/C 46/01 of 24 June 2006 by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, *The European Consensus*.

³² Communication COM(2011) 637 final of 13 October 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Increasing the impact of EU Development Policy: an Agenda for Change*.

³³ See European Commission Press Release Memo/15/5709 of 25 September 2015, *Sustainable Development Goals and the Agenda 2030*.

³⁴ Joint Statement, *Our World, Our Dignity, Our Future*, cit., para. 62.

³⁵ Regulation (EU, Euratom) 966/2012, of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) 1605/2002; Commission Delegated Regulation (EU) 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union; Regulation (EU) 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down Common Rules and Procedures for the implementation of the Union's instruments for financing external action (CIR) and the regulations or decisions of the Council, referred to as "basic acts" in the Financial Regulation and a Practical Guide to be further discussed below, and other specific instruments relating to the various cooperation programmes.

programmes funded by the EDF the applicable legal framework consists of the Cotonou Agreement,³⁶ Council Overseas Association Decision,³⁷ and Council Regulation on the Financial Regulation applicable to the 11th European Development Fund.³⁸ In addition, many partner countries have signed a Financing Agreement with the EU for the purposes of the programme, which sets out the programme objectives and budget. Moreover, various pieces of post-legislative guidance – including in particular the Practical Guide, which includes a number of standard documents and templates in the annexes, such as the standard grant contract for external action – and standard documents for calls for proposals are applied. The Cotonou Agreement, and possibly the Financing Agreement, are the only elements in this relationship that are actually negotiated with the EU's partners; most parts of the legal framework are constituted by unilateral EU legislation. Furthermore, even if the Cotonou Agreement is multilateral in nature, it offers the EU a clearly stated opportunity to interrupt assistance, following consultations with the relevant African, Caribbean and Pacific (ACP) country under Art. 96 of the Agreement. For example, cooperation with Mauritania was suspended following a coup in August 2008, but resumed in January 2010; EU-Niger cooperation was resumed in June 2011 and both parties now have a Country Strategy Paper (2008-2013) and National Indicative Programme (2014-2020). Fiji, however, continues to be subject to “appropriate measures” following a military coup, with EU development assistance being channelled primarily through NGOs.³⁹ These are all decisions that are ultimately unilaterally taken by the EU administrative machinery, often for good reasons, in situations that are politically loaded, and with vast implications for the ACP country subjected to them.

For development aid that comes from the EU budget, the relevant budgetary procedures are used. Under Art. 317 TFEU, the Commission – in practice EuropeAid, which is the Commission DG for International Cooperation and Development – implements the EU budget in cooperation with the Member States, “on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management”. The European Commission is in charge of all EU budget implementation tasks, which are performed directly by its departments, either at headquarters or in the EU delegations or through European executive agencies. The Financial Regulation requires the setting of specific, measurable, relevant and time-bound objectives, the

³⁶ Cotonou Agreement of 23 June 2000, cit.

³⁷ Decision 2013/755/EU of the Council of 25 November 2013 on the association of the overseas countries and territories with the European Union (Overseas Association Decision).

³⁸ Regulation (EU) 2015/323 of the Council of 2 March 2015 on the Financial Regulation applicable to the 11th European Development Fund.

³⁹ See Decision 2007/641/EC of the Council of 1 October 2007 on the conclusion of consultations with the Republic of the Fiji Islands under Art. 96 of the APC-EC Partnership Agreement and Art. 37 of the Development Cooperation Instrument. Fiji is, however, eligible to Regional and Thematic Programmes.

achievement of which can be measured by performance indicators.⁴⁰ The Commission authorising officer must report on the operations by reference to their objectives, possible risks, and the efficiency of internal control systems.⁴¹

The Commission seldom delegates implementation tasks to the EU Member States in external actions.⁴² In most cases, direct and indirect management with partner countries is used. Indirect management decisions on the procurement and award of contracts are taken by the partner country, which acts as the contracting authority. Authorisation from the Commission can be required *ex ante*. Deviations, prior approvals and events to be reported are processed internally by the European Commission. In a system of *ex post* controls, the decisions are taken by the partner country without prior authorisation by the Commission. Deviations from the standard procedures laid down in the Practical Guide require an authorisation by the European Commission.⁴³ In some cases the money is entrusted to the European Investment Bank or it is jointly spent with international organisations. Usually the European Commission is the contracting authority and takes decisions on behalf of and for the partner countries.⁴⁴ An example of this is Madagascar, when, in 2011 – following failed Art. 96 of the Cotonou Agreement consultations – the Commission concluded that the implementation of EU development aid could not continue to be entrusted to national authorities in Madagascar due to failures to guarantee proper project implementation and sound management of EU funds. It decided to take over the functions of National Authorising Officer itself.⁴⁵ Following positive EU assessment, the Commission decided to allow the function to be returned to Madagascar three years later.⁴⁶

Art. 11 TEU places the Commission under an obligation to conduct “broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent”. However, this is a provision that requires elaboration in implementation rules due to its breadth. The specific legal framework for development cooperation sets out a number of provisions for the allocation and evaluation of projects, as well as provisions on participation by third country actors. Regulation (EU) 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for

⁴⁰ Art. 30, para. 3, of Regulation 966/2012.

⁴¹ *Ibid.*, Art. 66, para. 9.

⁴² According to the Commission, there are a few cases such as joint operational programmes on cross-border cooperation implemented by a joint managing authority (for instance under the European Neighbourhood Instrument, ENI, or the Pre-accession Assistance, IPA II); European Commission, *Practical Guide*, 15 January 2016, www.ec.europa.eu,

⁴³ *Ibid.*, Section 2.1.

⁴⁴ *Ibid.*

⁴⁵ Decision C(2011) 1871 of the Commission of 21 March 2011 on the return of the functions of EDF National Authorising Officer to the Republic of Madagascar.

⁴⁶ Decision C(2014) 5143 final of the Commission of 24 July 2014 on the return of the functions of EDF National Authorising Officer to the Republic of Madagascar.

development cooperation for the period 2014-2020, establishes a financing instrument for development cooperation for the period 2014-2020 and a financial envelope of € 19.661.639.000 for this purpose.⁴⁷ In defining the objectives of the instrument, the Regulation references the broad objectives of development policy mentioned in the Treaties, the European Consensus and the EU's international commitments. The Cotonou Agreement recognises the relevance of non-State actors – defined under Art. 6 as including the private sector, economic and social partners and “Civil Society in all its forms according to national characteristics” – and allocates them rights to “be informed and involved in consultation on cooperation policies and strategies, on priorities for cooperation”, “be provided with financial resources”, “be involved in the implementation of cooperation project and programmes” and “be provided with capacity-building support in critical areas”. Regulation 233/2014 also sets out a number of general principles based on these commitments, as well as a duty to exchange information and cooperate with other relevant actors. Under the Regulation, the Union is to specifically promote, *inter alia*,

“the empowerment of the population of partner countries, inclusive and participatory approaches to development and a broad involvement of all segments of society in the development process and in national and regional dialogue, including political dialogue. Particular attention shall be given to the respective role of parliaments, local authorities and civil society, *inter alia* regarding participation, oversight and accountability”.⁴⁸

Regulation 233/2014 does not, however, specify in detail how such involvement or “particular attention” is to be guaranteed, nor does it settle how the results of this engagement are to be reported or used. Therefore, the contribution of these policies to accountability is limited.⁴⁹ In EU documents, reference is frequently made to “ownership” by third countries involved. However, even though some elements of the packages build on negotiations with partners, in practice all the key decisions relating to the allocation of money are ultimately unilateral EU decisions. Therefore, it appears that “ownership” in this context refers primarily to a wish that third country actors would embrace the EU agenda as its own and engage actively in its execution.

Union assistance is given through geographic programmes, a pan-African programme and thematic programmes, which specifically includes a programme on “Civil Society Organisations and Local Authorities”. Under Art. 11 of Regulation 233/2014, geographic programmes reiterate the broad objectives of EU development policy; thematic programmes can be used to complement these programmes. The former build on programming documents, which are prepared “based, to the extent possible, on a dia-

⁴⁷ Regulation (EU) 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020.

⁴⁸ Art. 3, para. 8, let. c, of Regulation 233/2014.

⁴⁹ More generally, see J. MENDES, *Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU*, in *Common Market Law Review*, 2011, p. 1849 *et seq.*

logue between the Union, the Member States and the partner country or region concerned”, but they are “drawn up by the Union” and are required unless the country has a national development plan accepted by the Commission. The Commission adopts the relevant implementing measures in comitology, which likely reflects more the desire of Member States to guarantee some degree of control over Commission choices, rather than as a means by which to “guarantee uniform conditions for implementing legally binding Union acts”, which, by reference to Art. 291 TFEU is the enunciated justification for this choice in the preamble of the Regulation. Geographic programmes set out “the priority areas selected for Union financing, the specific objectives, the expected results, clear, specific and transparent performance indicators, the indicative financial allocations, both overall and per priority area and approves where applicable, aid modalities”. The Commission also adopts these programmes in comitology, as well as the relevant financial allocations within each programme. The Commission also has the power to adopt delegated acts to amend the details of areas of cooperation and the indicative financial allocations. The preamble of the Regulation stresses that these constitute non-essential elements of the Regulation for the purposes of Art. 290 TFEU. However, from the point of view of beneficiaries, it is evident that it is these elements that are particularly essential; their perspective, however, is hardly decisive for making determinations for the purposes of EU constitutional law. The institutional choices made in the Regulation clearly identify the Commission as the key player in this framework.

In laying down common rules and procedures for the implementation of the Union’s instruments for financing external action, Regulation 236/2014 places the Commission under the general obligation to “use the most effective and efficient implementation methods. Where possible and appropriate in light of the action, the Commission shall also favour the use of the most simple procedures”.⁵⁰ Again, the precise content of these procedures is not specified. Under the Regulation, the Commission is to adopt annual or multi-annual action programmes that specify the “objectives, the expected results and main activities, the methods of implementation, the budget and indicative timetable, any associated support measures and performance monitoring arrangements”.⁵¹ These programmes thus emerge as key policy documents that are, as the main rule, to be adopted in the comitology examination procedure; qualified majority of Member States is therefore required to approve the Commission proposal.⁵²

Union assistance can be given through various means, including grants and procurement contracts. If general or sector budget support is given, this is based on “mutual accountability and shared commitments to universal values”, and should be based

⁵⁰ Art. 1, para. 5, of Regulation 236/2014.

⁵¹ *Ibid.*, Art. 2, para. 1.

⁵² Art. 5 of Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States and the Commission’s exercise of implementing powers.

on “a clear set of eligibility criteria and careful assessment of the risks and benefits”.⁵³ These are not defined in the legal framework. When providing budget support, “the Commission shall clearly define and monitor its conditionality, and shall support the development of parliamentary control and audit capacities and increased transparency and public access to information. Disbursement of the general or sector budget support shall be conditional on satisfactory progress being made towards achieving the objectives agreed with the partner country”.⁵⁴

Art. 7 of Regulation 236/2014 includes provisions on protection of the financial interests of the Union through preventive measures and, in case of irregularities, by recovery or restitution and administrative and financial penalties. The Commission, ECA and the European Commission Anti-Fraud Office (OLAF) can also act for these purposes through on-the-spot checks and inspections based on cooperation agreements with third countries and international organisations. Under Art. 12 of the Regulation, the Commission monitors all actions, where appropriate by means of independent external evaluations, and “shall, to the appropriate extent, associate a relevant stakeholder in the evaluation phase”. As regards the involvement of stakeholders in third countries, Art. 15 specifies that “the Commission shall, whenever possible and appropriate, ensure that, in the implementation process, relevant stakeholders of beneficiary countries, including civil society organisations and local authorities, are or have been duly consulted and have timely access to relevant information allowing them to play a role in that process”.

Again, no procedure is specified in the Regulation, which also leaves it open as to what indeed counts as “possible and appropriate”. An ECA report establishes that the involvement of non-State actors in the development cooperation process “has been limited and falls short of the sustained and structured dialogue envisaged by the EU legislation and the Commission’s own guidelines”.⁵⁵ Therefore, the extent to which these procedures in fact contribute to greater accountability for EU policies is questionable; instead they emphasise the broad discretion the Commission enjoys in implementing these policies.

II.2. POST LEGISLATIVE GUIDANCE AND THE REAL WORLD OF IMPLEMENTING EU ASSISTANCE

The Cotonou Convention and the Regulations quoted above constitute a rather general framework, which leaves much discretion to the Commission to decide what in fact is possible or appropriate. The general framework has been complemented by post-legislative guidance in various forms, in particular as regards stakeholder consulta-

⁵³ Art. 4, para. 2, of Regulation 236/2014.

⁵⁴ *Ibid.*

⁵⁵ European Court of Auditors, Special Report 4/2009, *The Commission’s Management of non-State Actors’ Involvement in EC Development Cooperation*, paras 18-35.

tions.⁵⁶ First, the Commission's Better Regulation Guidelines includes a specific Chapter on Guidelines on Stakeholder Consultation, which deals both with those impacted by policies and those involved in applying them.⁵⁷ These Guidelines are meant to flesh out the Art. 11 TEU requirement that the Commission conducts the "broad consultations with parties concerned" in the process of preparing policy initiatives and implementing existing interventions. However, the only situations where consultations are actually required under the Guidelines are when preparing a legislative initiative or when performing an evaluation or Fitness Check.⁵⁸ The Minimum Standards that are included seem to be inspired by the broader standards of social accountability in that they cover three stakeholder types: those affected by the policy; those who will implement it; and those who have an interest in the policy. Specific reference is made to those located in third countries.⁵⁹ The list of *mandatory* timeframes for consultation and feedback includes some documents that are of relevance for development policy (i.e. green papers, roadmaps, delegated and implementing acts, and legislative or policy proposals).

Second, a Practical Guide, available on the EuropeAid website, explains the contracting procedures for EU external aid contracts financed by the EU general budget and the EDF.⁶⁰ For the purposes of allocating assistance to individual projects, this is an essential document. The Practical Guide covers the contracting procedures that apply to EU external actions financed from either the EU budget or the EDF, and is used by the DGs and Commission Services in charge of the instruments financing and implementing external actions, including DG DEVCO (development aid through geographic, thematic or mixed instruments, such as DCI, EDF, EIDHR, NSCI). The Practical Guide includes instructions relating to management modes, participation in award procedures and possible exclusion criteria, regulatory penalties including administrative sanctions, applicable procurement procedures, conciliation and arbitration procedures, an Evaluation Committee, procedures for awarding and modifying contracts and a number of annexes, which include templates for most documents used in this context. It would seem that it is in fact the Practical Guide that settles most of the administrative questions that arise, even though, once again, many of its provisions are quite openly formulated and leave a great deal of room for discretion. Reading the Practical Guide, it is not always

⁵⁶ In addition, Commission, *Guidelines on Principles and Good Practices for the Participation of Non-State Actors in the Development Dialogues and Consultations*, November 2004, www.ec.europa.eu, is the only document that relates directly to the development context. It is not clear whether it is still being applied or replaced by another document. Moreover, the paper is intended for the use of Delegations in the context of programming and regular in country-dialogue, but specifically excludes questions of project implementation and procedural questions relating to project preparation and financial decisions.

⁵⁷ Commission Staff Working Document SWD(2015) 111 final of 19 May 2015, *Better Regulation Guidelines*, chapter VII, p. 67 *et seq.*

⁵⁸ *Ibid.*, p. 66.

⁵⁹ *Ibid.*, p. 74.

⁶⁰ Commission, *Practical Guide*, cit.

clear which of its provisions follow from the applicable secondary legislation, which are included for informative purposes, and which are examples of Commission guidance, included for the purpose of generally informing about its use of discretion. Therefore, it is not clear to what extent this guidance might sometimes fall short of capturing what the text or objectives of legislation actually require.⁶¹

However, based on this documentation, many of the procedural and most of the substantive questions are settled only at the stage of opening a call for tenders. The relevant Commission website currently includes several calls that are relevant for development policy. The call for “Support to the Rule of Law and Access to Justice for All” in Zimbabwe⁶² includes detailed rules for proposals, including eligibility criteria, the application process, evaluation, selection and notification as well as the conditions for implementation following the award decision. The call recognises:

“the Cotonou Agreement’s emphasis on the important role played by civil society in development cooperation and considering the Agenda for Change’s call to focus on partners’ commitments to human rights, democracy and the rule of law and to meeting their peoples’ demands and needs, an allocation of Euro 2.300.000 from the 11th EDF [...] is earmarked through this call to support the role played by non-state actors in enhancing access to justice for vulnerable populations”.

Following this, the call sets out the following priorities for funded actions:

“Provide legal and other relevant services to vulnerable groups and individuals, especially women, children, people living with disabilities, prisoners, people living in rural areas, amongst others, in respect of civil and criminal cases, and with regard to issues such as corruption, gender-based violence and pre-trial justice; [m]onitoring the whole or parts of the justice chain to implement evidence based lobby, advocacy and solution driven interventions in support of increased efficiency, effectiveness and respect of rights in the justice delivery system; and [i]mplementation of actions aimed at fighting against corruption in order to contribute to improved integrity and transparency of the justice system”.

A second call, made under the European Instrument for Democracy and Human Rights, is directed at Guyana and Suriname.⁶³ The total indicative amount is Euro 640.000, but the Commission reserves the right not to award all available funds. The call refers to the Commission’s Strategy Paper, which identifies the objective of “Strengthening the role of civil society in promoting human rights and democratic reform, in supporting the peaceful conciliation of group interests and in consolidating political partici-

⁶¹ On this more generally, see J. SCOTT, *In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law*, in *Common Market Law Review*, 2011, p. 330.

⁶² European Commission, *Support to the Rule of Law and Access to Justice for All – Guidelines for grant applicants*, 31 May 2017, EuropeAid/155198/DD/ACTIZW.

⁶³ European Commission, *EIDHR 2016/2017 Call for Proposals – Guyana and Suriname*, 4 June 2017, EuropeAid/155906/DD/ACT/GY-SR.

pation and representation” to be implemented through Country-Based Support Schemes (CBSS) and managed directly through Calls for Proposals by the European Union Delegations. The Commission has decided that this call is directed at projects relating to the death penalty, gender equality, Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) rights and Rights of the Child in Guyana and LGBTI rights, Human Trafficking and Domestic and Sexual Violence in Suriname. Proposed actions “should be designed to produce specific solutions in response to clearly identified needs and constraints within the priority areas as above”.

A final example relates to a call entitled “KULIMA – Promoting farming in Malawi”, which aims at “improving agricultural services in Malawi using the Farmer Field School (FFS) approach”.⁶⁴ The call specifies a global objective of promoting sustainable agricultural growth and incomes in Malawi, something that entails two particular objectives: first, empowering farming communities to sustainably address their various agricultural constraints and second, making quality agricultural services accessible for as many farmers as possible in the KULIMA districts. The overall indicative amount made available under this call for proposals is Euro 14.000.000, and the total of all grants requested must be between Euro 13.000.000 and 14.000.000.

In practice, this is the stage when the general objectives included in the Treaties, international agreements concluded with third States, other international commitments and the secondary legislation discussed in this section translate into actual projects to be funded. It is the Commission’s job to decide how these objectives are best promoted. For example, Tanzania is mainly financed by the EDF, which amounts to € 626 million in 2014-2020. Under the Council regulations relating to the use of the EDP, the Commission has adopted a National Indicative Programme,⁶⁵ which includes an Annex where the EU enunciates what it intends to do: good governance, energy and sustainable development, etc. A further Commission decision adopted in comitology includes the Tanzania Annual Action Programme 2015, which identifies four projects to be funded relating to Good Financial Governance, Support to Strengthen Statistics, Enhancing Access to Market and Value Addition in Tanzania; Support to Food security and Nutrition in Tanzania.⁶⁶ It would seem that in selecting these projects, the Commission – as with so many different aspects of this area – enjoys a very broad area of discretion. What needs to be stressed is that these are not merely technical decisions; indeed, they are highly political. In practice, in selecting these projects the Commission’s procedural discretion is limited primarily through the provisions of the Practical Guide and the call for tenders, which it adopts.

⁶⁴ European Commission, *Improving Agricultural Services in Malawi Using the Farmer Field School (FFS) Approach*, 31 May 2017, EuropeAid/155474/DD/ACT/MW.

⁶⁵ Decision C(2014) 3474 final of the Commission of 2 June 2014 on the adoption of the National Indicative Programme between the European Union and Tanzania.

⁶⁶ Decision C(2015) 7674 final of the Commission of 9 November 2015 on the Annual Action Programme 2015 in favour of Tanzania to be financed from the 11th European Development Fund.

Substantive criteria relating to choices between different projects is non-existent, since the Commission's policy discretion is more or less unbound with reference to the broad objectives to which the policies aim and the fact that it also prepares the calls.

The feeling that participation and ownership might figure high on the Commission agenda at the level of principle, but less so in practice, and that its understanding of the function of participation is quite limited is confirmed by the process leading to its Proposal for a new European Consensus on Development, *Our World, our Dignity, our Future*, another recent example of a key document with a soft law character.⁶⁷ The proposal indicates that during its preparation, the Commission conducted consultation with civil society, the public and stakeholders. When reporting the results of this consultation, the Commission stressed that “[a]n adequate overview of relevant material was gathered from stakeholders during the consultation process, and the main orientations were shown to be very consistent at key events and in all consultation windows”.⁶⁸ Since the Commission undoubtedly enjoys broad discretion in deciding what counts as “adequate”, “relevant”, “main orientations”, “consistent”, or “key events”, and the participating stakeholders were “targeted” – that is, selected by the Commission itself – the weight of the document might be questioned. This wording suggests that many of the more general shortcomings of Commission participatory practices might be present.⁶⁹ The Commission, however, reports of a “common understanding that the EU and its Member States need to put all the tools at their disposal to good use. The new Consensus should signal a shift towards more effective mobilization and use of resources. It should signal a move beyond just measuring aid, towards a culture of results, transparency, inclusive follow-up and review”.⁷⁰

As far as approaches are concerned, “[i]nclusiveness has been raised in different discussions and inputs, in particular the need to involve all stakeholders (e.g. local authorities, youths, marginalised groups, regional organisations) in the planning and implementation of the 2030 Agenda”.⁷¹ The report acknowledges that the private sector is generally regarded as a crucial player in the development landscape. Overall, the Commission reports that “[t]here have also been clear calls for a strong and effective system of monitoring accountability and review. In line with the above considerations, the proposed new policy framework puts forward concrete actions [...]. It also outlines how de-

⁶⁷ Communication COM(2016) 740 final of 22 November 2016 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Proposal for a new European Consensus on Development, *Our World, Our Dignity, Our Future*.

⁶⁸ Commission Staff Working Document SWD(2016) 389 final of 22 November 2016, *Synopsis Report Summarising the Main Results of the Consultation on the New European Consensus on Development*.

⁶⁹ For a critique of similar practices in other policy areas, see J. MENDES, *Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU*, cit., pp. 1859-1860.

⁷⁰ Commission Staff Working Document SWD(2016) 389, cit., p. 8.

⁷¹ *Ibid.*, p. 9.

velopment cooperation policy can contribute to an efficient and robust system of monitoring, accountability and review, which also requires improving data availability and analysis capacities worldwide".⁷² The European Consensus, however, does nothing of this sort. It is difficult to single out any concrete measures that would improve monitoring, accountability or review. In short, despite the calls for a broader understanding of accountability, it seems impossible to get the EU to think outside the box of its own established routines. Since the current practices build on the Treaty framework, it is evident that a non-binding policy document such as the European Consensus could not make any fundamental changes. However, it is illustrative of how the EU institutions think, and what they see as an "efficient and robust system of monitoring, accountability and review". In fact, this system the Commission visualises for the future bears a close resemblance with the current system: a system which makes accountability difficult to enforce, in particular as third country actors are concerned.

II.3. THE EUROPEAN INVESTMENT BANK: WHAT ROLE FOR VOLUNTARY POLICIES?

As noted in the Introduction, much of EU financial assistance is provided through funds established or managed by the EIB. Banks in general are primarily accountable to their own shareholders. However, reflecting more general developments in international financial institutions, the EIB has in recent years engaged in a series of reforms to strengthen its overall accountability.⁷³ The EIB's structural core builds on several elements: transparency, responsiveness and participatory processes and an internal Complaints Mechanism.⁷⁴ In addition, there is a Memorandum of Understanding between the EIB and the European Ombudsman, which creates a two stage complaints process.⁷⁵

Transparency in the EIB creates an interesting study on voluntary compliance. While the Commission and the EEAS when administering development policy are subject to the ordinary public access rules under Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Art. 15 TFEU limits the public access obligations required of the EIB regarding documents relating to its administrative activities. Despite this, the EIB has adopted a voluntary Transparency Policy which reaches beyond purely adminis-

⁷² *Ibid.*, p. 10.

⁷³ See N. HACHEZ, J. WOUTERS, *A Responsible Lender? The European Investment Bank's Environmental, Social and Human Rights Accountability*, in *Common Market Law Review*, 2012, p. 47 *et seq.*

⁷⁴ See European Investment Bank, *Complaints Mechanism Operating Procedures*, 28 August 2013, www.eib.org.

⁷⁵ Memorandum of Understanding of 9 July 2008 between the European Ombudsman and the European Investment Bank concerning information on the Bank's policies, standards and procedures and the handling of complaints, including complaints from non-citizens and non-residents of the European Union, www.ombudsman.europa.eu.

trative matters.⁷⁶ The EIB explains this with reference to how “the intention of [Art. 15, para. 3, TFEU] is that the EIB itself should determine, in a way consistent with the principles of openness, good governance and participation, how the general principles and limits governing the right of public access should apply in relation to its specific functions as a bank. The EIB does this through this through the Policy [...]”.⁷⁷

In the EIB Transparency Policy, transparency has an instrumental function: it “contributes to increasing efficiency, effectiveness and sustainability of the Group’s operations, reinforcing its zero-tolerance approach on fraud and corruption, ensuring adherence to environmental and social standards linked to financed projects, and promoting accountability and good governance”.⁷⁸ However, as a financial institution the EIB also needs to “maintain the confidence and trust of their clients, co-financers and investors”. The Policy includes provisions on proactive disclosure, the presumption of disclosure, and related exceptions, and procedures for handling requests, complaints and appeals: the Policy follows the model of Regulation 1049/2001. The final part of the Policy addresses questions of stakeholder engagement and public consultation. This part of the policy is largely addressed through principles and objectives: for example, the EIB “strives to engage with stakeholders”, it “recognizes that it can benefit from the establishment of a constructive dialogue with well-informed stakeholders” and “is committed to engage, on a voluntary basis, in formal public consultation on selected policies”. Finally, the EIB stresses that it also promotes transparency and good governance in the projects it finances. The latest Annual Report on the implementation of the Policy (2015) indicates that it has handled 42 information requests, most of which came from within the EU, and focused largely on environmental and social impact assessments.⁷⁹

The EIB’s “voluntary policy” and the Practical Guide discussed above illustrate many of the general challenges relating to the use of post-legislative guidance and its effect, especially since various procedural rights and obligations are only defined in these documents. Post-legislative instruments are generally intended to alleviate legal uncertainty and provide necessary information about the scope of vaguely drafted legal provisions.⁸⁰ However, these instruments also frequently raise questions concerning their binding nature and possible effect in courts.⁸¹ Therefore, even if post-legislative guidance is used to increase clarity, effectiveness and transparency, it may also have the

⁷⁶ The (revised) European Investment Bank Group, *Transparency Policy*, 6 March 2015, www.eib.org.

⁷⁷ *Ibid.*, para. 3.8.

⁷⁸ *Ibid.*, para. 2.2.

⁷⁹ European Investment Bank, *Report on the Implementation of the EIB Group Transparency Policy in 2015*, 12 May 2016, www.eib.org.

⁸⁰ See H. MARJOSOLA, *Regulating Financial Markets Under Uncertainty: the EU Approach*, in *European Law Review*, 2014, p. 355.

⁸¹ On this, see e.g. O. STEFAN, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union*, Alphen aan den Rijn: Wolters Kluwer, 2013.

opposite effect.⁸² An example offered by ECA relates to road infrastructure investment projects in sub-Saharan Africa, where the Commission used conditions in a way that left it unclear whether the partner countries were in fact required to comply with them: they were not legally binding but were described as “accompanying measures”, which then provoked the question of whether the Commission needed to pay EDF money regardless of whether the measures had been taken or not.⁸³ In the following section we will turn to a discussion of how the EU institutional policies, including the EIB policy, have been scrutinised by the Courts and the EO.

III. COURT AND EO PRACTICE: SETTING THE LIMITS OF PROCEDURAL DISCRETION

The previous section established that development cooperation aims at broad objectives, and that a number of procedures exist both in relation to the allocation of EU budget and the specification of substantive objectives. However, many of these procedures are defined only in general terms in relevant secondary legislation, which approaches these questions primarily through objectives and general principles. Substantive policy limits in the application of the EU objectives are non-existent in relation to the framework and the procedural constraints laid down in legislation remain few. Nevertheless, Court jurisprudence relating to the application of EU funds provides some additional boundaries on discretion of the latter kind, primarily through general principles such as equal treatment, transparency and the protection of legitimate expectations. Individual funding decisions have (rarely) been subject to appeals before the CJEU. The European Ombudsman has also reviewed a number of complaints relating to the use of EU funds in general, and development assistance in particular. Moreover, the institutions also have internal mechanisms for audit and monitoring, which provide additional impetus for discussion on the limits of discretion. These constraints are discussed in this section.

In the area of development policy, it is safe to contend that the full potential of the EU judiciary as an accountability avenue has not been exhausted. Instead, most cases concern interinstitutional relationships.⁸⁴ One of the most recent examples involves the Commission’s implementing powers in approving development cooperation project relating to border security in the Philippines.⁸⁵ While the case pre-dates the Treaty of Lisbon, it relates to the question of “non-essential elements” – something that is still a highly valid consideration. In the *Philippines* case, the Court stressed the Council’s right

⁸² See L. SENDEN, *Soft Law in European Community Law*, Oxford: Hart Publishing, 2004; P. LEINO, T. SAARENHEIMO, *Sovereignty and Subordination: On the Limits of EU Economic Policy Coordination*, in *European Law Review*, 2017, p. 166 *et seq.*

⁸³ European Court of Auditors, Special Report 17/2012, *The European Development Fund (EDF) Contribution to a Sustainable Road Network in Sub-Saharan Africa*, para. 27.

⁸⁴ K. SCHMALENBACH, *Accountability: Who is Judging European Development Cooperation?*, cit., p. 172.

⁸⁵ Court of Justice, judgment of 23 October 2007, case C-403/05, *European Parliament v. Commission* [GC].

to impose certain requirements in respect of the exercise of implementing powers, to be defined by reference to *inter alia* the essential general aims of the legislation in question. Under these powers, the Commission is “authorised to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to it”.⁸⁶ In the case, the Commission had adopted the contested decision under the power to administer the financial and technical assistance as well as the economic cooperation with developing countries, while the challenged decision related to the fight against terrorism and international crime, which were seen to fall outside development cooperation policy. The Court found that the Commission had indeed exceeded its implementing powers. This case demonstrates that, while there is some control over the Commission’s choices, the reason for activating this control relates more to interinstitutional prerogatives, rather than those of stakeholders or partner countries, over choices relating to individual projects.

The CJEU has addressed the implementation of the Financial Regulation on many occasions. In its jurisprudence, it has stressed the significance of the principles of transparency and equal treatment in awarding grants. According to the Court, equal treatment is required “as regards, firstly, the communication, in the call for proposals, of relevant information concerning the selection criteria for the projects to be submitted and, secondly, the comparative assessment of those projects culminating in their selection and the award of the grant”.⁸⁷ In budgetary matters, transparency is treated as a corollary of equal treatment, and is essential for precluding “any risk of favouritism or arbitrariness on the part of the budgetary authority”.⁸⁸ The Court has seen this to set conditions on how the award procedures are run:

“[A]ll the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, *inter alia*, in the call for proposals. Accordingly, all the information relevant for the purpose of a sound understanding of the call for proposals must be made available as soon as possible to all the operators who may be interested in a procedure for awarding grants in order, first, to enable all reasonably well-informed and normally diligent applicants to understand their precise scope and to interpret them in the same manner and, secondly, to enable the budgetary authority actually to verify whether the proposed projects meet the selection and award criteria previously announced”.⁸⁹

For the Court, any undermining of equality of opportunity and of the principle of transparency constitutes an irregularity that invalidates the award procedure.⁹⁰ Another

⁸⁶ *Ibid.*, para. 51.

⁸⁷ General Court, judgment of 15 April 2011, case T-297/05, *IPK International – World Tourism Marketing Consultants GmbH v. Commission*, para. 122.

⁸⁸ *Ibid.*, para. 124.

⁸⁹ *Ibid.*, paras 124-125.

⁹⁰ *Ibid.*

important principle recognised in the Court's case law relates to the principle of the protection of legitimate expectations, which the Court has defined as "one of the fundamental principles of the European Union".⁹¹ The right to rely on the principle applies to "any person with regard to whom an institution of the European Union has given rise to justified hopes", "[i]n whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such hopes. However, a person may not plead breach of that principle unless he has been given precise assurances by the administration".⁹²

A recent case brought by the International Management Group (IMG) illustrates the application of many of these principles in the context of development policy. It is a rare case also in the context of our broader study since it is not interinstitutional, but is a case brought by a potential recipient of an EU grant before an EU Court. The case concerned the Annual Action Programme in favour of Burma/Myanmar to be financed from the EU budget, in particular a budget implementing decision, where it was identified that the budget implementation tasks under joint management could be entrusted to the IMG, subject to the conclusion of a delegation agreement. The Financial Regulation and the Delegated Financial Regulation specify that tasks of budget implementation under "indirect management" can only be entrusted to entities that can be properly described as "international organisations". Prior to concluding this agreement, the Commission had taken the view that the applicant was not an international organization for the purposes of the agreement and replaced it with another actor. In the view of the applicant, in doing so the Commission had breached the provisions on indirect management, and the principles of sound financial management and good administration. Prior to taking its final decision, the Commission had contacted IMG with the purpose of investigating its status.⁹³

The Court accepted that while the contested decision did not explicitly specify the reasons for replacing the applicant with another actor, these reasons were clear from the broader context in which the decision was adopted. The Commission had asked for clarifications concerning the status of the applicant; therefore the latter was in a position to challenge the contested decision, which the Court could examine. The Court stressed that the Financial Regulation places the Commission under an obligation to "satisfy itself as to the financial capacity of international organisations to which it entrusts the implementation of the budget under indirect management". The mere fact that doubts existed about its status was enough to call this into question.⁹⁴ The Court recalled that, even in the case of procedural deficiency, the Court would need to verify

⁹¹ Court of Justice, judgment of 14 March 2013, case C-545/11, *Agrargenossenschaft Neuzelle eG v. Landrat des Landkreises Oder-Spree*, para. 23.

⁹² *Ibid.*, paras 24-26.

⁹³ General Court, judgment of 2 February 2017, case T-29/15, *International Management Group v. Commission*.

⁹⁴ *Ibid.*, paras 121-122.

whether the administrative procedure could have had a different outcome if the applicant had been in a better position to defend itself. In this case the Court found against such a conclusion.⁹⁵ The Court then referred to the functions of transparency and equal treatment in budgetary matters and the principle of legitimate expectations and applied them to the matter at hand. The Court found that the indication in the original implementing decisions that the applicant would be selected was built on the premise that it satisfied and continued to satisfy the criteria for joint management. Consequently the Commission was “entitled to consider that its doubts concerning the applicant’s status as an international organisation called into question whether it would conclude the delegation agreement with the applicant”.⁹⁶

The *IMG* case also illustrates a key feature of EU development policy: reliance on third States, international organisations and private actors in the actual implementation of projects. The challenges relating to contracting out have given rise to various complaints to the European Ombudsman concerning the award procedures specified by the Practical Guide and administered by the EU delegations, a context in which instances of maladministration have been identified.⁹⁷ The 2016 European Commission Anti-Fraud Office (OLAF) Annual Report also includes an example relating to the use of European Development Funds in an African country, which involved a tender procedure of Euro 3 million allocating a public works contract to a local company. A financial audit launched by the relevant EU delegation found financial irregularities by the partner. The delegation subsequently engaged OLAF, which conducted an investigation. The investigation demonstrated serious instances of corruption and resulted in a large part of EU funds being recovered.⁹⁸

The European Ombudsman has also addressed other complaints that are of relevance for development cooperation. In general, the EO has been concerned about the timeliness of payments, especially when private contractors and beneficiaries are concerned.⁹⁹ She has emphasised the need to accelerate the registration of invoices, coor-

⁹⁵ *Ibid.*, para. 139.

⁹⁶ *Ibid.*, para. 167. There is also another interrelated case brought by the International Management Group, which relates to its public access request under Regulation 1049/2001 relating to documents relating to an OLAF investigation relating to “possible irregularities in attributing EU-funds [in its favour] linked to its legal nature”. General Court, judgment of 26 May 2016, case T-110/15, *International Management Group v. Commission*.

⁹⁷ See Decision of the European Ombudsman of 23 September 2014 closing the inquiry into complaint 1091/2012/(AN)(RT)AN against the European Commission. The relevant procedure concerned a works and supply contract in Turkey and the Ombudsman concluded the investigation with two findings of maladministration. The Ombudsman has recently opened an investigation relating to a EuropeAid contract for support to higher education in Iraq, see European Ombudsman case 498/2017/EN of 24 April 2017 on the Commission’s alleged failure to honour its financial obligations under a EuropeAid contract for support to higher education in Iraq.

⁹⁸ European Anti-Fraud Office, *The OLAF Report 2016*, 2017, www.ec.europa.eu, pp. 17-18.

⁹⁹ Decision of the European Ombudsman closing her own-initiative inquiry OI/11/2015/EIS concerning the timeliness of payments by the European Commission.

dinate financial and operational checks, ensure that the number of successive requests for clarifications sent to beneficiaries is limited to what is strictly necessary, and in general better consider the needs of smaller operators, which are overwhelmed by Commission bureaucracy.¹⁰⁰ The EO has also considered cases brought by NGOs implementing development projects in third countries.¹⁰¹

A recent EO investigation also looked into the application of the EIB's "voluntary" Transparency Policy presented above.¹⁰² The investigation was carried out following a complaint against the Bank brought by a development organisation running a campaign about tax evasion in developing countries, who had asked for access to a report relating to tax evasion in relation to a particular project funded by the EIB in Zambia. The EIB's own Complaints Mechanism issued a recommendation that the EIB provide a meaningful summary of the investigation and its outcome. However, the EIB ultimately decided to refuse access to the report with reference to how its Transparency Policy "should be reconciled with the specific presumption of non-disclosure of documents and information relating to internal investigations based on the legitimate interest to protect the investigations as expressed in the EIB Anti-Fraud Policy".¹⁰³ Moreover, the EIB argued that fraud investigations regarding the contracts signed between the EIB and its counterparts do not constitute "administrative tasks" and thus fall outside Art. 15 TFEU irrespective of what the Bank's own "voluntary" Transparency Policy might indicate.¹⁰⁴

The EO noted that the EIB had not complied with the deadlines set out in its Transparency Policy, nor had it followed the procedural rules contained in it. The EO stressed that any attempt to define the EIB's administrative tasks would be fraught with both legal and political problems, with the EIB appearing to seek to limit transparency. The EO found that a general presumption of secrecy could not convincingly be made, since the request concerned only one document, and the investigation to be protected had already been completed. The EO noted that the EIB's own Complaints Mechanism's previously ignored recommendation seemed to strike a fair balance between the public's interest to obtain information and ensure that future investigations are carried out efficiently and that sensitive commercial information is not disclosed. The recommendation by the EO is interesting because it enforces the EIB's "voluntary" policy, in line with the Court's established case law relating to the effect of the institutions' unilateral

¹⁰⁰ Decision of the European Ombudsman closing her own-initiative inquiry OI/11/2015/EIS concerning the timeliness of payments by the European Commission, EO suggestions.

¹⁰¹ Decision of the European Ombudsman closing his inquiry into complaint 2139/2010/AN against the European Commission.

¹⁰² European Ombudsman Complaint 349/2014/OV against the European Investment Bank.

¹⁰³ Draft recommendation of the European Ombudsman in the inquiry into complaint 349/2014/OV against the European Investment Bank, para. 15.

¹⁰⁴ *Ibid.*, para. 18.

commitments,¹⁰⁵ but also because it says something about the influence of internal monitoring mechanisms.

Internal monitoring mechanisms of institutions are supposed to provide “early warning” signals in efforts to enforce financial accountability. In addition to OLAF, which investigates fraud within the EU institutions – and is mandated to detect, investigate and stop fraud with EU funds – internal mechanisms also exist within the EIB to monitor project implementation. Operations Evaluation (EV) carries out independent *ex post* evaluations and attempts to identify areas of improvement and ensure accountability through an assessment of whether the activities have been in line with policy mandates and delivered as expected.¹⁰⁶ In particular, EV has stressed the need to define expected outcomes from the onset of operations, systematic tracking and appropriate indicators, and the need to document processes thoroughly.¹⁰⁷ Obtaining quality technical assistance (TA) requires considerable EIB staff efforts to supervise TA assignments and substantial, and often inadequate, human and institutional capacity and ownership on the side of TA recipients.¹⁰⁸ A key issue raised in this context relates to the great complexity of EIB projects in countries with weak administrative, regulatory and management structures.¹⁰⁹ The question is therefore not only about the application of EU procedures, but more broadly about how administrative procedures operate in third countries. Whether the EV reports have had an impact on the activities of the EIB is difficult to evaluate.

On the whole, it would seem that the avenues for judicial and administrative accountability do provide some potential for enforcing accountability in the area of development policy. While actual court cases involving third country actors are relatively few, the Ombudsman emerges as a useful avenue for administrative redress; a body that has actively promoted rights relating to good administration also in relation to third country actors.

¹⁰⁵ In the area of competition, see e.g. Court of Justice, judgment of 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others v. Commission*, where the Court established that in adopting Guidelines designed to produce external effects, and in announcing by publishing them that they will apply to the relevant cases, the Commission had imposed a limit on the exercise of its discretion and could not depart from them under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. Thus, rules of conduct may produce legal effects.

¹⁰⁶ European Investment Bank, *Operations Evaluation – Thorough Assessments to Improve EIB Performance*, 2017, www.eib.org.

¹⁰⁷ See European Investment Bank, *Operations Evaluation – Activity Report 2014-2015 and Work Programme 2016-2018*, March 2016, www.eib.org.

¹⁰⁸ There is a special report focusing on EIB technical assistance (TA) allocated in the ACP States and Southern and Eastern Neighbourhood countries in 2003-2013, which specifically discusses accountability and transparency. European Investment Bank, *Operations Evaluation – EIB Technical Assistance Outside the EU, 2003-2013 – Synthesis Report*, June 2014, www.eib.org.

¹⁰⁹ *Ibid.*, p. vi.

IV. AUDIT AND DEVELOPMENT CO-OPERATION: A MEANS TO ENSURE POLITICAL ACCOUNTABILITY

Internal audit, audit by the Commission and external audit by the ECA have developed into a set of instruments designed to more effectively control the EU's spending. Key actors in ensuring financial accountability in the EU are the ECA and the EP. Based on Art. 285 TFEU, "the Court of Auditors shall carry out the Union's audit". Art. 287 TFEU specifies that this is done by examining "the accounts of all revenue and expenditure of the Union" including those of all Union bodies, offices or agencies unless this is specifically excluded. The Court also has access to information necessary for the audit of Union expenditure and revenue managed by the EIB.

The ECA's function is to provide information about the management of EU finances. Its opinions are not binding and its contribution to EU accountability rests on information and publication. However, the existence of external audit is believed to influence the behaviour of public officials engaged in the deployment of EU money both at EU and national level.¹¹⁰ The ECA provides the EP and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions, which can be supplemented by specific assessments for each major area of Union activity. The ECA examines "whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound". In this context, it is also under an obligation to report on any cases of irregularity.¹¹¹ Art. 1, para. 2, of Council Regulation 2988/95 defines "irregularity" as:

"any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure".¹¹²

Following the fall of the Santer Commission, the reform of the Financial Regulation in 2002 brought major changes to the procedural aspects of financial control. Art. 287 TFEU establishes that the audit of expenditure is carried out on the basis of both commitments undertaken and payments made. Under Art. 287 TFEU the ECA conducts *financial* and *compliance audits* by examining the legality and regularity of the expendi-

¹¹⁰ B. LAFFAN, *Auditing and Accountability in the European Union*, in *Journal of European Public Policy*, 2003, p. 770.

¹¹¹ Art. 159, para. 1, of Regulation 966/2012 stipulates that "the examination by the Court of Auditors of whether all revenue has been received and all expenditure incurred in a lawful and proper manner shall have regard to the Treaties, the budget, this Regulation, the delegated acts adopted pursuant to this Regulation and all other acts adopted pursuant to the Treaties".

¹¹² Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 on the protection of the European Communities financial interests; European Court of Auditors, *Financial and Compliance Audit Manual*, p. 211.

ture and revenue. The audit is based on records and, if necessary, performed on the spot, including on the premises of recipients of payments from the budget. The ECA draws up an annual report, but may also, at any time, submit observations on specific questions, particularly in the form of special reports. It also conducts Value for Money (VFM) audits – *performance audits* – published as special reports,¹¹³ which focus thematically on a particular policy field. It may also deliver opinions at the request of the EU institutions and generally assists the EP and the Council in exercising their powers of control over the implementation of the budget. *Performance audits* have become more important in the workflow of the ECA.¹¹⁴ The EP has emphasised this shift in focus from compliance with rules to performance, in particular with the need to improve the discharge procedure, thereby more effectively ensuring public accountability.¹¹⁵

Shared management and shared financing by the Commission and Member States and the introduction of other more complex financial instruments has in practice expanded the scope of EU financial administrative law.¹¹⁶ EuropeAid is in charge of administering the external aid instruments from the general budget of the EU as well as the special financial Instruments related to the EDF. External auditing on external operations also takes place. Third countries and parties receiving EU funding need to consent to this as a part of their financing conditions. For this purpose EuropeAid operates a system of annual audit planning.

Art. 319 TFEU sets out the discharge procedure in which the EP decides whether or not to grant discharge to the Commission.¹¹⁷ Art. 319, para. 1, TFEU provides for a list of documents that the Council and the Parliament have to examine throughout the discharge procedure, which includes the ECA annual report, the Statement of Assurance and relevant special reports. Their function is to contribute to a sound process of discharge and democratic control, and offer impetus for improving financial management. So far, ECA has never issued an approval of any of the financial years as far as legality and regularity is concerned, but there are no immediate discernible consequences stemming from a negative Statement of Assurance. However, the discharge procedure and the follow up of ECA recommendations may have political consequences in the EP and the Council, and the procedure forms a part of the accountability chain between the EP and the Commission. Over the years, attempts have been made by the Commis-

¹¹³ C. HARLOW, *Accountability in the European Union*, Oxford: Oxford University Press, 2002, p. 114.

¹¹⁴ C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, cit., p. 49; European Court of Auditors, *2015 Work Programme*, www.eca.europa.eu.

¹¹⁵ See European Parliament Report A7-0068/2014 of 30 January 2014 on the evaluation of the Union's finances based on the results achieved: a new tool for the European Commission's improved discharge procedure.

¹¹⁶ See A. BRENNINKMEIJER, *Audit and Administrative Law*, in C. HARLOW, P. LEINO, G. DELLA CANANEA, *Research Handbook on EU Administrative Law*, Cheltenham: Edward Elgar, 2017, p. 344.

¹¹⁷ More detailed provisions on the procedure are included in Arts 164-167, of Regulation 966/2012, and Rules 76 and 77 and Annex VI, of the Parliament's Rules of Procedure.

sion to improve its financial management following critical reports from ECA. The ECA's reports, therefore, form a basis of a dialogue between the EP and the Commission on how money has been spent and what improvements should be made with respect to financial management. The ECA reports and Commission replies to them are both published in the Official Journal.

The discharge procedure provides an opportunity to debate the ECA findings and invites the Commission to address them. The ECA has repeatedly called for "consistent and comprehensive accountability and audit arrangements [...] for all EU policies, instruments and funds" – in particular to cooperative and intergovernmental instruments.¹¹⁸ Many of the reports also deal with more detailed issues, such as the need to improve the allocation and use of human resources in delegations, or how reporting from delegations to EuropeAid provided inadequate feedback on results, or on the soundness of financial management systems.¹¹⁹ In its report, the EP supported the ECA conclusions, stressing the need for further efforts by the Commission in the evaluation of the quality and results of its interventions, which would contribute to better accountability. The EP also expected the Commission "to take all the necessary measures to overcome the weaknesses of the supervisory and control systems, notably at delegation level, as indicated by the Court".¹²⁰ In the context of the Commission discharge procedure, the Committee on Budgetary Control expressed "concern over persisting problems with staff involved in aid policies", encouraging the EU delegations to "systematically carry out technical and financial monitoring visits to the projects and to focus the internal reporting system more on the results achieved by the aid interventions".¹²¹ The Commission subsequently responded to the recommendations, admitting that "[a] results and resource management focused planning, monitoring and reporting system is at the heart of an efficient, effective and fully accountable devolved management structure" and referred to a plan to revise its internal monitoring guidance.¹²²

In a Special Report adopted in 2014 on "EuropeAid's evaluation and results oriented monitoring systems",¹²³ the ECA concluded that EuropeAid's accountability framework

¹¹⁸ 2014 Landscape Review, cit., p. 68.

¹¹⁹ European Court of Auditors, Special Report 1/2011, *Has the Devolution of the Commission's Management of External Assistance from its Headquarters to its Delegations Led to Improved Aid Delivery?*

¹²⁰ See European Parliament Resolution P7_TA-(2012)0144 of 20 April 2012 on the impact of devolution of the Commission's management of external assistance from its headquarters to its delegations on aid delivery.

¹²¹ European Parliament Report P7_TA-(2012)0154 of 10 May 2012 on the Court of Auditors' special reports in the context of the 2010 Commission discharge.

¹²² Commission Reply SEC(2011) 162 final of 4 February 2011 to the Special Report *Has the Devolution of the Commission's Management of External Assistance from its Headquarters to its Delegations Led to Improved Aid Delivery?*, p. 10.

¹²³ Special Report 18/2014, cit. See also European Court of Auditors, Special Report 21/2015, *Review of the Risks Related to a Results-Oriented Approach for EU Development and Cooperation Action*.

comprising of monitoring, evaluation and reporting – all key administrative functions – is not sufficiently reliable, and as such not an appropriate basis for accountability. The accountability framework also suffers from a lack of overall supervision and mechanisms for follow-up and dissemination of findings as well as “insufficiently well-defined objectives and indicators, the limited proportion of *ex post* evaluations and ROMs and inherent limitations in the evaluation methodology for budget support. These factors limit considerably EuropeAid’s capacity to account for the actual results achieved”.¹²⁴

In this context, the EP discussed the two types of evaluations used by EuropeAid and carried out by external evaluators, strategic and programme evaluations, with a view to examining their contribution to accountability.¹²⁵ In its Report given in the context of Commission 2014 discharge, the EP was:

“seriously concerned by the insufficient reliability of EuropeAid’s evaluation and ROM systems, by the inadequate level of supervision and monitoring of programme evaluation and also by the fact that EuropeAid cannot ensure that staff and financial resources are appropriate and efficiently allocated to the various evaluation activities”.¹²⁶

In its reply, the Commission argued that its strategic evaluation systems were “overall reliable even if they could be improved” and that “[m]echanisms for follow-up and dissemination are already in place”, even if “improvements are possible with respect to follow-up, oversight and monitoring”.¹²⁷ A more formalized framework has recently been launched for this purpose: Results Oriented Monitoring (ROM).¹²⁸ The Parliament has recently prepared reports and voted on an ECA Report relating to the risks related to a results oriented approach for EU development cooperation action. The Committee on Budgetary Control supported the ECA’s findings, stressing, for example, the need to develop “partner countries’ capacity building, governance frameworks and ownership” and “strengthen the political and policy dialogue, aid conditionality and the logical chain framework in order to ensure both the coherence between decision and preconditions of payments of payments or disbursements in financing agreements by

¹²⁴ Special Report 18/2014, cit., p. 6.

¹²⁵ European Parliament Working Document PE544.401v01-00 of 13 January 2015 on the European Court of Auditors’ Special Report 18/2014 (2014 Discharge) *EuropeAid’s Evaluation and Results-Oriented Monitoring Systems*.

¹²⁶ European Parliament Resolution P8_TA-PROV(2016)0148 of 28 April on the Court of Auditors’ Special Reports in the context of the 2014 Commission discharge, para. 2.

¹²⁷ Commission Replies COM(2014) 732 final of 4 December 2014 to the Special report of the European Court of Auditors *EuropeAid’s Evaluation and Results-Oriented Monitoring Systems*, p. 2.

¹²⁸ See the Commission Staff Working Document SWD(2015) 80 final of 26 March 2015, *Launching the EU International Cooperation and Development Results Framework*.

clearly linking payments to the achievement of actions and results as well as the relevance of selected objectives and indicators".¹²⁹

While the discharge procedure does provide a certain degree of accountability in that it forces the Commission to defend its solutions, it has limited consequences. It operates less as a mechanism of control and more as a process of learning through dialogue with stakeholders.¹³⁰ In Bovens's accountability definition, however, the procedure would seem to fulfil the criteria for an effective mechanism, because the consequences flowing from enforcing accountability may also be informal or implicit, such as the need to render account in public.¹³¹ To what extent the ECA Reports and the subsequent discharge procedure and EP debate have in fact contributed to changes in the way the policies are administered is somewhat difficult to measure. Moreover, it is a procedure that is internal to the EU, and mainly focuses on the funders' perspective and financial, rather than broader policy, control.

V. THINKING OUTSIDE THE BOX: TOWARDS A BROADER ACCOUNTABILITY CONCEPT

Let me stress the obvious. Even if the vagueness of EU development objectives makes evaluating accountability difficult, there is nothing fundamentally wrong with them. Of course the EU should do its utmost to fight inequality, eradicate poverty, achieve peace, and promote environmentally responsible policies, as well as everything else that remains to be done as parts of its global mission. However, the reality is that sovereigns are "unlikely to commit voluntarily to taking strangers' concerns and global welfare seriously into account. Their answer [...] is brief: we are bound to take other-regarding interests into account only when and to the extent that we explicitly and formally commit to doing so; nothing more may be assumed".¹³²

Being open about its ambitious global commitments, and decorating them with lofty ideas of partnership, participation and shared ownership, makes the EU a rare case as a sovereign. However, in doing so, the EU sets itself a very high standard by which to abide. Would it instead define its objectives as an act of charity, fully voluntary on its part, its mission would be clearly less demanding on issues of procedure or objective. However, this is a vision that is incompatible with the EU's self-perception as a good world power.

¹²⁹ ECA Special Report 21/2015, cit. See European Parliament Working Document PE573.176v02-00 of 9 March 2016 on ECA Special Report No 21/2015 (2015 Discharge) on *Review of the Risks Related to a Results-Oriented Approach for EU Development and Cooperation action*, p. 6.

¹³⁰ M. BOVENS, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, in *West European Politics*, 2010, p. 958.

¹³¹ *Ibid.*, p. 952.

¹³² E. BENVENISTI, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, in *American Journal of International Law*, 2013, p. 296.

This *Article* has tried to evaluate whether administrative law can contribute to meeting some of the challenges that EU development policy faces. The answer to this question is mixed. As far as policy accountability is concerned, the broad policy objectives give the Commission the right to decide what, in concrete cases, are the appropriate measures to achieve those objectives and the manner in which this should be done, since its procedural discretion is almost as broad as its substantive discretion. However, addressing only policy objectives and administrative procedures is likely to be insufficient. In a world of inequality, there is no space for genuine partnerships, and administrative law can only make a limited contribution in this regard. Ultimately it is the one with the money who decides how it should be spent. This is a more general feature in discussions on accountability in a global context: “[a]ccountability in world politics is inextricably entangled with power relationships. [...] Those who would hold power-wielders accountable need power themselves. Weak actors – including small, poor countries in the Global South and, more, their often disenfranchised publics – lack the capacity systematically to hold powerful actors accountable”.¹³³

This is also the setting that clearly emerges in the context of EU development assistance. Accountability continues to be pursued largely through mechanisms that are internal in nature, in particular the Parliament’s discharge procedure, the main function of which is to feed into the broader debate of political accountability from the perspective of the donor.

If Grant and Keohane, quoted above, are right, the possibilities of third country actors to enforce accountability will remain limited as long as they remain powerless. Administrative law has only limited means to combat such power asymmetries. However, the means of administrative redress may make a modest contribution: they have traditionally operated as an avenue for those that lack power, since complaining to them involves no cost, and is usually free of strict formal requirements. And indeed, in the EU it is the Ombudsman that gives most promise in this regard. However, enforcing accountability in a broader sense would also require thinking outside the box of established EU routines, which have proved largely ineffective as accountability safeguards for EU policies operating in a global context whose effects are predominately felt outside Union borders.

Contrary to the dominant thinking in development circles, a more careful look at procedural issues might be helpful in this regard. The tendency towards result-based monitoring reflects the idea that administrative procedures are instrumental, and that accountability is mainly related to efficiently achieving results. However, this kind of thinking undermines the potential of inclusive procedures and accountability mechanisms: they allow learning from mistakes and are as such more likely to result in useful and realistic objectives that can in fact be delivered. So it might ultimately be in the EU’s *own* interest to allow space for the interests of the EU’s third country partners and their

¹³³ R.W. GRANT, R.O. KEOHANE, *Accountability and Abuses of Power*, cit., p. 40.

citizens. In short, policies that are considered legitimate also tend to be more effective, and thus a win-win scenario both for the EU and third States.