



ARTICLES

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

ACKNOWLEDGING THE IMPACT OF ADMINISTRATIVE POWER IN THE EU EXTERNAL ACTION

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ABSTRACT: This *Article* identifies and explains the different impacts that the administrative activities implementing the Stabilisation Association Process (SAP) and the European Neighbourhood Policy (ENP) exercise on public power (of the Union and of third countries). Identifying the impact of the administrative power is an important passage in the study of administrative law in external relations, particularly in order to guarantee protection for affected parties. In carrying out such analysis, the *Article* will also classify the *de facto* administrative processes that are concealed in the modes of foreign governance constructed by the SAP and the ENP. The impact of the administrative activities implementing the two policies is neither incidental nor unforeseeable. Instead, it is often the outcome of processes that have crystallised over time.

KEYWORDS: administrative power – public authority – preparatory acts – rule-making acts – stabilisation and association process – European Neighbourhood Policy.

I. INTRODUCTION

The administrative power exercised by the Union in its external action clearly has an impact.¹ However, at first glance, such impact seems to be legally irrelevant. In this re-

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spect, the study of the external effects of administrative power needs to bear in mind the specificities of the external relations domain; it requires moving from the grammar to the pragmatics of the EU administrative action.² In other words, it requires moving beyond the narrow study of the rules to a more contextual approach that is capable of taking into account the specificities of the EU external relations. While such exercise could be the subject of an entire monograph, this *Article* will focus only on the Union's policies towards the Western Balkans (Stabilisation and Association Process)³ and towards its Eastern and Southern neighbours (European Neighbourhood Policy).⁴ The EU recreates with these countries a mode of foreign governance that sees a proliferation of administrative activities that have a significant impact on the Union external action, on third states to which they are addressed and on the life of their citizens.⁵

The administrative acts implementing the Stabilisation and Association Process (SAP) and the European Neighbourhood Policy (ENP) can be grouped under two categories: preparatory acts and rule-making instruments. This categorisation is valid both for the function that these instruments have internally within the Union as well as externally in third countries. Preparatory acts inform final decisions and indicate which topics shall be put on the policy agenda. Rule-making acts – as we will see throughout the *Article* – serve different roles: they can “organise and systematise, even in some cases con-

¹ For a detailed analysis on the notion of administrative power exercised by the Union in its external action see the introductory *Article* to this *Special Issue*, cf. M. CREMONA, P. LEINO, *Introduction: The New Frontiers of EU Administrative Law and the Scope of Our Inquiry*, in *European Papers*, 2017, Vol. 2, No. 2, www.europeanpapers.eu, p. 467 *et seq.*; as well as I. VIANELLO, *EU External Action and the Administrative Rule of Law: A Long-Overdue Encounter*, EUI PhD Thesis, defended on 13 December 2016, cadmus.eui.eu, document on file.

² The expression “from grammar to pragmatics” is taken from a recent article by Edoardo Chiti who uses it in a different context but with a similar meaning. E. CHITI, *Is EU Administrative Law Failing in Some of Its Crucial Tasks?*, in *European Law Journal*, 2016, p. 596.

³ The Stabilisation and Association Process (SAP) is the Union's regional approach initiated by the Commission in 1999 in order to assist the Western Balkan countries in meeting the relevant EU accession criteria and ultimately be accepted as Member States. For a comprehensive analysis of the policy, cf. S. BLOCKMANS, *Tough Love: The European Union's Relations with the Western Balkans*, The Hague: T.M.C. Asser Press, 2007.

⁴ The European Neighbourhood Policy is chiefly a bilateral policy between the EU and each neighbouring country (e.g. Ukraine, Moldova, Georgia, Egypt, Tunisia, Morocco, etc.) and it does not envisage accession. The EU offers its neighbours a privileged relationship including political association, deeper economic integration, increased mobility, and a very concrete set of opportunities through its sector policies. For a comprehensive analysis on the policy, cf. M. CREMONA, *The European Neighbourhood Policy More than a Partnership?*, in M. CREMONA (ed.), *Development in EU External Relations Law*, Oxford: Oxford University Press, 2008, p. 245 *et seq.*

⁵ Cf. E. TULMETS, *Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy*, in C.F. SABEL, J. ZEITLIN (eds), *Experimentalist Governance in the European Union Towards a New Architecture*, Oxford: Oxford University Press, 2010, p. 312; G. DE BÚRCA, *EU External Relations: The Governance Mode of Foreign Policy*, in B. VAN VOOREN, S. BLOCKMANS, J. WOUTERS (eds), *The EU's Role in Global Governance: The legal Dimension*, Oxford: Oxford University Press, 2013, p. 42.

solidate or codify, a body of legal rules emanating from diverse sources";⁶ they can indicate which projects the EU is committed to finance;⁷ or they can spell out the conditions for disbursement of macro financial assistance to third countries.⁸ It is in this context that it becomes clear why it is important to study the impact of the Union administrative action externally. Preparatory and rule-making instruments arguably belong to some of the most influential areas of administrative activity.⁹ The power exercised by the Union's activities implementing the SAP and the ENP is capable of influencing the policy and legal choices of both the Union and of third countries and it incurs the risk of raising expectations about the Union's future conduct.

This *Article* aims at empirically acknowledging the effects of the ever-increasing administrative power in EU external relations. It will analyse with concrete examples the impact that the administrative activities implementing the SAP and the ENP exercise on public power (both within the Union and in third states). In doing so, it will also describe the *de facto* overarching administrative procedures that are concealed in the modes of foreign governance developed by the SAP and the ENP. The impact of these administrative activities is neither incidental nor unforeseeable; it is often the outcome of processes crystallised over time. This *Article* will only focus on the impact that the external administrative power exercises on public authority, however, it should not be forgotten that these same administrative activities have an impact also on legally protected interests of natural and legal persons.

II. THE IMPACT OF ADMINISTRATIVE POWER ON THE EXERCISE OF EU PUBLIC AUTHORITY

This section, in presenting the impact that administrative activities implementing the SAP and the ENP have on the exercise of Union power, will also identify the administrative procedures underlying the two policies.

II.1. PREPARATORY ACTS INFORMING FINAL DECISIONS

Progress reports, action plans, impact assessments, etc. are preparatory acts to the extent that they inform the adoption of later decisions (e.g. the granting of candidate sta-

⁶ Cf. H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, Oxford: Oxford University Press, 2013, p. 539.

⁷ Commission Implementing Decision C(2014) 9387 of 10 December 2014 adopting an Annual Country Action Programme for Montenegro for the year 2014.

⁸ E.g. Commission Implementing Decision C(2014)5176/F1 of 16 July 2014 approving the Memorandum of Understanding between the European Union and Tunisia related to macro-financial assistance to Tunisia.

⁹ Cf. T. LARSSON, J. TRONDAL, *Agenda setting in the European Commission: How the European Commission Structure and Influence the EU Agenda*, in H.C.H. HOFMANN, A.H. TÜRK (eds), *EU Administrative Governance*, Cheltenham: Edward Elgar Publishing, 2006, p. 11 *et seq.*

tus, opening of accession negotiations, starting negotiations for an agreement with a third state, etc.). They influence the way in which the Union's power will be exercised. Formally, they are not internal acts within a procedure leading to the adoption of a final act. However, over the years the Union, by making constant use of these measures, has transformed them into internal acts within *de facto* procedures, which in most cases lead to the adoption of formal decisions.

SAP progress reports are preparatory acts to the extent that the Council uses them as reference documents in order to determine the next steps to be taken in the relations between the Union and each SAP state. This is even more so now that the enlargement process is becoming more and more proceduralised. For example, the granting of candidate status now represents a new procedural step before opening accession negotiations.¹⁰ In other words, obtaining candidate status does not automatically imply the opening of accession negotiations. The Commission Opinion on the accession of Albania to the EU contains a list of key priorities that need to be fulfilled by the latter in order to commence accession negotiations.¹¹ The key priorities identified by the Commission Opinion are monitored by yearly progress reports.¹² The Council, based on the findings of the progress reports, decided to grant candidate status to Albania¹³ and will later decide when to open accession negotiations.¹⁴

ENP action plans and progress reports are preparatory documents indicating the next steps to be taken in the policy implementation framework for each neighbouring state. Action plans have been used in order to adopt other administrative acts such as visa liberalisation action plans, which are based on these documents' Justice and Home Affairs section.¹⁵ Moreover, the Commission has used action plans as reference documents in

¹⁰ On 24 June 2014 Albania was granted candidate status, whilst as of today (25.06.2017) Albania has not yet started accession negotiations. See the following footnotes for reference documents.

¹¹ Commission Opinion COM(2010) 680 final of 9 November 2010 on Albania's application for membership of the European Union, p. 11.

¹² E.g. Commission Progress Report SWD(2015) 213 final of 10 November 2015 on Albania accompanying the EU Enlargement Strategy.

¹³ At the Luxembourg General Affairs Council meeting of 24 June 2014 the EU Member States agreed – based on the recommendation by the European Commission included in the Report from the Commission to the Council and the European Parliament COM(2014) 331 final of 4 June 2014 on Albania's Progress in the Fight Against Corruption and Organised Crime and in the Judicial Reform – to grant EU candidate status to Albania (3326th Council meeting, General Affairs, Luxembourg, 24 June 2014, 11198/14).

¹⁴ "Recalling its earlier Council conclusions, including those of June 2014, the Council reiterates that Albania will need to meet the five key priorities for the opening of accession negotiations, and that the Commission is invited to report, in addition to its 2016 Report, in a comprehensive and detailed manner, on Albania's progress on the key priorities", Council Conclusions of 15 December 2015 on Enlargement and Stabilisation and Association Process.

¹⁵ "The Justice and Home Affairs section of the EU-Republic of Moldova ENP Action Plan, in place since 2005, provides the overall framework for EU-Republic of Moldova cooperation in the area of Freedom, Security and Justice (JLS)", Council, Note from the General Secretariat of the Council to Delegations,

order to suggest to the Council the adoption of domestic legislation, internal EU legislation, or bilateral agreements. Examples of this type would be the Galileo agreement with Ukraine¹⁶ or the Visa Facilitation Agreements in general.¹⁷ Action plans in addition serve as the basis for the conclusion of Memoranda of Understanding (MoU).¹⁸ Finally, action plans have also been used to justify the conclusion of agreements with ENP states.¹⁹ Exploratory MoUs are also preparatory documents to the extent that they prepare the ground for concrete collaborative actions between the Union and third states.²⁰

The same analysis holds true also for Visa Liberalisation Action Plans (VLAPs) and Visa Liberalisation Progress Reports (VLPRs). They are preparatory acts to the extent that they lead to the adoption of a final decision: removing the third state from the list of countries whose citizens must be in possession of visas when crossing the EU's external borders. Moreover, they work as safeguards in making sure that all required reforms are carried out by the neighbouring states before they enjoy a visa-free regime. The adoption of VLAPs and VLPRs *de facto* proceduralises the process leading to the acceptance of a third

EU-Republic of Moldova Visa Dialogue – Action Plan on Visa Liberalisation, no. 18078/10, 17 December 2010, data.consilium.europa.eu.

¹⁶ The objective of the Galileo Agreement is to encourage, facilitate and enhance cooperation between the Union and Ukraine in Civil Global Navigation Satellite System. The agreement entered into force on the 1 December 2013. However, the official website of the Union does not provide clear indication as to its publication on the official journal.

¹⁷ Cf. M. CREMONA, *The European Neighbourhood Policy: More than a Partnership?*, cit., p. 276.

¹⁸ E.g. EU-Azerbaijan Action Plan: "Implement and monitor regularly the level of implementation of the Memorandum of Understanding on the establishment of a Strategic Partnership between the European Union and the Republic of Azerbaijan in the field of energy"; and its respective Memorandum of Understanding: "[...] the EU and Azerbaijan have decided to step up their energy co-operation and that EU-Azerbaijan Action Plan includes energy-related actions and objectives aimed at the gradual convergence of EU and Azerbaijan's energy legislation and integration of their respective energy markets", EEAS, *EU-Azerbaijan Action Plan*, eeas.europa.eu.

¹⁹ E.g. "In July 2005, the EU-Morocco Association Council adopted an Action Plan of the European Neighbourhood Policy including a specific provision having the objective of the further liberalisation of trade in agricultural products, processed agricultural products, fish and fishery products", Recital 2 of Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

²⁰ E.g. "Both sides will set up cooperation in the areas of energy technology and exchange of expertise, including technical support for the EU-Azerbaijan Strategic Partnership in energy. The possibilities for cooperation in this field (to be defined jointly) include: twinning of future Azerbaijan regulatory bodies with EU regulatory bodies in the field of energy; introduction of modern European technology into the Azerbaijan energy sector; exchange expertise regarding security and safety in the field of energy", European Union and Republic of Azerbaijan, *Memorandum of Understanding on a Strategic Partnership between the European Union and the Republic of Azerbaijan in the fields of Energy*, www.europarl.europa.eu, p. 11.

state into the Union visa-free regime. VLAPs are drafted, the Commission closely monitors their implementation through its VLPRs, and finally suggests to the Council and the European Parliament to adopt a single case measure delisting the third state – once it has successfully adopted all the necessary reforms. The preamble of the regulation de-listing the Republic of Moldova from the list of countries whose citizens must be in possession of visas when crossing the external borders clearly shows the link between the VLAPs and the final delisting decision: “[...] the Commission considers that the Republic of Moldova meets all the benchmarks set out in the Visa Liberalisation Action Plan”.²¹

Human rights impact assessments (HRIAs) are preparatory documents to the extent that they provide a structured approach to gathering and analysing evidence before the European Commission proposes a new policy initiative.²² Impact Assessments, with their section on human rights, are Commission staff working documents that accompany Commission recommendations for Council Decisions authorising the opening of negotiations of an agreement between the EU and a third state.²³ The Union has over the years proceduralised the adoption of HRIAs as a necessary step before adopting an agreement with a third state. The obligation to adopt HRIAs has so far been a matter of Commission discretion, self-imposed through internal guidelines. However, the General Court in the *Front Polisario* case seems to have introduced an obligation on the side of the institutions to carry out human rights impact assessments before concluding an agreement with a third state.²⁴ In other words, the General Court seems to have crystalized a *de facto* procedure by imposing on Union institutions an obligation to carry out a human rights impact assessment before concluding an agreement. The General Court’s judgment was reversed on appeal on other grounds, but the AG supported the argument that despite a

²¹ Regulation (EU) 259/2014 of the European Parliament and of the Council of 3 April 2014 amending Council Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

²² Commission, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives, trade.ec.europa.eu.

²³ Commission Staff Working Document SWD(2014) 41 final of 12 February 2014 on Impact Assessment Report on the EU-Myanmar/Burma Investment Relations accompanying the recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and Myanmar/Burma on investment protection.

²⁴ “[T]he Council must examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights, including, in particular, the rights to human dignity, to life and to the integrity of the person (Articles 1 to 3 of the Charter of Fundamental Rights), the prohibition of slavery and forced labour (Article 5 of the Charter of Fundamental Rights), the freedom to choose an occupation and right to engage in work (Article 15 of the Charter of Fundamental Rights), the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights), the right to property (Article 17 of the Charter of Fundamental Rights), the right to fair and just working conditions and the prohibition of child labour and protection of young people at work (Articles 31 and 32 of the Charter of Fundamental Rights)”, General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*, para. 228.

very broad policy discretion the institutions are under a duty to take into account the human rights implications of proposed agreements with third countries.²⁵

Figure 1 visualizes the impact of the administrative instruments implementing the SAP and the ENP described so far. The latter are preparatory acts leading to either single-case decisions or to new policy implementation measures within *de facto* procedures.

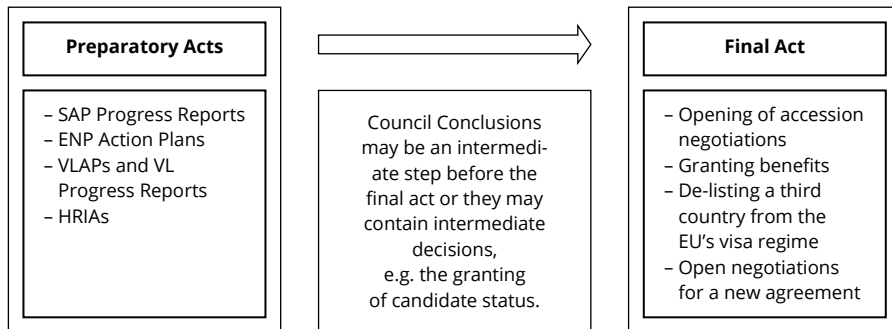


FIG. 1 – Impact of the administrative instruments implementing the SAP and the ENP.

Progress reports, action plans, impact assessments, etc. not only fulfil a preparatory function within the *de facto* procedures explained above; they are also used as reference documents for the adoption of other EU acts. Some examples will now be discussed.

European partnerships, action plans and progress reports inform and steer the strategising and programming of financial assistance for both the SAP and the ENP. They are used in order to legitimise the Commission's choices in the distribution of financial assistance funds. Both the Instrument for Pre-Accession Assistance (IPA II) and the European Neighbourhood Instrument (ENI)²⁶ make a clear reference to the SAP and ENP instruments as sources for guiding the programming of financial assistance.²⁷ The

²⁵ Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16, *Council of the European Union v. Front Polisario*, para. 274.

²⁶ Regulation (EU) 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument for Pre-accession Assistance (IPA II); Regulation (EU) 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI).

²⁷ "Assistance under this Regulation shall be provided in accordance with the enlargement policy framework defined by the European Council and the Council and shall take due account of the Communication on the Enlargement Strategy and the Progress Reports comprised in the annual enlargement package of the Commission, as well as of the relevant resolutions of the European Parliament", Art. 4 of Regulation 231/2014; "The partnership and cooperation agreements, the association agreements and other existing or future agreements that establish a relationship with partner countries, corresponding Commission communications, European Council conclusions, and Council conclusions, [...], constitute the overall policy framework of this Regulation for programming and implementing Union support under this Regulation. The key points of reference for setting the priorities for Union support under this Regulation

impact of action plans, progress reports, etc. on the programming of financial assistance for both the SAP and the ENP is then concretized in their respective programming documents. For example, the Indicative Strategy Paper for Montenegro (2014-2010) clearly states that, “[t]he planning of IPA II assistance for the period 2014-2020 will seek to support the implementation of the [...] priorities identified in [...] the annual Progress Reports prepared by the European Commission”.²⁸ The Single Support Framework for Georgia (2014-2017) states that the choice of sectors of intervention “[...] are in line with the Association Agreement, the Association Agenda, the DCFTA and the Visa Liberalisation Action Plan and build upon the progress that Georgia has made towards the implementation of the ENP Action Plan priorities”.²⁹

Furthermore, progress reports monitor the achievement of the objectives identified in the documents programming financial assistance.³⁰ For example, the new IPA II Indicative Strategy Paper for Montenegro for the years 2014-2020 states that the Commission progress reports for Montenegro will be used – not only as source to identify the priorities for action – but also as sources to monitor whether financial assistance achieved its goals.³¹ ENP progress reports are also used in order to allocate extra financial support to those neighbours taking clear and concrete steps on political reforms. The ENP progress reports are used as a clear source of information in order to determine how to distribute funding to the ENP countries depending on their performance.³²

Finally, the last example in this section shows how informal administrative activities, conducted with the aim of implementing the Union’s external action, can also have an impact on the exercise of the Union’s power even when they are not tied to *de facto* procedures. In the *Front Polisario* case, the applicant (the Front Polisario)³³ argued that

and for the assessment of progress as outlined in article 2(3) shall be: action plans or other equivalent jointly agreed documents such as the association agendas [...], Art. 3 of Regulation 232/2014.

²⁸ Commission Implementing Decision C(2014) 5771 of 18 August 2014 adopting an Indicative Strategy Paper for Montenegro (2014-2020).

²⁹ Commission Implementing Decision C(2014)3994 of 11 June 2014 adopting a Single Support Framework for Georgia (2014-2017).

³⁰ E.g. “The progress reports referred to in Article 4 of the IPA II Regulation shall be taken as a point of reference in the assessment of the results of IPA II assistance”, Commission Implementing Decision C(2014) 9387, cit.

³¹ E.g. Commission, *Indicative Strategy Paper for Montenegro (2014-2020)*, ec.europa.eu, pp. 42-43.

³² “[The] share shall be determined according to the progress made by partner countries in building deep and sustainable democracy, also taking into account their progress in implementing agreed reform objectives contributing to the attainment of that goal. The progress of partner countries shall be regularly assessed, in particular by means of ENP progress reports which include trends as compared to previous years”, Art. 4, para. 2, of Regulation 232/2014, cit.

³³ The Front Polisario is a nationalist movement for the liberation of West Sahara born in 1973 to fight the Spanish occupation and subsequently engaged in the fight against the new occupiers – Mauritania and Morocco. In the past 25 years the movement has been at the forefront of the UN negotiations over the juridical status of the region.

the administrative activities of the Commission were a clear indication that the agreement between the EU and Morocco would also be applicable to the territory of the West Sahara. In other words, the nationalist movement claimed that the numerous preparatory documents produced by the Commission before the conclusion of the agreement are a clear indication that the latter will also be applicable to the territory of the West Sahara. The documents referred to by the Front Polisario are the ones that evidence the numerous visits by the Directorate General for Health and Food Safety (DG SANCO) to the territory of West Sahara in order to establish whether the Moroccan authorities respect sanitary norms; as well as the agreed list of Moroccan exporters included in the association agreement with Morocco, which includes a total of 140 enterprises which are established on the territory of West Sahara.³⁴

II.2. RULE-MAKING ACTS: LOOKING BEYOND TECHNICALITIES

The administrative activities implementing the SAP and ENP aimed at strategising and programming financial assistance can formally be categorised as “subordinate rule-making” acts.³⁵ Multi-annual strategy papers and annual programming documents are Commission implementing decisions adopted under Art. 291 TFEU, and they are aimed at regulating how the disbursement of the Union’s financial assistance will be managed for each neighbouring state. The actual text of the Commission implementing decisions adopting the multi-annual strategy papers for each SAP and ENP state is a sole article which states that the indicative strategy paper for a specific country is adopted and can be found attached to the decision.³⁶ The text of the Commission implementing decisions adopting the country annual action programme for each SAP and ENP state regulates in three to four articles the maximum financial contribution, the budget-implementation modalities, and the possibility of the responsible authorizing office to adopt non-substantial changes to the decision itself.³⁷ While the actual text of the Commission implementing decisions is not very detailed as to the programming of financial assistance, the actual substance of the acts can be found in their annexes. The annexes do not seem to fit comfortably the definition of implementing acts;³⁸ however,

³⁴ *Front Polisario v. Council of the European Union*, cit., paras 79 and 80.

³⁵ Cf. H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, cit., pp. 524-535.

³⁶ E.g. “Sole Article The Indicative Strategy Paper for Montenegro for the period 2014-2020 attached to the present Decision is hereby adopted”, Commission Implementing Decision C(2014) 5771, cit.; Commission Implementing Decision C(2014) 3994, cit.

³⁷ E.g. Commission Implementing Decision C(2014) 9387, cit.; Commission Implementing Decision C(2014) 5020 of 14 July 2014 adopting the Annual Action Programme 2014 in favour of Georgia to be financed from the general budget of the European Union.

³⁸ Art. 291 TFEU establishes that the Commission is granted implementing powers “where uniform conditions for implementing legally binding acts are needed”.

they are more than preparatory measures since they set mandatory guidelines as to how financial assistance shall be disbursed for each SAP and ENP country.

Despite this lack of clarity, the annexes have a significant impact on the exercise of the Union's power. The multi-annual strategy documents indicate the priorities and objectives of financial assistance (e.g. LGBT support, promotion of reconciliation, capacity-building measures for improving law enforcement, etc.); they select the indicators to monitor and review performance; and they establish the means of verification.³⁹ Moreover, the annual action programmes also indicate the specific arrangements for disbursing financial assistance (e.g. budget support, direct management by the EU delegation, indirect management by the IPA II beneficiaries, etc.).⁴⁰ Multi-annual and annual priorities for EU financial assistance for each neighbouring state are both final acts and preparatory acts. They are final acts in so far as they establish how financial assistance will be disbursed for each SAP and ENP state, while at the same time they are also preparatory acts since based on them other acts will be adopted (e.g. call for tendering, grant proposal, budget support, etc.).

The choices taken by the Commission as to which project and area of cooperation to finance are not neutral. The Commission is granted significant discretion in selecting which projects receive financial support. Such discretion does not lack impact. An interesting case which was decided by the Court of Justice in 2004 exemplifies the relevance of the power granted to the administration in making such choices. The applicants in the case – B. Zaoui, L. Zaoui and D. Zaoui – were relatives of Mrs. Zaoui, who died on 27 March 2002 when a Palestinian terrorist carried out an attack on a hotel in Israel.⁴¹ The applicants claimed that the education in the Palestinian territories in the West Bank and in the Gaza strip “is the certain and direct causes of the attack which cost Mrs Zaoui her life, since that education incites individuals to hatred and terrorism”.⁴² In this respect, they brought an action for compensation for damages (Art. 340 TFEU – ex-Article 288 – read in conjunction with Art. 266 TFEU – ex-Article 233) against the Commission claiming that the Commission, by choosing to participate financially in the education programmes of Palestine, is responsible for the damage caused to them by the terrorist attack. According to the applicants, the defendant also infringed other provisions applicable to the financial support programmes.⁴³ However, such infringements were not

³⁹ E.g. the Annex of Commission Implementing Decision C(2014) 5771, cit.; and the Annex of Commission Implementing Decision C(2014) 3994, cit.

⁴⁰ E.g. the Annex of Commission Implementing Decision C(2014) 9387, cit.; and the Annex of Commission Implementing Decision C(2014) 5020, cit.

⁴¹ Court of Justice, order of 14 October 2004, case C-288/03 P, *Zaoui et al. v. Commission*.

⁴² Notice for the OJ, Action brought on 26 February 2003 by Bernard Zaoui, Lucien Zaoui and Déborah Stain, née Zaoui against the Commission of the European Communities, case T-73/03 (hereinafter Application, case T-73/03).

⁴³ “Articles 6 and 177(2) of the EC Treaty, the principles of sound financial management, the agreements entered into between the Communities and the United Nations Relief and Works Agency for Pales-

discussed by the Court since, according to the action for damage formula, a direct causal link could not be established between the harm suffered by the applicants and the action of the administration.⁴⁴ Without entering into a discussion of the merits of the case, what is important to highlight here is the fact that the choice of the Commission to fund educational projects in Palestine (rather than e.g. environmental projects) bears important consequence on the choices that the Union takes in respect of its external action. I am certainly not suggesting that the Commission in implementing the Union's external action should finance only technical and politically neutral projects. The point is rather that the choice as to which projects to finance cannot be conceived as a purely technical endeavor. EU administrative law needs to openly face this challenge.

Another example of rule-making activities implementing the ENP is the Commission Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967.⁴⁵ This interpretative notice produced by the Commission aims at providing Member States, economic operators and consumers with the necessary information on the indication of origin of products originating from Israeli settlements beyond Israel's 1967 borders.⁴⁶ The notice clarifies certain elements linked to the interpretation and the effective implementation of existing EU legislation. Although the interpretative notice states that it reflects the Commission's understanding of the relevant Union legislation, that it does not create any new legislative rules, and that its enforcement remains the primary responsibility of Member States, it still has the power to provide uniform rules on how the products originating in Israeli settlements beyond Israel's 1967 borders shall be labelled. For example, even though the EU has officially opposed sanctions, NGOs have used the guidelines to promote boycotting campaigns.⁴⁷ Here again, I am not suggesting that the Commission Interpretative Notice should have not been adopted. The point is rather that the Notice cannot be conceived as a purely technical endeavor, which can be swiftly adopted and published only on the website of the EU Delegation to Israel.⁴⁸ EU administrative law ought to embrace this reality.

tinian refugees (UNRWA), Article 3 of Regulation No 1488/96/EC, and Amendment No 177 to the 2002 EC General Budget", Application, case T-73/03, cit.

⁴⁴ *Zaoui et al. v. Commission*, cit., para. 3.

⁴⁵ Commission Interpretative Notice of 11 November 2015 on indication of origin of goods from the territories occupied by Israel since June 1967, C(2015) 7834 final.

⁴⁶ Interpretative notes are examples of administrative rule-makings. Cf. H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, cit., p. 555.

⁴⁷ Interview with NGO activist from medico international, 26 June 2016 Berlin; also affirmed by NGO Monitor, NGOs, *EU "Product Labeling" and BDS Warfare: What Next?*, in *NGO Monitor*, 13 December 2015, www.ngo-monitor.org.

⁴⁸ Interview with official working at Directorate General for Trade, 10 December 2015, Brussels.

III. THE IMPACT OF ADMINISTRATIVE POWER ON THE EXERCISE OF THIRD COUNTRIES PUBLIC AUTHORITY

The Union policies towards its neighbours have transformed from the sphere of pure politics into a *de facto* proceduralised process, which clarifies the different steps that a third country has to fulfil in order to get closer to the Union. This development gives the impression to third states that the path towards building stronger ties with the EU is carried out in a transparent and predictable way. The fact that the instruments are not in formal terms addressed to the third country should not mislead us. The instruments, even if formally addressed to e.g. the Council, have as their main *de facto* addressee the third country that is to follow the suggestion made in the document, adopt the standards indicated in the latter, and address the deficiencies identified if they do not want to trigger negative sanctions or renounce benefits.⁴⁹ Moreover, the neighbouring countries more often than not follow the guidance offered by progress reports, action plans, MoUs, etc. because the advantages of compliance outweigh the costs of non-compliance. Third states simply have to follow the rules of the game and adopt the internationally recognised standards as indicated in the SAP and ENP implementing activities if they want to pursue these international relationships.

The adoption of EU administrative measures has the potential to limit the freedom of third states by gradually becoming “politically, socially and morally binding” on them.⁵⁰ The impact exercised by the Union’s administrative activities on the neighbouring states rests on the empirical insight that many acts can, in the end, effectively curtail third countries’ freedom in the same way as legally binding acts. One of the characteristics of SAP and ENP administrative activities, as forms of technocratic regulation, is their tendency to blur positivist distinctions between non-binding and binding obligations.⁵¹ For example, action plans aim both at supporting third states in implementing the agreement that they have concluded with the Union, and at the same time advancing their relation with the EU under the umbrella framework established by the ENP. However, the documents do not make a clear distinction between those standards that must be adopted by the third states because they flow from obligations contained in their respective agreements with the EU, and those standards that are only to be treated as suggestions to further advance their relation with the Union. A question not addressed here is under which conditions a

⁴⁹ For example, adopting the standards and the legislation requested by the Visa Liberalisation Action Plans is a first fundamental step in order to obtain a visa liberalisation free regime. However, if lack of progress is registered in the way in which a third country implements its e.g. association agenda, the entrance into force of the Association Agreement might be postponed.

⁵⁰ Cf. K. JACOBSSON, *Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy*, in *Journal of European Social Policy*, 2004, p. 358.

⁵¹ Cf. D.M. LEVE, *International Regulatory Regimes: Case Studies in Health, Meteorology, and Food*, Lexington: Lexington Books, 1976, p. 561.

third state is more inclined to adopt an “EU friendly” agenda.⁵² The point in this instance is to show how in certain cases the instruments implementing the SAP and the ENP did have an impact on the exercise of third states’ power.

III.1. PREPARATORY ACTS: TAKE IT OR LEAVE IT

The instruments aimed at implementing both the SAP and the ENP are preparatory in so far as they assist third countries to evaluate a situation or circumstance and take appropriate action. They guide the third country in the transformation of a general *telos* (i.e. membership or partnership) into more concrete acts applicable, at times, to single-case situations. The action suggested might be seen as constituting an invitation for the addressee to follow certain steps leading to, for example, the adoption of legislation or to the changing of their political agenda.⁵³ Progress reports, European partnerships, action plans, impact assessments, etc. provide the Commission with a sophisticated system of reform promotion in the candidate and potential candidate countries.⁵⁴ The following provides some examples of how the SAP and ENP administrative activities can work as preparatory acts for third countries to which they are directly (and indirectly) addressed.

Progress reports have an impact on how relations between the Union and third states develop. The reports of the Commission, as we have seen, inform the Council as to the readiness of SAP states to, for example, start accession negotiations. It is in this context that the governments of third countries use progress reports in order to carefully address the deficiencies identified therein, with the hope that this will bring them closer to the Union. The Albanian National Action Plan for European Integration (2017-2020) makes multiple references to the Commission progress report in order to plan its reform agenda: “[f]ollowing the European Commission Progress Report 2015 on Albania, the Albanian Government has prepared an Action Plan to address short-term recommendations of this report”; “[t]he focus of the work of the Albanian Government has been to meet the obligations deriving from the Stabilisation and Association Agreement EU-Albania and in particular addressing the recommendations of the European Commission Progress Report 2015 for Albania”;

⁵² Cf. F. SCHIMMELFENNING, *Europeanization beyond Europe*, in *Living Reviews in European Governance*, 2012 pp. 1-31; S. LAVENEX, *EU External Governance in wider Europe*, in *Journal of European Public Policy*, 2004, p. 680 *et seq.*; O. ANASTASAKIS, *The Europeanization of the Balkans*, in *Brown Journal of World Affairs*, 2005, p. 77 *et seq.*; D. CHANDLER, *The EU and Southeastern Europe: the rise of post-liberal governance*, in *Third World Quarterly*, 2010, p. 69 *et seq.*

⁵³ This definition of preparatory acts is shaped around the meaning given by Hofmann, Rowe and Türk with regard of internal preparatory acts, see H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, cit., p. 546.

⁵⁴ Cf. D. KOCHENOV, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law*, Alphenaan Den Rijn: Kluwer Law International, 2008, p. 80.

“[i]n accordance with the European Commission’s Report recommendations, Bank of Albania has set as priority in the field of economic criteria:

- Implement effectively legislation against money laundering at all levels and further strengthen the national anti-money laundering and countering the financing of terrorism(AML/CFT) system;
- Implement the action plan on acquisition of property by foreigners”.⁵⁵

In general, the evaluations contained in progress reports have the inevitable effect of preannouncing the steps that the Union might want to take towards a third state. For example, Croatian governmental officials affirmed in separate instances how their expectation that Croatia would join the Union earlier than 2014 impacted their decisions regarding how, for instance, to programme financial assistance.⁵⁶ An Albanian governmental official also pointed out how the discrepancies between the positive signals given to them by the Commission and the steps taken by the Council in opening accession negotiations hindered the government’s strategic planning.⁵⁷

The function of progress reports, action plans, etc. as preparatory documents for third countries goes hand in hand with the programming of financial assistance. As just discussed in the previous sub-section, the priorities identified in the instruments establishing the agenda for action should normally become the target of Union financial support.⁵⁸ Therefore, the disbursement of funds in the areas identified by progress reports, action plans, etc. is another important incentive for having those reforms on the government’s agenda. A concrete example with Albania will illustrate the point. The progress report for Albania identifies a lack of improvement in the implementation of the public administration reform, although the implementation of public administration reform is a key priority for EU membership.⁵⁹

“As concerns public administration reform, Albania is moderately prepared. [...] However, efforts are needed to achieve the objective of a professional and depoliticised public

⁵⁵ Albanian Ministry for European Integration, *Albanian National Plan for European Integration 2017 – 2020*, January 2016, www.integrimi.gov.al, p. 179.

⁵⁶ Interviews with Croatian government officials from the IPA operating structure, 18 May 2015 and 19 May 2015, Zagreb.

⁵⁷ Interview with an Albanian government official from the Ministry of Justice, 20 May 2015, Zagreb.

⁵⁸ Art. 4 of Regulation (EU) No. 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument for Pre-accession Assistance (IPA II); Art. 3 of Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI).

⁵⁹ In November 2013, a High Level Dialogue with Albania was launched to help maintaining focus on the EU integration process and to monitor reform progress under the key priorities identified for the opening of accession negotiations. The five priorities are: reform of public administration, reform of judiciary, fight against corruption and organized crime and protection of human rights.

administration, to increase the financial and administrative capacity of local government units and to ensure effective implementation of the civil service law at local level".⁶⁰

Consequently, the document programming the distribution of financial assistance to Albania indicates that funds will be disbursed in order to support public administration reform: "Regarding the action to be supported, EU assistance will include technical assistance and capacity building for public administration reform and for democratic institutions".⁶¹ It is in this context that the government of Albania found itself in the position of putting the implementation of public administration reform on its governmental agenda – if it desired to make use of the funding: "The Albanian Government is committed to the genuine reform of public administration, to treatment and assessment based on merit, and commitment to its employees, thus creating an effective and efficient institutional network that provides better services to citizens".⁶² Moreover, the latest IPA II regulation introduced the idea of budget support.⁶³ According to the budget support strategy, financial support can only be provided to beneficiary countries that, among other points, must have adopted an appropriate sector reform plan on one of the topics identified in the Commission programming documents.⁶⁴ Therefore, if a SAP state wants to receive IPA II funding via the budget support mechanism, it needs to adopt a country strategy paper or a country action plan on the subjects identified in the Commission's documents. If the third country refuses to adopt an action plan on a specific sector identified for budget support, IPA II financing could be blocked for that specific project.⁶⁵ Finally, action plans have been used externally for the implementation of concrete projects. For example, in Moldova the National Institute of Justice was set up under the framework of the EU-Moldova Action Plan.⁶⁶

⁶⁰ Commission Staff Working Document SWD(2015) 213 final of 10 November 2015 Albania 2015 Report, Accompanying the Commission Communication on the EU Enlargement Strategy, p. 4.

⁶¹ Commission Implementing Decision C(2014) 5770 of 18 August 2014 on "Indicative Strategy Paper for Albania (2014-2020)", p. 15.

⁶² Albanian Ministry for European Integration, *Albanian National Plan for European Integration 2016-2020*, cit., p. 20.

⁶³ Commission, Directorate General for Enlargement, *Quick Guide to IPA II Programming*, Access to Documents request GESTDEM reference 2014/4443, abdigm.meb.gov.tr, pp. 54-56.

⁶⁴ The beneficiary countries have to fulfill four criteria in order to be entitled to budget support: "Stable macro-economic framework; Sound public financial management; Transparency and oversight of the budget; and National/sector policies and reforms", Commission, Directorate General for Enlargement, *Quick Guide to IPA II Programming*, cit., p. 54.

⁶⁵ See the example of Bosnia and Herzegovina, Initiative for Monitoring the European Integration of BiH, *The Initiative warns: Blocking IPA funds does not punish those responsible for political obstruction*, 15 April 2015, eu-monitoring.ba.

⁶⁶ Cf. A. KHVOROSTIANKINA, *Legislative approximation and application of EU law in Moldova*, in P. ROMANOV, P. VAN ELSUWEGE (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union*, Abingdon: Routledge, 2014, p. 176.

III.2. RULE-MAKING ACTS: “ACCEPT TERMS AND CONDITIONS”

The administrative activities aimed at implementing the SAP and the ENP may well constitute an initial step towards the adoption of legally binding measures in third states wishing to intensify their relations with the Union, in so far as they are quite detailed as to which standard shall be used by third countries when passing legislation. Regulations using non-binding forms often prove highly effective in practice.⁶⁷ The ability of progress reports, action plans, MoUs, etc. to serve a rule-making function in third states is sometimes correlated with the presence of legislative gaps in the legal systems of the countries to which they are directly or indirectly addressed. In some cases, third countries adopt the standards suggested by the administrative activities implementing the SAP and the ENP because the type of legislation suggested by the documents is actually missing in their own legal systems.⁶⁸ The tool-box for standard-setting created by the instruments implementing the SAP and the ENP includes traditional sources of international law,⁶⁹ an ever-expanding set of soft law instruments,⁷⁰ but also materials that on their face do not purport to set normative standards at all, including policy programmes for action,⁷¹ and even conditions attached to loans.⁷²

European partnerships, key priorities and action plans establish a benchmarked roadmap in bringing about required reforms in order for neighbouring countries to get closer to the Union.⁷³ Therefore, adopting the legislation required by those documents is the key, at least on paper, for both SAP and ENP partners to open accession negotiations or to conclude a Deep and Comprehensive Free Trade Agreement (the latest version of

⁶⁷ Cf. B. KINGSBURY, N. KRISCH, R.B. STEWART, *The Emergence of Global Administrative Law*, in *Law and Contemporary Problems*, 2005, p. 21.

⁶⁸ Interview with Georgian Ministry of Justice official, 1 March 2016, Berlin.

⁶⁹ E.g. The EU-Armenia action plan establishes that Armenia should “Ensure ratification and implementation of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, EEAS, *EU-Armenia Action Plan*, eeas.europa.eu.

⁷⁰ E.g. EEAS, *EU-Armenia Action Plan*, *cit.*, establishes that Armenia should “Cooperate on implementing the provisions of the OSCE Document on SALW, OSCE Document on Stockpiles of Conventional Ammunition and OSCE Best Practice Guide on SALW”.

⁷¹ E.g. The EU-Georgia Visa Liberalisation Action Plan establishes that Georgia should proceed with the “[a]doption of the national Integrated Border Management (IBM) Strategy and Action Plan, containing a timeframe and specific objectives for the further development of legislation, organisation, infrastructure, equipment, sufficient human and financial resources in the area of border management, as well as international cooperation”, Commission, *EU-Georgia Visa Dialogue – Action Plan on Visa Liberalisation*, migration.commission.ge.

⁷² Annex to the Commission Implementing decision C(2015) 3444 final of 18 May 2015 approving the Memorandum of Understanding between the European Union and Ukraine related to macro-financial assistance to Ukraine.

⁷³ This is especially the case when a pro-European government comes to power. Interview with EU Commission official who worked at the EU Delegation in Turkey, 15 October 2014, Florence.

ENP agreements).⁷⁴ Based on the European partnerships, SAP countries have to adopt their National Programmes for the Adoption of the Acquis (NPAA).⁷⁵ While on the one hand SAP states agreed to prepare themselves to cede part of their sovereignty to the EU, and thus are compelled to pass those reforms and accept the standards in order to join,⁷⁶ the ENP states remain sovereign states without an accession perspective – for the southern neighbours accession will never be an option since they do not qualify as European states.⁷⁷ Despite this difference, the clauses on approximation of laws contained in the action plans are far-reaching and a basis for specific commitments; they require ENP countries to ensure that their legislation will be gradually made compatible with EU law.⁷⁸

The reforms covered by the action plans include a wide range of policy areas ranging from transport, energy, conflict prevention, human rights, to education, enterprise policy, etc. A close look at these documents shows that, besides covering a wide range of policy areas, they are quite specific as to which standards third countries are required to respect. For example, the EU-Jordan action plan requires Jordan (amongst other things): “To sign a Memorandum of Understanding with the Monitoring and Information Centre (MIC) of the Community Civil Protection Mechanism”; “[f]urther strengthen legal provisions and practices on freedom of assembly and association in compliance with international standards and in particular with the right to the freedom of association enshrined in the International Convention on Civil and Political Rights (ICCPR)”; “[t]o review all legislation concerning children to ensure compliance with the UN Convention on the Rights of the Child (CRC) and other relevant international human rights instruments and standards”; “[t]o continue working on the full implementation of the WTO agreement on the application of the sanitary and phytosanitary measures and actively participate in relevant international bodies (OIE, IPPC, and Codex Alimentarius)”.⁷⁹

⁷⁴ The new generation of ENP association agreements has the objective of establishing gradual integration in the EU Internal Market by setting up a deep and comprehensive free trade area (DCFTA). At the heart of these DCFTAs lays the principle of market access conditionality according to which access to the EU internal market will only be granted if the partner country approximates its domestic legislation to a selected body of EU *acquis*.

⁷⁵ E.g. “In order to prepare for further integration with the European Union, the competent authorities in Albania should develop a plan with a timetable and specific measures to address the priorities of this European Partnership”, Council Decision 2008/210/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Albania and repealing Decision 2006/54/EC. Cf. also M. MARESCAU, *Pre-accession*, in M. CREMONA (ed.), *The Enlargement of the European Union*, Oxford: Oxford University Press, 2003, p. 31.

⁷⁶ Arguably also for the current SAP states accession seems a mirage (i.e. for Bosnia and Herzegovina, Kosovo and Macedonia).

⁷⁷ On 20 July 1987 Morocco applied for membership to the EU. However, the foreign ministers of the Community rejected the application since Morocco is not a European state. European Parliament, *Briefing No 23 – Legal Questions of Enlargement*, 19 May 1998, www.europarl.europa.eu.

⁷⁸ Cf. M. CREMONA, *The European Neighbourhood Policy: More than a Partnership?*, cit., p. 269.

⁷⁹ EEAS, *EU-Jordan Action Plan*, eeas.europa.eu.

The content of action plans (and of association agendas) is, in some cases, transposed through government decrees. For example, the Georgia National Action Plan for the Implementation of the EU-Georgia Association Agenda (Decree No 59 of the Government of Georgia 26 January 2015) indicates to transpose into national legislation the standards identified in the association agenda.⁸⁰

Visa Liberalisation Action Plans are the most powerful example of standard-setting instruments. They are presented in a way which seems to suggest that once the requirements spelled out in the plans are fulfilled by a third country, then a visa liberalisation regime would be established. VLAPs have rule-making function to the extent that they demand from third states specific legislative and policy reforms, as well as the respect of detailed benchmarks for implementation. SAP and ENP countries must achieve all the objectives established by their respective Road Maps and VLAPs if they wish to enjoy a visa free regime. The objectives are legislative measures and specific benchmarks for effective implementation. For example, the Georgian VLAP requires: "Consolidation, according to EU and international standards, of the legal and institutional framework on preventing fighting organized crime, together with national strategy and action Plan containing, within a clear time frame, specific objectives activities, results, performance indicators and sufficient human and financial resources";

"[s]ignature, ratification and transposition into national legislation of all relevant UN and Council of Europe conventions and respective protocols in the areas listed above and on the fight against terrorism, including: the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of terrorism; the Hague Convention on Protection of Children (1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children); the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; the Additional Protocol to the Criminal Law Convention on Corruption".⁸¹

Based on its VLAP, Moldova adopted and implemented more than 40 laws.⁸² Not all these laws have been peacefully accepted by Moldovan society, and some caused unprecedented civil protests. As experts have stated, without EU pressure and the promise of reward, the Moldovan lawmakers would never have adopted the progressive Law "On ensuring Equality" of 25 May 2012.⁸³

⁸⁰ Minister of Georgia on European and Euro-Atlantic integration, *2015 National Action Plan for the Implementation of the Association Agreement*, 26 January 2015, www.eu-nato.gov.ge.

⁸¹ Commission, *EU-Georgia Visa Dialogue – Action Plan on Visa Liberalisation*, cit.

⁸² Cf. A. KHVOROSTIANKINA, *Legislative approximation and application of EU law in Moldova*, cit., p. 170.

⁸³ Cf. V. URSU, *How the European Union Persuaded Moldova to Fight Discrimination*, in *Open Society Foundations*, 12 September 2012, www.opensocietyfoundations.org.

The latest Union practice of providing macro-financial assistance to the ENP states also represents a new mechanism of standard setting for the EU's borrowers. The Union's ability to deny funds or to suspend disbursement of a loan or credit implies that a failure to comply with the Union's policy prescriptions, as set out in the European Parliament and Council Decisions providing macro financial assistance to the ENP states and in the Memoranda of Understanding agreed with the borrowing states,⁸⁴ can result in enforcement. In other words, the third state could be denied macro-financial assistance due to its inability to fulfil the conditions set out in the MoUs concluded with the Union, without having any guarantee of being heard.⁸⁵ The Union's policy prescriptions are tied to the macro financial adjustments and structural reform programmes supported by the IMF. IMF conditionality forces governments to adopt local laws, reform governmental institutions, or refrain from taking actions that would otherwise be within their sovereign discretion.⁸⁶ Although both the Union's and IMF's conditions are not formally imposed on States, but are the products of state consent, critics rightly affirm that states are economically coerced into ceding their sovereign rights to govern their polities through conditionality.⁸⁷

IV. CONCLUSION

In light of the analysis carried out, it seems plausible to state that the administrative activities implementing the SAP and the ENP exercise a tangible pressure on the use of public power, both within the Union and in third countries. Internally, the administrative power channels and influences important Union choices as to the development of its external relations. It informs single-case decisions, and it constitutes the basis for the adoption of

⁸⁴ "The Commission shall [...] agree with the Ukrainian authorities on clearly defined economic policy and financial conditions, focusing on structural reforms and sound public finances, to which the Union's macro-financial assistance is to be subject, to be laid down in a Memorandum of Understanding ('the Memorandum of Understanding') which shall include a timeframe for the fulfilment of those conditions. The economic policy and financial conditions set out in the Memorandum of Understanding shall be consistent with the agreements or understandings referred to in Article 1(3), including the macroeconomic adjustment and structural reform programmes implemented by Ukraine, with the support of the IMF", Art. 3, para. 1 of Decision (EU) 2015/601 of the European Parliament and of the Council of 15 April 2015 providing macro-financial assistance to Ukraine; Art. 3, para. 1, of Decision (EU) 534/2014 of the European Parliament and of the Council of 15 May 2014 providing macro-financial assistance to the Republic of Tunisia.

⁸⁵ E.g. EU-Ukraine MoU on macro financial assistance at point 3: "The Commission will also continuously verify the financing needs of Ukraine and may reduce, suspend or cancel the assistance in case they have decreased fundamentally during the period of disbursement compared to the initial projections", Commission Implementing Decision C(2015)3444/F1 of 18 May 2015 approving the Memorandum of Understanding between the European Union and Ukraine related to macro-financial assistance to Ukraine.

⁸⁶ Cf. J.E. ALVAREZ, *International Organizations as Law-makers*, Oxford: Oxford University Press, 2006, p. 242.

⁸⁷ Cf. D. BRADLOW, *Stuffing New Wine Into Old Bottles: The Troubling case of the IMF*, in *Journal of International Banking Regulation*, 2001, p. 9 *et seq.*

political, administrative, and legislative acts. The administrative activities have over the year become preparatory acts within *de facto* procedures leading to final outcomes. Externally, the Union's activities implementing the SAP and the ENP work as *de facto* administrative acts addressed to third states. Actual enforcement mechanisms are developed by the Union with the final goal of encouraging third states to align their government agenda to the one suggested by the EU. Third states have to adapt their reform and legislative plan in accordance with the guidelines provided by progress reports, action plans, MoUs, etc., unless they want to trigger sanctions or renounce benefits. The legal freedom for third states to refrain from following a merely conditional act is often a mere fiction.⁸⁸

The *Article* has demonstrated that the study of EU administrative law in external policy fields needs to take account of the impact of administrative action and measures which, while they are not formally legally binding, will nevertheless have substantial effects as preparatory or rule-making acts. This *Article* also demonstrated that while the EU institutions have broad policy discretion in conducting external policy, they are not acting in an administrative vacuum, but are in fact working within elaborate procedural frameworks in which binding and non-binding measures interact. A careful analysis of the impacts of these measures within their legal and policy context is needed. Identifying the addressees and the impact of the administrative activities implementing the Union's external action is important to better understand which principles derived from the administrative rule of law internally are best suited to guide the exercise of administrative power externally and to protect those affected by it.⁸⁹

⁸⁸ Cf. A. VON BOGDANDY, *Common principles for a plurality of orders: A study on public authority in European legal area*, in *International Journal of Constitutional Law*, 2014, p. 988.

⁸⁹ For an attempt at integrating the EU external administrative activities into a coherent system of administrative law, cf. I. VIANELLO, *EU External Action and the Administrative Rule of Law*, cit.