



ARTICLES

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

INTRODUCTION: THE NEW FRONTIERS OF EU ADMINISTRATIVE LAW AND THE SCOPE OF OUR INQUIRY

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ABSTRACT: This *Article* introduces our study into the operation of administrative law in EU external relations by introducing its general themes and fields of study. It starts by characterising the EU as a global actor and by illustrating how EU administrative law has developed in general, and in the area of external relations in particular. It then moves to examine the instrumental role that administrative law plays in advancing the EU's external policy objectives, and the difficulties involved, following from the general way in which many of these objectives have been defined. Building on Bovens' definition of accountability, we lay down a main framework for studying accountability in this context, and its different dimensions studied in the individual *Articles*: legal, political, financial, administrative and social. This *Article* then provides a general comparison of administrative action in the area of external action, building on general typologies of EU administrative action, with a view to laying the ground for an examination of the extent to which external relations is *special*. Finally, it closes with a brief introduction to one of the key themes in this *Special Section*: the scope of institutional discretion, and its link to the overall accountability of EU action in this area.

KEYWORDS: European Union – administrative law – external relations – accountability – discretion – EU institutions.

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I. THE EU AS A GLOBAL ADMINISTRATIVE ACTOR

The traditional functions of administrative law are two-fold: controlling the administration and regulating the relationship of government with its citizens. Key issues of administrative law therefore relate to accountability and control. EU administrative law can be defined as “the rules and principles which govern the functional, organisational, and procedural elements of the administration of the Union”.¹ Administrative law constitutes “a complex web of laws, rules and procedures that determine the organisation, powers and duties of administrative authorities and govern the way that policy is implemented in specific areas”.² This project is designed to focus on these functions of administrative law, as they apply within EU external relations.

EU administrative law scholars have not traditionally concerned themselves much with external relations or foreign policy. Our research, and that of our collaborators, demonstrates not only that there is in fact a great deal to engage administrative law but also that EU external relations presents us with some of the most interesting problems in current administrative law.³ Many of the new challenges to administrative law we have witnessed in recent years have emerged through reactions to crises. Our *Special Section* illustrates the administrative measures that have been needed to respond to current crises relating to security, migration and climate. Crises also create a laboratory of our legal principles and how they work when put to proper test. More broadly, recent developments give reason to inquire, for example, how we identify those whose interests administrative law is designed to protect, how accountability operates in transnational contexts, and how we define the boundaries of executive discretion. Defining what exactly counts as *executive power* in the EU has often relied on *residual* approach, treating executive power as the power that is not judicial or legislative in nature, i.e. as the power that is not exercised by anyone else.⁴ In the external relations context a function that also falls outside these more clearly demarcated functions is the negotiation and conclusion of international agreements, which is an executive function that is neither legislative nor judicial in nature. These functions are clearly executive, but it is less evident whether they count as *administrative*, even if they in the residual approach would fall into this category.

¹ H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, Oxford: Oxford University Press, 2011, p. 57.

² C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, Oxford: Hart Publishing, 2014, p. 1.

³ For a pioneering work in this field see I. VIANELLO, *EU External Action and the Administrative Rule of Law: A Long-Overdue Encounter*, European University Institute, PhD thesis defended on 13 December 2016.

⁴ D. CURTIN, *Executive Power in the European Union*, Oxford: Oxford University Press, 2009, p. 53.

II. DEVELOPMENT OF EU ADMINISTRATIVE LAW AND EXTERNAL RELATIONS: SETTING THE SCENE

EU administrative law builds on certain core principles of good administration included in the EU Treaties and the CJEU's case law, which can be traced back to national constitutional traditions. The Treaties and the Charter of Fundamental Rights of the European Union (Charter) include various key provisions regulating the actions of the EU administration horizontally. These provisions are complemented by secondary legislation applicable in particular sectors or in relation to specific questions (such as access to documents or data protection).⁵ There are also policy sectors – including very relevantly for our study, trade defense and anti-dumping – where certain administrative procedural rights began to emerge already in the 1960s and 1970s. An event of major importance in the development of more constitutionalised administrative procedures was the establishment of the Court of First Instance (CFI) in 1988.⁶

Since the early 1990's EU administrative law has witnessed a growing emphasis on transparency, accountability and citizen participation, closely linked to the Maastricht referenda and the accession of Northern Member States to the EU. In parallel, there has been a strengthened regard for personal privacy.⁷ Following the resignation of the Santer Commission in 1999 administrative reform became urgent, and focused in particular on strategic priority setting and resource allocation, human resources management (Staff Regulations) and financial management and control.⁸ The discussions surrounding these reforms illustrated how creating a robust system of financial management and audit has always been challenging in the EU structure, and continues to be so, as our *Article* on development policy demonstrates. An attempt was made to cover all EU operations by the new Financial Regulation, thus creating over-arching financial principles that for the first time framed the whole of Union administration – something that Craig has defined as the “constitutionalisation” of Union administration.⁹ As the result of these waves of development, the EU today has its own machinery for accountability including the EU and national courts, systems of audit, parliaments (both European and national) and more recently, the European Ombudsman and the Data Protection Su-

⁵ On this, see e.g. P. LEINO: *Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU*, in *European Public Law*, 2014, p. 681 *et seq.*; *Enforcing Citizens' Right to Good Administration: Time for Action*, research report written at the request of the European Parliament Legal Affairs Committee and published in *Law of Administrative Procedure of the European Union. European Added Value Assessment – European Added Value Assessment*, October 2012, www.europarl.europa.eu.

⁶ H.P. NEHL, *Principles of Administrative Procedure in EC Law*, Oxford: Hart Publishing, 1999, p. 8.

⁷ See e.g. the rulings in Court of Justice: judgment of 8 April 2014, joined cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger* [GC]; judgment of 13 May 2014, case C-131/12, *Google Spain* [GC]; judgment of 6 October 2015, case C-362/14, *Maximillian Schrems* [GC].

⁸ See e.g. C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, *cit.*, pp. 22-23.

⁹ P. CRAIG, *The Constitutionalisation of Community Administration*, in *European Law Review*, 2003, p. 840.

pervisor. All of these developments and building blocks concern the EU administrative machinery as a whole. In the area of external relations the EU's own accountability machinery is often complemented by those of its international partners and collaborators.

The key principles of EU administrative law have been discussed in various textbooks that approach them mainly through the Treaty provisions and CJEU jurisprudence.¹⁰ While jurisprudence has been helpful in clarifying that citizens can rely on certain fundamental principles – such as the duty to give reasons – in their relations with the EU administration, there are a number of significant matters that remain unaddressed in case law or where the CJEU has been reluctant to enforce clear standards deriving from such principles. Secondary legislation is often needed to enforce the key principles and procedural requirements. At the same time, many questions that are addressed by the Charter provisions or national administrative law are currently not addressed by EU secondary legislation, or are addressed at such a general level that the provisions are of limited use for citizens or economic actors. Regulation of the EU administration has remained fragmented, uneven and far from comprehensive, which has been seen as one of the key motivations behind the recent initiatives to regulate the EU administrative function more horizontally.¹¹ While the rules applicable in some policy sectors (such as competition policy or state aid) have previously been subject to comprehensive studies, such examination has been limited in the area of external relations.

Against this background, our study has had two objectives. First, instead of studying general principles as a general phenomenon, as is usually the case in studies of administrative law, we have focused on the question of whether their applicability in the area of external relations faces specific challenges. Key principles that we have studied in this regard are the principles of equal treatment and non-discrimination, access to remedy and judicial review, and the duty of care, through a study of these principles and their operation in particular external policy areas. Second, while general principles often have the function of filling gaps in law, we have attempted to trace and study the *law* through particular examples of administrative procedures applied in individual external policy areas. Our research agenda has focused on mapping particular administrative procedures and types of administrative action applicable in the external policy fields and – keeping in mind the core functions of administrative law discussed above – examining the extent and type of gaps in accountability and control.

¹⁰ In particular J. SCHWARZE, *European Administrative Law*, London: Sweet & Maxwell, 2006, and P. CRAIG, *EU Administrative Law*, Oxford: Oxford University Press, 2012.

¹¹ European Parliament, The Context and Legal Elements of a Proposal for a Regulation on the Administrative Procedure of the European Union's Institutions, Bodies, Offices and Agencies, PE 536.487, 2016; Report 2012/2024(INI) of 12 November 2012 of the European Parliament with recommendation to the Commission on a Law of Administrative Procedure of the European Union; European Parliament Resolution P8_TA(2016)0279 of 9 June 2016 for an Open, Efficient and Independent European Union Administration.

The policy areas that in the EU Treaty structure fall specifically under external relations include the common foreign and security policy (CFSP), common commercial policy (CCP), development policy, association and neighbourhood policies, economic, financial and technical cooperation and humanitarian aid. We have included specific *Articles* on the CFSP (Cremona), common commercial policy (Korkea-aho and Sankari), development policy (Leino) and European Neighbourhood Policy (ENP) and Stabilisation and Association Process (SAP) (Vianello), which in this categorisation can be seen to represent the main external policies. However, as Art. 21 TEU illustrates, the distinction between *external* and *internal* is not a bright line. Not only are many important external measures based on *internal* policy competences (e.g. environmental policy) via the doctrine of implied external powers; today, internal legislative activity has a strong international dimension.¹² The EU frequently uses legislative techniques with territorial extension and exercises global regulatory power through EU legislation¹³ (on the *Brussels Effect*, see below). Thus, EU legislation often deals directly with third states, international organisations, or citizens or companies of third states.¹⁴ As AG Saugmandsgaard Øe noted in his recent Opinion in *Swiss International Airlines*,

“the concept of ‘external relations’ is not limited to the Union’s external action, within the meaning of Article 21(3) TEU, in the areas covered by Title V of the TEU and by Part Five of the TFEU. ‘External relations’ also includes the external aspects of other Union policies, which, in accordance with that provision, are governed by the same principles and pursue the same objectives as the Union’s external action”.¹⁵

For this reason, we have also included two *Articles* on policies which, while not exclusively external, have a clear external dimension: environmental policy (Hadjiyianni) and migration policy (Rijpma). As far as environmental policy is concerned, Art. 191, para. 1, TFEU specifically refers to “promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change”. In addition, under Art. 11 TFEU, environmental protection is to be integrated into all Union policies, including its external policies. As the Court of Justice recently held, the objective of sustainable development now “forms an integral part” of the CCP.¹⁶ Policies relating to immigration automatically include a cross-border element and external instruments are increasingly used. In defining our research agenda, we

¹² Directorate General Internal Market, Industry, Entrepreneurship and SMEs (DG Growth), Management Plan 2015, Ref. Ares(2015)3738909 of 10 September 2015.

¹³ J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, in *American Journal of Comparative Law*, 2014, p. 87 *et seq.*

¹⁴ See further M. CREMONA, *The Internal Market and External Economic Relations*, in P. KOUTRAKOS, J. SNELL (eds), *Research Handbook of EU Internal Market Law*, Cheltenham: Edward Elgar, 2017.

¹⁵ Opinion of AG Saugmandsgaard Øe delivered on 19 July 2016, case C-272/15, *Swiss International Air Lines*, para. 58.

¹⁶ Court of Justice, opinion 2/15 of 16 May 2017, para. 147.

have thus tackled two fundamental questions of definition: not only is it unclear what exactly counts as *administrative*; defining *external* also seems to escape clear definition.

The internal-external dichotomy can also be questioned in the context of international regulatory agreements that have a direct impact on individuals and their rights. Many regulatory rules and decisions are taken at the international level as decisions or recommendations¹⁷ of international bodies and are later incorporated into EU law through the adoption of administrative acts or non-legislative acts by the EU institutions or through the regulatory action of EU agencies. Many key aspects of our daily life in fact depend on rules and decisions adopted at international level, later to be adopted into EU law.¹⁸ In recent years, civil society organisations have convincingly argued that it should be a point of open discussion how these international agreements are made and to what extent the rights of individuals are balanced against other interests. International regulatory cooperation increasingly involves also EU administrative actors, such as EU agencies.¹⁹ The *Article* written by Joana Mendes focuses on these questions.

In addition, horizontal EU instruments are also applied in external action. In addition to the Charter, the effect of which is discussed by Rijpma in relation to immigration, such legislation includes in particular access to documents and data protection. The former forms the subject of Leppävirta's *Article* in the context of restrictive measures directed against individuals.

Our ambition has been partly empirical: we are interested in knowing what actually happens on the ground when EU external relations are administered, how administrative procedures work, whether information is available and how the institutions respond to inquiries. Empirical research is a rising theme in administrative law,²⁰ and several of our contributors have engaged in this kind of research to dig deeper into the administrative function and its actual operation.

A special feature of many external policies relates to conditionality, which also creates particular challenges to the administrative procedures through which conditionality is ap-

¹⁷ On the legal effects that may be produced internally by such *external* recommendations, see Court of Justice, judgment of 7 October 2014, case C-399/12, *Germany v. Council* [GC], para. 63.

¹⁸ On this, see J. MENDES, *The EU and the International Legal Order: The Impact of International Rules on EU Administrative Procedures*, Notes for the Hearing of the Committee of Legal Affairs of the European Parliament, 24 February 2015.

¹⁹ See e.g. A. OTT, E. VOS, F. COMAN-KUND, *European Agencies on the Global Scene: EU and International Law Perspectives*, in M. EVERSON, C. MONDA, E. VOS (eds), *EU Agencies in Between Institutions and Member States*, Alphen aan den Rijn: Wolters Kluwer Law & Business, 2014; M. GROENLEER, S. GABBI, *EFSA in the International Arena: Caught in a Legal Straightjacket – or Performing an Autonomous Role?*, in A. ALEMANNI, S. GABBI (eds), *Foundations of EU Food Law and Policy: Ten Years of the European Food Safety Authority*, Farnham: Ashgate, 2014, p. 331 *et seq.*

²⁰ C. HARLOW, P. LEINO, G. DELLA CANANEA, *Introduction – European Administrative Law: A Thematic Approach*, in C. HARLOW, P. LEINO, G. DELLA CANANEA (eds), *Research Handbook on EU Administrative Law*, Cheltenham: Edward Elgar, 2017.

plied. Conditionality also includes requirements of administrative reform in third countries. We have focused more on administrative procedures on the EU side, but the picture is not complete without observing that often the EU operates jointly with third country administrations in various arrangements of shared management, and ties the granting of assistance to how these funds and EU policy objectives are managed on the side of recipients. The administrative law challenges relating to managing conditionality is a theme that emerges in particular in our *Articles* on development policy and the ENP and SAP.

In the context of studying administrative action in external relations we have also inquired into the use of implementing and delegated powers in these policy fields. The limitation between implementing powers and delegated powers has been a heated debate in EU law post-Lisbon. Under Art. 290 TFEU, the Commission can be empowered to adopt rules that supplement or amend certain non-essential elements of a legal act. Therefore, the “purpose of granting a delegated power is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act”.²¹ Under the implementing powers of Art. 291, para. 2, TFEU, the Commission “is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States”.²² This is not entirely a clear-cut division, and the Court of Justice has confirmed the existence of a *grey zone* between the two categories: in practice, the EU legislature has discretion when choosing between conferral of a delegated power or an implementing power.²³ In practice, the definition “non-essential” has turned into a difficult concept to implement, with reference to a notion of *political choices* and the way in which what is “essential” depends on the policy field in question.²⁴ The idea of the mechanism of delegation is to “allow for swift reaction to rapidly changing circumstances in certain regulated domains”.²⁵

In external policy fields such as development cooperation where delegated and implementing acts play an important role a number of questions arise. First, is comitology used in matters that genuinely relate to establishing “uniform conditions”? Second, how is “essential” defined in the context of external policies, and are there policy-specific differences? In particular, essential to whom – the EU or the third countries, whose interests may be directly affected by the measure? Finally, linked to this, the accountability structure behind the Art. 290 TFEU procedure relies on the right of the EU legislature to

²¹ See Court of Justice, judgment of 18 March 2014, case C-427/12, *Commission v. Parliament and Council* (Biocides Case) [GC], para. 38.

²² *Ibid.*, para. 39.

²³ *Ibid.*, para. 40.

²⁴ See Court of Justice, judgment of 5 September 2012, case C-355/10, *European Parliament v. Council* [GC]. For an analysis, see e.g. M. CHAMON, *How the Concept of Essential Elements of a Legislative Act Continues to Elude the Court: Parliament v Council*, in *Common Market Law Review*, 2013, p. 849 *et seq.*

²⁵ K. LENAERTS, M DESOMER, *Towards a Hierarchy of Legal Acts in the Union? Simplification of Legal Instruments and Procedures*, in *European Law Journal*, 2005, p. 754.

object to the delegated act. The broader – and quite fundamental – question relating to realising accountability through this procedure relates to whether one can consider the Art. 290 TFEU mechanism as a functioning guarantee for accountability: the use of legislative veto over delegated legislation is extremely rare, and has, to our knowledge, not been used in the area of external relations. Therefore, as far as the legislature is concerned, delegated powers are lost powers, which makes observing the limits of “essential” particularly urgent.

III. ADMINISTRATIVE ACTION AS *INSTRUMENTAL ACTION* IN EXTERNAL RELATIONS

Administrative action is instrumental: it is taken “in the framework of, and for the purpose of achieving, the overall policies and goals of the EU”.²⁶ Art. 3, para. 5, TEU defines the Union’s aims in external relations:

“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”.

This provision, elaborated in Art. 21 TEU, for the first time gives the EU an explicit external mandate. Art. 21 TEU requires the Union to work together in partnership with others (third countries and international, regional or global organisations) that share its principles. Notably, these principles are identified with the EU’s own development and enlargement,²⁷ creating a clear link between the values which have shaped the EU, those which it looks for in its partners, and those it seeks to advance more broadly. This link between the EU’s internal development and its external action is also explicitly referred to in the context of its objectives; the EU’s general external objectives which are outlined in Art. 21, para. 2, TEU are to be pursued not only through its core external policies, but also in the external aspects of its other policies.²⁸ The EU as a global actor consistently (if not always successfully) seeks synergies between its internal and external policies and action, and claims an identity between its values and its interests.²⁹ The

²⁶ H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, cit., p. 57.

²⁷ According to Art. 21, para. 1, TEU, “[t]he Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world”.

²⁸ Art. 21, para. 3, TEU.

²⁹ “Our interests and values go hand in hand. We have an interest in promoting our values in the world. At the same time, our fundamental values are embedded in our interests”, European Union, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union’s Foreign And Security Policy*, June 2016, eeas.europa.eu, p. 13.

EU also aims at objectives that may sometimes be conflicting: its own interest may sometimes be far from the broader global interest that it declares itself willing to aim at. Sometimes choices need to be made, and making these choices is often a matter for the EU's administrative machinery.

When exercising power, accountability should follow. Accountability in foreign relations and world politics has been an emerging theme in political science literature.³⁰ This is linked to the role that the EU asserts for itself as a powerful actor global actor, but is a rising theme even outside the EU context. International lawyers have discussed how the increasing interdependence between countries and communities should affect the concept of sovereignty, and the extent to which national regulators should weigh other nations' interests when making decisions that could affect their nationals.³¹ These questions have engaged political scientists who have sought to identify those who should be considered entitled to hold the powerful to account in world politics.³² It is one of the significant questions for EU administrative law in this field and a theme raised by several contributions in this project.

When examining accountability in world politics, Grant and Keohane recognise two distinct models of accountability: one focusing on *participation* and the other on *delegation*. While the latter model is based on a principal-agent relationship between those entrusting powers and the trustee, the former stresses direct democracy and the right of participation of those affected by decisions taken. Indications of this kind of thinking have occasionally been seen also in some older Commission documents, which also relate to issues of increased openness and better involvement and more participation of stakeholders in the EU policy process.³³ While delegation might be a useful model for examining aspects of accountability in for example conclusion of international agreements, especially at the EU level given the different roles in this process played by the Commission, the Council and the European Parliament,³⁴ participation may be more central to administrative action, and links closely with other principles such as the duty of care. Valid questions may be asked as to whether and to what extent administrative rights are or should be applied in the area of external action, the identification of the

³⁰ R.W. GRANT, R.O. KEOHANE, *Accountability and Abuses of Power in World Politics*, in *American Political Science Review*, 2005, p. 29 *et seq.*

³¹ E. BENVENISTI, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, in *The American Journal of International Law*, 2013, p. 295 *et seq.*

³² See R.W. GRANT, R.O. KEOHANE, *Accountability and Abuses of Power in World Politics*, *cit.*

³³ See e.g. European Commission, *Report from the Commission on European Governance*, 2003, ec.europa.eu.

³⁴ On the balance between the Commission and Council in treaty-making, see Court of Justice: judgment of 16 July 2015, case C-425/13, *Commission v. Council* [GC]; judgment of 28 July 2016, case C-660/13, *Council v. Commission* [GC].

interests to be protected,³⁵ and the extent to which the EU does or should hold itself accountable to external constituencies affected by its external action.

These questions have been particularly topical in the context of discussions relating to the *Brussels Effect*. This term is used to refer to the “unprecedented and deeply underestimated global power that the European Union is exercising through its legal institutions and standards”, turning the EU into “the only jurisdiction that can wield unilateral influence across a number of areas”³⁶ such as antitrust, privacy, health, food, chemicals and environmental regulation. Exercising global regulatory power by denying market access to a product failing to meet EU standards is much easier than policing international practices that involve individuals that do not enter the European market: “the Brussels Effect captures a phenomenon where the EU does not have to do anything except regulate its own market to exercise global regulatory power. The size and attractiveness of its market does the rest”.³⁷

In principle, therefore, the producer has a choice between complying with the EU standard or not exporting to the EU. The picture is rendered more complex when we take account of the many forms of “territorial extension” defined by Joanne Scott, whereby in the absence of extra-territoriality in the strict sense, the EU’s regulatory determination is “shaped as a matter of law by conduct or circumstances abroad”.³⁸ As she says, “[t]he practice of territorial extension enables the EU to govern activities that are not centered upon the territory of the EU and to shape the focus and content of third country and international law”.³⁹ This setting, exemplified in this collection in the *Article* by Hadjiyianni, differs from that in a traditional nationally-confined legal system, where a framework for dealing with political accountability and guaranteeing rights of appeal when interests are infringed without due process would be likely to exist.⁴⁰ Yet, it is obvious that the interests of a state and its population are not limited by territory. This finding is also true for the EU, especially in light of its ambition to define its own policy objectives with reference to global goals. The *Article* by Hadjiyianni focuses in particular on these challenges in the context of the environment and the global commitments relating to climate change.

³⁵ Court of Justice: judgment of 22 January 1976, case 55/75, *Balkan-Import-Export*, para. 14; judgment of 28 October 1982, case 52/81, *Faust*, paras 24-25. Opinion of AG Poiares Maduro delivered on 20 February 2008, joined cases C-120/06 P and C-121/06 P, *FIAMM et al. v. Council and Commission*, para. 68.

³⁶ A. BRADFORD, *The Brussels Effect*, in *Northwestern University Law Review*, 2012, p. 1.

³⁷ *Ibid.*, p. 65.

³⁸ J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, cit., p. 90.

³⁹ *Ibid.*, p. 89.

⁴⁰ G. DAVIES, *International Trade, Extraterritorial Power and Global Constitutionalism: A Perspective from Constitutional Pluralism*, in *German Law Journal*, 2012, p. 1209.

The link between participation and accountability has a strong appeal, considering how closely EU administrative law is linked to issues of fundamental rights⁴¹ and democratic participation. The mission to contribute to respect for these latter principles is also a core feature of the self-image that the Union seeks to project as a global actor, as Art. 21 TEU makes clear. The implications of these principles in terms of concrete administrative or executive obligations have however been less clearly articulated. To define accountability (even partially) in terms of participation would place the institutions (and Member State authorities) under obligations that would simultaneously – even if hesitantly – create rights for individuals, and EU administrative law has not yet reached this point in a compulsory and horizontal manner. This can often be traced to a fear that granting procedural rights would limit the institutions' flexibility and procedural discretion, thereby hampering their efficient decision-making.⁴² Questions of participation and fundamental rights interact with transparency appearing as horizontal themes in the different policy-focused contributions. In several of them, participation functions primarily as a mean to making better decisions, in parallel to the ideals of the duty of care, which are seldom clearly articulated in these procedures. The relationship between participation and accountability is, however, not entirely straightforward. To live up to the functions of participation under Art. 11 TEU there should at least be transparency in the selection of participants to the process and in the justification of decisions that are based on the results of participation.⁴³

Our research demonstrates that while procedures are often nationality-blind, outcomes will not always be so. The CJEU has always been reluctant to acknowledge a principle that would grant third states substantive equal treatment rights in EU decision-making: "In the Treaty there exists no general principle obliging the Community, in its external relations, to accord to third countries equal treatment in all respects and in any event traders do not have the right to rely on the existence of such a general principle".⁴⁴

The same line of argumentation has persisted in more recent Opinions of Advocate Generals:

"Lastly, in the particular context of compliance with the WTO agreements which is pertinent to the cases in point, only citizens of the Union might rely on this system of no-fault liability to claim compensation for especially serious damage allegedly caused to them, in the general interest, by the Community institutions. The political authorities cannot be required, nor can it be open to them, for the purposes of exercising their freedom of action within the

⁴¹ See e.g. in the migration field Court of Justice: judgment of 22 November 2012, case C-277/11, *M.M.*; judgment of 10 September 2013, case C-383/13 PPU, *M.G and N.R.*

⁴² On this, see P. LEINO, *Efficiency, Citizens and Administrative Culture*, cit.

⁴³ 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.*

⁴⁴ *Balkan-Import-Export*, cit., para. 14; *Faust*, cit. See also Court of Justice, judgment of 10 March 1998, case C-122/95, *Germany v. Council* (Framework Agreement on bananas), paras 54-62.

context of the WTO, to assess as well the costs of their decisions for operators from third countries. Within the framework of the Community powers exercised by the institutions in the field of external trade policy, the concept of a 'rupture' in the equal distribution of public burdens can therefore be conceivable only between citizens of the Union".⁴⁵

Many of the administrative rights included in the Charter are today included in Title V on "Citizens' Rights".⁴⁶ In practice, at least some of these rights have been implemented more broadly (for example, the right of access to documents, or the duty to give reasons), and some are specified as rights belonging to "everyone". In addition, some legislation specifically grants administrative rights to third country actors (in the case of anti-dumping and of restrictive measures, for example). This is in line with more recent thinking where new pragmatic approaches to effective accountability at the global level are called for, both as regards problems of delegation and issues of participation, ranging from duties of consultation to increased transparency needed for public scrutiny in the media and beyond.⁴⁷

Accountability challenges also emerge in the context of the broad Union objectives in external relations. This is a recurrent theme in several of our *Articles*. First, in EU external action, global interest, Union interest and third country interest are often overlapping and might create particular complexities. Second, the fact that Union objectives in external action are defined so broadly creates particular challenges in trying to enforce accountability. The Treaties do not place the Union under obligations of result: it is to "contribute" to achieving certain objectives, and the Treaties give little indication of how this should be done or how to relate general foreign policy aims to more specific sectoral objectives.⁴⁸ Finally, while administrators often deal with questions that are more political than technical in nature, the application of Union objectives involves many such questions. The broad conditionality invoked by the Union in external relations subjects many political, constitutional and societal choices to scrutiny and approval by the EU administrative machinery. In these areas, proceduralisation is often a side product of conditionality. The challenges relating to involvement of the EU administration in these deeply political questions in third states become particularly pressing considering the difficulties experienced in enforcing accountability in this context. These

⁴⁵ Opinion of AG Maduro, *FIAMM et al. v. Council and Commission*, cit., para. 68; Opinion of AG Saugmandsgaard Øe, *Swiss International Air Lines*, cit., discusses these cases in the context of differentiated treatment of third countries by the EU's emissions trading legislation, calling it "the Balkan principle".

⁴⁶ I. VIANELLO, *Guaranteeing Respect for Human Rights in the EU's External Relations: What Role for Administrative Law?*, in S. POLI (ed.), *Protecting Human Rights in the European Union's External Relations*, in *CLEER Papers*, 2016/5, p. 21 *et seq.*

⁴⁷ R.W. GRANT, R.O. KEOHANE, *Accountability and Abuses of Power in World Politics*, cit., p. 34.

⁴⁸ For a discussion in the context of trade policy, see M. CREMONA, *A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon*, in *Swedish Institute for European Policy Studies, Working Paper*, no. 2, 2017, pp. 30-39.

challenges are significant in the light of the actors and accountability fora that are relevant for EU external relations; a matter that we turn to next.

IV. ACCOUNTABILITY: ACTORS, FORA AND DIFFERENT TYPES OF ACT

When studying administrative law in both its traditional functions, accountability emerges as a key consideration. Our starting point for evaluating accountability is that developed by Mark Bovens,⁴⁹ who defines accountability as “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*”.⁵⁰

Bovens’ definition is generally used to assess accountability in many different contexts – both internal and external. But when examining it in the external relations context, we find that many of the elements he enumerates as conditions of functioning accountability are either absent or difficult to identify or enforce.

As far as actors are concerned, when studying the actions of the *EU administration* in the external field, the obvious actors include the Commission and the EU delegations, the High Representative and the European External Action Service (EEAS),⁵¹ agencies that operate in the external field (such as Frontex and Europol) and actors with specific roles such as the European Data Protection Supervisor (EDPS). Financial institutions including the European Investment Bank are also active in third countries. While the Commission has a key role in implementing and enforcing many external policies, there are also specific bodies created by EU international agreements, such as Association Councils and international regulatory bodies.

Member States are involved in decision-making in the Council, and in the adoption of delegated and implementing acts. But they are relevant also in their national capacity, through shared administration. A lesson learned from the *Kadi* saga is that EU and national political institutions and administrations must implement international measures in such a way as to respect the constitutional guarantee of the rule of law as established and protected in the EU legal order.⁵² A lesson from the *Front Polisario* case is the need for the EU to respect fundamental rules of international law in the implementation of its interna-

⁴⁹ See M. BOVENS, *Analysing and Assessing Accountability: A Conceptual Framework*, in *European Law Journal*, 2007, p. 447 *et seq.*

⁵⁰ *Ibid.*, p. 450 (emphasis added).

⁵¹ The actors created by the Treaty of Lisbon are still relatively new, and much of the ground relating to them remains understudied. For example, the capacity of the EEAS to have standing before the CJEU more generally and in administrative matters in particular has provoked discussion, and it remains questionable to what extent the EEAS is treated as a formal “institution” in the administrative domain. On this question, see M. GATTI, *Diplomats at the Bar: The European External Action Service before EU Courts*, in *European Law Review*, 2014, p. 664 *et seq.*

⁵² Most recently, see Court of Justice, judgment of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi* [GC], para. 66.

tional agreements.⁵³ Therefore, Member States may also count as actors in some policy fields, such as development policy (where competence is by definition both shared and parallel), migration, and environment policy. This entails duties of sincere cooperation as well as compliance.⁵⁴ EU administration is a system that involves not only the EU institutions, but also national authorities, which have duties to implement EU legislation, including in relation to third states. For example, in the recent *Schrems* case the duty to ensure an adequate level of protection of individuals stretched beyond the Commission to national supervisory authorities with a duty to examine individual claims relating to how law and practices in a third country might in fact fail to ensure an adequate level of protection.⁵⁵ As the Court of Justice's recent ruling in *Ledra* shows, the EU institutions need to comply with the requirements of the Charter of Fundamental Rights also when they act outside the EU legal framework.⁵⁶ The circumstances in which the Charter will apply to Member States when engaging in joint administration, especially outside EU territory, is inherently difficult to determine (Rijpma).⁵⁷

A particular feature of EU external relations is the participation and contribution of international regimes and their potential impact on EU room for manoeuvre. Our contributors discuss the effect of Aarhus Convention on access to environmental information,⁵⁸ the WTO rules, UN decisions in particular in the context of sanctions, and the way in which the rules of other international players such as International Financial Institutions (IFIs) affect the Union. International regimes also provide various sources of obligations for the EU for example in the form of development commitments, climate change agreements and fundamental rights. The sources of obligation might also affect responsibility relationships. Mendes' *Article* focuses in particular on the status and effects of decisions adopted by international regulatory bodies in the EU legal system.

The relevant accountability forum depends not only on the actor in question, but also on the kind of accountability sought after. Our contributions illustrate the different variations of accountability with the purpose of gaining a broad picture of how accountability operates in external relations. We have studied various different kinds of accountability listed by Bovens in his study: political, financial, administrative, legal and social.⁵⁹

Political accountability is primarily exercised along principal-agent relationships between voters and their political representatives. The latter may delegate their powers to

⁵³ Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC].

⁵⁴ Art. 4, para. 3, TEU.

⁵⁵ *Maximilian Schrems*, cit., paras 102-103. See also Opinion of AG Sharpston delivered on 22 September 2016, case C-599/14 P, *Council v LTTE*, paras 60-67.

⁵⁶ Court of Justice, judgment of 20 September 2016, joined cases C-8/15 P to C-10/15 P, *Ledra Advertising* [GC], para. 67.

⁵⁷ Court of Justice, judgment of 26 February 2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson* [GC].

⁵⁸ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 337 (Aarhus Convention).

⁵⁹ The following builds on M. BOVENS, *Analysing and Assessing Accountability*, cit., pp. 455-457.

civil servants or more or less independent administrative bodies. The main principles of political accountability in the EU are established by the Treaties: citizens are directly represented at EU level by the European Parliament while national governments operating in the Council are democratically accountable to their national parliaments or their citizens. The Commission in its turn is democratically accountable to the European Parliament. These basic principles apply also in external relations, even though international relations have traditionally been dominated by executive prerogative. However, in various core parts of external policy the role of the European Parliament is more limited than in internal policy fields, where it usually acts as co-legislator. This applies in particular to the CFSP, although even its limited role in this field may have impact.⁶⁰ The role of the European Parliament in the negotiation of international agreements has been one of the recurring themes in external relations law post-Lisbon. Like in internal policy fields, its role in implementation is modest. However, the European Parliament acts as a general accountability forum for many external policies through its special relationship with the European Commission, which is a key actor also in most of these policy areas.

The European Parliament also plays a key function in ensuring – together with the systems of audit – *financial accountability*, which in the EU context forms a part of political accountability. In this area, the European Court of Auditors is another key actor, its role discussed here by Leino. Financial accountability is a significant form of *administrative accountability*. Other forms of administrative accountability include the European Ombudsman who has recently become more active in relation to external policy, and who has been successful in influencing at least some institutional practices.⁶¹ The role of the Ombudsman in different policy sectors is discussed in several of our contributions (Leppävirta, Cremona, Leino and Vianello). Various contributions also highlight the rise of other forms of administrative accountability through internal appeals bodies that many EU institutions have introduced in recent years to address potential administrative malfunctions (Korkea-aho and Sankari, Leino). OLAF, the EU Anti-corruption Office, is one of these bodies, and investigates fraud against the EU budget, corruption and serious misconduct within the European institutions – matters that become relevant when EU funds are being used, and that form the core of the *Article* on development policy (Leino).

⁶⁰ In explaining the importance of the requirement to inform the Parliament of the negotiation of CFSP agreements, the Court has stressed that the requirement enables the Parliament to exercise democratic scrutiny of the EU's external action as well as improving consistency, in that the Parliament is able "to exercise its own powers with full knowledge of the European Union's external action as a whole": Court of Justice, judgment of 14 June 2016, case C-263/14, *European Parliament v. Council* [GC], paras 71-72, 80.

⁶¹ In relation to transparency and access to documents relating to international negotiations, see P. LEINO, *The Principle of Transparency in EU External Relations Law – Does Diplomatic Secrecy Stand a Chance of Surviving the Age of Twitter?*, in M. CREMONA (ed.), *Structural Principles in EU External Relations Law*, Oxford: Hart Publishing, forthcoming. In relation to impact assessments, see footnote 14 above.

Legal accountability builds in particular on the jurisdiction of courts.⁶² As in EU administrative law more generally, in the area of external relations the Court of Justice has been instrumental in developing procedural principles (such as in the area of sanctions, discussed here by Leppävirta) as well as in policing institutional powers. The latter has been a strong theme in post-Lisbon case law on external relations, as the limits of new institutional prerogatives are explored. The case law on the sanctions regimes has developed our understanding of the procedural obligations that exist even in such cases (including the right to be heard, the obligation to give reasons, access to one's file, access to legal remedies). How effective these are in securing rights is another question, and there are specific considerations that need to be taken into account; for example, the right to be heard may be compromised if there is a necessary *surprise momentum* to the measure. The obvious exception to avenues of legal accountability relates to the CFSP, where the Court of Justice's jurisdiction is limited and its contours are now beginning to be explored,⁶³ and even pushed further through administrative law (Cremona). The new procedures relating to secret evidence discussed by Leppävirta also suggest that there might be another accountability gap emerging: in seeking to ensure the accountability of the executive, the accountability of the judiciary is put into question. Despite this, faith in the judiciary as a key channel for accountability seems to have remained strong: this is the avenue that most of our contributors still ended up examining in their *Articles*. We discuss in particular *locus standi* for third country actors, but also questions relating to the justiciability of discretion in external relations.

Social accountability relates to the growing understanding of the need of more direct and accountability relations between public authorities (in our case primarily the Commission, EEAS, EU Agencies), on the one hand, and citizens and civil society, on the other. It is also linked to the questions of accountability in world politics discussed above. In the context of EU external action these relationships reach beyond EU citizens and actors, involving increasingly those placed in third countries. In social accountability, we are also reaching beyond the legal, to an examination of the ethical, which has often been an area for ombudsmen rather than courts. Therefore, social accountability may be closely related to distributive and ethical questions, and include even proactive dimension, which becomes relevant already before anything actually is decided.

Enforcing accountability presumes a power relationship. A key challenge in the international context relates to the informal nature of many power relationships, and the lack of power possessed by those who, affected by the decisions taken by external actors, constitute the broader accountability forum needed to hold those actors account-

⁶² M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law – Constitutional Challenges*, Oxford: Hart Publishing, 2014.

⁶³ C. HILLION, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law*, cit., pp. 47-70.

able. The *Articles* by Leino, which focuses on accountability in the context of EU development cooperation, Vianello in the context of the European Neighbourhood Policy, and Hadjiyianni in the context of environmental regulation, discuss these challenges.

V. MAPPING ADMINISTRATIVE ACTION IN EU EXTERNAL RELATIONS

Administrative law is defined by the activities or tasks of the public authority, including the legal arrangements concerning its institutional structures, powers, duties, procedures, forms of action, instruments, mechanisms, constraints and controls.⁶⁴ One of the questions we had in mind when designing this project concerned whether EU administrative action in external relations was *different* from EU administrative action at large and the extent to which the (external) policy context impacted the administrative principles applicable in an internal context. In other words: how special is external action? We assumed that the answer to this question would be likely to depend in part on the different external policy sectors and the types of action they would typically entail (the CFSP being different from trade, for example). For this purpose, we and our contributors set out to map administrative action in EU external relations.

In the background of this exercise were the general considerations relating to the typology of EU acts in general and EU administrative action in particular. The EU categorisation of acts builds in general on a distinction between legislative and non-legislative acts, which affects for example the possibility of delegations of power, what kind of transparency regime is applied, and whether the specific provisions on subsidiarity and proportionality become applicable. International agreements which are part of the international relations function of the executive, play a central role and may themselves provide a source of administrative law. For example, the Aarhus Convention on access to environmental information creates new procedural and substantive principles and rules of administrative law. Other international agreements establish procedures and institutions, sometimes with decision-making powers. In their taxonomy of EU administrative action Hofmann, Türk *et al.*⁶⁵ include nine different administrative functions. The taxonomy of administrative of procedural objects and instruments developed by Harlow and Rawlings (“administrator’s toolkit”) lists fourteen elements,⁶⁶ partly overlapping with the nine listed by Hofmann, Türk *et al.* What to us was of most interest was whether all of these examples could be found in the area of external relations and whether we could identify administrative action that is particularly typical of external relations.

Coordination of administrative networks for the implementation of EU policies, including the setting up of specialised agencies, takes place for example in the coordination of donor groups in the development/humanitarian aid context, through agencies with ex-

⁶⁴ H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, cit., p. 57.

⁶⁵ *Ibid.*, pp. 60-63.

⁶⁶ C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, cit., pp. 60-61.

ternal responsibilities (Frontex, Europol), and in the context of the joint return operations between Frontex, Member States and third countries.

Internal institutional administration is equally valid for external relations, and as Harlow and Rawlings specifically point out, also includes *hierarchical control*.

Planning and coordination of joint actions and preparation of frameworks take place e.g. in the context of development policy, ENP and CFSP missions. In the “administrator’s toolkit”, it is specified that this also involves *contracting and outsourcing*, and subsequently and even more generally, *disbursement of funds, financial regulation and audit* (of which development policy is a prime example).

Assigning of tasks to, and coordination and supervision of, private actors involved in administrative activities takes place e.g. in CFSP Civilian missions, in operational cooperation and working arrangements (Frontex), through trade associations initiating anti-dumping procedures and through registration of interested parties by in these procedures by the Commission, and in the context of the Commission Delegated Regulation on procedural rules for recognition of monitoring organisations for timber. Harlow and Rawlings stress the importance of both *communication*, and *information gathering and retention* in all of these activities.

Regulatory action and administrative rule-making take place in more typical external relations context, such as international regulatory action and participation in international regulatory bodies and the Implementation of international agreements. But there are also more typical cases of regulatory action through comitology for example in anti-dumping decision-making, or through delegated acts establishing sustainability criteria for the cultivation of biofuels (including in third countries), procedural rules for recognition of monitoring organisations for timber or defining strategic priorities in the area of development policy. Plenty of examples can also be given relating to the adoption of formally non-binding guidance (see further below).

One of the assumptions we had when initiating this project was that external relations include fewer legislative acts than internal policy fields, and consequently, *preparation and introduction of legislative measures* might be of lesser relevance. But when studying the policy fields in more detail, we noticed the importance of ordinary EU legislation, adopted in the EU legislative procedure, in all the policy fields we studied.

In addition, EU institutions make *single-case decisions* for example in deciding on duties; restrictive measures; access to documents or data protection. Anti-dumping cases are settled through regulations, to be understood as “groups of individual decisions”. In addition, national authorities take decisions on issuing visas, and in the form of individual immigration or return decisions. EU institutions issue recommendations, opinions and reports – among our *Articles*, the ENP and SAP contexts illustrate the variety of administrative acts and their *de facto* effects. External action is also increasingly characterised by the proliferation of instruments produced by the Union’s complex administrative machine, of varying degrees of bindingness and formality, including working ar-

rangements, progress reports, action plans, executive agreements, memoranda of understanding, impact assessments. Even where non-binding, such administrative arrangements may create administrative obligations for the institutions and fall within the scope of procedural rules.⁶⁷ The EU institutions also exercise *supervisory functions*, in particular in the context of anti-dumping or timber monitoring. The toolkit also refers specifically to *supervision via evaluation and monitoring*, very well illustrated by ENP and SAP procedures.

Finally, Harlow and Rawlings refer to *complaints handling*, internal administrative review and also alternative dispute resolution. Again, development policy offers many examples of such functions, but they are also present in anti-dumping and trade policy more generally. External relations are not foreign to the more general development in administrative law to create independent bodies to monitor the administration, in particular, how it exercises its discretion.

VI. DISCRETION

In all modern legal systems, administrative actors are allocated broad and often discretionary powers. Delegation of powers to transpose a more abstract-general provision into a more concrete individual decision is impossible without at least some margin of decisional leeway.⁶⁸ Discretion – understood by Schwarze as “freedom of decision”⁶⁹ – is believed to exist “whenever the effective limits [on the power of a public officer] leave him free to make a choice among possible courses of action or inaction”.⁷⁰ When examined through the CJEU jurisprudence, “the use of undefined legal terms and the conferment of discretionary powers are only two particular dimensions of a more general phenomenon, which can be broadly described as the executive’s freedom to decide and order matters for itself”.⁷¹

Administrative decision-making is never totally bound or without any limits. Therefore, when discussing discretion, the major issue is that of “fine-tuning the extent and nature of the control over substantive decision-making by administrative actors”.⁷² In

⁶⁷ On the effects and procedural requirements for memoranda of understandings, see e.g. Court of Justice: judgment of 23 March 2003, case C-233/02, *France v. Commission* (regulatory cooperation); judgment of 28 July 2016, case C-660/13, *Council v. Commission* [GC] (Swiss Memorandum of Understanding). On impact assessments, see Decision of the European Ombudsman of 28 June 2005 on complaint 933/2004/JMA against the European Commission.

⁶⁸ H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, cit., p. 492.

⁶⁹ J. SCHWARZE, *European Administrative Law*, cit., p. 298.

⁷⁰ For the classic definition, see K.C. DAVIS, *Discretionary Justice. A Preliminary Inquiry*, Champaign: University of Illinois Press, 1971.

⁷¹ J. SCHWARZE, *European Administrative Law*, cit., p. 297.

⁷² H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, cit., p. 492.

the EU context, discretion is usually discussed in the context of possible Court of Justice review, it being generally acknowledged that in cases where the institutions enjoy a significant freedom of evaluation, Court substantive review remains limited. In particular, as the Court of Justice first established in the anti-dumping context but then began to apply even in other policy areas, courts “cannot substitute their own evaluation of the matter for that of the competent authority but must restrict themselves to examining whether the evaluation of the competent authority contains a patent error or constitutes a misuse of power”.⁷³ Further, an evaluation of complex facts and accounts requires a “considerable measure of latitude”.⁷⁴ This approach has also been applied to discretionary decision-making in a range of external contexts, from trade policy to restrictive measures.⁷⁵ While discretion is a construct of law, in being allocated by the legislature, its exercise depends on factors that stray clearly beyond the law.

Law delimits the space within which administrative actors need to choose a course of action that best suits the public interest, also in view of the means and resources they are able to mobilize. Arguably, law should have a role within this space, insofar as it defines criteria that ought to guide the decision. Nevertheless, what is the best or better option may have little to do with substantive legal determinations. It is influenced by policy choices that may not be straightforwardly supported by the relevant legislative act, and are rather determined by political directions defined by the top decision-makers.⁷⁶

Our inquiry into the role of discretion in external relations is at least two-fold: we study how discretion is defined by the law, but we are also interested in factors reaching beyond the law, in particular considering the broad and partly conflicting objectives of EU external action.

Previous research suggests that the scope of discretion enjoyed by the institutions in the external fields might be particularly broad and less constrained by Treaty-based policy parameters.⁷⁷ This can be mirrored against the background of how especially in politically sensitive policy fields the EU courts tend to limit their review of discretion to

⁷³ Court of Justice, judgment of 14 March 1973, case 57/72, *Westzucker*, para. 14.

⁷⁴ General Court, judgment of 14 May 2002, case T-81/00, *Associação Comercial de Aveiro v. Commission*, para. 50.

⁷⁵ General Court, judgment of 6 July 1995, case T-572/93, *Odigitria AAE v. Council and Commission*, para. 38; Court of Justice, judgment of 19 November 1998, case C-150/94, *UK v. Council*, paras 53-55; General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council*, paras 223-225; Court of Justice, judgment of 28 November 2013, case C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Naft*, para. 120.

⁷⁶ J. MENDES, *Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law*, in *Common Market Law Review*, 2016, p. 422.

⁷⁷ See e.g. M. CREMONA: *A Reticent Court? Policy Objectives and the Court of Justice*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law*, cit., 15-32; *The Role of Structural Principles in EU External Relations Law*, in M. CREMONA (ed), *Structural Principles in EU External Relations Law*, cit., pp. 3-29.

procedural aspects; however, in the external fields the institutions often have discretion even on procedural questions, which limits the role of courts further. The relationship between administrative discretion and the use of delegated and implementing acts has already been referred to. The scope, use and control of discretion, both substantive and procedural, is thus a general theme in the project (Leppävirta, Rijpma, Vianello, Leino) and is particularly relevant in cases where the EU administration interacts directly with individuals, legal persons and NGOs.⁷⁸

The use of *soft law* and other forms of non-binding measures such as action plans, guidelines and communications is widespread,⁷⁹ which also contributes to the difficulty of ascertaining whether a legally-reviewable act exists or what actually constitutes a right or an obligation. Soft law literature is generally divided on the question of whether post legislative guidance adds to or controls discretion: One justification for the widespread use of soft post-legislative instruments is that they alleviate legal uncertainty and provide necessary information on the scope of vaguely drafted legal provisions or *framework norms*.⁸⁰ This is practice also accepted by the CJEU: It is in principle fully acceptable for the Commission to adopt guidelines to indicate for example how it assesses compatibility with certain criteria and thereby impose limits on its exercise of its discretion.⁸¹ However, even if soft law is often used to increase clarity, effectiveness and transparency, it may often have also the opposite effect,⁸² and – as Vianello shows – blur distinctions between what is binding and what is non-binding. Consequently, natural and legal persons, even where materially affected by Union action, might find it difficult to challenge it or to assert any legal right. Legal certainty and legitimate expectations become more difficult to enforce. Leino's *Article* discusses the "voluntary policies" of the European Investment Bank and how they have been evaluated by the European Ombudsman. External relations also provide examples of cases where non-binding commitments made by selected actors in international fora later turn into binding EU legislation, provoking discontent among non-participating Member States and the Eu-

⁷⁸ See e.g. the Renewables Directive, which places the Commission under an obligation to maintain a dialogue and exchange information with third countries and biofuels producers, consumer organisations and civil society with respect to the implementation of the Directive. Directive 2009/28/EC of the European parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

⁷⁹ See e.g. B. VAN VOOREN, *A Case-Study for "Soft Law" in EU External Relations: the European Neighbourhood Policy*, in *European Law Review*, 2009, p. 696 *et seq.*

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

⁸¹ See Court of Justice, judgment of 19 July 2016, case C-526/14, *Kotnik et al.* [GC].

⁸² See L. SENDEN, *Soft Law in European Community Law*, Oxford: Hart Publishing, 2004.

ropean Parliament.⁸³ Mendes explores the challenges posed by advanced bilateral agreements such as CETA, with its provisions on regulatory cooperation, in this regard.

The *Articles* that follow do not aspire to provide answers to all the questions raised here; we hope that they make the case for the relevance of those questions and suggest some ways in which the inquiry might be taken forward.

⁸³ See e.g. European Parliament, The Group of Twenty (G20): Setting the global agenda, PE 545.712, Briefing January 2015, p. 7.