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EDITORIAL

The Thousand Cataluñas of Europe p. 463

ARTICLES

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

edited by Marise Cremona and Päivi Leino

Marise Cremona and Päivi Leino, *Introduction: The New Frontiers of EU Administrative Law and the Scope of Our Inquiry* 467

Joana Mendes, *The External Administrative Layer of EU Law-making: International Decisions in EU Law and the Case of CETA* 489

Ioanna Hadjiyianni, *The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors* 519

Emilia Korkea-aho and Suvi Sankari, *External Participants v. Internal Interests: Principles of EU Administrative Law in Anti-dumping Investigations* 543

Jorrit J. Rijpma, *External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory* 571

Ilaria Vianello, *Acknowledging the Impact of Administrative Power in the EU External Action* 597

Päivi Leino, *Administering EU Development Policy: Between Global Commitments and Vague Accountability Structures* 617

- Liisa Leppävirta, *Procedural Rights in the Context of Restrictive Measures: Does the Adversarial Principle Survive the Necessities of Secrecy?* 649
- Marise Cremona, *“Effective Judicial Review Is of the Essence of the Rule of Law”: Challenging Common Foreign and Security Policy Measures Before the Court of Justice* p. 671
- Marise Cremona and Päivi Leino, *Is There an Accountability Gap in EU External Relations? Some Initial Conclusions* 699

INSIGHTS

- Stefano Montaldo, *Judicial Cooperation, Transfer of Prisoners and Offenders’ Rehabilitation: No Fairy-tale Bliss. Comment on Ognyanov* 709
- Šeila Imamovic and Elise Muir, *The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?* 719

EUROPEAN FORUM

- Insights and Highlights* 729



EDITORIAL

THE THOUSAND *CATALUÑAS* OF EUROPE

Irrespective of the perspective from which one looks at the Catalanian events, which are still unfolding under our incredulous eyes, the impression can only be univocal: Spain is right and Catalonia is wrong. The claim of the Spanish Government to preserve the unity of the nation is well founded; conversely, the independence proclaimed by the Catalanian Government amounts to an *extra ordinem* revolutionary act.

This is the conclusion that must be naturally drawn from an inquiry conducted on the basis of Spanish Constitutional law. While recognising “the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all”, Section 2 of the Spanish Constitution points out that “[t]he Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards”.

This would inevitably also be the conclusion to be drawn from an international law perspective. The prevailing scholarly view, and the international case law, regard secession as the outcome of a factual process that takes place in an area largely unregulated by the law and, therefore, is neither permitted nor prohibited by international law (along these lines, see International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, advisory opinion of 22 July 2010, paras 79-84). Only indirectly do international rules govern that process, imposing on the parties to the conflict the obligation to comply with fundamental interests of the international community, such as the prohibition of excessive use of force and the obligation to comply with the rules protecting human rights. Moreover, the situation in Catalonia does not seem to come within the scope of the principle of self-determination, that applies to a minority group only if it is excluded from the governmental functions of a territory on grounds of race, creed or colour, according to the famous Declaration of the UN General Assembly on the Friendly Relations among States of 24 October 1970, UN Doc. A/RES/25/2625.

The same answer unequivocally flows from a legal inquiry conducted on the basis of European law. Also from that perspective, it is difficult to identify legal rules or principles conferring to sub-state entities a right to secede from their home country. Quite the contrary, from its inception, the EU legal order is based on the international conception of its Member States as unitary actors, represented by their Governments. States, and only States, can become members of the Union or withdraw from it. And States are

the only politically organised communities that can convey, albeit indirectly, democratic legitimacy to the Union, under Art. 10 TEU.

It is in this conceptual environment that the Commission has elaborated its conception of a secession from a Member State as a process entailing the exclusion of the seceding territory from the EU. This conception has been probably developed with a view to discouraging secessionist movements. In case of a unilateral secession, if the newly born State applied to the EU, it would probably meet the fierce opposition of its former home country, which would presumably veto its application. In the light of the dim perspective of an independence outside the EU, where the small newly born State would be left alone to navigate the troubled waters of the globalisation, many claims would probably vanish.

From a legal viewpoint, however, this conception is not as obvious as presented. It is based on the classical principle of the clean slate, according to which a newly born State has not obligations deriving from treaties concluded by its predecessor in the government of the same territory. However, the international practice is much less univocal than this facile formula may indicate. The classical rule of the clean slate, designed to secure the absolute freedom of action of the newcomer in the club of the sovereign entities, has been developed in a very simple legal world, hinged around a conception of international obligations as an exception to the absoluteness of the sovereignty exerted by a State on a given territory. It is less adequate to the needs of contemporary international law, where States are under a plethora of international obligations designed to fulfil a variety of different values and interests, individual, collective or even universal. Correspondingly, the international practice of States succession in regard to treaties appears to be much more nuanced and variegated than the Commission seems to believe. More and more, international law tends to favour the continuity of the legal regime applicable to a given territory that has acquired statehood, in particular with regard to treaties that confer a certain territorial status or grant rights and duties to individuals settled therein, or with regard to legal regimes whose enduring application corresponds to a collective interest of the international community.

Arguably, to deal with the troubled issue of the secession of a part of the territory from a EU Member State, the continuity model may be more appropriate than the clean slate model. Not only would it ensure the uninterrupted possession of the rights conferred by EU law to individuals, who, at least from *Van Gend den Loos* on (Court of Justice, judgment of 5 February 1963, case 26/62), are, indisputably, subject of this composite "new legal order of international law" (*ibid.*, p. 12). It could also serve the collective interest not to have the Union suddenly amputated of part of its territory and of its citizenship. Thus, if a choice ought to be made between the two models, that of the clean slate and that of the continuity in the rights and obligations flowing from a treaty, the latter would seem more consistent with the overall objective of integration that is the *raison d'être* of the EU.

This is, indeed, the position advocated, with great persuasive force, by Kochenov and van den Brink in a seminal work published in the very first issue of *European Papers* (*Secessions from EU Member States: The Imperative of Union's Neutrality*, in Vol. 1, 2016, No 1, p. 67 *et seq.*). In their view, the neutrality of the EU *vis-à-vis* a secession in one of its Member States should entail, if conducted on the basis of a democratic method, the automatic membership to the EU of the new State, and the consequential need to amend, to the extent necessary, the founding treaties. In Kochenov and van den Brink's view, this conclusion is the most consistent with the ethos of the Union, "the tamer of States and the promotor of liberal, inclusive and tolerant nationhood" (*ibid.*, p. 85).

This felicitous definition encapsulates in a few words the entire political philosophy that underlies the process of integration. The establishment of a European Union was regarded precisely as the antidote to the "absolute sovereignty of the national States" by the Ventotene Manifesto. This text, written between 1941 and 1942, well describes the feverish intellectual reflection that ultimately gave birth to the idea of a federation among the European peoples, designed to cure "[t]he multiple problems which poison international life on the continent [that] have proved to be insoluble: tracing boundaries through areas inhabited by mixed populations, defence of alien minorities, seaports for landlocked countries, the Balkan Question, the Irish problem, and so on".

There is, however, a case to be made for escaping the paralysing alternative between contradictory claims of sovereignty. If the historical mission of Europe is to assuage the "absolute sovereignty ideologies", to borrow again an expression used by Kochenov and van den Brink (*ibid.*), this entails moving away from two opposing versions of nationalism: the one inherent in the claim to the unity of the Member States – many of which still encompass ethnic, national or religious minorities – as well as the one inherent in the claim for statehood of these minorities. The latter is not less poisonous than the former, as it entails the acquisition, by a territorial community, of the stigmas of sovereignty against which it had hitherto strenuously fought. The conception of the European Union as an antidote to a poisonous bite, hence, must work both ways: against the bitten and against the biter.

But how can the EU help solve what appears to be an unsolvable conundrum? The EU is not a panacea and its invocation is certainly not a ready-made recipe for whatever difficulty may arise. However, a line of conceptual research based on its historical mission could point to a direction along which both antithetical claims could be assuaged.

One of the idiosyncratic features of the political system of the EU is its reliance on the international system of representation according to which the Member States are represented by their executives. Yet, precisely this model can represent a powerful incentive to claim independence and, conversely, to resist it. By claiming independence, sub-State communities are driven by the luring idea of having a seat in the European

“control room”; conversely, by resisting it, Member States reaffirm the idea that that room is reserved to the current members of that exclusive club.

In other words, in European as well as in international law, statehood is a threshold notion (all-or-nothing). If this personification of the State as a unitary entity is comprehensible under international law, it is less comprehensible at the European level, namely in a Constitutional legal order whose ultimate objective is to attain a high degree of integration among the peoples of Europe.

The question thus arises as to whether in European law this monolithic representation of statehood can be attenuated in favour of institutional solutions that reflect more faithfully the pluralistic nature of the modern forms of State.

It is certainly not the aim of the present writing to indicate the lines of a possible reform of the Constitutional setting of the Union; the more so at a time in which the pace of history seems rather to point to the opposite direction; to celebrate the triumph of the Member States as the main stakeholders of the European club. But it is precisely at this time that scholars have the moral duty to present the shortcomings of this historical tendency and the benefits of taking a different direction.

In particular, a transformation of the composition of the Council into a permanent body, including not only representatives of the Governments of the Member States, but also of their National Parliaments and, where present, also of their sub-national communities, may considerably defuse the tendency to independentism that is still present around Europe.

The adoption of a pluralistic representation of States within the EU may have other substantial benefits. It would help express the wider range of interests of the Member States and not only those of their executives; it would loosen the grip of national political pressures and facilitate the emergence of a general interest of the Union. It would attenuate the intergovernmentalism inherent in what has been labelled as *la méthode de l'Union*, that constitutes the mortal sin of the process of the European integration.

E.C.



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

MARISE CREMONA* AND PÄIVI LEINO**

TABLE OF CONTENTS: I. The EU as a global administrative actor. – II. Development of EU administrative law and external relations: setting the scene. – III. Administrative action as *instrumental action* in external relations. – IV. Accountability: actors, fora and different types of act. – V. Mapping administrative action in EU external relations. – VI. Discretion.

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. ALEMANNO, 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 *Maximillian 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.



ARTICLES

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

THE EXTERNAL ADMINISTRATIVE LAYER OF EU LAW-MAKING: INTERNATIONAL DECISIONS IN EU LAW AND THE CASE OF CETA

JOANA MENDES*

TABLE OF CONTENTS: I. The international regulation of public goods: legal challenges. – II. International decisions by CETA bodies. – III. Decisions of international bodies: a source of EU law. – IV. The external administrative layer of EU law. – IV.1. Interpretative effects: validating EU law. – IV.2. Authoritative international decisions. – IV.3. A next step for interpretative effects? – IV.4. Validating, but not invalidating EU law. – V. Strong in substance, weak in procedure. – VI. The EU Treaty procedure. – VII. The CETA bodies making EU law.

ABSTRACT: The legal status of binding and non-binding international decisions adopted by global regulatory bodies in EU law, their authority (as acknowledged in the case law of the CJEU) and legal effects allow one to characterise them as the external administrative layer of EU law-making. Mega-regional agreements, of which the Comprehensive Economic and Trade Agreement (CETA) is an instance, have the potential to expand this tier of law. This *Article* maps the substantive legal effects of international decisions in EU law as expounded by the CJEU, arguing that the case law the Court developed is transposable to future decisions of CETA bodies. Furthermore, it contrasts their possible substantive impact in EU law with the weaknesses of procedural controls over the exercise of public authority by those bodies.

KEYWORDS: global regulatory regimes – international decisions – public authority – non-binding acts – procedures – CETA.

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I. THE INTERNATIONAL REGULATION OF PUBLIC GOODS: LEGAL CHALLENGES

The negotiations of the Transatlantic Trade and Investment Partnership (TTIP)¹ and the ratification of the Comprehensive Economic and Trade Agreement (CETA)² provoked heated academic and public discussions throughout 2016. While largely focused on investor-state dispute settlement, they placed the spotlight on an important reality in the practice of EU external relations. Decisions adopted at the international level define substantive aspects of domestic law (including EU regulation concerning the provision of public goods, such as health and the safety of pharmaceuticals, chemicals, food products, environmental protection and financial stability).³ Whether adopted by international bodies set up to implement international agreements binding on the EU – as is now the case of CETA⁴ – or adopted outside the framework of an international agreement in informal regulatory fora (composed of EU administrative bodies and other global actors), international decisions may have important substantive legal effects. As the Court of Justice has explicitly acknowledged, even non-binding decisions of an international body “are capable of decisively influencing the content of [EU] legislation” and, thereby, may have a “direct impact on the European Union’s *acquis*”.⁵

¹ Initiated by EU directives ST 11103/13 for the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US, unanimously adopted by the Council on 14 June 2013 and declassified and made public by the Council on 9 October 2014 (for the current state of negotiation see trade.ec.europa.eu).

² Council document n°10973/16, “Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part”, dated 14th September 2016.

³ The term “decisions” is adopted here in a broad sense, to refer to acts that can have legal effects in the sense of Art. 218, para. 9, TFEU, as established in Court of Justice, judgment of 7 October 2014, case C-399/12, *Federal Republic of Germany v. Council of the European Union* [GC], irrespective of the scope of their addressees. Unless otherwise specified, it encompasses formally non-binding acts, such as guidelines, recommendations, best practices, standards. It does not include decisions of a judicial or a dispute settlement body, given their specific procedure and function as resulting from a dispute arbitrated by an impartial body (on these, see P.-J. KUIJPER, J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations*, Oxford: Oxford University Press, 2015, pp. 721-726).

⁴ At the time of the writing, the European Parliament had given its consent to the conclusion of the agreement (European Parliament Legislative Resolution of 15 February 2017 on the Draft Council Decision on the Conclusion of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (10975/2016 – C8-0438/2016 – 2016/0205(NLE)) and the Canadian Senate had approved the implementing act required under national law, available at www.parl.ca, thus triggering the possible provisional application of the agreement under Article 30.7, para. 3, CETA. The text of the agreement is available at data.consilium.europa.eu.

⁵ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 63 and 64. At stake in this case were recommendations of a body set up by an international agreement to which the EU is not a party (21 Member States are) but in which it is a “guest” in the terms of that body’s internal rules and whose meetings the Commission attends (*Federal Republic of Germany v. Council of the European Union* [GC], cit., para. 5).

International regulation of public goods is a reality that global markets cannot do without. Yet, it is also a reality that reinforces the law-making role of executive and administrative bodies while at the same time posing important challenges to law's ability to constrain their authority.⁶ By now, a plethora of bilateral and multilateral conventions set up regulatory regimes and bodies that adopt decisions, resolutions, recommendations, guidelines, best practices in a variety of policy fields. Mega-regional agreements, due to their scope and aims, give a distinct significance to this phenomenon and emphasise its legal challenges.⁷ As the name of the first mega-regional agreement approved by the European Parliament indicates, these are "comprehensive economic and trade" agreements touching virtually every relevant economic sector. Established between two parties that already apply feeble tariff barriers to bilateral trade – the EU and its Member States and Canada (the Parties) – CETA aims mainly at: eliminating non-tariff barriers; ensuring better access to public procurement; protecting investment, intellectual property (including pharmaceutical patents) and geographical indications; warranting that food safety, animal and plant health regulations do not create unjustified barriers to trade; facilitating the provision of services (including financial and telecommunication services); recognising professional qualifications; protecting the security and integrity of both Parties' financial systems as insurance and banking services are provided cross-border; regulating the maritime transport market; ensuring cooperation between their respective competition authorities; safeguarding conservation and sustainable management of forests and fisheries; preventing either side from ignoring or lowering environmental and labour standards to boost trade.⁸ CETA, in addition, establishes a set of committees whose function is to implement the agreement. Some of these committees have the capacity to adapt to evolving realities the substantive commitments that the Parties assumed when signing and ratifying the agreement, in a way that enables the agreement to continue fulfilling its purposes.

Addressing the international regulation of public goods from the perspective of the EU, this *Article* characterises the ensuing international decisions as the external adminis-

⁶ Specifically on this argument, see, J. MENDES: *Rule of Law and Participation: A Normative Analysis of Internationalised Rulemaking as Composite Procedures?*, in *International Journal of Constitutional Law*, 2014, p. 370 et seq.; *Participation in a New Regulatory Paradigm: Collaboration and Constraint in TTIP's Regulatory Cooperation*, in ILLJ/NYU Working Paper MegaReg Series 2016/5.

⁷ On mega-regional trade agreements, see R.T. BULL, N.A. MAHBOUBI, R.B. STEWART, J.B. WIENER, *New approaches to international regulatory cooperation: the challenge of TTIP, TPP and mega-regional trade agreements*, in *Law and Contemporary Problems*, 2015, p. 1 et seq. On the constitutional challenges that they pose, see E.-U. PETERSMANN, *Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?*, in *Journal of European International Economic Law*, 2015, p. 579 et seq.

⁸ Art. 30.10, para. 4, CETA. Analysing the changes in EU trade policy and the new generation of trade agreements, and thus placing CETA in its broader context, see A.S. SERRANO, *From External Policy to Free Trade: The EU-Singapore Free Trade Agreement* in P. EECKHOUT, M. LOPEZ-ESCUADERO (eds), *The European Union's external action in times of crisis*, Oxford: Hart Publishing, 2016, pp. 483-507, in particular pp. 487-491.

trative layer of EU law, given their legal status, authority and substantive legal effects in EU law. In addition, it points out the disconnect between these effects and the weak procedural rules that frame their adoption. It focuses on decisions by CETA bodies: because of the scope of this agreement, these have the potential to expand the external administrative layer of EU law. While it is at present not possible to assess the substantive effects of these decisions – at the time of writing the agreement is only being provisionally applied – the authority the CJEU has thus far attributed to, and the effects it has recognised regarding, international decisions could apply to those future decisions. In fact, the reasons that have led the CJEU to tease out the legal effects of decisions of international bodies, while at the same time justifying their authority in EU law, are arguably transposable to the future decisions of CETA bodies. Section II starts by highlighting the instances in which CETA bodies can adopt international decisions and recommendations to implement the agreement, even if acknowledging that formal decision-making is a small portion of their regulatory activity. Section III explains the formal legal status of decisions of international bodies in EU law. In doing so, it also considers decisions adopted to implement multilateral agreements, given the relevance of the respective case law for this discussion. Section IV examines the substantive effects and authority of international decisions through the lens of the case law of the Court of Justice.⁹ Section V returns to CETA and points out the procedural weaknesses of implementing decision-making as established by this agreement, which contrast with the status, authority and substantive legal effects of international decisions in EU law. Section VI examines the role of Art. 218, para. 9, TFEU in addressing the normative concerns raised by these procedural weaknesses. Section VII concludes arguing that, while CETA bodies can in practice make EU law, their authority in adopting such decisions may be virtually unrestrained.

II. INTERNATIONAL DECISIONS BY CETA BODIES

The interactions between international and EU regulatory bodies are multifaceted and often do not fit in the vertical scheme by which decisions adopted by international bodies are incorporated in domestic legal orders.¹⁰ By focusing on this type of interaction, the *Article* leaves in the shadow a multitude of softer, but not less influential, forms of public action that may equally influence the EU legal order. With regard to regulatory cooperation in the framework of mega-regional agreements, for instance, it has been pointed out that decisions, whether formal or informal, are possibly the least likely out-

⁹ Authority is understood here in the sense proposed by Armin von Bogdandy and others as the ability to affect the freedom of others in pursuance of a public interest (see, most recently, A. VON BOGDANDY, M. GOLDMANN, I. VENZKE, *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, in *European Journal of International Law*, 2017, p. 115 et seq.).

¹⁰ R.B. STEWART, *The Global Regulatory Challenge to U.S. Administrative Law*, in *NYU Journal of International Law and Politics*, 2005, p. 703.

come of the activities performed under an international agreement.¹¹ Indeed, regulatory cooperation under CETA entails a whole range of procedural obligations of the Parties regarding the “development, review and methodological aspects” of their regulatory measures.¹² Engaging in regulatory cooperation may mean only discussing regulatory reform, “lessons learned”, “exchange experiences”, mutually consulting on regulatory developments, sharing information, examining and comparing assumptions and methodologies of data analysis or post-implementation reviews.¹³ The list of regulatory cooperation activities shows the multitude of tasks involved in regulation that extend to international regulation and structure decision-making in ways that are often outside of the lawyers’ radar.

As important as it may be to analyse that transatlantic structure of regulation, it should not detract from the more conventional legal powers that may be involved in implementing international agreements, in particular – given their wide scope – in the case of mega-regional agreements. As specified in CETA, regulatory cooperation also entails examining the opportunities to achieve regulatory convergence (“minimise unnecessary divergences”) via, *inter alia*, “achieving a harmonised, equivalent or compatible solution” or “considering mutual recognition in specific cases”.¹⁴ To the extent that regulatory cooperation may ultimately lead to formal recommendations, these will be adopted either by the CETA Joint Committee (hereinafter, Joint Committee), possibly by suggestion of the Regulatory Cooperation Forum;¹⁵ or directly by the Regulatory Cooperation Forum, a specialized committee to which the Joint Committee may delegate its powers.¹⁶ Other CETA specialized committees have decision-making powers: the Joint

¹¹ R.T. BULL, N.A. MAHBOUBI, R.B. STEWART, J.B. WIENER, *New Approaches to International Regulatory Cooperation*, cit., pp. 10-12.

¹² Art. 21.1, CETA.

¹³ *Ibid.*, Art. 21.4.

¹⁴ *Ibid.*, Art. 21.4, let. g), ii) and iii).

¹⁵ *Ibid.*, Arts 21.6, para. 4, let. c), and 26.2, para. 6. The Regulatory Cooperation Forum needs to report to the Joint Committee “as appropriate” and “on the results and consultations from each meeting”. The chapter on regulatory cooperation does not give the Forum the power to decide or issue recommendations (Art. 21.6, and see also Art. 26.2, let. h)). The Joint Committee, on the contrary, may take decisions “in respect of all matters when this Agreement so provides” (Art. 26.3, para. 1) and “make appropriate recommendations” (Art. 26.3, para. 2). From the combination of these provisions, it results that decisions are most likely not permissible regarding regulatory cooperation (following Art. 26.3, para. 1, that power would need to be specified in the Agreement). Art. 26.2, para. 4, raises a doubt in this respect: it enables specialised committees to propose draft decisions for adoption by the Joint Committee, but presumably only where the latter’s power to take decisions is specified in the Treaty (see e.g. Arts 2.13, para. 2, and 8.10, para. 3, the regulatory cooperation chapter does not have similar provisions).

¹⁶ *Ibid.*, Art. 26.1, para. 5, let. a), which mentions the delegation of “responsibilities”. If the interpretation in the footnote 15 holds, the Joint Committee could only delegate the power to adopt recommendations as it would not have the power to adopt decisions in the field of regulatory cooperation. It is noteworthy that despite the reference in an official information site that the Regulatory Cooperation Forum does not have formal decision-making powers (Ministère de l’Économie, *Accord économique et commercial*

Management Committee for Sanitary and Phytosanitary Measures may decide to amend the annexes to the chapter on Sanitary and Phytosanitary; the Committee on Services and Investment may develop recommendations regarding a possible revision of the obligation to provide fair and equitable treatment, submit them to the Joint Committee for decision; it may make recommendations on the interpretation of CETA (that may eventually be binding via a decision of the Joint Committee) and recommendations on the functioning of the Appellate Tribunal; the Financial Services Committee has the power to adopt decisions and is involved in the arbitration of financial disputes; and the Committee on Geographical Indications may recommend that the Joint Committee add or remove geographical indications from the respective CETA Annex.¹⁷ Moreover, any decisions by the Joint Committee will be followed up by the CETA contact points, who monitor and ensure the continuity of the work of the CETA bodies.¹⁸

There are relatively few indications regarding the composition of these bodies. The Joint Committee comprises “representatives” of the EU (including of its Member States, given that this is a mixed agreement) and of Canada, being chaired by the Canadian Minister for International Trade and the Commission’s Trade commissioner.¹⁹ Specialised committees mostly gather regulatory representatives from each party; when they meet, “all the competent authorities for each issue on the agenda” must be represented to ensure an “adequate level of expertise”.²⁰ This means that the EU agencies, together with their Canadian and EU Member States counterparts, are likely to be involved in these specialised committees. For example, the Regulatory Cooperation Forum is composed of “relevant officials” of each Party, who by mutual consent may invite “other interested parties to participate” in their meetings; its chairs will be representatives of the Canadian government and of the Commission.²¹

The Joint Committee has a considerably broad mandate, within the scope of which it “shall” take decisions, when the agreement so provides, and may adopt recommendations.²² That mandate includes: the duty to consider “*any matter of interest* related to an *area covered by [CETA]*”; the possibility to “study the development of trade between the Parties and consider ways to further enhance trade relations between the Parties”; the

global (AECG – en anglais CETA: Comprehensive Economic and Trade Agreement) entre l’Union européenne et le Canada – Questions & réponses, 28 January 2015, www.tresor.economie.gouv.fr, this may change by a decision of the Joint Committee, which, in addition to delegation, has the power to “change or undertake the tasks assigned to a specialised committee” – Art. 26.1, para. 5, let. g), CETA).

¹⁷ Respectively, Art. 5.14, para. 2, let. d); Arts 8.10, para. 3, 8.28, para. 88, and 8.31, para. 3; Arts 13.18, para. 2, 13.18, para. 3, let. c), and 13.21, para. 3, (among other norms in this last provision); Art. 20.22, para. 1, all CETA.

¹⁸ *Ibid.*, Art. 26.5, para. 2, let. c).

¹⁹ *Ibid.*, Art. 26.1, para. 1.

²⁰ *Ibid.*, Art. 26.2, para. 5.

²¹ *Ibid.*, Art. 21.6, para. 3.

²² *Ibid.*, Arts 26.1, para. 4, let. e), and 26.3, paras 1 and 2.

interpretation of CETA provisions, which has binding effects to the tribunals that it establishes; the ability to “make recommendations suitable for promoting the expansion of trade and investment as envisaged in [the agreement]”, and to take on any “other action in the exercise of its functions as decided by the Parties”.²³ While the functions of the specialised committees vary (they are specified in their respective chapters), they work under the supervision of the Joint Committee and are subject to reporting obligations.²⁴ There are no provisions regarding the accountability of the Joint Committee, which one assumes is subject only to the domestic constitutional rules applicable to the representatives of each Party.

The extensive powers that CETA bodies are given – as exemplified in the observations above – beg an analysis of the legal status, authority and possible legal effects of the decisions that the Joint Committee, and, where applicable, the CETA specialised committees (possibly also under delegation from the Joint Committee) may adopt when making CETA the living agreement that it is intended to be. These will be decisions of international bodies set up by an international agreement to which the EU is party and are, as such, an integral part of EU law, in the terms analysed next.

III. DECISIONS OF INTERNATIONAL BODIES: A SOURCE OF EU LAW

In the late 1980s and early 1990s, the CJEU had the opportunity to clarify the legal status of decisions of international bodies in EU law.²⁵ Since then, established case law determines that, if those decisions are directly connected to an international agreement which is part of EU law, they are – as much as the agreements from which they emanate – an integral part of the EU legal system.²⁶ This norm was first formulated with regard to binding decisions of Association Councils acting under Association Agreements of the EU (*S. Z. Sevince v. Staatssecretaris van Justitie*), quite a distant reality from the world of international standards.²⁷ Nevertheless, the CJEU extended this same norm to decisions of other international bodies set up under international agreements concluded by the EU with third countries.

²³ *Ibid.*, Arts 26.1, para. 4, let. f), and 26.1, para. 5, let. d), e), f) and i) (emphasis added).

²⁴ *Ibid.*, Art. 26.1, para. 4, let. b). For the functions of the regulatory cooperation forum, see Art. 21.6, para. 2. In fact, the only specification regarding accountability of the Regulatory Cooperation Forum is its duty to report to the Joint Committee (Art. 21.6, para. 4, let. c)).

²⁵ This part adapts and develops the analysis in J. MENDES, *EU Law and Global Regulatory Regimes: Hollowing Out Procedural Standards?*, in *International Journal of Constitutional Law*, 2012, pp. 992-995.

²⁶ Court of Justice: judgment of 14 November 1989, case 30/88, *Greece v. Commission*, para. 13; judgment of 20 September 1990, case 192/89, *S. Z. Sevince v. Staatssecretaris van Justitie*, paras 8-9; judgment of 21 January 1993, case C-188/91, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, para. 17.

²⁷ In the case of *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., a Turkish national challenged the refusal of the Dutch State Secretary of Justice to grant him a residence permit on the grounds that such refusal violated a decision of the Association Council acting under the Association Agreement with Turkey.

In *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, the CJEU assessed the status in the EU legal order of a recommendation adopted by a Joint Committee under a multilateral agreement concluded by the then European Economic Community (EEC). The Joint Committee had been entrusted with the implementation of this agreement. The recommendation defined rules concerning the sealing of goods in transit between the parties to the Convention. The German authorities had applied that recommendation in a decision that Shell contested in a national court, questioning whether the recommendation was part of the EU legal order. The CJEU held that non-binding decisions stemming from the application of international agreements that form an integral part of the EU legal system are also part of EU law.²⁸ As a result, even if those decisions do not confer enforceable rights upon individuals, national courts “are nevertheless obliged to take them into consideration in order to resolve disputes submitted to them, especially when [...] they are of relevance in interpreting the provisions” of those agreements.²⁹

While the legal status of decisions of international bodies in EU law has remained relatively under-developed both in case law and in academic discussion,³⁰ *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* confirms that this layer of international post-treaty regulation is part of EU law irrespective of the binding character of the decisions. The justification for this incorporation reveals also (in part) the reasons that, according to the Court, ground the authority of those decisions. In the CJEU’s analysis, there is a direct link between the decision and the respective agreement (“*unmittelbaren Zusammenhang*” in the original wording of the CJEU in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*): the decision emanates from a body established under an agreement concluded by the EU, and its function is the implementation of that agreement.³¹ AG Van Gerven, relying on previous CJEU judgments, underlined that “the act is placed ‘within the institutional framework’ of the agreement and ‘gives effect to it’” (i.e. to its objectives) – these are crucial factors to determine a “close connection” (“*nauwe samen-*

²⁸ *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 17.

²⁹ *Ibid.*, para. 18.

³⁰ By contrast to the large literature on the effects of international agreements in EU law, there are relatively few accounts of the effects of international decisions: see B. MARTENCZUK, *Decisions of Bodies Established by International Agreements and the Community Legal Order*, in V. KRONENBERGER (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, The Hague: TMC Asser Press, 2001, p. 141 (noting too the marginal attention given to this topic); N. LAVRANOS, *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States*, Groningen: Europa Law Publishing, 2004, ch. 3; P.J. KUIJPER, *Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal rules in European Community Law*, in J. WOUTERS, A. NOLLKAEMPER, E. DE WET (eds), *The Europeanisation of International Law*, The Hague: TMC Asser Press, 2008, pp. 96-102; R.A. WESSEL, S. BLOCKMANS, *The legal status and influence of decisions of international organisations and other bodies in the European Union*, in P. EECKHOUT, M. LOPEZ-ESCUDERO (eds), *The European Union’s external action in times of crisis*, cit., pp. 223-248; focusing on procedural matters, see J. MENDES, *EU Law and Global Regulatory Regimes*, cit. On the case law, see section IV below.

³¹ *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 17.

hang") between the agreement and the decision.³² By signing the agreement, the EU agreed to entrust decision-making powers to bodies created by the agreement with the purpose of giving effect to the latter.³³ The consent of the EU (and of the other contracting parties) when concluding the international agreement thus grounds the authority of the decisions emanating from the bodies implementing that agreement. According to this reasoning, the binding or non-binding nature of the decision is irrelevant in determining whether or not it is a part of the EU legal order.³⁴

Consent is a formal justification. This is particularly evident regarding decisions of international bodies set up by multilateral agreements, as was the case in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*. In these cases, the EU participates in the decision-making process in a different position from the one it has in the context of bilateral agreements and the international decisions by which it is bound may be adopted against the will of the EU.³⁵ This is quite a different reality from decision-making within Association Councils that implement Association Agreements, where the CJEU first established the correspondence between the legal status and effects of international decisions in EU law and that of the underlying agreement. Here, the EU is virtually "the master of the preparation of decisions to be taken".³⁶ In the case of CETA, the fact that its Joint Committee adopts decisions and recommendations by mutual consent may bridge the gap between the original consent – given at the time of the conclusion of the agreement – and the reality of decision-making of a body whose function is primarily to "further [the] general aims [of the agreement]", *inter alia* by adapting it to evolving realities.³⁷ But even the decisions of bodies implementing bilateral agreements may be hard to pin-down to the consent of the Parties to the agreement. Institutional practice and the need to react to shifting realities may substantively bring decision-making away from the original intentions of the drafters of the agreement. Formal as it may be, the case law is clear: by concluding the agreement, the EU consented to the mandate of the bodies thereby estab-

³² Opinion of AG Van Gerven delivered on 15 October 1992, case C-188/91, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, para. 10.

³³ See also P. GILSDORF, *Les Organes Institués par des Accords Communautaires: Effets Juridiques de Leurs Décisions*, in *Revue du Marché Commun*, 1992, p. 332.

³⁴ Opinion of AG Van Gerven, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 10.

³⁵ The agreement at stake in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* was the Convention on a Common Transit Procedure, concluded on 20 May 1987 between the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden, the Swiss Confederation and the European Economic Community. See also P. GILSDORF, *Les Organes Institués par des Accords Communautaires*, cit., p. 332.

³⁶ P.J. KUIJPER, *Customary International Law*, cit., p. 101.

³⁷ Arts 26.1, para. 4, let. a), and 26.3, para. 3, CETA. Of the specialised committees, CETA only specifies mutual consent for the adoption of decisions of the Financial Services Committee (Art. 13.18, para. 2). The other committees may define in their rules of procedure another decision-making rule, except for their agenda and meeting schedule, for which CETA determines adoption by mutual consent (Art. 26.2, para. 4).

lished and it is, as a result, bound by such decisions. The section below will show that this is only one among other justifications that the Court has given for the authority of international decision in the EU and that, arguably, reinforce this authority.

IV. THE EXTERNAL ADMINISTRATIVE LAYER OF EU LAW

Despite the status of international decisions as a source of EU law, most judgments of the CJEU where such decisions feature pertain to the validity or interpretation of EU legal acts that incorporate them and not to the decisions themselves.³⁸ Their formal legal status – as an integral part of EU law – appears to have been overshadowed by the multiple instances in which “dynamic references” incorporate them into EU legislation.³⁹ Their legal status notwithstanding, this incorporation appears to be the main way by which international decisions produce substantive legal effects.

EU legislation may include explicit references to those decisions; irrespective of a legislative requirement, international decisions may be incorporated into EU non-legislative acts; or they may be given legal effects by the regulatory action of EU agencies that might follow those decisions or give them a presumption of compliance with EU rules.⁴⁰ By virtue of their incorporation into EU law, international decisions acquire a legal force they did not have at the time of their adoption. The case law analysed below will illustrate their possible substantive effects in EU law. As mentioned above, while existing case law refers to decisions of international bodies established under international agreements different from CETA, the substantive effects mapped here may, in the future, be attributed also to CETA bodies’ decisions, for the reasons that will be explained below.

³⁸ See further N. LAVRANOS, *Decisions of international organizations*, cit., pp. 56-57. *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., was a case where the Court ruled on the decision itself and it triggered a long litigation on Decision 1/80 of the Association Council established under the EEC-Turkey Association Agreement. In Court of Justice, judgment of 7 April 2016, case C-556/14 P, *Holcim (Romania) SA v. Commission*, the General Court did not appear to exclude the possibility to rule on the decision at stake, or at least that “it could be relied on before the Court” (para. 131; this point is arguably not excluded by the Court of Justice’s observation on appeal, where it underlined that the General Court had rejected the applicant’s pleas on other grounds).

³⁹ Opinion of AG Cruz Villalón delivered on 29 April 2014, case C-399/12, *Federal Republic of Germany v. Council*, para. 85.

⁴⁰ The case law analysed below provides examples of the first two instances. An example of the third is the international guidelines on the quality, safety and efficacy of pharmaceutical products used by the European Medicines Agency to assess the applications for the authorization of medicines and that the agency considers to reflect “the best or most appropriate way to fulfil an obligation laid down in the [Union] pharmaceutical legislation” (European Medicines Agency (EMA), *Procedure for European Union Guidelines and Related Documents within the Pharmaceutical Legislative Framework*, London, 18 March 2009, Doc.Ref. EMEA/P/24143/2004 REV. 1 corr (hereinafter, “EMA Procedural Guidelines”), pp. 4 and 5, paras 2.1 and 2.2.

IV.1. INTERPRETATIVE EFFECTS: VALIDATING EU LAW

International decisions may be a source of interpretation of an EU legal act. In *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, the Court made it clear that national courts should use international decisions in interpreting the provisions of the “parent” agreement.⁴¹ That they can also have interpretative effects regarding EU legislation was shown, more recently, in the *Philip Morris Brands SARL et al.* judgment, where the Court was called upon to assess the validity of the Revision of the Tobacco Products Directive (hereinafter, Tobacco Products Directive).⁴² Philip Morris and British American Tobacco challenged, on the grounds of incorrect use of Art. 114 TFEU (amongst other pleas), the legality of the Tobacco Products Directive’s prohibition on placing onto the market tobacco products with a characterising flavour. The guidelines adopted by the Conference of the Parties to the World Health Organisation Framework Convention on Tobacco Control (FCTC) – to which the Tobacco Products Directive refers – were an important element of the applicable legal framework and served as an anchor to the CJEU’s judgment that the Tobacco Products Directive was valid.⁴³ Those guidelines recommend the removal or restriction of the use of ingredients that increase the palatability of tobacco, without distinction. This was the CJEU’s argument in holding that the legislator “could properly” subject all characterising flavours to the same rules.⁴⁴

Having established the reasonableness of the norm, the CJEU still needed to determine whether the legislator had made proper use of Art. 114 TFEU. For this purpose, divergences between the regulatory systems of Member States on the regulation of those flavours either need to exist or may be envisaged. Disparities did exist at the time of the adoption of the Tobacco Products Directive, the CJEU found on the basis of its recitals. The CJEU went further: absent EU harmonisation, future national measures would lead to more disparate rules. The argument was the existence of international guidelines. Since these recommend the prohibition or restriction of the use of characterising flavours, thereby affording a “broad discretion” to the Contracting Parties, “it is foreseeable, with a sufficient degree of probability, that in the absence of measures at EU level,

⁴¹ *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 18. See also Court of Justice, judgment of 19 November 1998, case C-162/97, *Criminal proceedings against Gunnar Nilsson Per Olov Hagelgren and Solweig Arrborn*, para. 49.

⁴² Court of Justice, judgment of 4 May 2016, case C-547/14, *Philip Morris Brands SARL et al.* For the Directive see Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2011/37/EC.

⁴³ See Art. 1 of Directive 2014/40/EU.

⁴⁴ *Philip Morris Brands SARL et al.*, cit., paras 108-110 and 114-115.

the relevant national rules could develop in divergent ways".⁴⁵ The CJEU could then conclude that the object of the marketing prohibition was – somewhat paradoxically (if one relies only on internal market considerations) – the facilitation of the smooth functioning of the internal market.⁴⁶

In this two-fold way, the guidelines of the Conference of the Parties became, through interpretation of the Tobacco Products Directive, a legal argument to support the validity of an EU harmonisation measure. They enabled the CJEU to ascertain the reasonableness of the legislator's choice to prohibit the use of all characterising flavours – since such a general prohibition was set out in the recommendations; and, as part of the applicable legal framework, they allowed the CJEU to establish the likelihood that future national measures would create disparities in the internal market. Irrespective of the soundness of the EU legislator's choice to prohibit those ingredients, it is noteworthy that – as an interpretative tool – those guidelines were indirectly invoked against the parties that challenged the validity of the Tobacco Products Directive.

IV.2. AUTHORITATIVE INTERNATIONAL DECISIONS

The guidelines at stake are not binding, as the Court of Justice recalled. Nevertheless, four arguments led the CJEU to conclude that the FCTC guidelines are, nevertheless, authoritative and "intended to have a decisive influence" on the Tobacco Products Directive's rules.⁴⁷ First, the FCTC specifies that the guidelines of the Conference of the Parties are meant "to assist the Contracting Parties in implementing the binding provisions of that convention".⁴⁸ The authority of the guidelines therefore stems from the regulatory powers conferred upon the Conference of the Parties and from the purpose of those powers. In this case, one could see in this argument a concretisation of the consent rationale, as it results from *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*. But this is not the only justification for their authority. The Court's additional (second) argument was that the guidelines are based on the best available scientific evidence and on "the experience of the Parties to the FCTC".⁴⁹ Moreover, and thirdly, they have been adopted by consensus, including by the EU and by its Member States.⁵⁰ Finally,

⁴⁵ *Philip Morris Brands SARL et al.*, cit., paras 118-120 (emphasis added). The need to adapt EU law to the guidelines was also invoked in para. 99 to support the claim that disparities were likely to occur regarding the packaging and labelling of tobacco products.

⁴⁶ *Ibid.*, paras 116-117.

⁴⁷ *Ibid.*, para. 113.

⁴⁸ *Ibid.*, para. 111.

⁴⁹ *Ibid.*, para. 112.

⁵⁰ *Ibid.* Whether this feature will be present in other cases will largely depend on the respective constitutive agreements.

the EU legislature made an “express decision to take those recommendations into account” in the Tobacco Products Directive, as its recitals confirm.⁵¹

Although this reasoning was developed in the framework of a multilateral agreement, the same arguments could arguably also be invoked regarding future decisions (including recommendations) of CETA bodies. The type of international agreement at stake does not seem to be an obstacle to extend these arguments to decisions with analogous characteristics, beyond the case of *Philip Morris Brands SARL et al.* The same applies to the formal role of the EU in the decision-making processes of international bodies. In the *Federal Republic of Germany v. Council of the European Union* case the CJEU grounded the ability of non-binding decisions to produce legal effects (for the purposes of Art. 281, para. 9, TFEU) on some of the same arguments, although in that instance the EU was not a party to the underlying agreement.⁵² The Court grounded those decisions’ authority on their purpose, as established in the international agreement, combined with the competence this agreement attributed to *Federal Republic of Germany v. Council of the European Union*,⁵³ and on the fact that the EU legislator incorporated those recommendations in EU law.⁵⁴

Three of the four arguments the CJEU used in the *Philip Morris Brands SARL et al.* case would apply to decisions and recommendations of the CETA bodies: their mandate and the purpose of their decisions, i.e. achieving the objectives of the agreement; the fact that, at least judging from their composition, they should gather the relevant expertise; and their adoption by mutual consent. The latter is only required for decisions and recommendations of the Joint Committee and of the Financial Committee, but it is not excluded that specialised committees specify the same requirement in their rules of procedure.⁵⁵ The argument of expertise is stronger in the case of decisions of the specialised committees than in the case of acts of the Joint Committee, given the combined requirements that all competent authorities for each issue on the agenda be represented and that each issue be discussed “at the adequate level of expertise”.⁵⁶

Whether or not EU legislation will contain “dynamic references” to the acts of these bodies cannot, of course, be established at this point, but it is not an unlikely scenario given that those references are common in EU legislation and stem from the international obligations of the EU. While incorporation may be a strong basis to ascertain that

⁵¹ *Ibid.*, para. 113.

⁵² Court of Justice, judgment of 7 October 2014, case C-399/12, *Federal Republic of Germany v. Council of the European Union* [GC].

⁵³ In this case, one cannot read these arguments through the prism of consent, as the EU is not a party to the agreement (*Federal Republic of Germany v. Council of the European Union* [GC], cit., para. 52, see also para. 5; the Commission’s participation in the meetings of the International Organisation of Vine and Wine’s bodies cannot be considered a surrogate to consent of the parties).

⁵⁴ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 59, 60 and 61.

⁵⁵ See footnote 39.

⁵⁶ Art. 26.2, para. 5, CETA.

the substantive effects of international decisions were intended by the EU (including by its legislator), neither *Philip Morris Brands SARL et al.* nor *Federal Republic of Germany v. Council of the European Union* make it a necessary, or sole, condition of the authority of international decisions in EU law.

IV.3. A NEXT STEP FOR INTERPRETATIVE EFFECTS?

One of the reasons for attributing authority to international decisions – technical competence – was again invoked in a more recent judgment of the CJEU. The case regarded the validity of a Commission regulation provision that sets at 65 the age beyond which pilots of commercial aircrafts can no longer exercise this function; specifically, it concerned this norm's compatibility with the Charter prohibition of discrimination on grounds of age (Art. 21, para. 1, of the Charter of Fundamental Rights of the European Union). One of the questions at stake was whether this limitation on the prohibition of discrimination – intended to ensure air traffic safety – is necessary, under a proportionality test. The CJEU recalled that the EU institutions have broad discretion when setting a precise age limit beyond which one may presume the deterioration of physical capacities, because of the complex medical assessments and uncertainty involved. Nevertheless, the choices based on those assessments must be grounded on objective criteria and need to respect fundamental rights. This point was clearer in the Advocate General's opinion, which the Court followed.⁵⁷ With a view to determining whether this specific choice was based on objective criteria, AG Bobek resorted to the international standards of the International Civil Aviation Organisation (ICAO), to which both the enabling regulation and the Commission regulation referred in their recitals.

According to the Advocate General, international standards generally “may be considered to *form a crucial element* of such objective criteria”;⁵⁸ the standards specifically applicable to this case are “a valuable element in the assessment of proportionality” of the norm at stake.⁵⁹ Why? The reasoning is as follows:

“As they are based on *extensive professional debate and expertise*, they lay solid ground for the justification of the age limit, acting as *objective and reasonable references* for decision-makers. [...] They demonstrate the *consensus and good practice in a technical field* which is international by nature”.⁶⁰

⁵⁷ Court of Justice, judgment of 5 July 2017, case C-190/16, *WernerFries v. Lufthansa CityLine GmbH*, paras 59-63; Opinion of AG Bobek delivered on 21 March 2017, case C-190/16, *WernerFries v. Lufthansa City-Line GmbH*, paras 51-52.

⁵⁸ Opinion of AG Bobek, *WernerFries v. Lufthansa CityLine GmbH*, cit., para. 52 (emphasis added).

⁵⁹ *Ibid.*, para. 56 (emphasis added).

⁶⁰ *Ibid.*, para. 56 (emphasis added). See, too, judgment in *WernerFries v. Lufthansa CityLine GmbH*, cit., para. 63.

The CJEU followed this opinion, holding that international standards are an important element in assessing the objectivity – and, thereby, the necessity – of a choice of the EU institutions that restricts a fundamental right. The Court further decided (equally following the Advocate General's opinion) that the legislature was not required to make an individual examination of the physical and mental capabilities of each holder of a pilot's licence after the age beyond which it could objectively presume the deterioration of those capabilities. A general risk assessment embedded in international rules combined with progressive aged-based limitations – the legislature's choice in this case – could reasonably replace such an individual examination. This choice was “firmly rooted in the relevant international rules, which are themselves based on the current state of expertise in that field”.⁶¹

In one point, the Advocate General went farther than the CJEU in his assessment of the legal weight of international rules. Specifically regarding the choice to set the age limit at 65, he considered that “to call such a standard into question would require rather a robust case supported by strong evidence, which has not been presented in this case”.⁶² In this line of reasoning, international rules would have an additional substantive effect: they would raise the standard of proof to contest the validity of an EU law provision which incorporates them. What makes these standards authoritative – their technical quality that reveals consensus and good practice in a technical field – would give them the ability to set evidentiary standards. While the CJEU has not explicitly endorsed this consequence, it has hitherto shown a virtually unconditional reliance on the technical quality of international standards.⁶³ Their presumed technical quality – common to both the *Werner Fries v. Lufthansa CityLine GmbH* and the *Philip Morris Brands SARL et al.* judgments – reinforces the substantive effects that the case law gradually spells out. Even if they do not explicitly raise the standard of proof in validity cases, at least the EU norms that incorporate those standards appear to be impervious to substantive legality challenges, insofar as technical and scientific assessments are concerned.

IV.4. VALIDATING, BUT NOT INVALIDATING EU LAW

While international decisions may, as interpretative tools, support the validity of EU legislative and non-legislative acts – enabling the Court to establish the correct use of a legal basis, the reasonableness of the legislator's choice and the necessity of a restriction

⁶¹ *WernerFries v. Lufthansa CityLine GmbH*, cit., para. 65 and Opinion of AG Bobek, *WernerFries v. Lufthansa CityLine GmbH*, cit., paras 60-61.

⁶² Opinion of AG Bobek, *WernerFries v. Lufthansa CityLine GmbH*, cit., para. 58.

⁶³ The grounds to ascertain that quality may be feeble. In *Philip Morris Brands SARL et al.*, cit., para. 112, the Court established that the recommendations were based on the best available scientific evidence and expertise of the Parties on the basis of the text of the guidelines themselves. In doing so, it arguably took the text at face value (see the guidelines to which the Court referred: World Health Organization, *Partial Guidelines for Implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control*, in *FCTC*, 2012, www.who.int).

upon a fundamental right – they do not seem to ground a claim of invalidity of an EU measure. This was at least the case in *Holcim (Romania) SA v. Commission*.⁶⁴ At stake was the legality of the Commission's refusal to disclose, for confidentiality reasons, the localisation of greenhouse gas emission allowances allegedly stolen from a Romanian company (Holcim). The applicant invoked, amongst other pleas, the illegality of the applicable Commission's regulation, arguing that it was incompatible with the annex of a decision of the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), acting as the meeting of the parties to the Kyoto Protocol.⁶⁵ The General Court examined the decision and rejected the applicant's claim that the information listed therein should be characterised as non-confidential.⁶⁶

The General Court did not exclude *a priori* the possibility that the provision of EU law at stake would be considered invalid for breach of an international decision. On the contrary, it engaged in the merits of the applicant's argument and, in doing so, interpreted the relevant provisions of the international decision. The fact that the applicable EU legislation, including the Commission regulation at stake, implements the Kyoto Protocol and contains various references to decisions adopted pursuant to the UNFCCC or the Kyoto Protocol was recalled by the CJEU when establishing the background to the dispute, but this was not a relevant consideration either in the applicant's pleas or in the CJEU's reasoning.⁶⁷

Unlike the cases examined above, there was a reference (albeit brief) to the legal status of the decision in the EU legal order. Replying to the applicant's plea of illegality, the Commission contended that the annex of the international decision is not part of the EU legal order because "it has not been approved by the Union".⁶⁸ It appears that the Commission tried to contradict the *S. Z. Sevince v. Staatssecretaris van Justitie* precedent (extended in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* to multilateral agreements), suggesting that a prior Union approval is required before decisions adopted by international bodies (established by international agreements of which the Union is party) become an integral part of EU law.⁶⁹ The General Court did not react directly to this claim, although it appeared to contradict it: "even if [the annex to the international decision] forms part of the [EU] legal order and may be relied on before the Court", the applicant's plea was rejected on other grounds. In the Court's view, the in-

⁶⁴ *Holcim (Romania) SA v. Commission*, cit.

⁶⁵ General Assembly, United Nations Framework Convention on Climate Change of 20 January 1994, A/RES/48/189.

⁶⁶ *Holcim (Romania) SA v. Commission*, cit., paras 132-135.

⁶⁷ *Ibid.*, paras 6-7.

⁶⁸ *Ibid.*, para. 130.

⁶⁹ This cannot be an indirect reference to Art. 218, para. 9, TFEU (on this norm, see *infra*, section V), since nothing in this provision requires the approval of the international decision by the Union, only the definition by the Council of the position to be negotiated on the Union's behalf. Invoking such a dualistic system with regard to international decisions, as suggested by the Commission, see B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., p. 162.

ternational decision at stake did not apply to EU emission allowances, but to Kyoto units. While related (they both express a certain quantity of carbon dioxide equivalent for transaction purposes), the General Court held that they are different realities (they have a different nature, purpose and addressees) and, therefore, the respective confidentiality rules are equally distinct. For this reason – but not because of the inability of an international decision to ground the invalidity of an EU measure – the General Court concluded that the applicant could not argue that the EU regulation infringed the international decision in this case.⁷⁰

The ambiguity of both the General Court's statement regarding the legal status of the decision in EU law and of the Commission's argument that incorporation required an EU act of approval persisted in the judgment on appeal.⁷¹ The CJEU said nothing directly regarding the status of the international decision in EU law (more precisely, of its annex) – it framed the question as a matter of establishing what the General Court had or had not accepted. The Court of Justice held that the General Court “did not accept” that the annex to the international decision is part of the EU legal order (rebutting the applicant's claim), but rather rejected its plea on other grounds.⁷² Following *S. Z. Sevince v. Staatssecretaris van Justitie* and *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* (which neither Court explicitly mentions in this case), the decision at stake is undoubtedly part of EU law, since the European Union has approved the Kyoto Protocol (itself then an integral part of the EU legal order since its entry into force).⁷³ The CJEU does not seem to deny the applicability of *S. Z. Sevince v. Staatssecretaris van Justitie* and *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* to this case. As it simply pointed out that the General Court decided the case on other grounds, it – again – did not entertain the question of whether the international decision could have been a ground to establish the illegality of the Commission's refusal.⁷⁴ Even if the Commission's plea at first instance could have been an attempt to revise the *S. Z. Sevince v. Staatssecretaris van Justitie* and *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* case law (or at least to limit its scope of application) – seeking the recognition of a duality system in which an international decision is only incorporated into EU law if previ-

⁷⁰ *Holcim (Romania) SA v. Commission*, cit., paras 9 and 138-146.

⁷¹ The ambiguity is perhaps more evident in the French version of the text: “[à] supposer même que l'annexe à la décision 13/CMP.1 fasse partie de l'ordre juridique de l'Union et soit invocable devant le Tribunal” (*Holcim (Romania) SA v. Commission*, cit., para. 131).

⁷² *Holcim (Romania) SA v. Commission*, cit., para. 61. See *supra*, section II.

⁷³ Court of Justice, judgment of 21 December 2011, case C-366/10, *Air Transport Association of America et al. v. Secretary of State for Energy and Climate Change*, para. 73. In this case, the Court also held that the nature and broad logic of the Kyoto Protocol prevent it from being relied upon in the context of a preliminary reference procedure to contest the validity of an EU act (paras 73-78). The Court of Justice invoked the procedures for the implementation of the Kyoto Protocol, as established therein, and the flexibility awarded to the Parties on the implementation of their commitments to conclude that “the parties to the protocol may comply with their obligations in the manner and at the speed upon which they agree”.

⁷⁴ I am grateful to Marise Cremona for a discussion on this point.

ously approved by the EU – this was clearly not the route either CJEU took in *Holcim (Romania) SA v. Commission*.

It is by returning to *S. Z. Sevince v. Staatssecretaris van Justitie* and *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* (the latter insofar as it extends the former rule to multi-lateral agreements) that one may indicate the conditions under which an international decision that is part of EU law could serve as a basis to invalidate EU law. According to established case law regarding international agreements, the validity of an act of the EU may be affected if it is incompatible with international norms, as long as the following conditions are fulfilled: the EU is bound by those rules; the nature and the broad logic of the agreement do not preclude direct effect; and the provisions relied upon are unconditional and sufficiently precise.⁷⁵ Following *S. Z. Sevince v. Staatssecretaris van Justitie*, arguably the same conditions could be extended to provisions of international decisions.⁷⁶ Once it is established that the international decision binds the EU, the nature and purpose of the agreement – against which the decisions adopted for the agreement's implementation must be assessed – and the scheme of the decisions that implement it will determine whether direct effect is precluded. The ability of individuals to base claims regarding the validity of EU legal acts on provisions of international decisions binding on the EU will depend on this assessment (and on whether those provisions are unconditional and sufficiently precise).⁷⁷

The agreement and the implementing decision are different legal acts. The exclusion of direct effect of provisions of the agreement may not necessarily imply the exclusion of direct effect of provisions of the decisions of its bodies. In fact, the Court has held that the nature and structure of an agreement whose provisions do not have direct effect (inter alia because their legal effects presuppose the adoption of implementation decisions by bodies set up by the agreement) may confirm the direct effect of

⁷⁵ See, *inter alia*, Court of Justice: judgment of 26 October 1982, case 104/81, *Hauptzollamt Mainz v. C.A. Kupfberg & Cie KG a.A.*, paras 22 and 23; judgment of 3 June 2008, case C-308/06, *The Queen, on the application of International Association of Independent Tankers Owners (Intertanko) et al. v. Secretary of State for Transport*, paras 43-45 and *Air Transport Association of America et al. v. Secretary of State for Energy and Climate Change*, cit., paras 51-54. On these conditions, see, e.g., P. ECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, pp. 331-355.

⁷⁶ *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., paras 14-15. It is noteworthy that the particularity of decisions of Association Councils in the context of Association Agreements (see P.J. KUIJPER, *Customary International Law*, cit.) has not prevented the transposition of that case law to a very different context (in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit.). The specificity of the *S. Z. Sevince v. Staatssecretaris van Justitie* case may raise doubts regarding the ability to transpose that case law to other cases, as the Commission appeared to have hinted at in *Holcim (Romania) SA v. Commission*. However, to the author's knowledge, no subsequent case has restricted the scope of application of the *S. Z. Sevince v. Staatssecretaris van Justitie* rule.

⁷⁷ This reasoning follows the Opinion of AG Darmon delivered on 15 May 1990, case C-192/89, *S. Z. Sevince v. Staatssecretaris van Justitie*, paras 12, 19 and 33.

provisions of the implementing decisions.⁷⁸ Yet, this case law referred to agreements that did not contain a clause excluding direct effect. Only in the absence of such clauses does the CJEU engage in the interpretation of the provisions of an international agreement to determine whether they can have direct effect.⁷⁹ The question then is whether such a clause of an international agreement may also preclude the direct effect of the decisions that implement it. In CETA, the choice of the Parties concerning direct effect could hardly be clearer: “nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties”.⁸⁰ The sweeping terms of this clause may defeat an argument that the scheme of the decision may enable a conclusion of direct effect when the provisions of agreement itself cannot have that effect, if, as defended by AG Darmon in *S. Z. Sevince v. Staatssecretaris van Justitie*, the purpose and nature of these decisions should be assessed against the underlying agreement.⁸¹

Nevertheless, the preclusion of a right of judicial action against the legal acts of the Parties – that could ground the invalidity of EU law for breaching international decisions – does not prevent the production of substantive legal effects via interpretation of EU law provisions, as the examples examined above show.⁸² Since those decisions are binding on the EU, the EU Courts should interpret EU law in conformity with those decisions, in line with the EU’s international law obligations.⁸³

⁷⁸ Court of Justice, judgment of 30 September 1987, *Demirel and Stadt Schwäbisch Gmünd*, paras 21 to 24 and *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., paras 19 and 20. I am grateful to Marise Cremona for pointing this out.

⁷⁹ *Hauptzollamt Mainz v C.A. Kupfberg & Cie KG a.A.*, cit., para. 17.

⁸⁰ See too B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., p. 160. Art. 30.6, para. 1, CETA. Para. 2 adds: “A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement”. For a strong normative repudiation of clauses excluding direct effect in trade agreements, see E.-U. PETERSMANN, *Transformative Transatlantic Free Trade Agreements*, cit.

⁸¹ Opinion of AG Darmon, *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., para. 12.

⁸² Sub-sections IV.1. and IV.3. See also *The Queen, on the application of International Association of Independent Tankers Owners (Intertanko) et al. v. Secretary of State for Transport*, cit., para. 52, referring to an international agreement.

⁸³ See, e.g. Court of Justice, judgment of 18 March 2014, case C-363/12, *Z v. A Government Department and The Board of management of a community School* [GC], para. 75, albeit referring to consistent interpretation of EU acts with international agreements. Arguably, the principle of consistent interpretation applies irrespective of whether the EU act being interpreted was adopted to implement the international decision (P. ECKHOUT, *EU External Relations Law*, cit., pp. 356-357).

V. STRONG IN SUBSTANCE, WEAK IN PROCEDURE

The CJEU have not merely acknowledged the ability of decisions of international bodies to have a “direct impact on the European Union’s *acquis*”,⁸⁴ an impact that is intended and effected either through legislative incorporation or via the consent given to international agreements setting up decision-making bodies. The CJEU have furthermore justified their authority and have reinforced it by spelling out the substantive effects that those decisions may produce. Nevertheless, they remain oblivious to the procedural legitimacy of such decisions. This is not to say that it should be the role of the CJEU to filter the reception of international decisions according to procedural legitimacy standards accepted in the EU. The constitutional grounds exist.⁸⁵ Yet, there are also significant hurdles to the CJEU’s jurisdiction to review international decisions. They can interpret them to avoid divergent interpretations that could hinder the uniform application of EU law.⁸⁶ But these are not legal acts of the “institutions, bodies, offices or agencies of the Union” over whose validity the Court could rule.⁸⁷ For the same reason, reviewing their compliance with the procedures established in the underlying agreement is also, in principle, excluded. One could argue that if a decision of an international body is part of EU law because of its direct connection to the agreement, its validity depends on two conditions: the body that adopted it has the required powers under that agreement

⁸⁴ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 63-64.

⁸⁵ J. MENDES, *EU Law and Global Regulatory Regimes*, cit., pp. 1016-1017.

⁸⁶ *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., paras 10-11; *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 19 (where, however there is no reference to the functional or other justification of jurisdiction); see also *Holcim (Romania) SA v. Commission*, cit., paras 132-137 and 144, simply interpreting the provisions of an international decision.

⁸⁷ General Court, judgment of 22 July 2005, case T-376/04, *Polyelectrolyte Producers Group v. Council of the European Union and Commission of the European Communities*, para. 31. In this case, the General Court considered (in a judgment upheld on appeal) that the case law according to which the Court may rule on the validity of the internal act whereby the EU concludes an international agreement (not on the validity of the agreement itself – Court of Justice, judgment of 9 August 1994, case C-327/91, *French Republic v. Commission of the European Communities*, paras 13-17) could not apply in the same terms to an act establishing the EU position regarding a decision of an international body (*ibid.*, para. 35; see too Court of Justice, judgment of 8 December 2006, case C-368/05, *Polyelectrolyte Producers Group v. Council of the European Union and Commission of the European Communities*, paras 50 and 55). In the case of international decisions, unlike international agreements, there is no EU act “concluding” an external act, on whose validity the Court could rule (I am grateful to Marise Cremona for a discussion on this issue). The act that may be subject to a validity challenge is the prior Council decision establishing the position of the EU (Art. 218, para. 9, TFEU), the equivalent of which in *Polyelectrolyte Producers Group* the Court held was lacking the requisite direct and individual concern. In the case of legislative incorporation, the EU act that applies the international decision can be challenged. It should be noted that an act of incorporation is not a necessary condition of the validity (and authority) of international decisions in EU law (see sub-section IV.2.; for a contrary view, see B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., pp. 158-162, assuming that, contrary to institutional practice, a decision pursuant Art. 218, para. 9, TFEU should precede incorporation).

and the decision complied with the procedures established therein.⁸⁸ The former condition is covered by the *S. Z. Sevince v. Staatssecretaris van Justitie* case law. Assessing the latter (i.e. whether the decision complies with the procedures defined in the agreement) seems to be outside the remit of the Court, insofar as it would amount to reviewing acts of non-EU bodies, even if, *de iure condendo*, this should be a condition defining the status of international decisions in EU law.⁸⁹ Although the CJEU has on more than one occasion adopted an extensive interpretation of these Treaty requirements of a reviewable act – and, therefore, of its jurisdiction – to the author's knowledge, it has never ruled directly on the validity of an international decision.⁹⁰

At the same time, there is an important procedural disconnect. Regardless of the substantive effects that these decisions end up acquiring by effect of their reception into EU law, their procedures are fundamentally a matter of the regulatory regimes established under international law.⁹¹ These may suit the nature those decisions have at the international level (often, non-binding guidance reflecting or defining regulatory best practices in technical fields, adopted at the discretion of regulators meeting in international fora with few procedural constraints). Nevertheless, they fall short of procedural rules that would be warranted to ensure the impartiality, transparency, the protection

⁸⁸ B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., p. 157.

⁸⁹ The views of those authors that uphold the ability of the CJEU to rule on the validity of international decisions are based on defensible normative views, but, arguably, do not reflect the current status of EU law (see P. EECKHOUT, *EU External Relations Law*, cit., pp. 291, 275-276; similarly, K. LENAERTS, D. ARTS, I. MASELIS, *Procedural Law of the European Union*, London: Sweet & Maxwell, 2006, p. 354, cautiously setting out "an impression" that the Court also has jurisdiction to review validity matters). See, however, Opinion of AG Van Gerven, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., paras 11 and 17, stating that the Court has jurisdiction to give preliminary rulings on the interpretation and validity of international decisions. Admittedly, in *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., the Court linked its jurisdiction to give preliminary rulings over international decisions to its jurisdiction to give preliminary rulings over international agreements, without distinguishing questions of interpretation from questions of validity, in line with Art. 267, para. 1, let. b), TFEU (see paras 10-11). Nevertheless, at stake was a matter of interpretation (in the judgment in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., it is clearer that the jurisdiction is restricted to matters of interpretation – paras 18-19; see too Court of Justice, judgment of 27 October 2016, case C-613/14, *James Elliott Construction Limited v. Irish Asphalt Limited*, paras 34-35, justifying jurisdiction of the CJEU to interpret acts of private standardisation bodies with the need to avoid divergent interpretations in the Member States, in line with *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., para. 11).

⁹⁰ In Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [GC], the Court stressed that it was reviewing the EU act implementing the UN Security Council measure, not the measure itself (paras 286-287) and asserted that the jurisdiction over international agreements, with a view to preserving the constitutional principles of the EU, covers the EU implementing act but not the agreement itself (para. 285). It is well known that UN Security Council measures are not decisions adopted by an international body set up by an international agreement. Yet, arguably, the same reasoning would apply to these cases.

⁹¹ J. MENDES: *EU Law and Global Regulatory Regimes*, cit.; *Rule of Law and Participation*, cit.

of rights and legally protected interests of decisions that “decisively [influence]” the content of EU law and, even possibly, the standards of proof in judicial disputes involving individuals (even if only indirectly, given their presumed technical quality).⁹²

The procedural weakness of the rules guiding the adoption of decisions of international bodies will be illustrated here by an analysis of the relevant CETA provisions. As stated, the decisions and recommendations of Joint Committee or of its specialised committees will be international decisions that are part of EU law and may have substantive effects analogous to those examined above. Following *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* and *Federal Republic of Germany v. Council of the European Union*, the non-binding nature of its recommendations does not prevent them from producing legal effects in a way similar to binding decisions. CETA contains no provision regarding the procedure for the adoption of decisions or recommendations by its Joint Committee (the Committee itself will likely define them in its rules of procedure).⁹³ It merely specifies that decisions and recommendations are adopted by “mutual consent”,⁹⁴ a quality that will contribute to reinforcing their authority in EU law, as the cases of *Philip Morris Brands SARL et al.* and *WernerFries v. Lufthansa CityLine GmbH* illustrated. In addition, the agreement is cautious regarding the protection of confidential information (i.e. information considered as such by either Party) that the Parties may submit to the Joint Committee (or to any of the other committees).⁹⁵ These are the only specifications regarding decision-making by the Joint Committee.

Insofar as the specialised committees may have the power to adopt decisions and recommendations, they are bound by the rules of the chapters that establish them and by the rules of procedure that they may set for themselves.⁹⁶ A cursory look at the specialised committees indicates that either no binding procedural rules structure their decision-making or there are only a few specifications regarding, for instance, the regularity of their meetings.⁹⁷ They may establish working groups, whose procedural rules, one assumes, might be specified in rules of procedure. The picture that emerges is clearly one where a concern for procedural constraints over the powers of those committees – those that could ground objective controls or facilitate the protection of rights and legal interests – is virtually non-existent. In the case of the Regulatory Cooperation Forum (the body that, among other tasks, may examine opportunities for harmonisation and

⁹² *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 63-64; Opinion AG Bobek, *Werner Fries v. Lufthansa CityLine GmbH*, cit., examined above.

⁹³ See Chapter 26 on “Administrative and Institutional Provisions” and Art. 26.1, para. 2, and para. 4, let. d), CETA.

⁹⁴ *Ibid.*, Art. 26.3, para. 3.

⁹⁵ *Ibid.*, Art. 26.4.

⁹⁶ As noted above, they may also acquire by delegation of the Joint Committee the power to adopt decisions.

⁹⁷ Art. 5.14, paras 4-9, CETA.

mutual recognition), the only procedural specification regarding its activities is its ability to consult private entities:

“In order to gain non-governmental perspectives on matters that relate to the implementation of this Chapter, each Party or the Parties may consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organisations, businesses, consumer and other organisations. These consultations may be conducted by any means the Party or Parties deem appropriate”.⁹⁸

Consultations have a very specific and explicit function: they are a source through which the Regulatory Cooperation Forum may identify “regulatory policy issues of mutual interest” that ground its activities.⁹⁹ Consultation in this form is not a guarantee that ensures the due and transparent consideration of the various legally protected interests that the activities of the Regulatory Cooperation Forum may affect, possibly via recommendations or, indirectly, via decisions of the Joint Committee (if the Regulatory Cooperation Forum refers a matter to it).¹⁰⁰ The choices on who to consult, when, and how are fully in the hands of the Regulatory Cooperation Forum and of the Parties’ executives. In the absence of procedural rules, they decide the details of consultation based on their regulatory preferences and needs. This feature and the lack of any further control mechanisms – such as the duty to provide feedback on the input received and to make it transparent – prevent consultations from being a means to structure or constrain the authority that this body has been granted by CETA.¹⁰¹

This lack of concern for procedurally binding the authority of the CETA bodies is in contrast to the agreement’s specifications regarding the requirements to which domestic administrative procedures should adhere. While CETA bodies may adopt decisions (in the instances defined in the text of the agreement) and recommendations without being bound by virtually any procedural rules – except those that they may impose on themselves – CETA specifies that the Parties, in their respective domestic regulation processes, are bound by duties of transparency. They must, in particular:

“ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or made available in such a manner as to enable interested persons and the other Party to become acquainted with them”.¹⁰²

⁹⁸ *Ibid.*, Art. 21.8 (emphasis added).

⁹⁹ *Ibid.*, Art. 21.6, para. 2, let. a).

¹⁰⁰ On the different meanings of participation in the context of regulatory cooperation (analysing TTIP), see J. MENDES, *Participation in a New Regulatory Paradigm*, cit., section 4, p. 12 *et seq.*

¹⁰¹ *Ibid.*

¹⁰² Art. 27.1, para. 1, CETA.

This duty entails “to the extent possible” publication of legislative or regulatory proposals and “a reasonable opportunity to comment” on those proposals by interested persons and the other Party.¹⁰³ Furthermore, the Parties must “administer a measure of general application affecting matters covered by this Agreement in a consistent, *impartial* and *reasonable* manner”.¹⁰⁴ For this purpose, “laws, regulations, procedures and administrative rulings of general application” that relate to CETA matters and that apply to “a particular person, good or service” of the other Party should, “whenever possible”, require notice to be given to, and enable the participation by, the person of the other Party who is “directly affected”.¹⁰⁵ CETA equally requires that both parties have suitable domestic mechanisms of review and appeal that are impartial, independent and follow fair procedures.¹⁰⁶

These specifications regarding domestic procedures, means of review and appeal are a logical consequence of the very purposes of CETA: the establishment of a free trade area (Art. 1.4 CETA) in which measures that could restrict market access and trade between the Parties are progressively eliminated and regulatory convergence should be pursued. The agreement seeks to address thereby the impact that domestic regulations and procedures may have over trade and investment. Fair and transparent domestic processes – in any area covered by such a comprehensive economic agreement – are an important means of reaching the agreement’s goals. As EU integration shows, the establishment of free market areas requires opening not only domestic markets but also domestic law-making procedures to interested persons from other parties.

Be that as it may, CETA’s ultimate purpose hardly justifies that the institutional bodies that it created to achieve its goals are subject to virtually no procedural rules that could structure their authority and bind them to the same normative standards that CETA requires from domestic processes: impartiality, transparency, fairness and reasonableness. These can be important standards to ensure the principles set out in Art. 21, para. 1, TEU. As was shown above, decisions by CETA’s bodies – even if only recommendations – may produce substantive legal effects. They potentially impact the rights and legally protected interests of natural and legal persons of both Parties as well as of third parties. The formulation “stakeholders and interested parties” that may provide “non-governmental perspectives on matters that relate to the implementation” of CETA (Art. 21.8 CETA, albeit referring only to the chapter on regulatory cooperation) is broad enough to encompass holders of legally protected interests, as enshrined in both legal systems, and third parties legally affected by the measures adopted by the CETA bodies. But the agreement mostly leaves to the institutional practice of these bureaucratic bod-

¹⁰³ *Ibid.*, Art. 27.1, para. 2.

¹⁰⁴ *Ibid.*, Art. 27.3 (emphasis added). See too Arts 13.11, 15.11, para. 2, 19.17, para. 6, 23.5.

¹⁰⁵ *Ibid.*, Art. 27.3, let. a) and b).

¹⁰⁶ *Ibid.*, Art. 27.4. Art. 6.10, para. 3, demands that, in the field of customs, each Party provides for an administrative level of appeal or review “before requiring a person to seek redress at a more formal or judicial level”.

ies whether and how legally protected interests should be considered and balanced in their decision-making procedures, and hence, how the public interests that the agreement serves should be pursued.

VI. THE EU TREATY PROCEDURE

While the international decision-making procedure is a matter of the regulatory regimes established under international law, the TFEU envisages an internal EU procedure for the establishment of the positions to be taken “on the Union’s behalf” when those bodies’ acts have legal effects.¹⁰⁷ Since *Federal Republic of Germany v. Council of the European Union*, these encompass non-binding acts that “are capable of decisively influencing the content of [EU law]”, given their purpose, the competence the agreement delegates to their authors, and their incorporation into EU legal acts.¹⁰⁸ It is for the Council, on a proposal from the Commission (or from the High Representative of the Union for Foreign Affairs and Security Policy), to adopt the Union’s position. The TFEU thus acknowledges the existence of the external administrative layer of EU law. Nevertheless, this procedure arguably does little to alleviate normative concerns regarding the impartiality, transparency, fairness and reasonableness of international decisions that are authoritative in EU law. It is a very thin filter by which to address the weaknesses of the procedural constraints (or lack thereof) in international decision-making.

Despite its external function, establishing the Union’s negotiating position in the decision-making of international bodies has mostly inter-institutional implications, as confirmed by the case law.¹⁰⁹ What is now Art. 218, para. 9, TFEU was introduced by the

¹⁰⁷ This provision covers also the suspension of the application of an agreement. It does not apply to “acts supplementing or amending the institutional framework of the agreement”.

¹⁰⁸ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 63-64 (see also paras 59-61; contrary to the Opinion of the AG Cruz Villalón, *Federal Republic of Germany v. Council of the European Union*, cit., paras 84-99). The Organisation of Vine and Wine (hereafter *OIV*) also established that Art. 218, para. 9, TFEU is not limited to acts of bodies established by agreements of which the EU is a party.

¹⁰⁹ Court of Justice: judgment of 1 October 2009 case C-370/07, *Commission of the European Communities v. Council of the European Union*; judgment of 18 December 2014, case C-81/13, *United Kingdom of Great Britain and Northern Ireland v. Council of European Union* [GC], para. 66 (regarding the majority necessary to adopt that the Council’s decision); judgment of 6 October 2015, case C-73/14, *Commission of the European Communities v. Council of the European Union* [GC], paras 63-67 (excluding from its scope the submission of statements in the framework of international judicial procedures); case C-600/14, *Germany v. Council*, pending (where the Court is asked to rule on the correct application of Art. 218, para. 9, TFEU in case of an international decision that amends the international agreement and on the Union’s competence to use Art 218, para. 9); *Federal Republic of Germany v. Council of the European Union* [GC], cit. (extending the scope of the provision to non-binding acts as acts with legal effects and establishing that the EU does not need to be a party to the agreement to trigger the application of Art. 218, para. 9, TFEU). It has also implications to the relationships between the Member States and the EU, when the Union is not a party to the agreement and its position is expressed via the Member States, or when issues of competence are at stake (as in *Germany v. Council*, cit.).

Treaty of Amsterdam to allow the Union to “speak with one voice” and defend its interests more effectively in international bodies, by avoiding the involvement of the European Parliament (under the assent or consultation procedures) that hindered the desired effectiveness.¹¹⁰ Until recently at least, the EU institutions did not apply this provision in a consistent way, with the Commission dodging it in the field of commercial policy to avoid upsetting the common ways of working in international practice, and the Council seeking to eschew competence issues that could hinder negotiations in other areas.¹¹¹ Recent litigation appears to confirm that Art. 218, para. 9, TFEU acquired a new life after the Lisbon Treaty.¹¹²

As a tool to better equip the EU when conducting negotiations in international bodies, this procedure is a means of favouring the EU’s diplomatic efforts in these settings, framing and serving the Union interest in the context of those international fora, as it will be conveyed by the representatives of the EU institutions and regulators within the scope of their mandate. The ability of the Council’s positions to bind the EU representatives and impact the final decision of the international body will depend, respectively, on the vagueness or specificity of the decision it adopts and on the negotiating leverage of the EU representatives. At the end of the day, international decision-making may very well remain largely in the hands of regulators.

Nevertheless, positions adopted under Art. 218, para. 9, TFEU introduce one control: as acts of the Council, they need to respect EU law and are subject to judicial review. On a different level, it is not excluded that the formal intervention of the Council may lead to deliberations that may favour the consideration of the impact that those decisions may have on legally protected interests. Be that as it may, this procedure cannot remedy the fact that decisions of expert committees and executive representatives – having potentially important political and legal implications – are adopted in international fora, subject to

¹¹⁰ Opinion of AG Sharpston delivered on 16 July 2015, case C-73/14, *Council v. Commission*, para. 72 and footnote 22. A cursory reading of Art. 218 TFEU could convey that the European Parliament should be informed also of this step, given the schematic position of Art. 218, para. 10, TFEU (see J. MENDES, *EU Law and Global Regulatory Regimes*, cit., p. 1017). However, the history and purpose of the provision deny this interpretation (see too *United Kingdom of Great Britain and Northern Ireland v. Council of European Union* [GC], cit., para. 66, explicitly excluding the Parliament; and Opinion of AG Kokott delivered on 17 July 2014, case C-81/13, *United Kingdom of Great Britain and Northern Ireland v. Council of European Union*, footnote 63, stressing that Art. 218, para. 9, TFEU is a “separate, simplified procedure [...] regulated differently from the conventional procedure for the conclusion of international agreements” – emphasis in the original). See too B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., pp. 153-154, on the pre-Lisbon (pre-Nice) situation, indicating that despite the formal rights of the Parliament in some cases, the risks for the effective EU participation in international decision-making led the Council to design specific procedures for the adoption of EU positions.

¹¹¹ P.-J. KUIJPER, J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations*, cit., p. 86.

¹¹² *Ibid.* See also references in footnote 103. A search in eur-lex.europa.eu indicates that the vast majority of Council decisions of this type was adopted since 2010.

virtually no procedural or apparent political control (except those applicable under the domestic legal orders of the parties). And, still, they may constitute a significant part of EU law, determining and conditioning choices made by the EU legislator.

The authority and substantive effects of international decisions that allow one to characterise them as the external administrative layer of EU law justify, at least, the extension of the right of the European Parliament to be informed as determined in Art. 218, para. 10, TFEU, to also cover this aspect of the EU external action. This role of the European Parliament need not be the minimal involvement that would result from merely passively receiving information. It should place the European Parliament in the position to understand the policy implications of the decisions that it then incorporates into EU legislative acts (if not to exercise its right of democratic scrutiny).¹¹³ Despite the tensions between this claim and the original purpose of Art. 281, para. 9, TFEU – i.e. ensure the effectiveness of international negotiations and, thereby, avoid the involvement of the Parliament – the argument is especially compelling in the instances where the Parliament has stronger rights of participation in the negotiation of international agreements.¹¹⁴

VII. THE CETA BODIES MAKING EU LAW

Binding or not, the authority international decisions have in EU law stems from the original consent given by the parties to the agreement when defining the mandate of the authors of those decisions; from the expertise that they embody and their presumed technical quality; from the consensus established among professionals (whether regulators or private persons); and from their legislative incorporation into EU law. The decisions of CETA bodies are likely to fulfil most of these characteristics and, as such, to have substantive legal effects similar to those that the CJEU has expounded regarding the decisions of other international bodies that – as future CETA bodies' decisions – are an integral part of EU law, be it by force of the *S. Z. Sevince v. Staatssecretaris van Justitie* case law or by legisla-

¹¹³ The origins and purpose of Art. 218, para. 9, TFEU pointed out above may hinder an analogy with the *Mauritius and Tanzania* cases (Court of Justice: judgment of 24 June 2014, case C-658/11, *European Parliament v. Council* [GC], paras 81-86; judgment of 14 June 2016, case C-263/14, *European Parliament v. Council* [GC], paras 68-73) and are in tension with the argument made here. On the scope of Art. 218, para. 10, TFEU, see R. PASSOS, *The External Powers of the European Parliament*, in P. EECKHOUT, M. LOPEZ-ESCUDERO (eds), *The European Union's external action in times of crisis*, cit., pp. 125-128, suggesting (albeit briefly) that the Parliament's future involvement in the implementation of international agreements could be envisaged in an inter-institutional agreement.

¹¹⁴ Art. 218, para. 6, let. a) and b), TFEU. Referring to the pre-Lisbon (and pre-Nice) situation, Martenczuk argued that, if the Council would set up specific procedures for the adoption of the EU position, the Parliament should also assent to these procedures in the instances where the assent procedure applied for the conclusion of the agreement (B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., p. 154). On the role of the European Parliament in the field of financial services, see M.S. BARR, G.P. MILLER, *Global Administrative Law: The View from Basel*, in *European Journal of International Law*, 2006, p. 15 et seq., pp. 36 and 37.

tive incorporation. They may ground the validity of EU legislative and non-legislative acts and may be indirectly invoked against the parties that contest the legality of these acts for alleged incompatibility with EU law. In fact, as in *Philip Morris Brands SARL et al.* and in *WernerFries v. Lufthansa CityLine GmbH*, international decisions may be an interpretative tool that ascertains the reasonableness and the necessity of the legislature's choices – including where these restrict fundamental rights – not least because of their presumed technical quality as expressing the current state of expertise in complex technical fields. Because of the legal status, authority and substantive effects of those decisions in EU law, one may characterise them as the external administrative layer of EU law, which CETA is likely to expand. At the same time, significant constraints encumber the ability to challenge the legality of an EU act for breach of an international decision: lack of direct effect might preclude the right of judicial action. In the case of CETA, the sweeping terms of the clause precluding direct effect (Art. 30.6 CETA) arguably leave little room to attribute direct effect to the decisions implementing the agreement.

While CETA bodies' decisions (as decisions of international bodies binding on the EU) may shield the validity of EU acts against illegality claims, there are important procedural weaknesses in the way they are adopted. As far as the agreement is concerned, there are virtually no procedural constraints that would bind CETA bodies' decision-making to the standards of impartiality, transparency, fairness and reasonableness that it imposes on domestic procedures. A judicial role in eventually process-perfecting institutional practices appears to be excluded. There are, at least, significant obstacles to judicial review of the legality of international decisions before CJEU: validity questions are in principle outside their jurisdiction and there might not be a subsequent EU act of transposition (akin to the concluding act of international agreements). Appellants are left with the possibility to challenge the Council decision establishing the Union's position (Art. 218, para. 9, TFEU), whose ability to bind the EU representatives and impact the final international decision may vary.

Given the substantive strength and procedural weaknesses of international decisions, a clause that protects the Parties' right to regulate, similar to that inserted in CETA, while important as a matter of principle, hardly shields the "direct impact" that those decisions may have in EU law, which remains "direct" even where supported by legislative incorporation.¹¹⁵ Legislative incorporation may be voluntary, but the authority of these decisions places a high threshold on the EU legislator, should it ever decide, for example, to oppose "dynamic references" inserted by the Commission in a legislative proposal. In the case of CETA, neither the EU nor Canada are obliged to change their regulations and, of course, their representatives may not agree on common decisions or recommendations regarding aspects covered by CETA. None of this precludes

¹¹⁵ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 61 and 64. Arts. 21.2, para. 4, let. c), 21.2, para. 6, and Art. 21.5 CETA.

the conclusion that, when functioning smoothly, CETA's institutional structure allows Canadian and EU executive bodies as well as Member State regulatory authorities to take decisions on public goods with potential effects on rights and legally protected interests with very weak procedural and judicial controls.

Those decisions can condition (whether enhancing or limiting) the rights and duties that citizens and legal persons enjoy on both sides of the Atlantic. They can define, or at least impact (whether raising or lowering), the level of protection that public goods (environment, health, financial stability, consumer protection) are subject to under domestic regulation. It is hardly justifiable – unless one is willing to accept a regression of law in the name of executive expertise – that they can be adopted without suitable procedural constraints that could structure the authority that executives exercise in the extensive areas of internationalised regulation, in an analogous way to those that apply domestically: i.e., to ensure both the objective legality of their actions and the subjective protection of those that they legally affect. The challenge is, of course, how to design those constraints in a way that preserves the ability of decision makers to pursue public interests that cannot be protected domestically, while ensuring that they are legally and politically accountable for their actions.



ARTICLES

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

THE EXTRATERRITORIAL REACH OF EU ENVIRONMENTAL LAW AND ACCESS TO JUSTICE BY THIRD COUNTRY ACTORS

IOANNA HADJIYIANNI*

TABLE OF CONTENTS: I. Introduction. – II. The legal phenomenon of IEMEIs. – II.1. IEMEIs regulating conduct abroad on the basis of environmental regulatory requirements. – II.2. IEMEIs regulating trade: market access conditions and obligations on Third Country actors. – II.3. Compliance with IEMEIs: “contingent unilateralism”, equivalence and flexibility. – III. Access to justice. – III.1. Avenues for access to justice for different kinds of third country actors. – III.2. Standing. – III.3. The Aarhus Convention and access to justice. – IV. Conclusion.

ABSTRACT: The EU conducts its external relations through different types of tools, including through unilateral domestic measures with extraterritorial implications that extend its regulatory power to processes occurring partly abroad. These are increasingly prevalent in the area of environmental protection, including climate change. Examples include the sustainability criteria for biofuels, the inclusion of aviation emissions in the EU emissions trading system, ship recycling, exports of electrical and electronic waste and imports of timber. Because these measures are unilateral in nature, developed within the EU legal order, but have important legal and policy effects beyond EU borders, they raise complex legitimacy questions and may give rise to an external accountability gap. The role of EU administrative law, which controls the exercise of EU public power, is important in “disciplining” the exercise of EU power beyond EU borders and filling this gap. The *Article* explores some of the novel regulatory techniques employed in these kinds of internal measures to conduct external action and how administrative law responds to their complexities. It focuses on access to justice in the EU legal order in exploring the extent of an external accountability gap. The constraints of accessing the EU judicial system may accentuate the external accountability gap if the

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EU cannot be held into account on the basis of its own rule of law by third country actors affected by its action.

KEYWORDS: environment – climate change – extraterritorial implications – access to justice – Aarhus Convention – third country.

I. INTRODUCTION

The EU pursues external action through different kinds of legal mechanisms and regulatory techniques, including unilateral measures that extend its regulatory power to processes taking place abroad. These measures are proliferating in many EU policy areas, including financial services regulation¹ and data protection law.² The focus of this *Article* is on such measures as they become increasingly prevalent in the area of environmental protection and climate change. Examples of *Internal Environmental Measures with Extraterritorial Implications* (IEMEIs) include the sustainability criteria for biofuels,³ the inclusion of aviation emissions in the EU Emissions Trading System (EU ETS),⁴ regulation of ship recycling,⁵ exports of waste of electrical and electronic equipment,⁶ imports of timber,⁷ and imports of fish and fishery products.⁸ By their legal design, IEMEIs regulate conduct or processes taking place, at least partly, in third countries (TCs),⁹ and influence business practices and regulatory approaches abroad, thus having important impacts on different kinds of TC actors.¹⁰ IEMEIs reflect the extraterritorial reach of EU environ-

¹ J. SCOTT, *The New EU 'Extraterritoriality'*, in *Common Market Law Review*, 2014, p. 1343 *et seq.*

² C. KUNER, *Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law*, in *International Data Privacy Law*, 2015, p. 235 *et seq.*

³ 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 (hereinafter, also Renewable Energy Directive).

⁴ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (hereinafter, also Aviation Directive).

⁵ Regulation (EU) 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling (hereinafter, also Ship Recycling Regulation).

⁶ Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE; hereinafter, also Directive on electrical and electronic waste).

⁷ Regulation (EU) 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (hereinafter, also Timber Regulation).

⁸ Regulation (EC) 1005/2008 of the Council of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU; hereinafter, also IUU Fishing Regulation).

⁹ TCs are understood as non-EU countries.

¹⁰ TC actors consist of non-EU public and private interests, including government, industry, civil society and individual interests situated outside EU borders.

mental law and constitute an important manifestation of the exercise of EU global regulatory power.¹¹

In situations where cooperative regimes fail or are inadequate, the EU increasingly resorts to IEMEIs, partly as a way of filling international regulatory gaps. However, the unilateral exercise of global regulatory power through measures that originate in one legal order but affect actors and regimes beyond its borders may give rise to important accountability questions. In the absence of state consent for their application to TCs, IEMEIs could create mistrust, as the EU could be perceived as outsourcing climate and environmental responsibilities outside its territory and engaging in protectionism. IEMEIs can be particularly contentious because they often affect developing countries,¹² such as ship recycling and timber producing countries, which may lack the necessary resources and capacity to adapt to EU standards. Furthermore, IEMEIs give rise to global governance that involves “rule-making and power-exercise at a global scale, but not necessarily by entities authorised by general agreement to act”¹³ and can raise questions about controlling regulatory power exercised across and beyond established jurisdictional borders. IEMEIs can therefore be problematic because regulatory standards are extended to TC actors that do not usually have a voice in the formulation and implementation of decisions that affect them. Also, the EU is usually not under an obligation to justify and explain its action in relation to TC effects. Therefore, in accordance with Mark Bovens’ definition of accountability,¹⁴ there is no clear relationship between the EU institutions in exercising regulatory power through IEMEIs and TC affected interests as a relevant forum for holding EU actors to account.¹⁵ This can lead to exercise of power without accountability or representation of affected interests situated outside the EU as the regulating jurisdiction,¹⁶ thus creating an external accountability gap.¹⁷ As Benvenisti argues, when sovereigns legislate for humanity rather than solely for domestic stakeholders, they should be subject to obligations to take into account foreign interests of affected stakeholders.¹⁸ While the logic of “power brings responsibility” may justify IEMEIs in terms of the EU instigating environmental regu-

¹¹ J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, in *American Journal of Comparative Law*, 2014, p. 87 *et seq.*

¹² The term developing countries includes countries at different stages of development, including less developed, developing and least developed countries, depending on the countries affected by each IEMEI.

¹³ R.O. KEOHANE, *Global Governance and Democratic Accountability*, in D. HELD, M. KOENIG-ARCHIBUGI (eds), *Taming Globalization: Frontiers of Governance*, Cambridge: Polity Press, 2003, p. 132.

¹⁴ M. BOVENS, *Analysing and Assessing Accountability: A Conceptual Framework*, in *European Law Journal*, 2007, p. 447 *et seq.*

¹⁵ See 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.*

¹⁶ G. DAVIES, *International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism*, in *German Law Journal*, 2013, p. 1203 *et seq.*

¹⁷ R.O. KEOHANE, *Global Governance and Democratic Accountability*, cit., pp. 139-142.

¹⁸ E. BENVENISTI, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, in *American Journal of International Law*, 2013, p. 295 *et seq.*

latory changes in TCs, EU global regulatory power should be disciplined and held to account in relation to TC effects in order to “guard against abuse”.¹⁹

On the basis of this background and in light of uncertain accountability relationships between the EU as a regulating jurisdiction and foreign interests affected by its domestic legislation, this *Article* explores the extent to which EU administrative law contributes to filling an accountability gap related to IEMEIs. In governing and controlling the exercise of global regulatory power through IEMEIs, EU law can play a dual role. On the one hand, EU law can *enable* the adoption of IEMEIs by providing the legal basis for the EU to act, particularly through broad interpretation of competences. On the other hand, EU law can *constrain* the exercise of EU global regulatory power by holding it to account in relation to TC effects. Enabling IEMEIs without sufficiently disciplining the exercise of EU regulatory power can exacerbate an external accountability gap. In this respect, EU administrative law, which controls the exercise of public power, may provide mechanisms that protect the rights and interests of those affected by EU regulatory power, including those situated outside the EU, and thereby create transnational accountability avenues. There are different mechanisms through which an accountability gap could be filled in this context, including through participation rights in the formulation of IEMEIs, due process rights, transparency, as well as judicial review. This *Article* examines judicial review as a promising mechanism for enforcing *legal accountability*²⁰ and disciplining the exercise of EU global regulatory power through IEMEIs.

The *Article* first explores novel regulatory techniques in various examples of IEMEIs, which provide unique challenges for EU administrative law in controlling EU regulatory power, and demonstrates how the distinction between internal and external EU action is often blurred (section II). In evaluating the extent of an accountability gap in relation to IEMEIs, the *Article* examines judicial review of IEMEIs and related acts in the EU legal order as a transnational accountability avenue for TC affected actors, particularly focusing on access to justice hurdles faced by TC applicants in the EU judicial system (section III). While this is done in the context of the extraterritorial reach of EU environmental law, some aspects of the analysis are also relevant more broadly for the inquiry of this *Special Issue* into the existence of an accountability gap in EU external relations, and for other policy areas where the extraterritorial reach of EU law is evident.

II. THE LEGAL PHENOMENON OF IEMEIs

The global reach of EU environmental law is increasingly prevalent in IEMEIs, which manifest “territorial extension”, whereby the application of EU legislation takes into ac-

¹⁹ J. SCOTT, *The Geographical Scope of the EU's Climate Responsibilities*, in *Cambridge Yearbook of European Legal Studies*, 2015, p. 92 *et seq.*

²⁰ On the different types of accountability see M. CREMONA, P. LEINO, *Introduction: The New Frontiers of EU Administrative Law and the Scope of our Inquiry*, *cit.*, p. 467 *et seq.*

count, as a matter of law, conduct or circumstances taking place abroad.²¹ This section sets out several legal features of IEMEIs in regulating access to the EU market, with the aim of demonstrating their extraterritorial character, as well as showing how different kinds of TC actors come within the scope of application of EU law in different ways. This discussion also draws attention to the kinds of acts involved in the implementation of IEMEIs to TC actors, on the basis of which judicial challenges may be brought. The analysis explores three features of IEMEIs relating to their transnational functioning: 1) how IEMEIs “regulate” conduct abroad through environmental regulatory requirements; 2) how these requirements are used as market access conditions in the form of direct or indirect obligations on TC actors; and 3) how IEMEIs link compliance to developments abroad.

II.1. IEMEIs REGULATING CONDUCT ABROAD ON THE BASIS OF ENVIRONMENTAL REGULATORY REQUIREMENTS

The legal design of IEMEIs in regulating conduct that partly takes place abroad operates in at least two ways. First, certain IEMEIs regulate conduct abroad by conditioning access to the EU market on the basis of how production or waste treatment processes take place in TCs. Such examples include the sustainability criteria for biofuels, the requirements for environmentally sound ship recycling, the regulation of imports of timber, the exports of electrical waste and regulation of illegal, unregulated and unreported (IUU) fishing. “Regulating” conduct abroad on the basis of process standards does not necessarily entail exporting EU-set standards, but also covers situations where the EU indirectly asserts regulatory power over processes abroad. For example, while the EU Timber Regulation requires that only legally harvested timber can enter the EU market, it regulates market access by reference to legality standards of the country of origin.²² Also, certain IEMEIs impose restrictions on processes abroad on the basis of TC and international law. For example, the IUU Fishing Regulation requires fishing activities, which result in fishery products exported to the EU, wherever these may occur, to be carried out in accordance with legality requirements of the flag state of the fishing vessel and in accordance with international standards on conservation and management.²³ Second, beyond process standards, other IEMEIs “regulate” conduct abroad by attaching economic incentive obligations to such conduct. For example, the inclusion of flights departing from or arriving at EU airports in the EU ETS initially required airlines to surrender ETS allowances on the basis of their entire journey, including those parts taking place outside EU borders.²⁴

²¹ J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, cit., p. 87 *et seq.*

²² Regulation 995/2010, cit.

²³ Arts 2, para. 2, let. a), and 12, para. 3, of Regulation 1005/2008, cit.

²⁴ Directive 2008/101, cit.

Notably, “regulating” processes abroad through IEMEIs does not mean that the EU imposes restrictions on how conduct takes place abroad even when not accessing the EU market.²⁵ Nonetheless, the effects of such EU market-related measures can be far-reaching in practice. Through “unilateral regulatory globalisation”, the EU is sometimes able to “externalize its laws and regulations outside its borders”, giving rise to a “Brussels effect”.²⁶ EU market-related measures create incentives for non-EU economic operators to comply with EU standards when trading with the EU, which may lead to changes in business practices more generally. Foreign companies may change their business practices to match EU regulatory standards across their entire production, irrespective of their ultimate market (“*de facto* Brussels effect”).²⁷ In turn, domestic industry may urge TC governments to change their regulatory policies to be similar to those of the EU, thus leading to formal changes in TC domestic law (“*de jure* Brussels effect”).²⁸ Through different kinds of market mechanisms, the EU uses its market power as leverage for compliance and regulatory change beyond its borders.²⁹

II.2. IEMEIs REGULATING TRADE: MARKET ACCESS CONDITIONS AND OBLIGATIONS ON THIRD COUNTRY ACTORS

In regulating trade, environmental regulatory requirements in IEMEIs function as market access conditions in different ways. As demonstrated through various examples in this section, IEMEIs are legally designed either as *mandatory conditions* or as *partial restrictions* to the EU market, and impose different kinds of obligations on foreign actors, either *directly* or *indirectly*. The ways in which market access restrictions apply to TC actors ultimately determines their legal position in the EU legal order, including whether they have access to EU courts, as discussed in section III.

IEMEI standards are often designed as *mandatory conditions for access to the EU market*. This is the case with the IUU Fishing Regulation,³⁰ the Timber Regulation³¹ and the Ship Recycling Regulation.³² Under the IUU Fishing Regulation, access of fishing vessels to EU ports is subject to authorisation, including an obligation to have a catch certificate on board the fishing vessel,³³ which has been validated by an eligible flag state.³⁴

²⁵ R. HOWSE, D. REGAN, *The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, in *European Journal of International Law*, 2000, p. 249 *et seq.*

²⁶ A. BRADFORD, *The Brussels Effect*, in *Northwestern University Law Review*, 2012, p. 1 *et seq.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ J. SCOTT, *EU Global Action on Climate Change: Contingent Unilateralism and Regulatory Penalty Defaults*, in *SADC Law Journal*, 2012, p. 1 *et seq.*

³⁰ Regulation 1005/2008, *cit.*

³¹ Regulation 995/2010, *cit.*

³² Regulation 1257/2013, *cit.*

³³ Arts 7, para. 1, and 12 of Regulation 1005/2008, *cit.*

³⁴ *Ibid.*, Arts 12, para. 2, and 20.

The IUU Regulation contains far-reaching enforcement measures for excluding illegal fishery products from the EU market³⁵ and ensuring *direct* compliance both by TC individual fishing vessels and by flag states. On the one hand, fishing vessels can be included in the Community IUU vessel list when there is information about the vessel engaging in IUU fishing and the flag state fails to investigate and take enforcement measures against it.³⁶ On the other hand, flag states that fail to take action to prevent, deter and eliminate IUU fishing may be identified as non-cooperating countries whose products and catch certificates are not accepted in the EU market.³⁷

Mandatory conditions for access to the EU market take a different form under the Timber Regulation, which imposes a due diligence obligation on operators placing timber on the EU market for the first time.³⁸ Operators are required to provide information on the imported timber,³⁹ carry out a risk assessment evaluating the risk of illegal timber in their supply chain⁴⁰ and take risk mitigation steps when the risk of illegality is found to be non-negligible.⁴¹ Notably, the Timber Regulation sometimes *directly* imposes these obligations on non-EU actors when they place timber on the EU market for the first time. Even in situations where non-EU suppliers are not the ones placing timber on the EU market, the Regulation requires them to provide information about their harvesting processes to the operator.⁴²

Mandatory restrictions to trade are also imposed in export measures. The Ship Recycling Regulation requires ship recycling facilities to apply to be included in the “European list” in order to be able to recycle ships flying the flag of an EU Member State.⁴³ In this way, it imposes *direct* obligations on TC facilities regarding safe and environmentally sound ship recycling if they want to receive EU ships. The Commission authorises facilities to be included in the European list in implementing legislation on the basis of technical requirements set out in the Ship Recycling Regulation, and further spelled out in post-legislative Commission guidance, and following site inspections.⁴⁴ Although the primary aim of export waste treatment standards is to ensure that EU ships are not recycled in facilities with lower standards, their operation can influence TC practices more

³⁵ Products not accompanied by catch certificates will be refused importation: *ibid.*, Art. 18.

³⁶ Art. 27 of Regulation 1005/2008, cit.

³⁷ *Ibid.*, Arts 31, 33, and 38.

³⁸ Art. 6 of Regulation 995/2010, cit.

³⁹ *Ibid.*, Art. 6, para. 1, let. a).

⁴⁰ *Ibid.*, Art. 6, para. 1, let. b).

⁴¹ *Ibid.*, Art. 6, para. 1, let. c).

⁴² *Ibid.*, Art. 6, para. 1, let. a).

⁴³ Art. 13 of Regulation 1257/13, cit.

⁴⁴ Communication COM(2016) 1900 from the Commission – Requirements and procedure for inclusion of facilities located in third countries in the European List of ship recycling facilities – Technical guidance note under Regulation (EU) 1257/2013.

generally. The technical and economic “non-divisibility”⁴⁵ of standards, such as those relating to the design and construction of ship recycling facilities,⁴⁶ could lead TC facilities expanding EU standards to all ships received (“*de facto* Brussels effect”). This could lead to regulatory reforms in ship recycling countries (“*de jure* Brussels effect”) and prompt international developments. However, in practice, widespread “out-flagging” practices may result in EU ships circumventing EU regulatory requirements.

Beyond mandatory conditions to trade, certain IEMEIs *partially and indirectly restrict access to the EU market*. Such IEMEIs do not entirely close the EU market to non-complying TC products or operators, but reduce the incentives for EU operators to trade with non-complying products or operators. Examples of such legislation include the sustainability criteria for biofuels, which impose restrictions on the origin of biofuels from specific types of land and stipulate specific greenhouse gas emission savings.⁴⁷ Non-complying biofuels are not excluded from the EU market, but compliance is required for energy from biofuels to count towards the target for biofuel use in transport, and for EU operators to be eligible for funding for consumption of biofuels.⁴⁸ Similarly, electrical and electronic equipment waste shipped from the EU to TC facilities should be treated in conditions that “are equivalent to the requirements of the Directive”⁴⁹ in order for it to count towards the recovery targets imposed on EU Member States.⁵⁰ Equivalent conditions are to be determined on the basis of criteria set by the Commission in delegated acts.⁵¹ Recovery targets reduce the incentives for EU exporters to export waste to facilities that do not meet equivalent standards. Although indirectly restricting the EU market, these IEMEIs function on the basis of a similar logic to mandatory market access conditions and can have similar impacts beyond EU borders.

II.3. COMPLIANCE WITH IEMEIs: “CONTINGENT UNILATERALISM”, EQUIVALENCE AND FLEXIBILITY

In incentivising regulatory changes abroad, IEMEIs often render application of EU legislation to TCs “*contingent upon legal developments abroad*,”⁵² thus implicating TC governments, qualifying the unilateral nature of the EU’s action, and alleviating the trade-

⁴⁵ A. BRADFORD, *The Brussels Effect*, cit., p. 17 (non-divisibility occurs when “the exporter has an incentive to adopt a global standard whenever its production or conduct is non-divisible across different markets or when the benefits of a uniform standard due to scale economies exceed the costs of forgoing lower production costs in less regulated markets”).

⁴⁶ Art. 13 of Regulation 1257/13, cit.

⁴⁷ Art. 17 of Directive 2009/28, cit.

⁴⁸ *Ibid.*, Art. 17, para. 1.

⁴⁹ Art. 10, para. 2, of Directive 2012/19, cit.

⁵⁰ *Ibid.*, Art. 11.

⁵¹ *Ibid.*, Art. 10, para. 3.

⁵² J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, cit., p. 87 *et seq.*

restrictiveness of IEMEIs through flexible compliance clauses. For example, the inclusion of aviation emissions in the EU ETS provided the possibility for revising the scheme in case an international agreement was reached.⁵³ TC regimes were also initially implicated by providing the possibility for airlines departing from countries with legislation reducing the climate change impact of flights to be exempted from the EU ETS,⁵⁴ requiring the Commission to ensure “optimal interaction” with TC measures with an equivalent environmental effect.⁵⁵ The interaction between the EU’s unilateral measure with international action and TC regimes would have raised novel questions concerning the considerable discretion given to the Commission in determining the “contingency” of EU action, which should have been determined in consultation with the relevant TC without much further direction. Notably, equivalence determinations by the Commission could be subject to judicial review by the CJEU, as demonstrated in the field of data protection.⁵⁶ In response to an overwhelmingly negative international reaction to the inclusion of aviation emissions in the EU ETS, the EU temporarily excluded international flights from the regime.⁵⁷ The possibility that the application of the EU ETS to international flights might be resumed functioned as a “stick”⁵⁸ in seeking a global agreement. Following the 2016 agreement on a global market-based mechanism in the International Civil Aviation Organisation (ICAO),⁵⁹ the Commission proposed that the current domestic geographical scope of the EU ETS should continue, at least until 2020, to demonstrate commitment to a global solution.⁶⁰ It remains to be seen whether a “contingency” clause would be included in the application of the EU ETS, making its application contingent on the implementation of the ICAO mechanism.

A different kind of contingency manifests in the design of IEMEIs through *equivalent requirements of environmental protection* in TCs. Instead of exporting EU standards, this feature leaves room for discretion and variation of TC standards as long as they meet an equivalent level of protection. However, equivalence can have different meanings

⁵³ Art. 25a, para. 2, of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community (consolidated version).

⁵⁴ *Ibid.*, Art. 25a.

⁵⁵ Recital 17 of Directive 2008/101, cit.

⁵⁶ Court of Justice, judgment of 6 October 2015, case C-362/14, *Schrems*.

⁵⁷ Decision 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community.

⁵⁸ V.L. BIRCHFIELD, *Coercion with Kid Gloves? The European Union's Role in Shaping a Global Regulatory Framework for Aviation Emissions*, in *Journal of European Public Policy*, 2015, p. 1276 *et seq.*

⁵⁹ ICAO, Resolution A39-3: Consolidated statement of continuing ICAO policies and practices related to environmental protection—Global Market-based Measure (MBM) scheme, 2016, www.icao.int.

⁶⁰ Commission Proposal for a Regulation of the European Parliament and of the Council amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021, COM(2017) 54 final.

and is ultimately determined by the EU Commission. Apart from equivalence at country-level, as illustrated in the Aviation Directive above, equivalence is imposed directly on TC economic operators, specifically within the export IEMIs that impose conditions on how processes take place in TC facilities. As mentioned above, under the Directive on electrical and electronic waste, waste treatment in TC facilities should take place in equivalent conditions determined on the basis of criteria set by the Commission.⁶¹ Additionally, the Ship Recycling Regulation requires TC facilities that receive EU ships to demonstrate that waste management facilities carry out waste recovery or disposal operations in accordance with broadly equivalent human health and environmental standards, which are explicitly set out in Commission guidance.⁶²

In terms of compliance, other IEMIs provide for alternative or supplementary routes for satisfying market access requirements that particularly influence compliance by TCs. These flexible compliance modes manifest in two ways. First, TCs can conclude *bilateral agreements* with the EU, such as the possibility to conclude a Voluntary Partnership Agreement (VPA) under the Timber Regulation, which provides a “green lane” for access to the EU market.⁶³ Despite incentives to conclude VPAs prior to the Timber Regulation, VPAs expanded only after the adoption of the Regulation restricting access to the EU market, showing the strong incentivising function of such trade-restrictive measures.⁶⁴ On the one hand, VPAs are more cooperative in prompting legal developments abroad and incorporate greater involvement of TC local actors, including civil society, in their formulation and implementation. On the other hand, there is minimal information about how the negotiating procedures of VPAs are to be carried out and there is no mechanism for appeal of suspension of negotiations.⁶⁵ Their political nature may therefore hinder possibilities for TCs to challenge their formulation and application.

Second, TC operators can use *private certification and monitoring* in complying with EU standards. For example, monitoring organisations established in the EU and recognised by the Commission⁶⁶ can be used as a supplementary route for complying with the Timber Regulation by providing due diligence systems.⁶⁷ Additionally, producers of biofuels can verify compliance with the sustainability criteria through private voluntary

⁶¹ Art. 10, para. 3, of Directive 2012/19, cit.

⁶² Art. 15, para. 5, of Regulation 1257/13, cit.; Communication COM(2016) 1900, cit.

⁶³ Art. 3 of Regulation 995/2010, cit.

⁶⁴ C. OVERDEVEST, J. ZEITLIN, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, in *Regulation and Governance*, 2014, p. 22 *et seq.*

⁶⁵ A. FISHMAN, K. OBIDZINSKI, *European Union Timber Regulation: Is It Legal?*, in *Review of European, Comparative and International Environmental Law*, 2014, p. 258 *et seq.*

⁶⁶ Commission Delegated Regulation (EU) 363/2012 of 23 February 2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations as provided for in Regulation (EU) 995/2010.

⁶⁷ Arts 4, para. 3, and 8 of Regulation 995/2010, cit.

certification schemes authorised by the Commission,⁶⁸ in accordance with Commission guidance.⁶⁹ The procedures for authorisation of certification schemes on the sustainability of biofuels have been criticised for lengthy delays, interference of third parties and general lack of transparency.⁷⁰ Given the absence of clear provisions on the administration and selection of private certification schemes,⁷¹ a TC applicant would face difficulties particularly in challenging the basis of a negative decision.

Overall, flexibility and conditionality features exhibit a mixture of unilateralism and cooperation.⁷² Clauses linking to developments beyond EU borders are used in various ways: as negotiation tools, as incentives for concluding bilateral agreements and advancing international regimes, and as catalysts for the development of private regimes. They all contribute to creating a dynamic relationship between EU unilateral measures and legal developments in TCs. This mixture of unilateralism and cooperation is also reflected in the implementation of IEMEIs through different types of acts and in the ways in which market access conditions apply to TC actors, which ultimately determine their access to the EU market and to the EU legal order. In this respect, TC actors could seek to challenge different kinds of acts, including general regulatory acts as well as individually addressed EU acts that authorise operators and products. Importantly, depending on the legal design of IEMEIs and their effects in TCs, it could also be the case that the TC affected actors would seek to challenge TC domestic law adopted in response to IEMEIs.

To conclude, this section has exposed some of the novel regulatory techniques employed in IEMEIs, which give rise to novel administrative acts and procedures as well as novel challenges for controlling EU global regulatory power. As *internal* measures, which pursue *external* action, IEMEIs blur the distinction between internal and external EU action. As a mode of EU external environmental action, IEMEIs first operate within EU constitutional and external relations law. Beyond conventional issues of EU external environmental competence, concerning the delimitation of powers between the EU and the Member States and the EU's international representation,⁷³ IEMEIs implicate areas of EU law that have been less explored in relation to EU external action. Particularly, they

⁶⁸ Art. 18 of Directive 2009/28, cit.

⁶⁹ Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability scheme, COM(2010) 160/01 (hereinafter, also Communication on voluntary schemes and default values).

⁷⁰ M. GAEBLER, *Recognition of Private Sustainability Certification Systems for Public Regulation (Co-Regulation): Lessons Learned from the EU Renewable Energy Directive*, in C. SCHMITZ-HOFFMANN, M. SCHMIDT, B. HANSMANN, D. PALEKHOV (eds), *Voluntary Standard Systems: A Contribution to Sustainable Development*, Heidelberg: Springer, 2014.

⁷¹ *Ibid.*

⁷² J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, cit., p. 114.

⁷³ G. MARIN-DURAN, E. MORGERA, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions*, Oxford: Hart Publishing, 2012, pp. 5-25.

raise “transnationalised” questions in EU administrative law about controlling the unilateral exercise of global regulatory power and holding it to account in relation to TC impacts. In this respect, judicial review of IEMEIs and their implementing acts becomes particularly important in controlling how EU institutions exercise discretion and how procedural and substantive principles and rights under EU law apply to TC affected actors. The rest of this *Article* explores judicial review in the EU as a transnational accountability avenue for IEMEIs by assessing the extent to which TC actors may have access to justice in the EU legal order. As there is no special framework to determine the position of TC actors affected by EU domestic legislation, their position is determined by the application of mainstream EU law doctrines and procedures and how they apply to TC affected actors.

III. ACCESS TO JUSTICE

Judicial review is an important mechanism for holding regulatory power to account and upholding the rule of law.⁷⁴ In developing doctrines and procedures that determine the legality of EU action, the CJEU’s role has been critical, particularly in relation to internal EU action. In relation to IEMEIs, it could be argued that, ideally, TC actors would be able to challenge their legality before an international court. However, there are limited opportunities for this, and these would not consist of challenges to IEMEIs on the basis of EU law, which constitutes the internal law of the regulating jurisdiction. Access of TC affected actors to the EU judicial system is therefore important in holding EU institutions to account on the basis of the EU’s own rule of law.

The extent to which TC actors can challenge IEMEIs in the EU legal order is partly determined by whether they can access EU courts and partly by the grounds of review, which can determine how TC interests may be protected as a matter of EU law. The different grounds of review under Art. 263 TFEU demonstrate how the external accountability gap could be filled through various procedural and substantive considerations of TC affected interests. IEMEIs could be challenged on the basis of competences, relating to the broad territorial scope and the unilateral nature of IEMEIs in pursuing environmental protection goals. Competences in this sense, are usually interpreted broadly by the CJEU and tend to enable, rather than constrain, the adoption of IEMEIs, as long as there is a territorial link between the regulated activity and the EU.⁷⁵ IEMEIs could also be challenged on the basis of essential procedural requirements, which can ensure procedural fairness for TC actors, particularly when IEMEIs are implemented through individual decisions. Furthermore, substantially the effects of IEMEIs on TC actors could potentially be reviewed under proportionality. However, the lack of a general requirement

⁷⁴ C. SCOTT, *Accountability in the Regulatory State*, in *Journal of Law and Society*, 2000, p. 38 *et seq.*

⁷⁵ Court of Justice, judgment of 21 December 2011, case C-366/10, *Air Transport Association of America and Others (ATAA)*.

for equal treatment of TCs⁷⁶ and the deferential review of EU complex policy decisions involving economic and political choices would likely result in a light review of TC effects. Finally, IEMEIs could potentially be challenged on the basis of infringement of fundamental rights of TC actors, particularly when certain rights are owed to “everyone” as a matter of EU law. However, it is still unclear how EU extraterritorial human rights obligations would arise in situations where EU domestic legislation, such as IEMEIs, have effects in TCs.⁷⁷

While both access to justice hurdles and the intensity of review by EU courts are equally relevant in assessing judicial review as a transnational accountability avenue for IEMEIs, the rest of this *Article* focuses on access to justice issues. Assessing the extent of an accountability gap and the position of TC actors in the EU legal order is particularly determined by the extent to which they can access EU courts, even before considering the grounds of review. In examining the extent to which TC actors can challenge the legality and interpretation of IEMEIs within the EU legal order, this section explores: (1) the routes through which different kinds of TC litigants can have access to the EU judicial system; (2) the conditions that determine whether litigants have *locus standi* to bring a case before EU courts; and (3) the Aarhus Convention,⁷⁸ which is legally relevant for access to justice in environmental matters. It is also notable that, apart from general rules on access to justice in the EU, the legal design and effects of IEMEIs may determine whether IEMEIs can be challenged in the EU legal order on the basis of a reviewable EU act. Particularly in cases of “*de jure* Brussels effect”, where the TC may change its own regulation in response to EU standards, or when the EU measure defers to TC law, such as the Timber Regulation,⁷⁹ it could be the case that it is domestic TC law that imposes obligations on TC actors, which cannot be challenged before EU courts.

III.1. AVENUES FOR ACCESS TO JUSTICE FOR DIFFERENT KINDS OF THIRD COUNTRY ACTORS

Depending on the legal design of IEMEIs, different kinds of TC actors may seek to challenge IEMEIs and related acts, ranging from TC individuals to TC governments. As a general rule, any natural or legal person can access EU courts⁸⁰ and apply for annulment of EU law under Art. 263, para. 4, TFEU irrespective of nationality, place of resi-

⁷⁶ Court of Justice, judgment of 22 January 1976, case 55/75, *Balkan-Import-Export*, para. 14.

⁷⁷ D. AUGENSTEIN, *The Human Rights Dimension of Environmental Protection in EU External Relations Post-Lisbon*, in E. MORGERA (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge: Cambridge University Press, 2012, pp. 263-286.

⁷⁸ 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).

⁷⁹ Regulation 995/2010, cit.

⁸⁰ Art. 19, para. 3, TEU.

dence or registration.⁸¹ In fact, there are many examples of cases brought by TC natural or legal persons.⁸² The CJEU has not conclusively ruled whether this covers non-EU countries. However, it has implied that companies that constitute “emanations of the state” would have access to EU courts as there is no rule preventing them from doing so and denying them access would go against the principle of effective judicial protection.⁸³ Therefore, in principle, TC actors, including TC governments, could apply to EU courts for annulment of IEMEIs or IEMEI-related acts. However, contrary to Member States that have privileged access to EU courts under Art. 263, para. 2, TFEU, TC governments must satisfy the standing requirements under Art. 263, para. 4, TFEU, which as discussed in section III.2. are difficult to fulfil for both EU and non-EU affected actors.

Apart from direct access to EU courts, TC actors could also challenge the validity and interpretation of IEMEIs through the preliminary reference procedure.⁸⁴ Notably, foreign companies incorporated under national law in Member States can bring cases before national courts that could then be referred to the CJEU. This is particularly important as it would be unlikely for such companies to have standing before EU courts directly, as discussed below. This route has been employed in several cases, including in *ATAA*,⁸⁵ where US airlines challenged the legality of the Aviation Directive before the High Court in the UK. However, at the same time, it would be unlikely for TC individuals to be able to bring a case before Member State courts and have access to EU courts through this route. Their access through the preliminary reference route is thus, in practice, more restrained in comparison with EU nationals. The access of TC actors through this route is thus easier for rich multinational corporations with registered offices in the EU than it may be for weaker TC actors, such as smaller companies and individual actors, particularly from developing countries. This demonstrates how “accountability in world politics is inextricably entangled with power relationships” and how weak actors are in a disadvantaged position to hold powerful actors to account.⁸⁶

Overall, TC individual actors face similar challenges in directly accessing EU courts as do EU actors,⁸⁷ while their access to national courts may be more restricted. As for TC governments, their position, as non-privileged applicants, imposes additional limitations for accessing EU courts, compared to access by Member States. This is due to strict standing requirements for non-privileged applicants.

⁸¹ K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2014, p. 316.

⁸² For example, General Court, judgment of 25 October 2011, case T-262/10, *Microban*.

⁸³ Art. 47 of the Charter of Fundamental Rights of the European Union (the Charter); General Court, judgment of 18 September 2015, case T-156/13, *Petro Suisse*.

⁸⁴ Art. 267 TFEU.

⁸⁵ *ATAA*, cit.

⁸⁶ R.W. GRANT, R.O. KEOHANE, *Accountability and Abuses of Power in World Politics*, in *American Political Science Review*, 2005, p. 29 *et seq.*, p. 40.

⁸⁷ E. KORKEA-AHO, ‘Mr Smith Goes To Brussels’: *Third Country Lobbying and the Making of EU Law and Policy*, in *Cambridge Yearbook of European Legal Studies*, 2016, p. 1 *et seq.*

III.2. STANDING

Although standing requirements do not formally discriminate or delimit access on the basis of nationality or place of establishment, in practice TC applicants face difficulties in directly accessing EU courts. This is due to the restrictive interpretation of standing as well as different features of the legal design of IEMEIs discussed in section II, including whether IEMEIs impose direct obligations on TC actors and whether it is the EU act or TC act that could be challenged.

In EU law terms, having established that TC actors are eligible to bring a case before EU courts, the next step concerns the admissibility of a case. In this respect, the regulatory design of IEMEIs may determine whether TC actors fulfil the standing requirements under EU law. According to Art. 263, para. 4, TFEU, “any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”.

The easiest way of accessing the courts is when a decision is addressed to a specific person as this right is granted unconditionally. Thus, in principle a decision addressed to a TC actor that is refused access to the EU market can be challenged before EU courts, irrespective of nationality. For example, a negative decision refusing to include a TC ship recycling facility on the European list, a decision rejecting a TC biofuels certification scheme or a decision identifying a TC as a non-cooperating country under the IUU Fishing Regulation⁸⁸ could potentially be challenged by the relevant TC actor.

However, as most EU acts related to IEMEIs would not be individual acts addressed to a specific person, TC actors would usually have to satisfy the accompanying strict conditions of Art. 263, para. 4. In particular, the condition of “individual concern” has been narrowly construed by the CJEU. Standing is accorded only where a decision affects applicants “[...] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons [...]”.⁸⁹ This gives rise to restrictive access to affected interests, which in relation to environmental matters are often represented by NGOs that would not satisfy this test.⁹⁰ With respect to IEMEIs, TC operators, TCs or NGOs representing TC affected interests would usually not satisfy the “individual concern” test as they would not be distinguished by such special attributes. Nonetheless, at least some IEMEI decisions, such as the inclu-

⁸⁸ For example, Implementing Decision (EU) 2017/889 of the Commission of 23 May 2017 identifying the Union of the Comoros as a non-cooperating third country in fighting illegal, unreported and unregulated fishing.

⁸⁹ Court of Justice, judgment of 15 July 1963, case C-26/52, *Plaumann*, para. 107.

⁹⁰ Court of Justice, judgment of 2 April 1998, case C-321/95, *Greenpeace*; L. KRÄMER, *Environmental Justice in the European Court of Justice*, in J. EBBESSON, P.N. OKOWA (eds), *Environmental Law and Justice in Context*, Cambridge: Cambridge University Press, 2009, pp. 195-210.

sion of a fishing vessel on the IUU vessel list, could be challenged on this basis given that such vessels are individually named under an implementing regulation.⁹¹

The alternative Lisbon test for standing under Art. 263, para. 4, TFEU, according to which an applicant can challenge “a regulatory act which is of direct concern to them and does not entail implementing measures”, covers measures of general application. However, as interpreted, this test does not substantially expand the standing requirements. First, it only applies to regulatory acts, which exclude legislative acts.⁹² Second, these acts should not entail any implementing acts, which has also been interpreted narrowly.⁹³ Once these two requirements are met however, regulatory acts that apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged in general and in the abstract are covered.⁹⁴ Importantly, the Lisbon test can lead to more extensive judicial review of non-legislative acts,⁹⁵ which are often used in the implementation of IEMEIs, such as the delegated act on equivalent requirements for treatment of electrical waste⁹⁶ and implementing acts setting out the European list of ship recycling facilities.⁹⁷

An additional element of the standing requirements relevant for TC actors, which often practically limits their access to EU courts, is the interpretation of “direct concern”, specifically as applied by the General Court in *Inuit I*.⁹⁸ The *Inuit* series of cases is particularly relevant for the analysis of IEMEIs because they are cases brought by TC actors affected by an EU measure which established a qualified import ban for hunted seals and seal products.⁹⁹ In identifying whether the applicants were directly concerned, the General Court made a distinction between those applicants that were active in placing seal products on the EU market, whose legal position would be affected by the EU measure, and those applicants engaged in seal hunting outside the EU, whose economic position would be affected.¹⁰⁰ The Court found direct concern only in relation to the former category. This legal point was not reviewed by the Court of Justice, which deter-

⁹¹ Implementing Regulation (EU) 2015/1852 of the Commission of 19 October 2016 amending Regulation (EU) 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing.

⁹² General Court, order of 6 September 2011, case T-18/10, *Inuit* (hereinafter, *Inuit I*).

⁹³ General Court, order of 4 June 2012, case T-381/11, *Eurofer*.

⁹⁴ *Microban*, cit.

⁹⁵ C. BUCHANAN, *Long Awaited Guidance on the Meaning of Regulatory Act for Locus Standi under the Lisbon Treaty*, in *European Journal of Risk Regulation*, 2012, p. 115 et seq.

⁹⁶ Art. 10, para. 3, of Directive 2012/19, cit.

⁹⁷ Art. 16, para. 1, of Regulation 1257/2013, cit.

⁹⁸ *Inuit I*, order of 6 September 2011, cit.

⁹⁹ Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (hereinafter, also *Seals Regulation*).

¹⁰⁰ *Inuit I*, order of 6 September 2011, cit., para. 75.

mined that the measure was not a regulatory act and that the applicants lacked individual concern.¹⁰¹

This distinction can be important for TC actors affected by IEMEIs when they are not directly involved in placing products in the EU market but rather are indirectly affected by requirements imposed on processes abroad, which is often the case.¹⁰² For example, the Timber Regulation places due diligence obligations on operators who place timber on the EU market and that indirectly affect harvesters of timber. Although there may be situations where “the operator” under the Regulation will be the non-EU entity, in most transactions the “operator” will be the EU entity importing the timber.¹⁰³ In this case, TC harvesters could instead potentially challenge TC standards determining legally harvested timber under TC law, on the basis of which the Timber Regulation and VPAs apply, before TC courts. However, given that timber producing countries are often developing countries with less established legal and judicial systems, affected actors may face other kinds of hurdles in challenging timber regulation in TCs. Generally, when obligations are imposed on a different level of the supply chain, TC operators cannot challenge IEMEIs, even if they are directly economically affected and possibly also indirectly legally affected. Indirectly affected TC actors may instead resort to external review mechanisms under the WTO, as TCs did in relation to the Seals Regulation.¹⁰⁴ However, review of IEMEIs before the WTO dispute settlement system does not provide opportunities for challenging IEMEIs on the basis of the legal system from which they originate. Additionally, WTO rulings lack direct effect in the EU,¹⁰⁵ thereby restricting their disciplining function with respect to IEMEIs.

Apart from the standing requirements discussed above, EU courts have developed a rights-based approach to a participation exception,¹⁰⁶ which could provide an alternative avenue for TC actors directly accessing EU courts. This allows those with a legally recognised right of participation to challenge its application.¹⁰⁷ However, when recognised participation rights do not exist, this avenue of standing would not be available by general consultation with TC actors in the formulation of IEMEIs, for example in impact assessments. Recognised participation rights, particularly in the form of a right to be heard, may be explicitly provided in secondary legislation or arise as general principles of law. For example, in the context of IEMEIs, a right to be heard is specifically provided

¹⁰¹ Court of Justice, judgment of 3 October 2013, case C-583/11, *Inuit*.

¹⁰² See *infra*, section II.2.

¹⁰³ Commission, Guidance Document for the EU Timber Regulation, COM(2016) 755 final, Annex I.

¹⁰⁴ WTO DSB, appellate body report of 18 June 2014, case no. ds400, *United States v. European Communities, EC – Measures Prohibiting the Importation and Marketing of Seal Products*.

¹⁰⁵ Court of Justice, judgment of 9 September 2008, joined cases C-120/06 P and C-121/06 P, *FIAMM*, para. 129.

¹⁰⁶ J. SCOTT, S. STURM, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, in *Columbia Journal of European Law*, 2006, p. 565 *et seq.*

¹⁰⁷ General Court, judgment of 9 April 2002, case T-339/00, *Bactria*.

in the IUU Regulation when an adverse decision is taken against a TC fishing vessel¹⁰⁸ or a TC flag state.¹⁰⁹ As a general principle however, a right to be heard is recognised only in limited circumstances. For example, it is recognised in relation to individual measures adversely affecting a person¹¹⁰ but it does not, however, extend to legislative measures, or acts of general application.¹¹¹ In the context of IEMELs, a right to be heard could potentially apply when a TC facility applies to be included in the European list of ship recycling facilities.¹¹² The ship recycling facility would be under investigation, including through site inspections. However, it is not clear whether a right to be heard would apply in the absence of an explicit right given that authorisation of facilities is done on the basis of general conditions, and the European List is set out in implementing legislation that lists all authorised facilities. A right to be heard could arise at different stages of implementation of the Ship Recycling Regulation. The Commission's guidance provides for TC facilities the opportunity to present their case and answer the Commission's questions when the Commission considers removing a facility from the European list.¹¹³ Although this is provided in a non-legally binding instrument, such a right would likely apply as a general principle given that removing a facility from the list would be set out in an individual decision or administrative act. In any case, when standing is established on the basis of legally recognised participation rights, the applicant cannot challenge the substantive content of a decision,¹¹⁴ but rather they must show that they would have been in a better position to ensure their defence if they had been given the opportunity to be heard.¹¹⁵

Overall, direct access to EU courts is restricted. This is despite a right to effective judicial protection under the Charter.¹¹⁶ As the Court of Justice has emphasised, the complete system of legal remedies of the EU consists of a combination of direct action before EU courts as well as judicial review in national courts and references for preliminary rulings.¹¹⁷ The shortcomings of providing a full system of judicial protection through the preliminary references route have been repeatedly identified, both by the

¹⁰⁸ Art. 27, para. 2, of Regulation 1005/2008, cit.

¹⁰⁹ *Ibid.*, Arts 32 and 33.

¹¹⁰ Art. 41 of the Charter.

¹¹¹ General Court, judgment of 11 December 1996, case T-521/93, *Atlanta*.

¹¹² Art. 15 of Regulation 1257/2013, cit.

¹¹³ Communication COM(2016) 1900, cit., p. 5.

¹¹⁴ *Eurofer*, order of 4 June 2012, cit.

¹¹⁵ General Court, judgment of 9 June 2016, case T-276/13, *Growth Energy and Renewable Fuels*, para. 252.

¹¹⁶ Art. 47 of the Charter; A. ARNULL, *Judicial Review in the European Union*, in A. ARNULL, D. CHALMERS (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, pp. 376-402.

¹¹⁷ Court of Justice, judgment of 25 July 2002, case C-50/00, *Union de Pequenos Agricultores* (UPA).

judiciary¹¹⁸ and by academia.¹¹⁹ These shortcomings are equally true, or perhaps even more so, in relation to judicial protection of TC interests when domestic measures, such as IEMEIs, are designed to extend beyond EU borders. TC actors may not have easy access to national courts; their review can raise political issues affecting EU external relations; and their varying review by national courts can affect the effectiveness of the harmonisation of common European environmental standards that determine access to the European single market. For these reasons, consideration of TC impacts should preferably be determined by EU courts rather than national courts, because access to national courts may favour some kinds of privileged TC actors while excluding weaker ones.

The alternative routes for access to the EU judicial system do not necessarily compensate for the restrictive approach to standing for direct access to EU courts. This was recently highlighted by the Aarhus Convention Compliance Committee (ACCC) in reviewing the compliance of the EU with its obligations under the Aarhus Convention,¹²⁰ which is also legally relevant when examining the possibilities for access to justice in environmental matters.

III.3. THE AARHUS CONVENTION AND ACCESS TO JUSTICE

While there is scepticism as to whether the Aarhus Convention (the Convention) has had a real impact in the EU in terms of accountability and transparency,¹²¹ its implementation in the EU legal order is significant for the inquiry of this special issue into the crossroads of EU administrative law and external relations in three ways. These relate to how an international agreement can create new substantive and procedural rules and principles within the EU legal order; how these rules and principles can develop through the oversight of external compliance bodies; and how ensuring access to justice in accordance with the Aarhus Convention could expand judicial review as a transnational accountability avenue by broadening the personal scope of procedural rights to non-EU actors.

The Aarhus Convention is legally relevant for IEMEIs particularly in terms of access to justice and access to environmental information. Notably, its provisions do not discriminate on the basis of nationality in terms of who can access the Convention's rights and could thus be relied upon by TC actors. In the context of access to EU courts, the third pillar of the Aarhus Convention on access to justice is particularly relevant. This

¹¹⁸ General Court, judgment of 3 May 2002, case T-177/01, *Jégo-Quéré*, para. 51. See also Opinion of AG Jacobs delivered on 10 July 2003, case C-50/00, *Union de Pequenos Agricultores* (UPA).

¹¹⁹ M. LEE, *EU Environmental Law: Challenges, Change and Decision-Making*, Oxford: Hart Publishing, 2005, pp. 139-144.

¹²⁰ Findings and Recommendations of the Compliance Committee adopted 17 March 2017 with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union (ACCC Findings).

¹²¹ C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, Oxford: Hart Publishing, 2014, pp. 297-321.

relevance lies in the international commitments of the EU under Art. 9 of the Convention, and in its implementation in EU law, demonstrating how the external accountability gap could be filled through the implementation of an international agreement in the EU legal order.

Depending on the kind of act that applicants seek to challenge, different standing requirements apply in the Aarhus context. In relation to a negative decision for access to information, applicants can ask for a re-examination of their request following which they can challenge a negative decision before EU courts.¹²² In relation to IEMIs and external accountability, it is notable that the first pillar of the Aarhus Convention – that is, access to environmental information – extends to any person in the world.¹²³ This is notwithstanding the formulation of access to documents and information under Art. 15, para. 3, TFEU and Art. 42 of the Charter, which provide for access to information for “any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State”. The Aarhus Regulation¹²⁴ provides that request for access to environmental information under the Transparency Regulation,¹²⁵ which is also limited in scope, applies without discrimination as to citizenship, nationality, domicile or where legal persons have their registered seats or effective centre of activities.¹²⁶ A combined reading of the Aarhus and Transparency Regulations covers persons from non-signatory states to the Aarhus Convention, enabling TC actors to require the disclosure of information based on which IEMIs are adopted and applied, as well as providing the possibility to institute court proceedings in cases where access to information is refused. For example, TC actors could require information and challenge refusals of access regarding the basis of default values for biofuels, which can be used to more easily prove compliance with specific sustainability criteria¹²⁷ or the bases on which the criteria for equivalent treatment of electrical waste are determined.¹²⁸

Importantly, “environmental information” is a broad concept that includes any measures likely to affect environmental factors as well as cost benefit and other eco-

¹²² Art. 8 of Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (Transparency Regulation).

¹²³ A. BERTHIER, L. KRÄMER, *The Aarhus Convention: Implementation and Compliance in EU Law*, ClientEarth EU Aarhus Centre, 2014, www.clientearth.org, p. 14.

¹²⁴ Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (Aarhus Regulation).

¹²⁵ Regulation 1049/2001, cit.

¹²⁶ Art. 3 of Regulation 1367/2006, cit.

¹²⁷ These are set out in Annex V of Directive 2009/28, cit., but the Commission can also add default values in accordance with criteria and processes set out in the Commission Communication on voluntary schemes and default values.

¹²⁸ Art. 10, para. 3, of Directive 2012/19, cit.

conomic analyses and assumptions used within the framework of measures and policies.¹²⁹ For example, in the context of IEMEIs, environmental NGOs brought a case against the Commission for failure to provide access to information about the authorisation of biofuels voluntary certification schemes.¹³⁰ Particularly, this information also related to effects in TCs in terms of food prices and effects on the environment, which the Commission is specifically required to monitor under the Renewable Energy Directive,¹³¹ and which TC actors may also wish to challenge. Recently, information relating to the environment was interpreted to include foreseeable emissions into the environment¹³² which can be particularly relevant for IEMEIs relating to climate change.

Beyond access to information, the Aarhus Convention and its implementation in the EU provide for access to justice in relation to “acts or omissions relating to the environment”. Art. 9, para. 3, of the Aarhus Convention requires signatories to ensure that the public has access to “administrative or judicial procedures to challenge acts or omissions by [...] public authorities which contravene provisions of its national law relating to the environment”. This includes a caveat that contracting parties can lay down any criteria that will determine access to justice. While the implementation of Aarhus access to justice requirements at first sight seem promising, implementing legislation has been construed and interpreted narrowly, considerably limiting this accountability avenue.

In complying with Art. 9, para. 3, the EU established a procedure to apply for an internal review of an administrative act or alleged omission in relation to environmental law under the Aarhus Regulation.¹³³ This procedure is limited in two important respects. First, it can only be invoked on the basis of violation of EU environmental law.¹³⁴ Second, it is only open to a specific class of legal persons – NGOs established under national law of an EU Member State – whose primary objective is the promotion of environmental protection.¹³⁵ While the administrative review procedure provides a significant avenue for social accountability by environmental NGOs, these limitations are important. The review does not extend to issues of procedural fairness that may have been circumvented and is not open to non-environmental NGOs such as trade unions, which may also be affected by such acts or omissions,¹³⁶ or to other members of the

¹²⁹ Art. 2, para. 1, let. d), of Regulation 1367/2006, cit.

¹³⁰ General Court, order of 9 November 2011, case T-449/10, *ClientEarth et al. v. Commission*.

¹³¹ Art. 17, para. 7, of Directive 2009/28, cit.

¹³² Court of Justice, judgment of 23 November 2016, case C-673/13, *Commission v. Stichting Greenpeace Nederland and PAN Europe*.

¹³³ Art. 10 of Regulation 1367/2006, cit.

¹³⁴ *Ibid.*, Arts 10, para. 1, and 2, para. 1, let. f).

¹³⁵ *Ibid.*, Art. 11.

¹³⁶ M. PALLEMAERTS, *Access to Environmental Justice at EU Level: Has 'the Aarhus Regulation' Improved the Situation?*, in M. PALLEMAERTS (ed.), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Groninger: Europa Law Publishing, 2011, pp. 273-312.

public.¹³⁷ This can be particularly problematic in light of the EU's commitment to sustainable development¹³⁸ and coherence among its different policies.¹³⁹

Furthermore, internal review is only available for "administrative acts" under environmental law, thus excluding legislative acts adopted by ordinary legislative procedure.¹⁴⁰ "Administrative acts" include only measures of individual scope, excluding measures of general application,¹⁴¹ something that enables the Commission to refuse most requests for internal review. Even though the narrow scope of acts covered by the internal review has been challenged, the CJEU has avoided assessing the compatibility of Art. 10 of the Aarhus Regulation with Art. 9, para. 3, of the Aarhus Convention by holding that the Regulation is not meant to implement these provisions and that the Convention lacks direct effect in the EU legal order.¹⁴² Despite its narrow scope, this procedure allows for review of some transnational regulation, such as authorisations under the Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)¹⁴³ or the authorisation of placing genetically modified organisms on the market,¹⁴⁴ but may still be restrictive on the merits.¹⁴⁵ On the basis of the current interpretation of the administrative review procedure, environmental NGOs could potentially challenge IEMEI-related decisions, such as the inclusion of a ship recycling facility on the European list, if the implementing act is considered to be of individual scope, or the recognition of a biofuels sustainability certification scheme which is set out in individual implementing acts.¹⁴⁶ However, in this respect, environmental NGOs could seek to challenge Commission decisions because of contravention of environmental law, which in effect may be conflicting with TC economic or developmental interests affected by IEMEIs. This demonstrates the various kinds of contradictory accountability claims that IEMEIs may raise from the perspective of internal and external interests.

What is of particular interest in terms of access to justice, is the possibility for NGOs to challenge the process of internal review under the Aarhus Regulation before EU

¹³⁷ This was found to be contrary to Art. 9, para. 3, by ACCC Findings (Part II), cit., paras 93-94.

¹³⁸ Art. 11 TFEU.

¹³⁹ M. PALLEMAERTS, *Access to Environmental Justice at EU Level*, cit., pp. 273-312.

¹⁴⁰ Art. 10 of Regulation 1367/2006, cit.

¹⁴¹ *Ibid.*, Art. 2, para. 1, let. g).

¹⁴² Court of Justice: judgment of 8 March 2011, case C-240/09, *Lesoochránárske zoskupenie*; judgment of 13 January 2015, joined cases C-404/12 P and C-405/12 P, *Stichting Natuur en Milieu*.

¹⁴³ Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

¹⁴⁴ M. PALLEMAERTS, *Access to Environmental Justice at EU Level*, cit., p. 284.

¹⁴⁵ *Ibid.*, pp. 283-286.

¹⁴⁶ For example, Implementing Decision (EU) 2016/1361 of Commission of 9 August 2016 on recognition of the "International Sustainability and Carbon Certification system" for demonstrating compliance with the sustainability criteria under Directives 98/70/EC and 2009/28/EC of the European Parliament and of the Council.

courts,¹⁴⁷ which could provide for a combination of social and legal accountability. Although at first sight it may seem as if the standing requirements are relaxed, it is doubtful, however, whether this would amount to a full review of the legality of the act or instead be limited merely to review of the written reply provided under the Aarhus Regulation.¹⁴⁸ If the NGO wants to challenge the initial act or omission, it would likely have to qualify under the normal standing rules,¹⁴⁹ which as analysed above are restrictive for NGOs.

The restricted nature of EU standing requirements has been repeatedly criticised by the ACCC, which oversees the implementation of the Aarhus Convention. In 2011, the ACCC noted that if EU courts continued with the same restrictive approach to standing, this would lead to a breach of the Convention's access to justice provisions, unless administrative review procedures compensated for the restrictive approach.¹⁵⁰ In March 2017, the Committee issued its final findings, holding that the post-Lisbon Art. 263, para. 4, TFEU,¹⁵¹ the internal review procedure under the Aarhus Regulation¹⁵² and the CJEU's case law discussed above,¹⁵³ do not constitute a change in direction to the effect of bringing the EU in compliance with the Convention. While the ACCC findings are not legally binding, the EU has committed to international obligations under the Aarhus Convention and to comply with findings of the ACCC. In terms of accountability, there is at least some political pressure on the EU to comply with access to justice requirements to enable members of the public to have access to effective judicial redress. While it seems unlikely for standing requirements to be drastically expanded, designing and interpreting Aarhus implementing legislation in accordance with the Aarhus Convention, possibly through more expansive administrative procedures, could extend access to justice in the EU legal order in some respects. It remains to be seen whether and how the EU will change its approach to be in line with the Aarhus Convention and what this would mean for access to justice for different kinds of TC actors.

Overall, while TC actors have access to justice through several avenues in the EU legal order, in practice direct access of TC affected interests to EU courts is restricted. This calls into question whether judicial review in the EU provides sufficient ways to hold EU global regulatory power into account, rendering it an imperfect accountability avenue for IEMEIs.

¹⁴⁷ Art. 12 of Regulation 1367/2006, cit.

¹⁴⁸ M. PALLEMAERTS, *Access to Environmental Justice at EU Level*, cit., pp. 295-296.

¹⁴⁹ C. PONCELET, *Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?*, in *Journal of Environmental Law*, 2012, p. 287 *et seq.*

¹⁵⁰ ACCC Findings (Part I) adopted 14 April 2011 on the compliance of the European Union, para. 88.

¹⁵¹ ACCC Findings (Part II), cit., paras 67-80.

¹⁵² *Ibid.*, paras 95-105.

¹⁵³ See *supra*, footnote 142.

IV. CONCLUSION

Territorial extension through IEMEIs blurs the distinction between internal and external EU action, with IEMEIs simultaneously regulating the internal market and catalysing developments outside EU borders by regulating conduct abroad. Given the uncertain nature of accountability relationships between the EU as the regulating jurisdiction and TC interests affected by its action, this phenomenon gives rise to complex questions about controlling the exercise of EU global regulatory power.

With the unilateral exercise of EU global regulatory power proliferating, not only in environmental law, but in many policy areas, judicial review in the EU legal order has a significant role to play in holding EU regulatory power to account in relation to TC affected interests. Judicial review in the EU has some disciplining potential in relation to IEMEIs by providing access to EU courts when TC actors are directly affected, through the preliminary rulings procedure, and when individual decisions are addressed to them. However, direct access by TC actors is restricted when they are affected by IEMEIs in indirect and general ways. The restricted access to EU courts exacerbates an external accountability gap when TC affected actors cannot judicially challenge IEMEIs on the basis of the home legal system of EU law. Further, while this *Article* has focused on *access to justice* in determining the disciplining potential of judicial review for controlling EU global regulatory power, the extent to which the disciplining potential of judicial control of IEMEIs is realised also depends on the grounds and intensity of review by EU courts. Research into the intensity of review on the basis of grounds such as proportionality and fundamental rights in relation to TC effects can also help determine the extent to which legal accountability through judicial review contributes to addressing an external accountability gap related to IEMEIs.



ARTICLES

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

EXTERNAL PARTICIPANTS V. INTERNAL INTERESTS: PRINCIPLES OF EU ADMINISTRATIVE LAW IN ANTI-DUMPING INVESTIGATIONS

EMILIA KORKEA-AHO* AND SUVI SANKARI**

TABLE OF CONTENTS: I. Introduction. – II. Discretion or clear rules? The “fundamental importance” of the administrative law framework. – III. Interests involved in anti-dumping policy-making. – III.1. Decision to initiate investigations. – III.2. Decision on anti-dumping duties. – IV. Three functions of participation. – IV.1. Mechanism to collect expertise and information. – IV.2. Participation as constraining the exercise of administrative powers. – IV.3. Democratic anti-dumping regime: participation as contributing to accountability? – V. Concluding discussion: do administrative law principles protect equally?

ABSTRACT: Anti-dumping policy is key among the EU trade defence instruments. Although formally a political regime to restrict cheap imports to the EU, its daily operations target individual companies, predominantly from third countries. Finding a balance between multilateral trade rules and the individualised and international decision-making requires a well-functioning administrative procedure to protect the rights of the defence. Anti-dumping decision-making is exercised according to WTO-compliant rules laid down in the Basic Regulation (i.e. Regulation (EU) 2016/1036) which governs the Commission’s exercise of discretion. The EU has put in place a procedurally elaborated and territorially blind administrative framework, which invites external participation and promotes reciprocity in third-country procedures for EU producers. The framework extends beyond the rights of the defence for those affected by the decisions, to a broader participation. Formally respecting the rights of participants, including their interests, and treating them equally regardless of geographical origin does not negate the fact that certain interests weigh more than others. The disparity is not created by inadequacies or limitations of administrative law, but rather by the overall framing of the process to cater to the needs of domestic EU industry and political tit-for-tat thinking. The lack of soft law rules further augments executive discretion in anti-dumping decision-making, and accountability for Commission choices is difficult to enforce. In addition to insisting on transparency and the rights of the defence, a

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complementary way to increase and improve accountability would be to acknowledge a more substantive duty to state reasons in anti-dumping policy-making.

KEYWORDS: trade defence instruments – anti-dumping procedure – external interests – EU administrative law – rights of the defence – equal treatment.

I. INTRODUCTION

Trade policy interests of both the EU and its Member States are promoted within the Common Commercial Policy (CCP). The CCP covers “both unilateral measures adopted by the Union institutions and conventional measures negotiated with third countries and international organisations”.¹ Unilateral measures include a whole host of instruments, amongst which are – as described by Art. 207 TFEU – “measures to protect trade such as those to be taken in the event of dumping and subsidies”. From the start, European Economic Community law has followed and applied General Agreement on Tariffs and Trade (GATT) rules on anti-dumping. In other words, this part of the CCP, which dates back to the original Treaty, is derived from GATT. Dumping is a situation where producers from a third country export their goods to the EU at prices below the cost of production or the domestic price of the product.

As a policy area, the CCP differs from other external relations policy fields, such as the Common Foreign and Security Policy or development policy, because the EU has exclusive competence to act. In one of the earliest important CCP cases, the Court talks about “the common interests of the Community, within which the particular interests of the member states must endeavour to adapt to each other”,² and the exclusivity of the CCP serves this idea of the common interest. The Council adopts CCP measures by a qualified majority (Art. 207, paras 2 and 4, TFEU) following a proposal by the Commission, according to the ordinary legislative procedure.

Since the early days, EU institutions have had wide discretion to promote the common interest in the CCP, a conclusion forcefully asserted by the Court of Justice in the 1970s. In its view,

“the proper functioning of the Customs Union justifies a wide interpretation of Articles 9, 27, 28, 111 and 113 [the latter two appearing in the ex-chapter headed Commercial Policy] of the Treaty and of the powers which these provisions confer on the institutions to allow them thoroughly to control external trade by measures taken both independently and by agreement”.³

¹ P. KOUTRAKOS, *EU International Relations Law*, Bloomsbury: Bloomsbury Publishing, 2015, p. 19.

² Court of Justice, opinion 1/75 of 11 November 1975, pp. 1363-1364.

³ Court of Justice, judgment of 12 July 1973, case 8/73, *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*, para. 4.

In a subsequent case, the Court linked the two more explicitly, arguing that the breadth of executive discretion and the lack of substantive policy prescriptions in the Treaty serve the promotion of the common interest.⁴

Beyond Court jurisprudence, there is little guidance on CCP policy-making. The EU Treaties do not elaborate on the administration of the CCP, noting only that it “shall be conducted in the context of the principles and objectives of the Union’s external action”.⁵ Specific CCP objectives are rare, except for the commitment to liberalisation in Art. 206 TFEU. Has this traditional starting point been altered by the objectives and principles introduced as general external objectives in Art. 21 TEU and in Art. 3, para. 5, TEU? Both are defined broadly and in universal terms, including “free and fair trade” (Art. 3, para. 5), “sustainable economic, social and environmental development” and “integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade” (Art. 21, para. 2, let. d) and e)).

Besides these manifold and possibly contradictory objectives, Art. 21 states that, in the context of implementing the CCP, the most relevant guiding principles are the rule of law, the universality and indivisibility of human rights and fundamental freedoms, the principle of equality, and observance of international law. The Union is also encouraged to develop relations and partnerships with third countries including giving preference to multilateral solutions where available. Finally, the EU must ensure consistency between external actions and its other policies (Art. 21, para. 3, TEU).

The current set of broadly defined goals does not easily translate into guiding EU action in the CCP generally, or anti-dumping policy-making more specifically. However, it gives an idea of the complex interests involved when deciding whether imposing anti-dumping duties is in the Union interest. The depiction of the anti-dumping regime as free from substantive treaty-based policy constraints or as primarily technical decision-making is thus misleading, and anti-dumping policy is “trade policy”,⁶ involving contestations between economic and political systems.⁷ One such tension relates to the conceptualisation of the anti-dumping regime.⁸ Is anti-dumping decision-making perceived as an illustration of, or an exception to, free and fair trade? Anti-dumping investigations can, on the one hand, be seen as measures to protect trade (Art. 207 TFEU) from unfair trading practices. On the other hand, free and fair trade can be seen as “fair” in the

⁴ Court of Justice, judgment of 19 November 1998, case C-150/94, *UK v. Council*, see e.g. paras 53-55, 64 and 67.

⁵ Art. 207, para. 1, TFEU.

⁶ N. PALMETER, *Editorial: The Antidumping Emperor*, in *Journal of World Trade*, 1998, p. 7. For the historical overview, see F. SNYDER, *The Origins of the ‘Nonmarket Economy’: Ideas, Pluralism and Power in EC Anti-dumping Law about China*, in *European Law Journal*, 2001, p. 369 et seq.

⁷ F. SNYDER, *The Origins of the ‘Nonmarket Economy’*, cit., p. 390.

⁸ For an overview, see P. MAVROIDIS, *The Regulation of International Trade: Volume 2, The WTO Agreements on Trade in Goods*, Cambridge: MIT Press, 2016, pp. 175-184.

sense of equitable and inclusive trade, where anti-dumping measures ultimately serve the treaty goals of “integration of all countries into the world economy” and “sustainable economic, social and environmental development”.⁹ This example suffices to show how quite run-of-the-mill decisions in anti-dumping investigations may lead to decision-making that either undermines or promotes free and fair trade: in other words, decision-making that cannot be purely technical in nature.

Anti-dumping policy is closely linked to the internal market policies via EU competition law, because both are concerned with “unfair” conduct in the market as well as the economic interests of individuals. Furthermore, many procedural rights were first established in competition law cases,¹⁰ before being applied to the anti-dumping context,¹¹ and together they can be thought of as leading the way for the development of administrative procedures in other policy areas.¹² But there are also some interesting differences that centre around executive discretion. Competition law decision-making is non-discretionary in the sense that certain behaviours are “automatically” banned in the absence of an applicable exception. In contrast, there is no obligation to impose an anti-dumping duty if dumping is found, hence, discretion exists in how the exception is applied. Moreover, trade defence measures, unlike competition law proceedings, are not regulated at the level of primary law, but are “a legislative creation”.¹³ Although secondary legislation constrains executive discretion, there always remains a residual discretion as to whether or not to impose anti-dumping duties.

Different ideological approaches to fair trade and wide discretion are not the only relevant challenges. The context of anti-dumping policy-making is international and political, where the majority of cases pursued affect the EU's key trading partners.¹⁴ Currently, most EU anti-dumping investigations involve Chinese companies, in particular in the contexts of chemicals and metals. In December 2016, there were 95 anti-dumping measures in force, out of which 66 were against China, followed by Indonesia (8), Malaysia (8), and Russia (7). In 2016, the EU initiated a total of nine new investigations, and

⁹ On such understanding, see especially Court of Justice, opinion 2/15 of 16 May 2017, para. 146.

¹⁰ See, e.g., Court of Justice, judgment of 25 October 1977, case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v. Commission*.

¹¹ For instance, Court of Justice, judgment of 20 March 1985, case 264/82, *Timex Corporation v. Council and Commission*.

¹² H. NEHL, *Principles of Administrative Procedure in EC Law*, Oxford: Hart Publishing, 1999, pp. 6-7.

¹³ P. ECKHOUT, *Administrative Procedures in EU External Trade Law*, Briefing Note prepared by request of European Parliament's Committee on Legal Affairs, March 2011, p. 10.

¹⁴ In December 2016, some provisions in China's Protocol of Accession to WTO expired, leading China to insist on “market economy status”. Disappointed by lukewarm reactions of its trading partners, China has requested the establishment of a panel to decide on whether the use by the EU (and US, ds515) of non-market economy methodology in anti-dumping proceedings involving China is consistent with WTO law. See WTO DSB, *EU – Price Comparison Methodologies*, case no. ds516, pending, www.wto.org. In an effort to lobby the EU, China has threatened to set restrictions targeting German auto industry and used climate change policies as a leverage against the EU. The DSB decision is expected by the end of 2017.

China was again at the top of the list with five opened files.¹⁵ What is more, there are always different interests at play in anti-dumping proceedings. The most significant axis of interests links the complainants (EU industry also referred to as EU producers) and Member State governments, whereas the second axis is comprised by importers, third-country producers (also referred to as exporters), consumers, and third-country governments. All parties have specific individual as well as bilateral interests – and may have procedural rights – which have to be balanced both legally and politically in a way that furthers Union interest.

As with the CCP in general, institutions' discretionary choices also provide the starting point for many analyses and Court judgments in the field of anti-dumping. Wide discretion is considered necessary given "the complexity of the economic, political, and legal situations" which Union institutions have to examine.¹⁶ However, discretion is not unfettered but is limited by the respect of rights guaranteed by the EU legal order, which encompasses the requirement that discretion must be exercised carefully and in accordance with the established principles of administrative law. In the anti-dumping context, those principles include, according to Lenaerts *et al.*, "the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case and to give an adequate statement of reasons".¹⁷ More generally, specific constraints upon the exercise of administrative powers include rights of the defence (right to be heard), right to an adequately reasoned decision, and right to effective remedy, whereas the rights of the defence can be broken down to the right to be informed of the commencement and material object of proceedings, right to be advised and assisted by counsel, and the right of access to the file.¹⁸

The administration of the anti-dumping regime takes place in the context of Anti-Dumping Regulation EU 2016/1036 (Basic Regulation).¹⁹ The Regulation, the present

¹⁵ European Commission, Anti-Dumping Anti-Subsidy Safeguard, *Statistics covering 2016*, 28 February 2017, trade.ec.europa.eu, pp. 6-7, 46 *et seq.* According to the Directorate General for Trade website search-engine, there are currently altogether 205 (of which 148 on anti-dumping) cases of trade defence investigations or measures in force by third countries against the EU and its Member States, of which 20 (17) are by China, 8 (0) by Indonesia, 3 (0) by Malaysia, 1 (1) by Russia – compared to, for example, 33 (28) by the US: see trade.ec.europa.eu.

¹⁶ K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2014, p. 399. See also, e.g., Court of Justice, judgment of 16 February 2012, joined cases C-191/09 P and C-200/09 P, *Council and Commission v. Interpipe*, para. 63.

¹⁷ K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, cit., pp. 399-400. Footnotes in the original omitted here.

¹⁸ J. BAST, *Of General Principles and Trojan Horses: Procedural Due Process in Immigration Proceedings under EU Law*, in *German Law Journal*, 2010, pp. 1011-1012; J. SCHWARZE, *European Administrative Law*, London: Sweet & Maxwell, 2006, pp. CXLVIII-CLIV.

¹⁹ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification). This is the latest of a long line of regulations originally started with Regulation (EEC) 459/68 of the Council of 5

version of which the Council originally adopted in 2009, was codified in 2016, rather than modernised. It provides an administrative law framework for individually examining the pricing policies of exporting companies, which are alleged to be dumping. An interesting aspect is that the Basic Regulation does not operate at the level of general administrative principles, rather, it builds on very detailed provisions that govern the investigation, determination and application of anti-dumping duties. Much of the Regulation's content owes itself to Art. VI of GATT 1994 and the Agreement on Implementation of Art. VI of GATT 1994, commonly known as the Anti-Dumping Agreement (ADA).

The individual character of anti-dumping investigations explains the significance of rights of the defence in controlling the powers of administration. But the geographically concentrated statistics together with the trade political "tit-for-tat" nature of anti-dumping also raise the question of rights protection in an international environment. Is the application of rights of the defence in anti-dumping procedures affected by the fact that addressees of those rights are outside the EU? Is Union discretion wider or exceptionally circumscribed in the implementation of anti-dumping measures due to the indirect "extraterritorial" effects of EU anti-dumping decisions? While the topic of anti-dumping and, especially, rules applicable to the calculation of anti-dumping margins, have been subject to much scholarship, fewer studies have been undertaken in relation to administrative law aspects, which are at the core of this *Article*. Such an in-depth study is warranted. First, many of administrative law principles applicable to the external relations field originate in anti-dumping policy-making. Second, whilst anti-dumping procedures are different from other areas of external relations law, they are similar to "cousin" procedures in internal market competition law, both in terms of the Commission powers and interests involved, making it a useful case study in the typology of administrative procedures. The present focus is on administrative law aspects, therefore the evolution of anti-dumping legislation is excluded.²⁰ Similarly, other trade defence instruments, i.e. countervailing duties and safeguard measures, are not analysed in this article, because anti-dumping investigations are more common and have some specific characteristics. Safeguards intended to temporarily shield domestic industry from excess imports are not targeted, and no individual decisions are taken by the EU, whereas in the case of subsidies it is a third country which is targeted and not an exporter.

The *Article* is organised as follows. Section 2 shortly introduces the fundamental tension between discretion and rules, the tension which characterises both the evolution and

April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community.

²⁰ Modernisation of trade defence legislation has been an arduous task. For the recent effort to overhaul the system, see F. HOFFMEISTER, *Modernising the EU's Trade Defence Instruments: Mission Impossible?*, in C. HERRMANN, B. SIMMA, R. STREINZ (eds), *European Yearbook of International Economic Law: Trade Policy between Law, Diplomacy and Scholarship. Liber Amicorum in Memoriam Horst G. Krenzler*, Heidelberg: Springer, 2015, p. 365 *et seq.*

application of the EU anti-dumping regime. Section 3 focuses on different substantive interests involved in anti-dumping investigations, whereas Section 4 analyses how these different interests play out in participatory processes and what function they have from the perspective of external application of EU rules on administration. Finally, we conclude.

II. DISCRETION OR CLEAR RULES? THE “FUNDAMENTAL IMPORTANCE” OF THE ADMINISTRATIVE LAW FRAMEWORK

As indicated above, the Treaties provide few benchmarks for developing and applying the EU anti-dumping regime, conferring wide discretion on the institutions to interpret and apply the rules. The Court has consistently held that the powers which the institutions have under the Treaties must be interpreted widely in order to ensure the proper functioning of the CCP policy-making. Discretion exercised by the institutions in the external policy field has been broad, encompassing both substantive aspects of the policy as well as procedural questions.²¹

Anti-dumping decision-making involves two parts: first, the anti-dumping investigation and, second, the imposition of anti-dumping duties. The decision-making process gives rise to preparatory measures adopted by the Commission that cannot be challenged as well as (final) measures that have legal effects and can be challenged by bringing an action for annulment. Definitive anti-dumping duties adopted by the Commission as Commission implementing regulations since 2014, as well as the decision not to impose them, are both challengeable acts.²² The Basic Regulation does not qualify the level of the duty to state reasons, hence the general “hybrid” procedural-substantive principle in Art. 296, para. 2, TFEU applies to anti-dumping decisions.²³

Annulment jurisprudence provides an interesting context from which to offer perspective into EU anti-dumping decision-making. Drawing on extensive case law in the area, Hartley has characterised anti-dumping measures as “acts of quasi-judicial nature” and anti-dumping policy-making as a field “in which the Union institution adopting the act is bound by clear rules”.²⁴ He argues that “the final determination depends largely

²¹ Generally on exercise of discretion in external policy field, see 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.*

²² According to Lenaerts *et al.*, also the following decisions are challengeable: decision rejecting a request for initiation of partial interim review and decision to impose provisional duties. See K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, cit., p. 299.

²³ On hybridity, see H. NEHL, *Principles of Administrative Procedure*, cit., pp. 104, 120. For recent case law on the duty, see Court of Justice, judgment of 10 March 2016, case C-247/14, *HeidelbergCement AG v. Commission*, para. 16 (and the cases it refers to). On WTO standard of review, see P. MAVROIDIS, *The Regulation of International Trade*, cit., p. 167 *et seq.*

²⁴ T. HARTLEY, *The Foundations of European Union Law*, Oxford: Oxford University Press, 2014, p. 371.

on questions of fact, and a semi-judicial procedure is followed".²⁵ For Hartley, determinations of anti-dumping measures are not discretionary acts, but rather decisions based on fact and law, something which the Court has reflected in its jurisprudence by adopting, as shown below, a rather liberal approach to standing.

How can a policy area simultaneously be characterised by wide discretion and clear prescriptive rules? In order to answer the question, it is necessary to look into the role of the Court, whose influence has been the most decisive for the development of the policy area and is still strongly felt in the field. The Court's influence on policy choices and administrative procedures has been critical. In the early versions of the Basic Regulation little was said about procedures, offering the Court an unprecedented opportunity to make its mark through jurisprudence.²⁶

An indicative example can be found as early as in the 1980s, when the Court allowed non-privileged applicants (complainants and third-country exporters) to challenge anti-dumping duties that are, technically speaking, regulations and usually non-challengeable due to their general character. In the *Japanese Ball-Bearing* case, in addition to interpreting direct concern more generously than had been past practice, the Court held that third-country exporters fulfill the conditions of individual concern if they had been named in the regulation.²⁷ A few years later, the Court went further, establishing that exporters could also challenge the anti-dumping duties where they "were concerned by the preliminary investigations".²⁸ The Court granted standing to third-country exporters who had actively participated in the proceedings although they were affected by the measure only as members of an open category of actors. This was an anomaly in the doctrinal understanding of standing for non-privileged applicants, suggesting that the Court allowed a larger circle of applicants to challenge duties in return for a more decisive role in shaping the EU anti-dumping regime. Although it certainly appears to be possible that relaxation of standing had something to do with the non-EU origin of exporters, proving such an assertion would be extremely difficult. The international *quid*

²⁵ *Ibid.*

²⁶ See however the repealed Regulation (EEC) 2423/88 of the Council of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, especially its Arts 7, para. 1, let. a) and b), and para. 4, preceding Regulation (EC) 1225/2009 of the Council of 30 November 2009 on protection against dumped imports from countries not members of the European Community, and now codified into Regulation EU 2016/1036. The repealed Regulation had express provisions especially on the right to be heard. However, the Court influenced its content. See on this J. MENDES, *Participation in European Union Rule-Making. A Rights-Based Approach*, Oxford: Oxford University Press, 2011, p. 171.

²⁷ Court of Justice, judgment of 29 March 1979, case 113/77, *NTN Toyo Bearing Company Ltd v. Council*.

²⁸ Court of Justice, judgment of 21 February 1984, joined cases 239/82 and 275/82, *Allied Corporation et al. v. Commission*, para. 12. The relaxation favoured also complainants, but the situation of (independent) importers was, and still is, ambiguous. They have been treated differently on the basis that they, as subjects to import duty, can challenge the measure in national courts. See T. HARTLEY, *The Foundations of European Union Law*, cit., p. 380 *et seq.*

pro quo was part of the consideration, as the Commission supported the admissibility of the exporters' action on the basis that EU exporters might otherwise not be able to challenge similar measures in the US.²⁹

Given the international context, administrative law benchmarks could not be developed in a vacuum. GATT law in anti-dumping (the 1994 ADA) lays down detailed procedure on how to open anti-dumping investigations, how to conduct the investigations and how often to include the interested parties during the investigation procedure. The CJEU has recognised and accepted GATT law in anti-dumping, using it both as an inspiration as well as evidence of a general practice in international trade law.³⁰ In this regard, judicial recognition reflects EU policy more broadly. In a recent report, the Commission explicitly states that:

"Since the beginning, considerable efforts have been made to harmonise the rules relating to trade instruments. During the last GATT round [...] much of the attention was focused on the procedural and material conditions to be fulfilled before measures can be adopted. The EU played an active role in the *negotiation of these relevant criteria which are reflected in its own legislation*".³¹

In which direction did the Court take the EU anti-dumping regime? Early anti-dumping case law demonstrates that the Court limited itself to reviewing the institutions' discretion from a procedural perspective, with the focus of review upon determining whether or not there was a manifest error of appraisal or misuse of powers, with no assessment of the substantive policy choices.³² It is, nevertheless, interesting that dissimilarly to other fields of external relations – where the institutions have discretion even on procedural questions – the Court was never shy to review procedural choices in anti-dumping policy-making. The rationale is likely two-fold. On the one hand, the Court may have wanted to align the EU anti-dumping policy with similar areas in the internal market fields, where policy-making has not escaped the Courts' critical scrutiny. On the other hand, the Court may have taken inspiration from rules and jurisprudence related

²⁹ *Allied Corporation*, cit., para. 6.

³⁰ Note also that as an exception to the WTO system more generally, WTO anti-dumping standards are taken into account by the Courts in two situations. First, where the EU intends to implement a particular WTO provision, and second, where the EU law instrument refers to a specific WTO provision. See e.g. Court of Justice, judgment of 7 May 1991, case C-69/89, *Nakajima v. Council*, paras 29-32. For an excellent recent introduction to the issue, see Court of Justice, judgment of 16 July 2015, case C-21/14 P, *Commission v. Rusul Armenal* [GC], paras 38-55, especially para. 41.

³¹ Staff Working Document COM(2016) 661 final of 18 October 2016 of the Commission accompanying the 34rd Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2015), p. 7 (emphasis added).

³² Court of Justice: judgment of 22 October 1991, case C-16/90, *Nölle v. Hauptzollamt Bremen-Freihafen*; judgment of 7 May 1987, case 240/84, *NTN Toyo Bearing Company Ltd et al. v. Council*; Order of the President of the Court of 17 December 1984, case 254/84 R, *Nippon Seiko KK v. Council*.

to anti-dumping investigations at the WTO level, which clearly have guided the procedural evolution of EU law.³³ In this context, the fundamental importance of the administrative law framework is portrayed as a protective element against the excesses of wide discretion exercised by the institutions.

In more recent case law, there are indications that the Court is growing concerned about the EU institutions' "extremely broad discretion".³⁴ In one case, the four US producers of bioethanol challenged the imposition of duties on the basis that, in 2013, the EU had failed to calculate individual dumping margins, alleging also an infringement of several articles of the Basic Regulation (rights of the defence, breach of the principles of non-discrimination and sound administration and failure to provide adequate reasons). The Court annulled the regulation, rejecting the institutions' argument that it would have been impracticable for them to establish individual margin, pointing out that permitting such an argument would have resulted in an extremely broad discretion. The applicants were less fortunate with respect to enforcing their procedural rights (see *infra*, Section IV).

There is another issue that emerges from the analysis of the Court's jurisprudence. Early case law perceived wide discretion ultimately as a policy choice made by the Treaties. It was the task of the Court to safeguard such discretion in decision-making involving complex societal considerations.³⁵ In subsequent jurisprudence, however, wide discretion emerges in a different light, as a result of practical difficulties and a lack of (reliable) information. The following two cases demonstrate this well. At the WTO level, the Dispute Settlement Body (DSB) recently ruled that in failing to calculate the cost of production of the product on the basis of the records kept by the Argentinian producers, the EU had failed its obligations under ADA.³⁶ In the above-mentioned bioethanol case, the Court of Justice rejected the argument regarding difficulties in calculating individual margins, limiting institutional discretion to deviation from the rules only when there are difficulties in implementing them.³⁷ Neither of the review bodies was convinced of the severity of problems, suggesting that wide discretion will in the future be subject to more stringent control.

From the perspective of discretion, anti-dumping law in the EU is characterised by two features that differentiate it from other areas of external relations. First, decision-making is structured by and exercised according to rules laid down in the Basic Regulation, narrowing the institutions' discretion from what it is usually in the field of external relations. Second, and relatedly, unlike in similar areas of competition law and state aid, there is very little soft law guidance in anti-dumping to curtail institutional discretion,

³³ See *supra*, footnote 31. See also Court of Justice, judgment of 9 June 2016, case T-276/13, *Growth Energy and Renewable Fuels Association v. Council*, para. 179, under appeal.

³⁴ *Growth Energy and Renewable Fuels Association v. Council*, cit., para. 228.

³⁵ See *supra*, footnote 32.

³⁶ WTO DSB, panel report of 29 March 2016 and the appellate body report of 6 October 2016, case no. ds473, *European Union – Anti-dumping Measures on Biodiesel from Argentina*, agreed on this issue.

³⁷ *Growth Energy and Renewable Fuels Association v. Council*, cit., para. 238.

and “anti-dumping is mostly governed by hard law”.³⁸ With the power to impose definitive duties shifted from the Council to the Commission in 2014, it seems likely that further constraints on the latter’s discretion will emerge, either via soft law, the courts, or both, reproducing development similar to that in competition law.

III. INTERESTS INVOLVED IN ANTI-DUMPING POLICY-MAKING

Administrative decision-making is often perceived as a formalised exercise intended to balance conflicting interests of individuals or groups, where the role of administrative law is to ensure that these decisions are made openly and fairly. The group of actors whose interests must be balanced in anti-dumping proceedings is large and varies depending on the stage of the proceedings. Rights of participation do not cover only the right of those directly affected to be heard but, in the spirit of open and “fair” administrative decision-making, opportunities are also extended to those who are interested in contributing.

III.1. DECISION TO INITIATE INVESTIGATIONS

Art. 5 of the Basic Regulation establishes the requirements for the initiation of investigations. Anti-dumping procedures have a slightly unusual point of initiation, as they are ordinarily commenced in response to a complaint lodged by EU producer (lobby) groups, thereby involving the key interest group from the early stages of the process.³⁹ The duty of complainants is to bring forward evidence to justify the initiation of an investigation, if such evidence is “reasonably available” to the complainant.⁴⁰ The Commission is required to examine “the accuracy and adequacy” of the evidence in order to determine whether there is “sufficient evidence” to justify the opening of the proceedings.⁴¹ A decision not to initiate an investigation cannot be challenged.⁴² Reading the

³⁸ P. ECKHOUT, *Administrative Procedures*, cit., p. 5. In connection with the latest 2013 effort to modernise trade defence legislation, the Commission prepared four draft guidelines on the choice of the analogue country, injury margin, expiry review and length of measures and Union interest, trade.ec.europa.eu. The draft guidelines were never officially adopted, as the whole reform process stalled due to institutional disagreements. See F. HOFFMEISTER, *Modernising the EU’s Trade Defence Instruments*, cit., p. 375.

³⁹ See also Art. 5 ADA that specifies that investigations should generally be initiated on the basis of written request submitted “by or on behalf of” a domestic industry.

⁴⁰ Art. 5, para. 2, of the Basic Regulation.

⁴¹ *Ibid.*, Art. 5, para. 3.

⁴² K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, cit., pp. 298-299; the General Court’s case law on inadmissibility predates the Commission taking over from the Council as to imposing of definitive duties, however, the conclusion is not only based on the decision being preparatory (both provisional and definitive measures posing duties can be challenged) but also on that initiating a procedure neither affects the legal positions nor requires cooperation from companies concerned. See General Court: order of 14 March 1996, case T-134/95, *Dysan Magnetics Ltd and Review Magnetics (Macao) Ltd v. Commission*, para. 27; order of 10 December 1996, case T-75/96, *Söktaş v. Commission*, paras 39, 41-42.

Regulation's text and taking into account its open-ended terms, it seems that Commission discretion is at its widest in the period running up to the initiation decision, as the Regulation does not give the interested parties an opportunity to participate.⁴³ In fact, the authorities (including also national ones) must avoid publishing information about the complaint, with the exception that the third-country government must be formally notified once the complaint has been received by the Commission.⁴⁴

Once the Commission has appraised the evidence, it communicates the decision (including also a decision to not open an investigation) to the third-country exporters and importers including their representative associations as well as third-country representatives and the complainants, attaching the full text of the complaint.⁴⁵ In addition to individually informing all exporters and importers known to be concerned by the procedure, the Commission publishes a public notice in the Official Journal announcing the initiation of proceedings and requesting "interested parties" to make themselves known with a view to being able to present their views and submit information (notification procedure).⁴⁶ The Regulation does not contain a definition of "interested parties", but the reference is likely to be, in addition to the groups of actors mentioned above, to EU consumers and civil society actors.

Pursuant to Art. 5, para. 10, of the Basic Regulation, the notification procedure involves the interested parties making a written request for hearing, submitting evidence on how they are likely to be affected and what the particular reasons are for their inclusion in the investigation.⁴⁷ The Commission does not make an administrative decision on notifications of interests, rather, the procedural rights, such as the right to be heard and the right to inspect all information made available by any party, are created through the notification itself. Participation by interested parties as such cannot be barred by the Commission, but evidence or information can be rejected, in accordance with Art. 18 of the Basic Regulation on non-cooperation (see *infra*, section IV.1).

III.2. DECISION ON ANTI-DUMPING DUTIES

Following the initiation of proceedings, the Commission begins its investigation in accordance with rules enshrined in Art. 6 of the Basic Regulation. It is still the main actor, although the Regulation assumes that during this decision-making stage, the Commission acts together with national authorities that may, for instance, be called upon to assist the Commission in collecting and verifying information. Four conditions must be present and satisfied for the EU to impose anti-dumping duties, namely, the Commis-

⁴³ Note also that the decision to initiate procedure cannot be challenged.

⁴⁴ Art. 5, para. 5, of the Basic Regulation.

⁴⁵ *Ibid.*, Art. 5, para. 11.

⁴⁶ *Ibid.*, Art. 5, para. 10.

⁴⁷ *Ibid.*, Art. 6, para. 5.

sion must demonstrate that *a)* dumping exists, *b)* it has caused injury to EU industry, *c)* there is a causal link between dumping and injury, and *d)* acting is in the EU's interests.⁴⁸ Duties are imposed in the form of (directly applicable) regulations, as they aim at setting the anti-dumping duties, which are collected by national customs officials who directly rely upon the regulation. However, although not formally addressed to whom they affect, the titles of anti-dumping regulations identify the imports concerned by name of country of origin or even company.

Prior to 2014, provisional duties were set by the Commission, whereas definitive duties were imposed by the Council. According to changes introduced by the Lisbon Treaty, the Council is no longer involved in the process and has granted to the Commission the powers to set definitive measures by adopting Commission implementing regulations.⁴⁹ Provided that the Commission adopts all major decisions in competition and state aid, this change in anti-dumping seems a natural extension of powers in a functionally similar field.⁵⁰ However, the Trade Defence Committee (TDI), composed of national representatives and chaired by the Commission, ensures – as it also did before – that Member States' interests are not neglected, with the ultimate possibility to override the Commission with respect to the imposition of definitive measures.⁵¹ From an administrative law perspective, the strict confidentiality of consultations that comes with the use of comitology is problematic from the point of view of accountability and rights of the defence.⁵²

Member State interests are not the only ones to which the Commission heeds in deciding whether to impose anti-dumping duties, with several other interests vying for the Commission's attention. The original complainants remain in anti-dumping proceedings, not least because they are perceived to have a special task in giving a "human" face to the whole policy area. One of the aims of Union trade policy is to protect

⁴⁸ *Ibid.*, Art. 9, para. 4. Similarly, ADA establishes requirements for evidence of dumping, injury, and causality.

⁴⁹ See Art. 291, para. 3, TFEU; Recitals 1-2 of Regulation (EU) 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (the "Amending Regulation"); and Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (the "Comitology Regulation").

⁵⁰ T. SCHARF, *Decision-Making in EU Trade Defence Cases After Lisbon: An Institutional Anomaly Addressed?*, in C. HERRMANN, B. SIMMA, R. STREINZ (eds), *Trade Policy between Law, Diplomacy and Scholarship*, cit., pp. 396-397.

⁵¹ The committee delivers its opinion either through an advisory procedure (simple majority, not binding on the Commission) on whether or not to impose provisional measures or initiate expiry review, or through an examination procedure (qualified majority, binding on the Commission) on imposing definitive measures and amending or extending them. See Arts 2-5 of Comitology Regulation.

⁵² As usual with comitology committees, all aspects of TDI Committee consultations are confidential. On confidentiality and access to documents specifically, see Arts 11-13 of the Rules of Procedure for the Trade Defence Instruments Committee, adopted by the TDI Committee.

domestic industries, and this “protection aim of trade policy is translated into a central administrative role for the complainants, which must represent the EU industry”.⁵³ Due to globalised supply chains, EU producers are increasingly divided. Those who produce exclusively within the EU demand a strong anti-dumping policy, whereas those with production both inside and outside the EU are – in growing numbers – sceptical of the benefits of such an approach, rendering the “protection aim” of anti-dumping policy an increasingly contested goal.⁵⁴

Third-country exporters comprise another important interest group, since the decision to impose anti-dumping duties significantly affects these actors beyond EU borders. Their interest is, of course, commercial in the sense that they are seeking to avoid the imposition of duties altogether, or at the very least to have them reduced to the lowest possible level. As they are potentially facing negative consequences, their interest has also a distinct procedural value: the right to be heard is an important right in case of potential negative effects.⁵⁵ EU-based importers are the third main group of actors in anti-dumping decision-making. Importers are divided into two distinct yet related categories. Importers may be associated with exporters, which means that they can bring their views forward through third-country exporters, or they can be individual importers, in which case they have an individualised interest to participate in anti-dumping decision-making on their own behalf.⁵⁶

The views of these parties, as well as those of other interested parties, shall be taken into account during the investigation, provided that they have made themselves known to the Commission. Participation does not occur solely through written means, and the main parties can request the Commission to organise a meeting, “so that opposing views may be presented and rebuttal arguments offered”.⁵⁷ EU consumer organisations are barred from making such a request. The right to inspect information is again granted to a wider circle, and, in addition to the main actors, representative associations, users and consumer organisations are also allowed to inspect the information.⁵⁸

Additional procedural rules concern the determination of the Union’s interest.⁵⁹ According to Art. 21 of the Basic Regulation, this determination must be based on an appreciation of all the various interests taken as a whole. Inclusion is in fact a legal re-

⁵³ P. ECKHOUT, *Administrative Procedures*, cit., p. 9.

⁵⁴ See D. DE BIÈVRE, J. ECKHARDT, *Interest Groups and the Failure of EU Antidumping Reform*, Paper presented for the ECPR Joint Sessions of Workshops, Lisbon, 14-19 April 2009, ecpr.eu.

⁵⁵ H. NEHL, *Principles of Administrative Procedure*, cit., p. 75.

⁵⁶ This distinction between independent and associated importers has relevance in jurisprudence concerning standing. See, e.g. T. HARTLEY, *The Foundations of European Union Law*, cit., p. 381.

⁵⁷ Art. 6, para. 6, of the Basic Regulation.

⁵⁸ *Ibid.*, Art. 6, para. 7. Similar provisions are contained in Art. 6 ADA.

⁵⁹ The Union interest comes through at several stages: initiating proceedings; imposing provisional duties; terminating investigation or proceedings and imposing definitive duties as well as suspending measures.

quirement, as the provision reads that the determination “shall only be made where all parties have been given the opportunity to make their views known”.⁶⁰ Art. 21, para. 2, enumerates the actors entitled to participate in the Union interest evaluation, including complainants, importers and their representative associations, representative users and representative consumer organisations. The information submitted by the parties is made available by the Commission, with the possibility given to the interested parties to provide comments. The Commission is obliged to organise a hearing upon request, so long as the request is made within the time limit set in the initial notification and the reasons for organising the hearing are detailed.⁶¹ The Commission is also required to disclose the information (facts and considerations) on which the final decision on Union interest is to be based to the interested parties.⁶²

The wording of Art. 21 suggests that Union interest is considered after dumping and injury have been established. Hence, information given to the Commission on Union interest relates only with respect to concluding that “it is not in the Union’s interest to apply such measures”⁶³ – an issue where the Commission’s discretion remains wide. According to Mavroidis, “consumer’s rights have not proved to be a formidable obstacle to imposition of AD duties” in the EU as they have not been invoked (in court) and when invoked, “the Court of Justice has been quite reluctant to interpret the ‘Union interest’, leaving [...] the Commission with substantial discretion in this respect”.⁶⁴ In practice, the results of some empirical studies suggest that concerns of consumer representatives, importing, and user industries over “price increases, supply shortages or anti-competitive effects” of duties are categorically ignored by the Commission.⁶⁵ However, it remains to be seen how the 2014 change of definitive duty-setting power from the Council to the Commission reflects upon the ultimate determination of Union interest.

As seen above, there is a diversity of interests at play, local and foreign, particular and general, institutional and individual. Substantive interests involved in anti-dumping procedures can also be represented in different ways, and professional interest representation is among them.⁶⁶

⁶⁰ Art. 21, para. 1, of the Basic Regulation.

⁶¹ *Ibid.*, Art. 21, para. 3.

⁶² *Ibid.*, Art. 21, para. 6.

⁶³ *Ibid.*, Art. 21, para. 1.

⁶⁴ P. MAVROIDIS, *The Regulation of International Trade*, cit., p. 112.

⁶⁵ Empirical evaluation of 32 cases sampled for 2005-2008 for the Union interest test revealed that in all 32 cases their concerns were refuted by the Commission. See L. DAVIS, *Anti-dumping investigation in the EU: How does it Work?*, in *ECIPE Working Paper*, no. 4, 2009, p. 6.

⁶⁶ For third-country participation (lobbying) in EU policy-making, see E. KORKEA-AHO, ‘Mr Smith Goes to Brussels’: *Third Country Lobbying and the Making of EU Law and Policy*, in *Cambridge Yearbook of European Legal Studies*, 2016, p. 45 *et seq.* The search for anti-dumping on the EU’s Transparency Register returns with 11 hits. There are seven in-house lobbyists and trade/business/professional associations, including one Turkish organisation. Furthermore, four professional consultancies/law firms/self-employed consult-

IV. THREE FUNCTIONS OF PARTICIPATION

One part of the legal framework is participation opportunities provided to a range of actors. The main interested parties come in four categories: producers, exporters, (independent) importers – including their representative associations – and governments of the exporting country.⁶⁷ Moreover, beyond requirements of the ADA, the Basic Regulation includes an additional category: EU consumers and the associations that represent them. Wide participation possibilities prior to decision-making increase the amount of information on which the decision is based (information-based decision-making) as well as safeguard the rights of the defence (procedural fairness). Moreover, opportunities for participation have the potential to add to the (democratic) accountability of the EU decision-making process on anti-dumping.⁶⁸ Below each is studied in turn, paying close attention to the treatment of external participants.

IV.1. MECHANISM TO COLLECT EXPERTISE AND INFORMATION

Anti-dumping investigations are expertise-driven processes, where measures are based on information obtained and analysed during anti-dumping investigations. In addition to the Commission (together with Member States) searching for and putting together information, the process relies on participants providing information. However, information cannot be provided by just anyone. The Basic Regulation builds on the premise that only those perceived as “insiders” to the process can participate by providing their comments. The insider status can be gained in two ways: either by reference to the Regulation’s text (producers, importers, exporters, and third-country representatives are specifically mentioned) or by notification to the Commission (Art. 6, para. 5, of the Basic Regulation). Statuses are not defined in the Regulation except for producers that are defined by reference to “Union industry” in Art. 4 of the Basic Regulation.

Much attention is placed in the Basic Regulation on the validity and accuracy of the information that participants provide to the Commission. It, e.g., states that “the information which is supplied by interested parties and upon which findings are based shall be examined for accuracy as far as possible”.⁶⁹ The Commission is primarily responsible for ensuring that the information used in determinations of anti-dumping duties is correct. This obligation can be inferred from the Regulation’s text *de facto* forbidding the

ants indicate anti-dumping as their professional interests, two law firms and two consultants. One law firm represents especially Chinese interests in anti-dumping procedures. The search was conducted on 31 May 2017.

⁶⁷ For the definition of “interested parties” in WTO law, see Art 6.11 ADA.

⁶⁸ Opportunities for participation as such do not of course result in accountable policy-making, which ultimately depends on who participates and what effect is given to participation. See J. MENDES, *Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU*, in *Common Market Law Review*, 2011, pp. 1859-1860, 1876.

⁶⁹ Art. 6, para. 8, of the Basic Regulation.

Commission from using information which is not “supported by actual evidence which substantiates its validity”.⁷⁰ However, the Commission cannot disregard verifiable information submitted to it by an interested party although it is not “ideal in all respects” as long as, among other things, the party has “acted to the best of its ability”.⁷¹ Refusal to accept evidence or information submitted requires, first, that the Commission offers the party a chance to provide further explanations and, second, if still not accepted the Commission must state reasons for its rejection.⁷² However, the Commission may replace missing or false information with available facts.⁷³ Actors themselves are also in a position to check the accuracy of the arguments presented by others. For instance, Art. 6, para. 6, of the Basic Regulation stipulates that hearings may be organised to ensure that “opposing views may be presented and rebuttal arguments offered”.

Do authorities have the right to collect information from possibly reluctant actors or can actors refuse to participate? This is a relevant consideration, as it may be related to the parties’ right not to divulge information that would be crucial to establishing the existence of dumping. Whilst the Basic Regulation does not establish a general right of non-participation, Art. 18 contains detailed provisions on the effects of “non-cooperation”. The main principle is voluntary cooperation, and actors are encouraged to provide necessary information by reminding them of the consequences of non-cooperation. Although it is not clarified what those consequences are, presumably they relate to making the decision on the basis of available facts,⁷⁴ which is mentioned in the same provision.

The information collected during the anti-dumping proceedings is – with some exceptions related to confidentiality and professional and business secrecy – available to all parties to the proceedings. In practice, however, the Trade Hearing Officer (discussed in more detail below) who can access confidential files at the request of interested parties,⁷⁵ argues that the EU declares a large amount of files confidential, especially when it comes to information relating to calculation of dumping and injury margins.⁷⁶

⁷⁰ *Ibid.*, Art. 21, para. 7.

⁷¹ *Ibid.*, Art. 18, para. 3. The Basic Regulation seems to suggest that verification means that facts are checked against information from independent sources, including information provided by other parties to the proceedings, see Art. 18, para. 5.

⁷² *Ibid.*, Art. 18, para. 4.

⁷³ *Ibid.*, Art. 18, para. 1. See, for example, General Court, judgment of 9 June 2016, case T-277/13, *Marquis Energy v. Council*, para. 163, referring to WTO DSB, panel report of 22 April 2003, case no. ds241, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, para. 7.263, stating that in case “an investigating authority [...] receives [...] information that is not usable or is unreliable [...] the substantive provisions in the AD Agreement [...] expressly allow investigating authorities to complete the data”.

⁷⁴ P. MAVROIDIS, *The Regulation of International Trade*, cit., p. 154-157.

⁷⁵ Art. 15 of the Decision 2012/199/EU of the President of the European Commission of 29 February 2012 on the function and terms of reference of the hearing officer in certain trade proceedings.

⁷⁶ Annual Report of the Hearing Officer for Trade Proceedings 2015/2016, 12 June 2017, trade.ec.europa.eu, p. 21.

The right of access to the file allows the parties to acquaint themselves with the evidence so that they can express their views effectively. Access to the file is an integral part of the right to be heard, and, as shown in the next subsection, both are protected as part of the procedural rights guaranteed pursuant to Art. 41 of the Charter of Fundamental Rights of the European Union (Charter). Formally, the right of access to information in anti-dumping measures is enshrined in secondary legislation.⁷⁷ The only statutory exception to disclosure of information occurs in the early stages of the proceedings, where the authorities are advised (however, not forbidden) not to publish information relating to the complaint (Art. 5, para. 5). Despite legislative backing, the CJEU have also done their share of cementing the right. In *Timex*, the Court of Justice held that all non-confidential information irrespective of the source must be disclosed in order to enable the complainant to see whether the facts had been correctly applied in the case.⁷⁸ In the *Al-Jubail* case a few years later, the right of access to information was perceived and treated by the Court as part of the right to be heard. The institutions must act with all due diligence in performing their duty to provide all the information that is necessary for the parties' successful defence.⁷⁹ The effectiveness of the protection deriving from the duty to provide information was underpinned by the link made with the principle of care, that is, the "duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case".⁸⁰ Whilst the power to collect information ensures efficient implementation of policies, the principle of care "aims to provide individual protection in administrative proceedings [...] which applies as soon as the administration is empowered to decision-making liable to affect the interests of citizens, and *a fortiori*, if it enjoys a margin of discretion in that regard".⁸¹

As parties to the proceedings, third-country actors enjoy comparable rights to those internal to the EU. The only limitations might occur in relation to right of public access to European Parliament, Council and Commission documents enshrined in Art. 42 of the Charter, which is relevant with regard to keeping abreast of general policy and legislative development. Unlike the right to have access to the file, public access to documents is in principle territorially limited to "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State".⁸² Although in practice this is interpreted more broadly, the formal limitation may be the reason why

⁷⁷ See e.g., Arts 20 and 21 of the Basic Regulation.

⁷⁸ *Timex Corporation v. Council and Commission*, cit., paras 25-27.

⁷⁹ Court of Justice, judgment of 27 June 1991, case C-49/88, *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v. Council*, para. 17.

⁸⁰ Court of Justice, judgment of 21 November 1991, case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, para. 14.

⁸¹ H. NEHL, *Principles of Administrative Procedure*, cit., p. 110 (emphasis in the original).

⁸² Art. 42 of the Charter; see also Art. 15, para. 3, TFEU. Note that territorial restrictions found in the Charter are of more recent origin than public access to documents rights found in the Basic Regulation.

specific procedural rights, especially the right of access to institutions' documents, are also retained in the Basic Regulation.⁸³ A specific provision is needed, as third-country actors would not otherwise be able to enforce their right of access to documents pursuant to principles laid down in the Treaties.

IV.2. PARTICIPATION AS CONSTRAINING THE EXERCISE OF ADMINISTRATIVE POWERS

By relying on information provided by the parties, the Basic Regulation aims at the efficient enforcement of EU anti-dumping rules. However, from the point of view of constraining the exercise of administrative powers, the right to obtain information must be balanced with respect for the parties' rights. According to Bignami, wide participation in Commission proceedings goes beyond a traditional continental understanding of what is required to guarantee the right to a fair hearing (i.e. rights of the defence) – contesting the administrative decision via judicial review after it has been made – and is instead closer to a common law understanding, where the fairness of administrative acts requires that the defendant is able “to engage in a quasi-judicial process at the time of its adoption”.⁸⁴ In anti-dumping issues, fair hearing requirements extend to the investigative process prior to the process of adopting measures,⁸⁵ and businesses involved in anti-dumping proceedings before the Commission enjoy rights of the defence which safeguard their interests.⁸⁶ According to the recent judicial formulation, the protection of the rights of the defence is a fundamental principle in trade proceedings:

“respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views”.⁸⁷

This is the second goal pursued by participation: the inclusion of different views serves the fundamental principle of the right to defend oneself. From the perspective of protecting interests, the rights granted to importers should be of key importance, as the

⁸³ For instance, Art. 21, para. 6, of the Basic Regulation lays down that “the parties [...] may request that the facts and considerations on which final decisions are likely to be taken be made available to them. Such information shall be made available to the extent possible and without prejudice to any subsequent decision taken by the Commission”.

⁸⁴ On this difference, the British influence more broadly, as well as on how such an approach first developed in competition law during the 1980s, see F. BIGNAMI, *Three Generations of Participation Rights Before the European Commission*, in *Law and Contemporary Problems*, 2004, p. 63 et seq.

⁸⁵ *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v. Council*, cit., para. 15.

⁸⁶ For rights of the defence in EU administrative law, see *supra*, footnote 18.

⁸⁷ *Growth Energy and Renewable Fuels Association v. Council*, cit., para. 250. See also *Technische Universität München v. Hauptzollamt München-Mitte*, cit., para. 25.

imposition of anti-dumping duties (collected by customs from the importer at the point of goods entering the common customs Union) will most immediately and adversely affect their interests, rather than those of third-country exporters (producers).⁸⁸ However, from a fair hearing perspective, it is significant that the rights of Union producers are emphasised in many of the provisions instead of importers. For instance, in situations where the EU reviews the duties, Union producers are provided with “the opportunity to amplify, rebut or comment on the matters”.⁸⁹

Among several rights collected under “the rights of the defence”, the right to be heard is the most significant. Although the right to be heard was enshrined in early Regulations,⁹⁰ the Court of Justice has emphasised its role and operationalised it in anti-dumping determinations. The crucial case is the above-mentioned *Al-Jubail*, which established that the right to be heard

“must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them”.⁹¹

Hence “the highest standards of procedural protection” are applied in anti-dumping procedures.⁹² In establishing such a right, the Court had to square the circle between the general nature of the anti-dumping determinations, formally applicable to an indeterminate number of persons, and their individualised character.⁹³ In *Al-Jubail*, the highest standards included also, for the first time in anti-dumping jurisprudence, the protection of the right to be heard as a fundamental right.⁹⁴ Despite the generous reading of “the highest standard of procedural protection”, the number of beneficiaries remained limited, as procedural protection benefited only those with financial or economic interests at stake. This limitation proved fatal to independent importers in the subsequent

⁸⁸ On the right to be heard, limiting it to decisions that affect somebody in a negative manner, how this might be difficult to establish at the outset, and how the issue has been discussed in the context of the horizontal exercise, see P. LEINO, *Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU*, in *European Public Law*, 2014, p. 704.

⁸⁹ Art. 11, para. 2, of the Basic Regulation.

⁹⁰ E.g., in the first EU anti-dumping regulation.

⁹¹ *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v. Council*, cit., para. 15. The importance of the right to be heard was recognised by AG Warner in the first major anti-dumping case before the Court. See Opinion of AG Warner delivered on 14 February 1979, case C-113/77, *NTN Toyo Bearing v. Council*.

⁹² H. NEHL, *Principles of Administrative Procedure*, cit., p. 75.

⁹³ J. MENDES, *Participation in European Union Rule-Making*, cit., pp. 170-174.

⁹⁴ *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v. Council*, cit., para. 15. For the importance of the right to be heard as a fundamental right in anti-dumping procedures, see also General Court, judgment of 4 March 2010, case T-409/06, *Sun Sang Kong Yuen Shoes Factory (Hui Yang) Corp. Ltd v. Council*, para. 132.

Nölle case, where the applicant could not enforce its right to be heard. Instead, the General Court granted the equivalent protection under the “principle of care”, establishing that the applicant as an interested party can rely on this principle in order to protect its interests in anti-dumping proceedings.⁹⁵

The Court’s formulation in *Nölle* is not as elegant as one might have hoped, as it introduced a superficial distinction between parties, depending on the role of the party to the proceedings. Whereas key interested parties can rely on the right to be heard, the interests of “third parties”, i.e., those who do not have direct (or as such accepted by the Court) economic interests at stake, are looked after under the principle of care.

Be that as it may, the existing case law has emphasised that the institutions need to carefully and impartially examine all the relevant aspects of the individual case and guarantee respect for the rights of the defence.⁹⁶ The applicant, on the other hand, is required to substantiate the claim and produce evidence that the EU has disregarded its obligations and that that disregard has negative implications for the applicant’s possibilities to defend itself.

The scope and effectiveness of procedural protection depends on the existence of financial interests, not on the geographical location of the applicant. There are, however, some additional considerations that need to be taken into account when enforcing EU law against third-country actors. For example, rights of the defence may be compromised if there is a surprise moment to the investigative measure, and unannounced visits to examine company records cannot be taken in case of companies not based in the EU.⁹⁷ Possible complex questions relate to the exercise of investigative powers in anti-dumping investigations by national and EU authorities, as the Basic Regulation does not provide any guidance on how investigative powers, including *inter alia* verification visits,⁹⁸ should be exercised and what the rights of companies are.⁹⁹ How are powers enforced if they are exercised overseas? There is bound to be ambiguity regarding whose responsibility – that of EU institutions or that of Member States – should prevail with regard to protecting the company’s rights of the defence, right of access to the file as well as the confidentiality of the information provided. This is a serious issue with respect to legal certainty.

To ensure the rights of the defence, the EU anti-dumping regime contains an administrative innovation: the Trade Hearing Officer (the Officer). Since 2007, its role has

⁹⁵ General Court, judgment of 18 September 1995, case T-167/94, *Detlef Nölle v. Council*, para. 73; cf. also *Technische Universität München v. Hauptzollamt München-Mitte*, cit., para. 15.

⁹⁶ General Court, judgment of 12 December 2014, case T-643/11, *Crown Equipment (Suzhou) and Crown Gabelstapler v. Council*, para. 46, and the case law cited.

⁹⁷ Art. 16, para. 1, of the Basic Regulation. See also P. ECKHOUT, *Administrative Procedures*, cit., p. 5.

⁹⁸ Verification visits aim to verify information already gathered are mandated either by Art. 16 of the Basic Regulation or Art. 6.11 ADA.

⁹⁹ It is possible that the Commission relies, by way of analogy, on Regulation (EC) 1/2003 of the Council of 16 December on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

been to ensure that the rights of the parties to the proceedings are protected in trade defence investigations – in particular that due consideration is given to all relevant facts and arguments, confidential treatment of business secrets is respected, and access to the investigation file is granted. The Officer can, upon request, organise hearings, make decisions on certain issues concerning the rights of parties (including confidentiality) as well as provide policy advice to the Commissioner and the Directorate General for Trade.¹⁰⁰ It acts upon reasoned requests of interested parties involved in trade proceedings, including third-country authorities and Commission services. During 2010–2015, on average 40 per cent of 50 annual intervention requests came from exporters in third countries.¹⁰¹ The Officer intervenes in 20–30 proceedings, which is one third of all ongoing trade proceedings. For example, in 2015 most requests related to “product definition, choice of analogue country or requests for individual examination”,¹⁰² which points toward transparency issues in access to the (non-disclosed parts, such as calculations) file. In its 2015 Report, the Officer concluded that it was not consulted on policy change initiatives as agreed; cooperation from the Commission’s trade defence services was unsatisfactory; certain Commission representatives tend not to attend hearings; progress as to improving access to information for interested parties is slow; the EU’s trade defence system is not transparent (nor becoming more so); and reported “growing concerns about consistent and correct application of the established rules and procedures for anti-dumping and anti-subsidy proceedings”.¹⁰³

IV.3. DEMOCRATIC ANTI-DUMPING REGIME: PARTICIPATION AS CONTRIBUTING TO ACCOUNTABILITY?

Unlike the instrumental functions of participation mentioned above – in the sense that they promote certain widely recognised aims such as expertise-based and rule-bound decision-making – participation promotes accountable decision-making through ensuring equal representation of interests and legitimising decisions, in which case it has a more normative dimension entailing a strong democratic commitment. Participation is crucial, perhaps even critical, in ensuring that decision-makers are accountable for their actions and responsive to different interests. What could this more normative dimension involve? In his 1999 analysis of anti-dumping case law, Nehl argued that the CJEU have often given great weight to the core rule of law elements – which together he refers to as “the principle of care” – than to administrative efficiency. He viewed this judicial approach as attempting to move closer to the US style of review, critiquing, however, the EU style as lacking “a democratic dimension” and not using the possibility to fur-

¹⁰⁰ Decision 2012/199.

¹⁰¹ Annual Report of the Hearing Officer, cit., p. 9.

¹⁰² *Ibid.*, p. 12.

¹⁰³ *Ibid.*, pp. 20–22.

ther “the democratic impetus”.¹⁰⁴ A decade later, Eeckhout echoed similar sentiments, noting that it “is at the level of rights protection and democratic participation that perhaps further work needs to be done” in anti-dumping.¹⁰⁵

What would the democratic impetus involve in anti-dumping decision-making and how could it be furthered, judicially and otherwise? In keeping with the focus of this *Special Issue*, we discuss the matter by adopting an external perspective, based on two different sets of considerations. We will first focus on the narrower answer, framed in terms of what is legally required of the EU in the administrative process with regard to third country actors, before moving on to discuss the representation of external interests from the perspective of the principles of non-discrimination and democratic accountability.

As is clear from the previous sections, geographical location does not seem to be a relevant concern for the Basic Regulation, and actors can participate and exercise their rights from anywhere in the world. From the face of the Basic Regulation, the only exception to the equal treatment of third-country actors occurs at the stage of initiating the complaint.¹⁰⁶ Territorial considerations do not feature anywhere else in the text, and especially *inter alia* the exporters’ rights of the defence, the right to participate, the right to receive information, the right to comment and so on, are implemented in the Regulation without regard to a recipient’s nationality or place of establishment.

Similarly, little concern over nationality or place of establishment is evident in the Charter. The Commission is required to respect fundamental rights during the administrative procedure, which include the right to good administration enshrined in Art. 41 of the Charter, collecting together a series of specific rights.¹⁰⁷ Art. 41, though placed under the Title “Citizens’ Rights” is not restricted to the citizens of the Union, as its wording adopts a universal tone with regard to persons and their location: “*Every person* has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union [...] right of *every person* to be heard [...] right of *every person* to have access to his or her file”. This ascertains the conclusion reached above on the basis of the Basic Regulation: that is, the basic principles of EU administrative law apply to legal persons as well as to natural persons and participants physically and/or legally within and outside the EU, the latter often being the case in anti-dumping proceedings. Any deficiencies in the procedure affect the legality of the final decision and constitute grounds for judicial review of the decision, similar to cases involving EU actors. The CJEU has accepted this and held that rights protection, especially in terms of the right to be heard, afforded by EU law equally concerns EU and non-EU citizens. Alt-

¹⁰⁴ H. NEHL, *Principles of Administrative Procedure*, cit., p. 164.

¹⁰⁵ P. EECKHOUT, *Administrative Procedures*, cit., p. 8.

¹⁰⁶ Under “special circumstances” the Commission may initiate an investigation without a complaint on behalf of the Union industry, see Art. 5, para. 6, of the Basic Regulation.

¹⁰⁷ General Court, judgment of 4 October 2006, case T-193/04, *Tillack v. Commission*, para. 127.

though the case often referred to in this respect is *Kadi*,¹⁰⁸ it is important to realise that one of the earliest recognitions of the right to be heard occurred in anti-dumping case law, involving third-country nationals.¹⁰⁹

As outlined above, no restrictions exist which prevent non-EU actors from seeking judicial redress, and mechanisms of judicial accountability are equally available both to external and internal actors. In order to bring a case before the CJEU, that is, to have standing, third-country actors must demonstrate the existence of an interest, communicating to the court that the action is likely to procure an advantage to the party bringing it,¹¹⁰ but in practice this has never amounted to a hurdle.

The broader democratic question is whether the EU is obliged to promote the interests of those situated beyond Union borders in ongoing anti-dumping investigations and legitimise to them the decisions it makes? No easy answers to the question exist. Decision-making in national communities, or in the EU, is liable to exclude many who are affected by their actions simply because they are not part of the *demos* as usually understood.¹¹¹ However, the Basic Regulation's provisions seem, at times at least, worded to assuage the concerns of third-country actors, assuring them of appropriateness and overall fitness of the administrative law framework for EU anti-dumping decision-making. The provisions seem to welcome participation and thereby interest representation from third-country actors. For instance, the Basic Regulation stipulates that requests for confidentiality "shall not be arbitrarily rejected",¹¹² or that when the Commission organises meetings, it shall take account of confidentiality and "the convenience to the parties".¹¹³ These and other such provisions do not have precedent in general EU administrative law, raising a question of whether these can be traced back to the ADA (in a bid to avoid WTO dispute settlement proceedings), or if they are a product of the Union interest in ensuring due respect for external rights and interests in anti-dumping investigations (hoping this is reciprocated by third countries). Underpinning

¹⁰⁸ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat v. Council and Commission*.

¹⁰⁹ See *supra*, Section IV.1.

¹¹⁰ See e.g. *Growth Energy and Renewable Fuels Association v. Council*, cit., para. 159. See also E. KORKEA-AHO, 'Mr Smith Goes to Brussels', cit., p. 64.

¹¹¹ N. KOMESAR, M. POIARES MADURO, *Governance Beyond the States: A Constitutional and Comparative Institutional Approach for Global Governance*, in N. KOMESAR, M. POIARES MADURO, W. WAGNER, G. SHAFFER, A. BAKARDJEVA-ENGELBREKT (eds), *Understanding Global Governance: Institutional Choice and the Dynamics of Participation*, Robert Schumann Centre for Advance Studies, March 2014, p. 12. For the same problem from the point of view of economic efficiency, see G. DAVIES, *International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism*, in *German Law Journal*, 2012, pp. 1208-1209.

¹¹² Art. 19, para. 3, of the Basic Regulation.

¹¹³ *Ibid.*, Art. 6, para. 6.

these considerations is the issue of discrimination, which occasionally features in anti-dumping investigations.

Is the principle of non-discrimination relevant here? In principle, anti-dumping as a policy is about discrimination justified by the GATT as a defence against unfair trade. EU trade law does not contain a general principle of non-discrimination, and to the extent that non-discrimination plays a role in anti-dumping it is a consequence of GATT compliance. Though central for both EU and WTO law in general,¹¹⁴ it is hardly even mentioned in the Basic Regulation,¹¹⁵ and according to a long-established principle of external relations law, the EU is not obliged to treat third countries equally. The Court of Justice has recently reaffirmed this principle in *Swiss International Air Lines AG*, where it emphasised broad discretion in external relations policy decisions, providing that “the treatment of one third country [may] differ[s] from that of other third countries”.¹¹⁶ Although the EU is not required to treat third countries equally under EU trade rules, the administrative law principle of equal treatment may still be significant in anti-dumping proceedings. Equal treatment is a general principle of EU law, the corollary of which is the prohibition of discrimination under Art. 18 TFEU, necessitating in the internal market context that nationals or legal persons of one Member State must be treated on a similar footing in another Member State.¹¹⁷ The scope and relevance of the notion in connection with the application of the administrative process involving EU and non-member actors has remained unclear despite occasional references to the principle in Court jurisprudence. In one case, the US actors claimed that the complainant (EU lobby organisation ePure) had released the news on the decision already on 20 December, although the formal announcement was made on 21 December, which, according to the complaint, indicated that they, together with Member State representatives in the TDI Committee, had received information before anyone else had.

The EU institutions are, according to the Court, in breach of this principle if they are shown to have treated like cases differently, placing some operators at a disadvantage,

¹¹⁴ See T. COTTIER, M. OESCH, *Direct and Indirect Discrimination in WTO and EU Law*, and K.E. SØRENSEN, *Non-discriminatory Restrictions on Trade*, both in S. GAINES, B.E. OLSEN, K.E. SØRENSEN (eds), *Liberalising Trade in the EU and the WTO: A Legal Comparison*, Cambridge: Cambridge University Press, 2014, pp. 141 *et seq.* and 176 *et seq.*

¹¹⁵ Non-discrimination appears once, in Art. 9, para. 5, of the Basic Regulation, concerning appropriate amounts of anti-dumping duties.

¹¹⁶ Court of Justice, judgment of 21 December 2016, case C-272/15, *Swiss International Air Lines AG*., para. 24. See also Court of Justice: judgment of 22 January 1976, case 55/75, *Balkan-Import-Export*, para. 14; judgment of 28 October 1982, case 52/81, *Offene Handelsgesellschaft in Firma Werner Faust v. Commission*, paras 54-62.

¹¹⁷ For the principle in situations involving judicial remedies, see K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, cit., p. 112.

without being able to justify it by the existence of substantial objective differences.¹¹⁸ The Court correctly notes that applicants and Member States are not in a comparable situation, and the disclosure of information to the Member States is not governed by Art. 20 of the Basic Regulation, but rather by Art. 15 concerning Committee procedure. However, the more relevant comparison that was disregarded by the Court would have been between the applicants and the complainants (ePure), not with national authorities.

The ruling suggests two findings, which are indicative of the whole policy field generally. First, territorial considerations do not play much of a role, and the anti-dumping regime appears to have been built on the premise that all interests, irrespective of their geographical origin, are equally and fairly represented. Provided that some of the provisions in the Basic Regulation seem to have been specifically created to take into account the interests of external actors, it would appear extremely difficult for any of the key external actors in the process to adduce evidence for the breach of the principle of non-discrimination.¹¹⁹ Second, and as far as the administrative law framework is concerned, actors' formal opportunities for participation are many and generally available throughout the anti-dumping procedure. Intensity of participation is sometimes invoked as a reason for the Court's "soft touch" review of the more substantive duty to state reasons. The reality, however, indicates a disparity of influence between EU industry and non-EU-industry interests. It is not created by inadequacies or limitations of administrative law, but rather by political tit-for-tat thinking and the overall framing of the process to cater to the needs of domestic EU industry. The inclusive, transparent and – therefore, to an extent – democratic nature of interest representation in anti-dumping procedures does little by way of balancing their outcomes in favour of other than EU industry interests.

V. CONCLUDING DISCUSSION: DO ADMINISTRATIVE LAW PRINCIPLES PROTECT EQUALLY?

The EU's anti-dumping measures are different from many other trade policy instruments in that, rather than regulating imports and exports at a general (legislative) level, anti-dumping measures are administrative measures aimed at regulating certain imports to the EU. Moreover, they are undoubtedly complex and political decisions. Formally, since 2014 anti-dumping decision-making in the EU has become less intergovernmental, however, substantively the Member States continue to play an important role in the procedure, and anti-dumping decision-making provides them with the procedural weaponry to "protect trade".

¹¹⁸ General Court, judgment of 23 October 2003, case T-255/01, *Changzhou Hailong Electronics & Light Fixtures and Zhejiang Yankon v. Council*, para. 60.

¹¹⁹ Crucial question is the role of civil society and non-commercial actors that seem to be playing no role whatsoever. For instance, only actors acting on behalf of the EU industry, rather than EU interests, can initiate a complaint, see Art. 5, para. 1, of the Basic Regulation.

Whilst the EU's anti-dumping regime targets individual companies which are predominantly from third countries, effects are felt widely, from EU companies and importers to consumers as well as third-country governments. In terms of administrative procedure, detailed secondary legislation is in place, securing respect for the rights of the defence and other procedural guarantees. Fine-tuning concerning participation, rights of the defence, the duty of care, and accountability has continued to be triggered by the Court of Justice as well as by the Trade Hearing Officer since 2007 – benefiting both third-country participants and their interests as well as other interested parties. Their input is critical, as the proposals to modernise anti-dumping policy and legislation have not succeeded.

The procedural soundness of anti-dumping decision-making as well as territorial blindness can be seen to invite participation and guarantee reciprocity in third-country procedures for EU producers. However, formally respecting the rights and including the interests of participants and treating them equally regardless of geographical origin does not negate the fact that certain interests are weighted more heavily than others, and the anti-dumping policy area is heavily ruled by substantive discretion of the Commission. Considering the broad and conflicting objectives of the framework (global free trade and protection of EU producers), accountability for Commission choices is difficult to enforce. Accountability in the exercise of discretion is usually measured against the objectives for which it has been granted, but things get more complicated when discretion also extends to choosing which of the conflicting objectives one wishes to pursue.¹²⁰ In other words, as participation and the rights of the defence in this context seem to mainly guarantee that decision-makers are accountable for their procedural decisions, the procedure fails to ensure that all interests involved would substantively be taken into account. For this reason, anti-dumping measures create less democratic added value both within and outside the EU than would be hoped.

An example of such a missed opportunity is the definition and evaluation of Union interest. One of the most crucial stages of anti-dumping decision-making involves the determination of whether or not it is in the Union interest to “strike back”. It is also a key point at which certain internal and external interests that are institutionally underrepresented, or otherwise non-influential because of the design of the procedure, might align to create a more democratically responsive process. Any improvement in this respect would likely have to come from the CJEU by way of more substantive review, as impetus to improve will not come from the WTO, as ADA does not require public interest review. Even though the CJEU has in many respects been crucial to ensuring an accountable anti-dumping regime, they have their own blind spots, too. One accountability omission by the CJEU concerns importers whose rights, unlike those of oth-

¹²⁰ On structuring discretion in decision-making, see J. MENDES, *Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law*, in *Common Market Law Review*, 2016, p. 422.

er actors, are better protected in the administrative procedure than before Courts. Should the CJEU be inspired to rethink their review in response to the Commission's new role, these two opportunities should not be missed again.

The procedure is also lacking in transparency, something that the proposed anti-dumping modernisation package partly aimed to tackle. One important milestone would have been the adoption of soft law guidance, which would have made the Commission discretion, for instance in evaluating Union interest, more transparent and accountable. While soft law in many contexts tends to blur lines of accountability, thereby creating problems for the application of administrative law principles, in the anti-dumping context non-binding guidance could have the potential of increasing accountability and transparency. Telling in this respect is also the fact that the duty to state reasons, despite its seminal importance in EU administrative law generally, has not become a substantive principle in anti-dumping investigations.¹²¹ In the post-Council phase, the Court may now be more inclined to demand reasons from the Commission – to enable courts to assess the reasons underlying anti-dumping decisions – and the Commission to give them.

In sum, although administrative principles protect more or less equally, anti-dumping is currently such a tightly-rigged ship that it is difficult to foresee where democratic innovation or intervention could take root. And so, we wish to conclude by paraphrasing Mavroidis, who enunciates the conclusion one is compelled to draw: “Judges are not legislators, of course, so WTO panels cannot put into question the rationale for AD: the distortion lies in the law itself. This is the elephant in the room”.¹²²

¹²¹ Cf. *UK v. Council*, cit., paras 29-39.

¹²² P. MAVROIDIS, *The Regulation of International Trade*, cit., p. 184.



ARTICLES

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

EXTERNAL MIGRATION AND ASYLUM MANAGEMENT: ACCOUNTABILITY FOR EXECUTIVE ACTION OUTSIDE EU-TERRITORY

JORRIT J. RIJPMAN*

TABLE OF CONTENTS: I. Introduction. – II. EU visa policy. – II.1. Judicial review of decisions. – II.2. Judicial review in case of representation. – II.3. Humanitarian visa. – II.4. The extra-territorial applicability of the Charter. – III. Refugee resettlement. – III.1. EU Resettlement initiatives. – III.2. Resettlement in the refugee crisis. – III.3. Proposal for an EU resettlement mechanism. – III.4. Applicability of the Charter of Fundamental Rights to EU resettlement. – IV. Frontex coordinated joint operations in third country territory. – IV.1. Frontex as an executive actor. – IV.2. Responsibility for fundamental rights violations. – IV.3. Fundamental rights accountability mechanisms. – IV.4. Frontex as an external executive actor. – IV.5. Accountability for fundamental rights violations on third country territory. – V. Conclusion.

ABSTRACT: EU migration and asylum law, an area of administrative law *par excellence*, has from the moment that the EU acquired competences in this field, had a very strong external dimension. By looking at three areas of EU migration and asylum policy: visa policy, refugee resettlement and border management through Frontex operational activity, it will be shown that, notwithstanding significant improvements, a restrictive interpretation of the scope of EU law and the multi-level structure of EU executive action continue to pose challenges in holding the EU and its Member States to account.

KEYWORDS: EU migration and asylum policy – external dimension – executive action – Charter of Fundamental Rights of the European Union – accountability mechanisms – cooperation with third countries.

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I. INTRODUCTION

EU migration and asylum law, an area of administrative law *par excellence*, has from the moment that the EU acquired competences in this field, had a very strong external dimension. This external dimension has been shaped both by legally binding instruments (EU legislation, international agreements), as well as by instruments of a less than clear legal value (mobility partnerships, action plans and memoranda of understanding).¹ One could group the EU-Turkey Statement in response to the 2015 refugee crisis into the latter category. Although broadly reported as an agreement between the EU and Turkey, the General Court has recently ruled that, without pronouncing itself on the legal nature of the “deal”, it was in any case concluded by the Member States rather than the EU.²

In the field of migration and asylum, the EU’s integrated administration, through which EU law is implemented by the EU’s institutions, bodies and agencies, as well as the Member States’ competent authorities, is mirrored externally.³ Likewise, the implementation of EU law may take the form of legally binding decision making, such as the handling of individual visa applications, but it may also take place through more factual executive action, such as the joint patrolling against human smuggling and the training of third country border guards. The often unclear division of responsibilities between Member States and EU actors, including EU agencies such as the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (Frontex), is amplified in the external domain where executive action is often supported by, or carried out in cooperation with, international organisations, such as the International Organization for Migration (IOM) or the United Nations High Commissioner for Refugees (UNHCR), or with third country authorities.

In the field of migration and asylum, States have often resorted to externalisation in an attempt to prevent access to territory, allowing them to evade administrative and constitutional safeguards, as well as international obligations at home, whilst simultaneously co-opting third countries in achieving their own policy objectives.⁴ Externalisation often amounts to a policy of deterrence, stopping third country nationals from

¹ J.J. RIJPMAN, M. CREMONA, *The Extra-Territorialisation of EU Migration Policies and the Rule of Law*, in *EUI Working Paper Series*, no. 1, 2007.

² EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016. On the question of whether the agreement is to be considered an agreement under public international law: M. DEN HEIJER, T. SPIJKERBOER, *Is the EU-Turkey refugee and migration deal a treaty?*, in *EU Law Analysis*, 7 April 2016, eulawanalysis.blogspot.nl; General Court, orders of 28 February 2017, cases T-192/16, T-193/16 and T-257/16 T-192/16, *NF, NG and MN v European Council* (appeals have been lodged before the Court of Justice, cases C-208/17 P, C-209/17 P and C-210/17 P).

³ H. HOFMANN, *Mapping the European Administrative Space*, in *West European Politics*, 2008, p. 662 *et seq.*

⁴ S. LAVANEX, *Shifting up and out: The foreign policy of European immigration control*, in *West European Politics*, 2006, p. 329 *et seq.*

reaching EU territory and preventing them from entering into direct contact with EU or Member States' authorities. Rather than a strategy for migration control, it is often presented in terms of security and/or humanitarian concerns.⁵ This holds true also for instance for the EU's Common Foreign and Security Mission Operation Sophia, as well as for the EU-Turkey Statement, both claiming to target human smuggling and to prevent people from undertaking dangerous journeys.⁶

As EU and Member States' authorities increasingly act themselves on third country territory, on the basis of EU legislation and/or agreements concluded by the EU with third countries, there is room for greater scrutiny of the executive action in this area. The European Court of Human Rights, already early on, made it clear that it would not allow a Contracting Party to engage in conduct in contravention of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) outside its own territory.⁷ The Charter of Fundamental Rights of the European Union (Charter) provides for even greater opportunities to control the actions of the EU bodies and agencies, as well as the Member States when they act outside EU territory but within the scope of EU law. In addition, non-judicial remedies are developed to ensure compliance with fundamental rights.

This *Article* will illustrate the above by looking at three areas of EU migration and asylum policy with a strong external dimension: visa policy, refugee resettlement and border management through Frontex operational activity.⁸ In all three areas there have been recent political, legislative or judicial developments, which shed light on the scrutiny of EU external action in the field of migration and asylum law, from the perspective of the individual. EU external action is understood in this context as the implementation of EU law outside the territory of the Member States, be this by EU institutions or agencies, or by Member States' authorities. It will be shown that, notwithstanding significant improvements, a restrictive interpretation of the scope of EU law and the multi-level structure of EU executive action make it difficult to hold the EU or its Member States accountable for possible wrongdoings. This difficulty is exacerbated in the external field, due to the involvement of non-EU actors and the fact that those affected are generally non-EU citizens who find themselves outside EU territory, which may practically impede their access to accountability mechanisms.

⁵ B. FRELICK, M. KYSEL, J. PODKUL, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, in *Journal on Migration and Human Security*, 2016, p. 193.

⁶ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

⁷ European Court of Human Rights, judgment of 16 November 2004, no. 31821/96, *Issa et al. v. Turkey*, para. 71.

⁸ Hence no attention will be paid to CFSP missions with (secondary) migration and asylum management objectives or executive action by the Member States that has no link with the EU's migration and asylum policy.

II. EU VISA POLICY

The EU's visa policy is a clear example of "remote policing", aimed at preventing the arrival of unwanted third country nationals, supported by the private enforcement of carrier sanctions.⁹ Third countries whose nationals are under an obligation to obtain a visa to visit the Schengen area are listed in Regulation 539/2001.¹⁰ The rules and conditions governing the issuance of visas were laid down in a regulation in 2009, the Visa Code.¹¹ A Visa Information System (VIS), technically supporting the visa application process and registering a set of applicants' data, including fingerprints, has been up and running since 2011.¹²

II.1. JUDICIAL REVIEW OF DECISIONS

The Common Consular Instructions, the predecessor of the Visa Code, gave consular authorities considerable discretion in their decision of whether or not to grant a visa, allowing also for national rules to supplement the reasons for denying a visa.¹³ This changed with the advent of the Visa Code, which was specifically intended to improve the rights of third country nationals in the visa application process.¹⁴ Art. 32 of the Visa Code now contains an exhaustive list of, admittedly broadly formulated, criteria which Member States are not allowed to supplement, as was held by the Court of Justice in the *Koushkaki* case.¹⁵

The Visa Code also introduced a right of appeal against the refusal, revocation or annulment of a visa, although not against decisions of non-admissibility.¹⁶ Art. 23, para. 3, of the Visa Code provides for this right against the Member State that has taken the final decision on the application and in accordance with the national law of that Member State. National laws are however subject to Art. 47, para. 1, of the Charter, which

⁹ D. BIGO, E. GUILD, *Policing at Distance: Schengen Visa Policies*, in D. BIGO, E. GUILD (eds), *Controlling Frontiers: Free Movement Into and Within Europe*, Aldershot: Ashgate, 2005, p. 234.

¹⁰ Regulation (EC) 539/2001 of the Council of 15 March 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.

¹¹ Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

¹² Regulation (EC) 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

¹³ Common Consular Instructions on Visas for Diplomatic Mission and Consular Posts, part V, point 2.4.

¹⁴ A. MELONI, *The Community Code on Visas: Harmonisation at Last?*, in *European Law Review*, 2009, p. 671 *et seq.*

¹⁵ Court of Justice, judgment of 19 December 2013, case C-84/12, *Koushkaki* [GC], para. 55.

¹⁶ This *Article* will focus on the review of the decision on the application for a Schengen visa, not on the provision on the protection of personal data under the VIS, although here as well the fact that the data subject is outside EU territory may lead to similar problems in terms of access to justice.

states that anybody “whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal”.

Art. 47 of the Charter is based on Art. 13 of the ECHR. However, where the ECHR refers to a remedy before a national authority, the Charter provides for more protection by requiring an effective remedy before a court.¹⁷ Accordingly, the European Commission in 2014 started infringement proceedings against a number of Member States, after which most amended their national laws.¹⁸ In the meantime, the question of whether the provision requires Member States to provide for a right of appeal before a court of law, rather than an administrative body, has reached the Court of Justice by way of a preliminary reference from Poland, one of the Member States that continues to exclude judicial review.¹⁹ Although one could argue that there is no substantive right to a visa, it should be recalled that the Court in *Koushkaki* held that, despite the large discretion that Member States retain in applying the provisions of the Visa Code, they cannot refuse a visa on grounds not provided for in that Code.²⁰

Moreover, as regards the scope of the appeal, in the *Zakaria* case the Court of Justice was asked whether the right to appeal a refusal of entry under the Schengen Borders Code should include a right to challenge the way in which checks were conducted and, if not, whether this would infringe Art. 47 of the Charter. In that case, a third country national did not wish to appeal the refusal of entry, but rather the way in which he had been treated by national border guards, which he alleged had infringed his fundamental rights. The Court made it very clear that if a situation falls within the scope of EU law Member States ought to provide for appropriate legal remedies for infringement of fundamental rights.²¹

II.2. JUDICIAL REVIEW IN CASE OF REPRESENTATION

An application for a Schengen visa should be made at the consulate of the Schengen Member State of (main) destination or, in the absence thereof, the Member State of first entry.²² Art. 8 of the Visa Code provides Member States with the possibility of concluding bilateral representation arrangements and stipulates that Member States shall

¹⁷ The Court of Justice enshrined that right as a general principle of Union law in its judgment of 15 May 1986, case 222/84, *Johnston*, paras 18-19.

¹⁸ A. MELONI, *Visa Code Regulation (EC) No 810/2009*, in K. HAILBRONNER, D. THYM (eds), *EU Immigration and Asylum Law – A Commentary*, Baden-Baden: Nomos, 2016, p. 169.

¹⁹ Court of Justice, request for a preliminary ruling lodged on 19 July 2016, case C-403/16, *El Hassani*.

²⁰ See also the Opinion of AG Mengozzi delivered on 7 February 2017, case C-638/16 PPU, *X and X*, para. 82, with reference to Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N. S. et al.* [GC], paras 68 and 69.

²¹ Court of Justice, judgment of 17 January 2013, case C-23/12, *Zakaria*, para. 40.

²² Art. 5 of the Visa Code.

endeavor to do so in countries where they do not have consular services.²³ It provides that where the representing Member State considers refusing a visa, the visa application will be referred to the represented Member State in order for it to take the final decision.²⁴ However, Art. 8, para. 4, let. d), allows for a derogation from this obligation to consult with the represented Member State. Under the Commission proposal for a recast of the Visa Code, this obligation would be deleted in full.²⁵

A number of Dutch courts have held that where the representation agreement does not provide for consultation with the represented Member State – in the cases at hand the Netherlands – appeal against a refusal lies with the representing Member State.²⁶ Moreover, the obligation under Dutch law to refer an administrative appeal to the correct authority in case it is wrongly directed at another administrative authority does not apply.²⁷ This raises questions regarding the right to effective judicial protection guaranteed by Art. 47 of the Charter and principles of good administration.²⁸ This right applies to everyone within the scope of the Charter, including third-country nationals whose legal position is regulated by EU law, even if they have not (yet) been issued a permit to stay.²⁹ The same holds true for the right to good administration, which – although included under the heading of citizens' rights – applies to everyone within the scope of the Charter. Although the right is directed at the EU institutions and bodies, it applies as a general principle also to the Member States when they implement EU law.³⁰

Considering that the Commission's proposal for a recast removes the possibility for involvement in the procedure by the represented Member State, it seems all the more opportune to ask the Court of Justice for clarification. From the perspective of mutual recognition and trust – that underpin the Area of Freedom, Security and Justice – differ-

²³ Under the Commission's recast proposal of 2014, in the absence of a consulate of the responsible Member State, the applicant may apply at any of the other Schengen consulates present ("mandatory representation"). See Art. 5 of the Commission Proposal for a Regulation of the European Parliament and the Council on the Union Code on Visas (Visa Code) (recast), COM(2014) 164 final.

²⁴ Art. 8, para. 2, of the Visa Code.

²⁵ Art. 39 of the Proposal for a Regulation COM(2014) 164.

²⁶ District Court of The Hague, judgment of 3 April 2013, No. AWB 12/34042; District Court of The Hague (Roermond seat), judgment of 9 December 2011, No. AWB 11/119995.

²⁷ District Court of The Hague, judgment of 24 April 2013, No. AWB 12/30040.

²⁸ E. BROUWER, *Wanneer een staat een visum weigert namens een andere staat – Vertegenwoordigingsafspraken in het EU-visumbeleid en het recht op effectieve rechtsbescherming*, in *Tijdschrift voor Europees en Economisch Recht*, 2015, p. 164 *et seq.*; see also Meijers Committee, *Response to the Open Consultation – Improving procedures for obtaining short-stay 'Schengen' visas*, 17 June 2013, www.commissie-meijers.nl.

²⁹ Court of Justice, judgment of 22 November 2012, case C-277/11, *M.; Zakaria*, cit.

³⁰ Court of Justice, judgment of 17 July 2014, joined cases C-141/12 and C-372/12, *Y.S. and M.S.*, para. 68. The scope of the Charter and that of general principles in as far as they apply to the Member States is the same, whenever they act within the scope of EU law: see Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC], para. 21.

ences in national rules applying to the appeal should not necessarily be problematic or amount to a violation of fundamental rights. However, one could image that in accordance with the Court's case law in *N.S.*, that presumption of mutual trust is rebuttable.³¹ Also, it could well be that in line with the Court's case law in *C.K. et al.*, there may be specific personal circumstances in which the appeal should lie with the represented Member State. This could be the case where the absence of legal aid, for instance as regards the provision of translations, would unreasonably impede applicants' access to justice.³²

II.3. HUMANITARIAN VISA

Art. 25 of the Visa Code allows Member States to exceptionally issue a visa with a limited territorial validity on humanitarian grounds. This provision became central to the discussion on humanitarian visas as a means of allowing refugees from conflict-ridden countries a safe passage to Europe. It was argued that the provision on territorially-limited Schengen visas allowed for the introduction of a humanitarian visa on a larger scale.³³ In Belgium, in a number of cases that were the subject of much media coverage, the argument was made – and initially accepted by the Belgian judge – that Art. 4 of the Charter not only allowed but even required that a Schengen visa be issued on humanitarian grounds to Syrian applicants fleeing the civil war in their home country.³⁴

In one of these cases, *X and X*, preliminary questions were referred to the Court of Justice, in essence asking whether indeed under the Visa Code there is an obligation for the Member States to issue a territorially limited Schengen visa, where there is a risk that the applicants will otherwise fall victim to torture or inhumane or degrading treatment.³⁵ The case concerned a family from Aleppo (Syria), that had travelled to and from Beirut (Lebanon) in order to apply at the Belgian Embassy for visas with limited territorial validity. The visas would allow them to leave Syria and seek asylum in Belgium.

Contrary to the Advocate General's opinion, the Court argued that the delivery of a humanitarian visa for the purpose of requesting asylum did not fall within the scope of EU law and hence not within the scope of the Charter. It ruled that the request made by the Syrian family was a request for a long-term visa, which had not been harmonised at EU level and therefore remained within the remit of the Member States' competences.³⁶ The Court added that to conclude otherwise would enable third country nationals to

³¹ *N. S. et al.* [GC], cit.

³² Court of Justice, judgment of 16 February 2017, case C-578/16 PPU, *C.K. et al.*

³³ See e.g. U.I. JENSEN, *Humanitarian Visas: Option or Obligation?*, Study for the LIBE Committee of the European Parliament, 2014, www.europarl.europa.eu, and S. PEERS, *Do potential asylum-seekers have the right to a Schengen visa?*, in *EU Law Analysis*, 20 January 2014, eulawanalysis.blogspot.nl.

³⁴ VRT, *Asylum secretary rejects visa for Aleppo Syrians*, in *Flandersnews.be*, 27 October 2016, dereactie.be.

³⁵ Court of Justice, judgment of 7 March 2017, case C-638/16 PPU, *X and X* [GC].

³⁶ *Ibid.*, paras 42-45.

request asylum outside the EU, which the EU asylum *acquis* excludes, and would *de facto* amend the laws on international protection in the Member States.³⁷ The Court thus seemed to reaffirm one of the principles of the global refugee system, namely the territoriality of that regime, which requires an asylum seeker to be outside her own country and which does not impose obligations on Member States outside their own borders.

The Court's reasoning has been criticised for bringing the applicants outside the scope of the Visa Code on the basis of the purpose for which they requested the visa. As the Advocate General argued, the applicants' intention cannot alter the nature or purpose of their application, nor can it convert their claim into an application for a long-term visa, thereby placing them outside the scope of the Visa Code and EU law more generally.³⁸ Moreno-Lax draws a comparison between the position of visa applicants and asylum seekers who, under a similar reasoning, would be excluded from the remit of the asylum directives upon a negative decision on their request.³⁹

The Court's decision is, however, consistent with earlier cases such as *Iida*⁴⁰ and *Ymeraga*,⁴¹ which were also invoked by the intervening Member States. In those cases, the Court held that the Charter did not apply to a refusal to grant a residence permit to a third country national family member because the third country nationals in question did not satisfy the conditions for the grant of that card. The Advocate General sought to distinguish these cases, arguing that the Syrian family in the *X and X* case did fall within the material and personal scope of the Visa Code, being of a nationality requiring a visa to cross the Schengen external border.⁴² The Court, however, reached its conclusion without referring to either the Advocate General's Opinion or its previous case law.

In theory, the Belgian authorities could have made a distinction between non-admissibility (for having submitted the wrong application) and refusal (for posing a risk of not returning home upon expiry of the visa). In both cases the outcome would likely be based on the invocation of Art. 4 of the Charter, as the request for a visa in order to seek protection in the Member State of destination will be considered to indicate that the applicants intend to stay for more than three months. Against a non-admissibility decision, the Visa Code would not have granted an appeal possibility, whereas against a refusal it does. Still, it should be remembered that the exclusion of the possibility of appeal against admissibility decisions has been criticised.⁴³ More important, issuing an

³⁷ *Ibid.*, para. 49.

³⁸ Opinion of AG Mengozzi, *X and X*, cit., para. 50.

³⁹ V. MORENO-LAX, *Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part I)*, in *EU Immigration and Asylum Law and Policy*, 16 February 2017, eumigrationlawblog.eu.

⁴⁰ Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida*.

⁴¹ Court of Justice, judgment of 8 May 2013, case C-87/12, *Ymeraga*.

⁴² *X and X* [GC], cit., paras 58-60.

⁴³ A. MELONI, *The Community Code on Visas*, cit., p. 692.

admissibility decision could itself be considered an application of the Visa Code, thereby bringing the action within the scope of EU law and therefore the remit of the Charter.

If anything, the Court's decision to exclude the facts of the case from the scope of application of the Charter was motivated by its wish not to intervene in a highly sensitive area, aware of the potentially far-reaching consequences for Member States' protection systems. It was the ambiguity of the notion of the scope of EU law, which determines the application of the Charter, that allowed it to do so.

II.4. THE EXTRA-TERRITORIAL APPLICABILITY OF THE CHARTER

Whereas Art. 1 of the ECHR clearly limits the territorial scope of the Convention to the contracting parties' territory, and the Strasbourg case law limits its extra-territorial effect to situations of effective control, similar restrictions do not exist as regards the Charter. In the *X and X* case, the Court confirmed that "the question is not to identify an independent field of application of the Charter, but to determine the remit of EU law and its relevance to a particular situation".⁴⁴

The Court and the Advocate General may have differed on the outcome of the case, but they did so on the basis of a differing assessment of whether the situation at hand fell within the scope of EU law. They did not, at least not openly, disagree on the conclusion that once a situation falls within the scope of EU law, the Charter applies, be it internally or externally. AG Mengozzi was very explicit in his Opinion that Member State authorities acting in the context of EU law are required to observe the Charter, irrespective of any territorial criterion or the legal situation of the persons to which it applies.⁴⁵ As regards the content of the rights contained in the Charter, AG Mengozzi recalled that, whilst the Charter follows the level of protection of the ECHR, nothing prevents the Union from providing more extensive protection.⁴⁶

The EU is bound by the Charter "whenever it exercises its competences, both internally and externally, either directly or through the intermediation of the Member States 'implementing EU law'".⁴⁷ Moreover, the EU's institutions, bodies and agencies remain bound by the Charter, also when they act outside the EU legal framework.⁴⁸ The follow-

⁴⁴ V. MORENO-LAX, C. COSTELLO, *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, 2014, p. 1680.

⁴⁵ Opinion of AG Mengozzi, *X and X*, cit., para. 89. Compare the Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16 P, *Front Polisario*, paras 270-272.

⁴⁶ Art. 52, para. 3, of the Charter. Opinion of AG Mengozzi, *X and X*, cit., para. 99.

⁴⁷ V. MORENO-LAX, C. COSTELLO, *The Extraterritorial Application of the EU Charter of Fundamental Rights*, cit., p. 1682.

⁴⁸ As was the case of the Commission in the conclusion of Memoranda of Understanding with Member States such as Cyprus within the context of the financial crisis: Court of Justice, judgment of 20 September 2016, joined cases C-8/15 P to C-10/15 P, *Ledra Advertising* [GC], para. 67.

ing two examples, relating to resettlement and cooperation on border management, may serve to illustrate how the Charter can play a role in ensuring the compatibility of external action by the EU and its Member States' executive authorities. However, they will also show how the definition of scope of EU law continues to raise questions, as does the multi-actor nature of the EU's external executive action.

III. REFUGEE RESETTLEMENT

Refugee resettlement has been defined as the "selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status".⁴⁹ Refugee settlement serves as a protection tool and an expression of international solidarity, allowing for a durable solution for refugees and alleviating the pressure on refugee receiving countries.⁵⁰ The UNHCR plays an important role in resettlement. UNHCR identifies refugees in need of resettlement as part of its mandate and refers them for consideration to States that are willing to offer permanent residence.

In addition to persons that fall under the definition of the 1951 Geneva Convention,⁵¹ persons in need of subsidiary protection – due to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order – also fall within its mandate. Determination as a refugee under UNHCR's mandate is a precondition to be considered by States for resettlement.⁵² UNHCR divides its resettlement submissions by category (including categories of particularly vulnerable refugees, such as women and children at risk, as well as torture victims) and priority level (emergency, urgent and normal).⁵³

There is no obligation on States to allow for resettlement, which is therefore considered a voluntary and discretionary act of benevolence. States will normally engage in a further examination of the files of the individuals that have been pre-selected by UNHCR or engage in on-the-spot interviews. Some States impose additional requirements – such as the chance of successful integration in the resettlement State – or engage in extensive background checks. Nonetheless, recent figures show that the large majority of refugees referred by the UNHCR (91,8 percent) are accepted by resettlement countries.⁵⁴ This makes the initial Refugee Status Determination (RSD) by the UNCHR of paramount importance for the individuals concerned.

⁴⁹ UNHCR, *Resettlement Handbook*, Geneva, July 2011, www.unhcr.org, p. 3.

⁵⁰ *Ibid.*

⁵¹ Art. 1 of the Convention Relating to the Status of Refugees, Geneva, 28 July 1951.

⁵² UNHCR, *Resettlement Handbook*, cit., p. 21.

⁵³ *Ibid.*, p. 245 *et seq.*

⁵⁴ UNHCR, *Global Resettlement Needs*, 2017, www.unhcr.org, p. 63.

Alexander concluded in 1999 that the UNHCR RSD procedures lagged behind developments in administrative and human rights law.⁵⁵ In September 2005, the UNHCR published a manual on Procedural Standards for RSD under the UNHCR's mandate, which significantly improved asylum seekers' rights, introducing the duty to state reasons and the possibility to appeal a negative RSD decision with another protection office.⁵⁶ Still UNHCR appears to operate below international standards, as well as its own position on a fair and effective RSD procedure for States.⁵⁷ The lack of procedural safeguards has been replicated at the stage of State examination of UNHCR referrals for resettlement. On occasion EU Member States have refused resettlement without stating reasons, making it difficult for the UNCHR to refer the individual in question to another State.

Resettlement is increasingly seen as a means of providing a safe pathway to refugee protection, and promoted by the UNHCR as such. However, it must be stressed that resettlement cannot be a substitute for national asylum procedures, since there is no obligation for States to allow for resettlement. Only in its most extensive form, where a full asylum procedure is provided for outside national territory followed by a transfer to the asylum granting State, does resettlement overlap with the notion of extra-territorial processing.⁵⁸ Arguably, it also gives UNHCR a role that it was never intended to play, shifting responsibility from States to the UN.⁵⁹

III.1. EU RESETTLEMENT INITIATIVES

A majority of EU Member States have in one way or another engaged in resettlement, either on an *ad hoc* basis or in the framework of more structured programmes, both with and without the involvement of the UNHCR. However, national rules on resettlement remain diverse both in form and substance.⁶⁰

Member States have proven to be unreceptive to harmonisation attempts, emphasising the political nature of the decision to resettle. As a result, EU initiatives in this field have consisted primarily of the provision of financial support under the European Refugee Fund (ERF), running from 2008-2013, and its successor the Asylum, Migration

⁵⁵ M. ALEXANDER, *Refugee Status Determination Conducted by the UNHCR*, in *International Journal of Refugee Law*, 1999, p. 251 *et seq.*

⁵⁶ UNHCR, *Procedural Standards for Refugee Standard Determination under UNHCR's Mandate*, 20 November 2003, www.unhcr.org.

⁵⁷ M. KAGAN, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, in *International Journal of Refugee Law*, 2006, pp. 23 and 27.

⁵⁸ Dutch Advisory Committee on Migration Affairs, *External Processing: conditions applying to the processing of asylum applications outside the European Union*, Advisory Report no. 32, December 2010, acvz.org, p. 49.

⁵⁹ M. KAGAN, *The Beleaguered Gatekeeper*, cit., p. 4.

⁶⁰ D. PERRIN, F. McNAMARA, *Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames*, EUI Research Report 2013/03, www.migrationpolicycentre.eu.

and Integration Fund (AMIF) running until 2020.⁶¹ In 2012, a decision to amend the ERF established the Joint EU resettlement programme, under which the Commission adopts annual common Union resettlement priorities.⁶² This has been taken over in the AMIF. Administrative cooperation is supported by the EASO, which has the competence to “coordinate exchanges of information and other actions on resettlement taken by Member States”, as well as the European Resettlement Network, an initiative co-funded by the AMIF and involving also the UNHCR and the IOM.⁶³

Resettlement initiatives by the EU, which are aimed at bringing over refugees from outside the Union, should be distinguished from pilot projects aimed at transferring recognized refugees from one Member State to another as a means of intra-EU solidarity.⁶⁴ Likewise resettlement should be distinguished from relocation, which refers to the transfer of asylum seekers from one Member States to another, together with the responsibility for their asylum claim, again as a means of intra-EU solidarity.⁶⁵

III.2. RESETTLEMENT IN THE REFUGEE CRISIS

It was the refugee crisis that prompted Member States to further increase and coordinate their resettlement efforts. Representatives of the Governments of Member States meeting within the Council on 20 July 2015 committed to resettling 20.000 people.⁶⁶ On top of this, the EU-Turkey Statement of 18 March 2016 added a commitment from the Member States to resettle another Syrian from Turkey to the Member States, for every Syrian re-admitted by Turkey from the Greek islands, within the framework of the existing com-

⁶¹ Decision 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows; Art. 17 of Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund.

⁶² Decision 281/2012/EU of the European Parliament and of the Council of 29 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’.

⁶³ Art. 7 of Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

⁶⁴ See for instance EU Pilot Projects on Intra-EU Relocation from Malta (EUREMA), implemented under ERF Community Actions.

⁶⁵ Relocation was decided upon by the Council during the 2015 refugee crisis as an emergency measure under Art. 78, para. 3, TFEU. Decision (EU) 2015/1523 of the Council of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Decision (EU) 2015/1601 of the Council of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁶⁶ Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection, Brussels, 22 July 2015, Council document 11130/15. See also the Commission Recommendation C(2015) 3560 final of 8 June 2015 on a European Resettlement Scheme.

mitments from 20 July 2015.⁶⁷ Any further need for resettlement would be carried out under another voluntary arrangement up to a limit of an additional 54,000 persons.⁶⁸

The fact that the pledge by the Member States to commit to the resettlement of 20,000 people was taken by the Representatives of the Member States underlines that resettlement is considered a voluntary act by the individual Member States. This seems to be confirmed by the General Court's conclusion that the EU-Turkey Statement was really an agreement between the Member States and Turkey, rather than between the EU and Turkey. However, in the period following the conclusion of the "deal", it was the Commission, in close consultation with Turkey and the Justice and Home Affairs Counsellors, that drafted Standard Operating Procedures (SOPs) for the resettlement of Syrian refugees under the EU-Turkey Statement⁶⁹, which were subsequently endorsed by the Representatives of the Governments of the Member States.⁷⁰

What is interesting about the SOPs is that they clearly set out the selection criteria for the Syrian refugees that would be eligible for resettlement, essentially replicating the UNHCR resettlement submission categories.⁷¹ In addition they provide for a number of exclusion grounds. A Member State may, for instance, refuse resettlement in order to preserve the proportion in overall numbers between the different individual submission categories. Moreover, priority is to be given to persons who have not previously entered or tried to enter the EU irregularly.⁷² The procedure relies heavily upon a pre-selection made by the UNHCR, which however does not include a RSD.⁷³ While the participating States retain the right to decide on and reject candidates in individual cases, the participating State "should reject a candidate only in case he or she does not meet the eligibility criteria".⁷⁴

On the basis of the General Court's ruling quoted above, as well as the "adoption" of the SOPs with endorsement by the Member States, rather than by Council Decision, it would be difficult to maintain that the SOPs are binding under EU law. Even under public international law, they could only be considered to constitute binding obligations if the

⁶⁷ EU-Turkey Statement (2016).

⁶⁸ *Ibid.* Any commitments undertaken under that additional framework could be offset against non-allocated places under Decision 2015/1601, i.e. the places for relocation from Italy and Greece: Decision (EU) 2016/1754 of the Council of 29 September 2016 amending Decision (EU) 2015/1601.

⁶⁹ See Presidency of the Council, Standard Operating Procedures implementing the Mechanism for Resettlement from Turkey to the EU as set out in the EU-Turkey Statement of 18 March 2016, Brussels, 5 April 2016, Council document 7462/16.

⁷⁰ Presidency of the Council, Standard Operating Procedures implementing the Mechanism for Resettlement from Turkey to the EU as set out in the EU-Turkey Statement of 18 March 2016 – Endorsement, Brussels, 27 April 2016, Council document 8366/16.

⁷¹ *Ibid.*, p. 4.

⁷² *Ibid.*

⁷³ *Ibid.*, p. 6.

⁷⁴ *Ibid.*, p. 8.

EU-Turkey Statement to which they give effect were to be considered an agreement under public international law. Nonetheless, considering Member States' support for the SOPs, they *de facto* form the regulatory framework within which resettlement under the EU-Turkey Statement will take place. From that perspective it is worrying that they provide for even fewer procedural safeguards than the UNHCR's resettlement procedure. It is clear that the SOPs are not EU law and Member States implementing these therefore escape scrutiny under the Charter. Presumably the Charter would apply to the EU institutions and agencies if they were involved in their implementation.⁷⁵ The Charter would also apply if the SOPs were included in EU legislation, such as in the Commission proposal for a regulation establishing a Union resettlement framework of June 2015.⁷⁶

III.3. PROPOSAL FOR AN EU RESETTLEMENT MECHANISM

In 2016, the Commission proposed a regulation to create "a more structured, harmonised and permanent framework for resettlement".⁷⁷ It presented its proposal as an essential part of the Common European Asylum System (CEAS).⁷⁸ The regulation would go further than any prior involvement of the EU in resettlement in so far as it not only provides for establishing priorities, but also procedures and exclusion grounds, as well as the adoption of a resettlement plan by the Council that determines the maximum numbers of people to be resettled under the proposed regulation.⁷⁹ The eligibility criteria in the Commission proposal largely overlap with the UNHCR's submission criteria.⁸⁰ Aside from the exclusion criteria that would exclude a person from refugee status in the first place (e.g. for having committed war crimes), there are other – more problematic – exceptions, such as the exclusion of anyone who has been irregularly in the territory of the Member States prior to resettlement or to whom resettlement has been refused in the preceding five years.⁸¹

⁷⁵ *Ledra Advertising* [GC], cit., para. 67.

⁷⁶ Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework, COM(2016) 468 final.

⁷⁷ *Ibid.*, p. 2.

⁷⁸ *Ibid.*, p. 3.

⁷⁹ *Ibid.*, Art. 7.

⁸⁰ *Ibid.*, Art. 5.

⁸¹ *Ibid.*, Art. 6. See also the critical opinions of the Committee of the Regions and the Economic and Social Committee in this regard: Opinion of the European Economic and Social Committee of 25-26 January 2017 on the 'Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council' (COM(2016) 468 final — 2016/0225 COD), 2017/C 125/05, point 2.5; Opinion of the European Committee of the Regions of 8-9 February 2017, Reform of the Common European Asylum System Package II and a Union Resettlement Framework, cor.europa.eu, point 27.

The proposal provides for both ordinary and expedited resettlement procedures for targeted Union resettlement schemes.⁸² Interestingly, UNHCR or the EASO, under its proposed new mandate, may refer to the Member States third country nationals that, according to their assessment, fall within the scope of the Regulation.⁸³ In addition, UNHCR may be requested to carry out a full RSD.⁸⁴ Member States are explicitly allowed to give preference on the basis of family or socio-economic ties, and can ask UNHCR to take into account such considerations.⁸⁵ The Commission's proposal states that Member States shall make the assessment of whether third country nationals are eligible for resettlement on the basis of documentary evidence, a personal interview or a combination of both.⁸⁶ There is no duty to provide reasons for negative decisions and there is no possibility to appeal negative decisions. Instead it is simply stated that in such event no resettlement will take place.⁸⁷ If the Commission proposal were to be adopted without amendments this would raise important questions in terms of judicial protection and good administration.

III.4. APPLICABILITY OF THE CHARTER OF FUNDAMENTAL RIGHTS TO EU RESETTLEMENT

The Commission's explanatory memorandum contains the by now obligatory statement that the Regulation respects fundamental rights.⁸⁸ It specifically states that it is without prejudice to the right to asylum and the prohibition of *refoulement*. At the same time recital 19 of the proposal makes it clear that there would be no subjective right to resettlement. The explanatory memorandum furthermore stresses that the proposal does not create any right to be admitted to the territory of the Member States for the purpose of being granted international protection.⁸⁹ The reference to the right to asylum and the prohibition of *refoulement* should therefore be understood as an affirmation of those rights solely within EU territory.

It could be argued that, following the Court's reasoning in the *X and X* case, an individual who does not fall within the eligibility criteria would not be within the scope of the regulation and therefore also outside the scope of the protection of the Charter. However, any resettlement taking place under the Union framework would have to be

⁸² Arts 8, 10 and 11 of the Proposal for a Regulation COM(2016) 468.

⁸³ *Ibid.*, Art. 10, para. 8; Commission Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final.

⁸⁴ Art. 10, para. 8, of the Proposal for a Regulation COM(2016) 468.

⁸⁵ *Ibid.*, Art. 10, para. 8.

⁸⁶ *Ibid.*, Art. 10, para. 3.

⁸⁷ *Ibid.*, Art. 10, para. 6.

⁸⁸ *Ibid.*, pp. 8-9.

⁸⁹ *Ibid.*, p. 10.

considered to fall within the scope of EU law, in any case after preselection. Although there is no right to resettlement, the appropriate comparison would once more be with an applicant for asylum, who during her application is protected by the Charter, irrespective of whether her claim is ultimately accepted.

The argument could even be made that the Charter should apply if preselection were to be done by EASO. Agencies' expert opinions must be considered preparatory acts and can therefore not be challenged.⁹⁰ However, the refusal to preselect a candidate for resettlement by EASO would effectively close the way to resettlement resulting in a *de facto* final decision. Substantively the same would be true where preselection is carried out by the UNHCR, although an UN Agency is of course not bound by the Charter. Whilst this would not in theory exclude the possibility of triggering the international responsibility of the UNHCR, neither the Member States nor the EU could be held responsible for the UN Agency's actions, as they lack effective control.⁹¹

Assuming that the Charter and general principles of EU law apply in full to the EU's institutions and agencies, as well as the Member States when acting under the Union framework, the current proposal must be considered to provide insufficient procedural safeguards. The EU framework would even set standards below those of the UNHCR.

The right to be heard, as part of the general principle of good administration, would require that a person considered for resettlement be allowed to make her views known.⁹² That right applies also where the legislation in question does not expressly provide for such a procedural requirement, although it does not necessarily require an interview.⁹³ Still, the way in which the proposal prescribes that Member States should reach a decision on resettlement – on the basis of documentary evidence and/or an interview – would allow a Member State to reach a decision on resettlement without hearing the person concerned. Likewise, the absence of a duty to state reasons must be considered contrary to the principle of good administration. This duty is moreover closely related to the right to an effective remedy laid down in Art. 47 of the Charter which, given the absence of the possibility to appeal a negative decision, must be considered infringed as well.⁹⁴

⁹⁰ Consistent case law of the Court of Justice holds that recourse can only be had against the decision terminating the procedure: Court of Justice: judgment of 11 November 1981, case 60/81, *IBM*, para. 12; judgment of 13 October 2011, joined cases C-463/10 P and C-475/10 P, *Deutsche Post*, para. 53.

⁹¹ International Law Commission, Draft Articles on the Responsibility of International Organizations, in *Report of the International Law Commission*, sixty-third session, 2011, UN Doc. A/66/10 (DARIO), p. 54 *et seq.*

⁹² *M.*, cit., para. 87 and Court of Justice, judgment of 5 November 2014, case C-166/13, *Mukarubega*, para. 46.

⁹³ Court of Justice, judgment of 18 December 2008, *Sopropé*, case C-349/07, para. 38; *M.*, cit., para. 86; judgment of 10 September 2013, *G. and R.*, case C-383/13 PPU, para. 32.

⁹⁴ M. RENEMAN, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford: Hart Publishing, 2014, p. 106.

Even if the argument that the Charter applies in full to resettlement activity under the Union framework is accepted, it would be very difficult for an individual to challenge a negative decision on resettlement, be it on procedural or substantive grounds. In the absence of a right to resettlement and in view of the practical predicament in which candidates for resettlement will find themselves, access to a judge may be illusory.

IV. FRONTEX COORDINATED JOINT OPERATIONS IN THIRD COUNTRY TERRITORY

In the above examples one of the key questions is whether the Member States are acting within the scope of EU law. The final example will look at joint operational activity for the management of the EU's external borders, taking place however within, and with the cooperation of, third countries. In that situation it is not the scope of EU law but rather the multiplicity of actors that makes it difficult to hold executive authority to account. The involvement of third country authorities adds a layer of complexity to the already unclear division of responsibility between EU and Member States' border guard authorities during joint operations. A similar difficulty was touched upon in the preceding section when it was pointed out that it would be impossible to hold the UNHCR, as an intergovernmental organisation, to account under the Charter despite the close connection between its referrals and Member State decisions.

IV.1. FRONTEX AS AN EXECUTIVE ACTOR

The European Border and Coast Guard Agency, known by the French acronym of its original name (Frontex), was initially set up in 2004 with the aim of supporting Member States' joint operational cooperation for the management of the external borders.⁹⁵ Ever since its establishment its tasks and powers as well as its financial resources have been steadily growing, most importantly with the adoption of its current legal basis in 2016.⁹⁶ It is an independent agency which currently has three roles: 1) a regulatory role, providing the Commission, Council and Member States with technical and situational information related to the management of the external borders; 2) a supervisory role, assessing the vulnerability of Member States border management systems on a rolling basis and participating in the Schengen Evaluation System; and 3) an operational role.⁹⁷ In its operational

⁹⁵ Regulation (EC) 2007/2004 of the Council of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex Regulation). Its current legal basis is Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (EBCG Regulation).

⁹⁶ J.J. RIJPMAN, *Frontex and the European system of border guards: the future of border European border management*, in M. FLETCHER, E. HERLIN-KARNELL, C. MATERA (eds), *The European Union as an Area of Freedom, Security and Justice*, London: Routledge, 2016, p. 217 *et seq.*

⁹⁷ J.J. RIJPMAN, *The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?*, Study for the LIBE Committee of the European Parliament, 2016, www.europarl.europa.eu.

role, the Agency can initiate, finance and support joint operational border activity as well as joint return operations of the Member States' border guard authorities.⁹⁸ Despite the fact that successive amendments to its founding regulation have given the Agency an increasingly important influence over Member States' conduct during these operations, it does not itself utilise any autonomous law enforcement powers. Instead, national border guards from a Member State may exercise a range of law enforcement powers under the law of the host Member State in the context of joint operations.⁹⁹

IV.2. RESPONSIBILITY FOR FUNDAMENTAL RIGHTS VIOLATIONS

Frontex has from the outset been subject to criticism for failing to ensure compliance with fundamental rights during joint operational activity.¹⁰⁰ Part of the difficulty here lies with the unclear division of responsibilities, resulting in the EU's official stance that since the Agency does not dispose of executive powers and only coordinates Member States' activities, it cannot be held responsible for any possible violation of fundamental rights.¹⁰¹ Indeed, responsibility for any such violations would primarily lie with the Member State hosting an operation, as this is the Member State that exercises command and control.¹⁰² This would be the general finding both under public international law, as well as ECHR and EU law. Moreover, Fink has argued that in addition to the host Member State participating Member States, as well as Frontex itself, may also incur liability. This liability is based on the doctrine of positive obligations and incurred for what she calls associated conduct, i.e. behaviour that facilitates or fails to prevent foreseeable breaches of fundamental rights.¹⁰³ With respect to the Agency, this argument is supported by the range of obligations that have been imposed upon Frontex to respect and guarantee compliance with fundamental rights during joint operations, as well as

⁹⁸ Arts 15 and 28 of the EBCG Regulation.

⁹⁹ *Ibid.*, Art. 40.

¹⁰⁰ See for instance Human Rights Watch, Report of 21 September 2011, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, but also the Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013.

¹⁰¹ See for instance: Frontex, Opinion from Frontex on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012, p. 2.

¹⁰² M. FINK, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (PhD dissertation, Leiden University, forthcoming 2018).

¹⁰³ M. FINK, *Frontex and Human Rights*, cit., *passim*; R. MUNGIANU, *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge: Cambridge University Press, 2016, p. 226, argues that under public international law, both Frontex and the participating Member States could incur derivative responsibility for providing aid and assistance (Art. 14 DARIO and Art. 16 of the Draft Articles on State Responsibility for Internationally Wrongful Acts – i.e. International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts of 3 August 2001, UN Doc. A/56/10).

the duty imposed on its Executive Director to withdraw financial support, suspend or terminate a joint operation in case of serious and persistent human rights violations.¹⁰⁴

IV.3. FUNDAMENTAL RIGHTS ACCOUNTABILITY MECHANISMS

The mainstreaming of fundamental rights in the Agency's activities initially developed in practice and was later codified and reinforced by legislative amendments.¹⁰⁵ Frontex is now equipped with a Fundamental Rights Officer (FRO) and a Consultative Forum, both of which contribute to fundamental rights monitoring. Additionally, Frontex has drawn up a Fundamental Rights Strategy, adopted a Code of Conduct which sets out behavioural standards for all persons participating in Frontex activities, and has included fundamental rights training in the common core curricula for border guards.¹⁰⁶

Upon the recommendation of the European Ombudsman, the 2016 Regulation introduced an individual complaints mechanism.¹⁰⁷ This is an important step forward, even if its effectiveness will need to be proven in practice. A standardised complaint form has been made available on the Frontex website in six different languages, out of which four are non-EU languages (Arabic, Urdu, Pashtu and Tigrinya). Any person who considers that the action of staff (be they Frontex or national) has resulted in a breach of their fundamental rights may submit a written complaint the Agency. The FRO is responsible for handling these complaints, including determining their admissibility and forwarding them to the Agency and/or Member States and ensuring appropriate follow-up. Yet, despite the increased attention paid to fundamental rights, and the introduction of the individual complaints procedure, the continuing disagreement over the respective responsibilities of participating Member States and the Agency means that judicial review, and by extension respect for Art. 47 of the Charter, will not always be guaranteed. Not only will there be practical impediments to access to justice, it will also be next to impossible for an individual to establish precisely which actor contributed to what extent to the violation of her fundamental rights.

Accountability of the Agency should also not be confused with the civil or criminal liability of individual Frontex staff or visiting border guards. In this regard, the 2004 Regulation merely stated that visiting border guards and agency staff working in another Member State than their own would be subject to the national law of that Member State.¹⁰⁸ In addition, it provided that the Protocol on the privileges and immunities of the European Communities would apply to the Agency, meaning that its staff would be

¹⁰⁴ Arts 25, 26 and 28, para. 6, of the EBCG Regulation.

¹⁰⁵ P. SLOMINSKI, *The Power of Legal Norms in the EU's External Border Control*, in *International Migration*, 2013, p. 41 *et seq.*

¹⁰⁶ Arts 34-36, 70 and 71 of the EBCG Regulation.

¹⁰⁷ *Ibid.*, Art. 72.

¹⁰⁸ Art. 10 of the Frontex Regulation.

immune from legal proceedings in respect of acts performed by them in their official capacity.¹⁰⁹ In 2007, the first amendment to the Frontex Regulation made it clear that the civil and criminal liability of the visiting border guards would be governed by the law of the host Member States.¹¹⁰ The reference to the criminal and civil liability of Agency staff was deleted at that time, whereas the Protocol continued to apply.¹¹¹ In 2011, another amendment to the Frontex Regulation introduced the provision that visiting border guards would remain subject to “appropriate disciplinary or other measures in accordance with its national law” for breaches of fundamental rights.¹¹²

IV.4. FRONTEX AS AN EXTERNAL EXECUTIVE ACTOR

From the outset, Frontex tasks have included the facilitation of operational cooperation between Member States and third countries. For that purpose it concludes working arrangements on the management of operational cooperation with the authorities of third countries, generally the authorities responsible for border management in those countries.¹¹³ The 2011 amendment to the Frontex Regulation introduced the possibility for the Agency to send liaison officers to third countries and to launch and finance technical assistance projects in third countries independently.¹¹⁴ In bilateral agreements with third countries, Member States may include provisions on the role of the Agency and the powers of guest officers in the context of joint operations.¹¹⁵ Although Frontex has not made much use of these provisions so far, the 2015 refugee crisis and the EU’s focus on cooperation with third countries in response, is likely to change that. The Agency appointed a liaison officer in Turkey in April 2016 and will shortly designate a liaison officer for the Western Balkans.

Frontex is generally not considered to have international legal personality. Commentators seem to agree that working arrangements are to be considered non-binding under public international law.¹¹⁶ In fact, without exception the arrangements contain a provision to this effect, confirming the absence of any intention to be legally binding. Where the previous version of the Frontex Regulation rather enigmatically stipulated that these working arrangement were “to be concluded in accordance with the relevant

¹⁰⁹ *Ibid.*, Art. 18.

¹¹⁰ Current Arts 42 and 43 of the EBCG Regulation.

¹¹¹ *Ibid.*, Art. 59.

¹¹² *Ibid.*, Art. 21, para. 5.

¹¹³ *Ibid.*, Art. 54, para. 2.

¹¹⁴ *Ibid.*, Arts 54, para. 9, and 55.

¹¹⁵ *Ibid.*, Art. 54, para. 10.

¹¹⁶ A. OTT, E. VOS, F. COMAN-KUND, *EU Agencies and their International Mandate: A New Category of Global Actors*, CLEER Working Paper 2013/7, p. 32.

provisions of the TFEU”, the current Regulation prescribes that they shall receive the Commission's prior approval and that the European Parliament must be informed.¹¹⁷

The most important innovation that was brought about by the 2016 change of Frontex's legal basis, is the possibility for the Agency to coordinate operational cooperation between Member States and third countries. It may carry out actions at the external borders involving one or more Member States and a third country neighbouring at least one of those Member States, *including on the territory of that third country*.¹¹⁸ This naturally further complicates the already complex picture of responsibility during Frontex coordinated joint operations.

In situations where a joint operation includes the exercise of executive powers by border guards from the Member States on third country territory, a status agreement must be concluded by the Union with the country concerned under Art. 218 TEU.¹¹⁹ The status agreement shall cover all aspects that are necessary for carrying out the actions. It must be based on a model status agreement, which was published by the Commission on 22 November 2016.¹²⁰ The Commission is currently negotiating with Serbia, has received a mandate from the Council to start negotiations with FYR of Macedonia and intends to present a proposal for negotiating mandates for status agreements with Albania, Bosnia and Herzegovina, and Montenegro.¹²¹

The Model Status Agreement confirms that joint operations in third countries may only serve to control those stretches of a third country's border that are also part of the EU's external border (e.g. the Serbian-Hungarian border) and therefore not those parts of the third country's external border with other third countries (e.g. Serbian-Montenegrin border).¹²² This seems in line with the Agency's mandate, which is limited to the management of operational cooperation at the external borders of the EU and not the control of irregular migration more generally. It does not, however, exclude cooperation in other areas of border management covered by the Frontex Regulation. It also leaves open the question of whether cooperation with countries on the other side of the Mediterranean in the context of sea borders operations would be permissible.¹²³

¹¹⁷ Art. 54, para. 2, of the EBCG Regulation.

¹¹⁸ *Ibid.*, Art. 54, para. 3.

¹¹⁹ *Ibid.*, Art. 54, para. 4.

¹²⁰ See Communication COM/2016/0747 final of 14 September 2016 from the Commission to the European Parliament and the Council, Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (Model Status Agreement).

¹²¹ Fourth Report COM(2017) 325 final of 13 June 2017 from the Commission to the European Parliament, the European Council and the Council on the operationalisation of the European Border and Coast Guard, p. 12.

¹²² Art. 2, para. 2, of the Model Status Agreement.

¹²³ In the judgment of 5 September 2012, case C-355/10, *Parliament v. Council* [GC], the Court of Justice left the question as to the geographical scope of the Schengen Borders Code in the context of Fron-

Like any joint operation, joint operational activity with third countries is based on an operational plan.¹²⁴ Operational plans, detailing the *modus operandi* of a joint operation, have been used from the very start of Frontex operations. A first explicit reference to the Operational Plan was introduced only by the 2011 amendment of the Frontex Regulation. The plan is agreed between the executive director and the host Member State, in consultation with the participating Member States. Not until the adoption of the 2016 Regulation was the binding nature of the plan made explicit in the Regulation.¹²⁵ In the external sphere, however, the question of the binding nature of the plan arises again, as the Model Status Agreement is silent as to who concludes the operational plan and what its legal status is.¹²⁶

Unlike the Working Arrangement and the Operational Plan, a Status Agreement would need to qualify as an agreement under public international law for which the Commission's Model Status Agreement forms a blueprint. When looking at the content of the Model Status Agreement it replicates on the one hand the most important provisions of the Frontex Regulation, most importantly giving visiting border guards the authority to exercise those powers that are required for border control, under rules and regulations of the third country and under the instructions of the third country's border authorities.¹²⁷ On the other hand, in stipulating the privileges and immunities of the visiting border guards, it replicates the provisions of the EU Status of Forces/Mission Agreements of European Security and Defence Policy (ESDP) missions.¹²⁸ It essentially provides visiting EU border guards with immunity from the criminal, civil and administrative jurisdiction of the third country in respect of acts carried out in an official capacity.¹²⁹

tex-coordinated joint operations at sea unanswered. It did however seem to imply that rules on interception, disembarkation and search and rescue fall within the concept of surveillance.

¹²⁴ Art. 16 of the EBCG Regulation.

¹²⁵ It does however remain unclear how the operational plan should be qualified under EU law. It is not an implementing measure under Art. 290 TFEU, considering that it requires the approval of both the Executive Director, representing the Agency and participating Member States. It could therefore more readily be compared as a cross-over between an interinstitutional agreement and an agreement between Member States. Thanks to Melanie Fink for pointing out this analogy.

¹²⁶ Art. 3 of the Model Status Agreement.

¹²⁷ *Ibid.*, Art. 4.

¹²⁸ Council, Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State, 8720/05 Limite, 18 May 2005; Council, Draft Model Agreement on the status of the European Union Civilian Crisis Management Mission in a Host State (SOMA), 10564/05 Limite, 27 June 2005.

¹²⁹ Art. 6 of the Model Status Agreement.

IV.5. ACCOUNTABILITY FOR FUNDAMENTAL RIGHTS VIOLATIONS ON THIRD COUNTRY TERRITORY

The EBCG Regulation states that Frontex and the Member States must comply with EU law, also when cooperation with third countries takes place on the territory of those countries.¹³⁰ It specifically stipulates that the status agreement shall ensure the full respect of fundamental rights during these operations.¹³¹ How does it aim to do so?

The Model Status Agreement provides that the Executive Director may suspend an action in cases of breach of fundamental rights.¹³² On the one hand the threshold for doing so is lower than under the Frontex Regulation, which requires the violations to be serious or persistent. On the other hand, it is not an obligation (shall), but a possibility (may). The Model Status Agreement further states that each party shall have a complaint mechanism in place.¹³³ Although there is no reference to an individual complaints mechanism, it seems that the purpose of this provision is to have a similar mechanism as that of the Agency available also in the third country.

The Model Status Agreement imposes a general duty on all participating border guards to fully respect fundamental rights in the exercise of their tasks.¹³⁴ Participating border guards, whilst enjoying immunity from jurisdiction of the third country, are not exempt from the jurisdiction of their respective home Member State.¹³⁵

All neighbouring countries of the EU, with the exception of Belarus, are members of the Council of Europe. They are also all parties to the 1951 Refugee Convention, although Turkey retains a geographic limitation to its ratification limiting refugee status to European refugees. Northern African countries are, for obvious reasons, not party to the ECHR. With the exception of Libya, they are signatories of the 1951 Refugee Convention. There is a strong argument to be made for limiting joint operational activity on the territory of non-EU countries to members of the Council of Europe. Since the prime responsibility for breaches of fundamental rights in the context of such operations lies with the host State, i.e. the third country, this would at least guarantee the possibility for individuals to bring a complaint before the European Court of Human Rights, since the Charter and general principles of EU law cannot apply to third countries.

It would be more difficult to establish the responsibility of participating Member States under the ECHR, as this would require that the visiting border guards exercise effective jurisdiction in line with the case law of the European Court of Human Rights on

¹³⁰ Art. 54, para. 1, of the EBCG Regulation.

¹³¹ *Ibid.*, Art. 54, para. 4.

¹³² Art. 5 of the Model Status Agreement.

¹³³ *Ibid.*, Art. 8, para. 2.

¹³⁴ *Ibid.*, Art. 8, para. 1.

¹³⁵ *Ibid.*, Art. 6, para. 7.

extra-territorial application of the Convention.¹³⁶ Until the EU accedes to the ECHR, there is also no possibility to challenge Frontex's actions under the ECHR.

The Charter would of course apply in full to Frontex as well as the participating Member States as there can be no doubt that they act within the scope of EU law. Unlike CFSP missions, which are excluded from judicial review on the basis of Art. 24, para. 1, TEU, joint operational activity in the field of border management is fully within the jurisdiction of the CJEU.¹³⁷ However, the difficulty would be to establish a sufficiently serious breach that is required under EU liability law, as neither Frontex nor the participating Member States can be considered to have legal decision-making powers over operations on third country territory.¹³⁸ This would not however exclude the liability of Frontex for associated conduct, were it to disregard the options it has to withdraw from the operation in case of fundamental rights violations.

Despite the attention that is paid to the need to respect fundamental rights during joint operations in third country territory and the establishment of accountability mechanisms, such as the complaints procedure, in practice it may prove difficult to hold all actors involved responsible. In both practical and legal terms, the EU and ECHR liability regimes do not sufficiently reflect the multi-actor reality in EU external administrative action. Moreover, notwithstanding the conclusion of a Status Agreement, Member States' border guards *de facto* fall under the control and command of a third country that is not bound by the EU administrative and fundamental rights safeguards that would apply were a joint operation to take place on EU territory.

V. CONCLUSION

The three examples that have been discussed in this *Article* serve to show that EU external administrative action takes place in a complex reality that involves Member States' authorities, the EU institutions and agencies, as well as third country authorities and IGOs, such as UNHCR. Despite a continuing trend to externalise migration and asylum policies, it has become harder for Member States to escape fundamental rights constraints by "moving out", to the extent that they themselves or EU institutions or agencies continue to play an active role in the implementation of these policies.

¹³⁶ *Issa et al. v. Turkey*, cit., para. 71.

¹³⁷ Art. 24, para. 1, TEU. See also *Ledra Advertising* [GC], cit., para. 67. The limitation of the Court's jurisdiction in Art. 276 TFEU as regards the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State is limited to judicial cooperation in criminal matters and police cooperation. On the exclusion of judicial review of CFSP missions see M. CREMONA, "Effective Judicial Review is of the Essence of the Rule of Law": Challenging Common Foreign and Security Policy Measures Before the Court of Justice, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 671 *et seq.*

¹³⁸ See M. FINK, *Frontex and Human Rights*, cit.

First of all, the integration of the Schengen *acquis* in the EU legal order, the full jurisdiction of the CJEU and the recast of Schengen rules as EU instruments, have meant that the EU system of judicial protection applies in full. Second, the EU legislator has improved the position of third country nationals, either by prescribing the possibility of judicial review or by inserting accountability mechanisms that provide for some form of redress in case of a violation of fundamental rights. Third, the Charter applies to the EU institutions and agencies in whatever capacity or legal framework they operate, and to the Member States whenever they act within the scope of EU law, which means that EU administrative action continues to be bound by the Charter also outside the EU's geographical borders. Importantly, the Charter not only protects classic fundamental rights, but also a range of administrative rights, in particular the right to good administration. As this *Article* has shown, these administrative rights may take on a special relevance in the context of migration and asylum in which procedural safeguards are key to arriving at carefully considered decisions.

There are however difficulties that remain. The first is inherent in the nature of external action and the category of people most likely to be affected: third country nationals such as refugees, who are often in a vulnerable position and not able effectively to make use of the accountability mechanisms that have been established – without legal aid and practical assistance for instance with internet access, translation and even literacy. Second, non-judicial accountability mechanisms, as we have seen in the example of Frontex coordinated border management operations, are a response to the unclear division of responsibilities between different actors. They should however not be allowed to become a substitute for a system of judicial responsibility that does justice to the multi-actor nature of EU external administrative action. In particular when cooperating with non-EU actors, the EU should insist on full respect for fundamental rights also by its partners.

Third is the notorious difficulty in defining when Member States act within the scope of EU law, as illustrated by the *X and X* case. The question of scope becomes ever more important as Member States increasingly resort to coordinated bilateral or multilateral cooperation with third countries, outside the framework of EU law. The EU-Turkey Statement forms a case in point. Even if the Court were to uphold the General Court's decision that this "deal" is not a measure concluded by the European Council, nor an international agreement, in its implementation the Member States must still be considered as acting within the scope of EU law when declaring an asylum request inadmissible or issuing a return decision. The question of scope is also relevant where the EU decides to formalise initiatives such as resettlement, which were previously in the hands of the Member States alone, thus potentially bringing them within the scope of EU law.

Although increased scrutiny of EU external administrative action must at face value be considered a positive development, it may also pose some problems. If the applicability of the Charter becomes a side-effect of the EU becoming more closely involved in areas previously left to the Member States, it may instill in Member States a suspicion

against EU action, hampering initiatives that in themselves are much needed, such as the EU Framework for Resettlement. If the full application of the Charter, such as was feared in the *X and X* case, would have disruptive effects on the EU's visa regime, but also put into question the foundations of the global refugee system, unchecked application of the Charter would ultimately defeat its purpose.



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

ILARIA VIANELLO*

TABLE OF CONTENTS: I. Introduction. – II. The impact of administrative power on the exercise of EU public authority. – II.1. Preparatory acts informing final decisions. – II.2. Rule-making acts: looking beyond technicalities. – III. The impact of administrative power on the exercise of third countries public authority. – III.1. Preparatory acts: take it or leave it. – III.2. Rule-making acts: “accept terms and conditions”. – IV. Conclusion.

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.

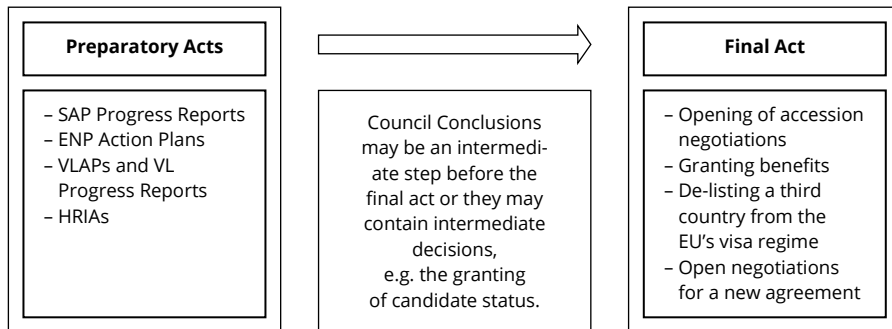


FIG. 1 – Impact of the administrative instruments implementing the SAP and the ENP.

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 damages 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 to 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.



ARTICLES

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

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

PÄIVI LEINO*

TABLE OF CONTENTS: I. Introduction. – II. Legal framework. – II.1. The hard law: the Cotonou Convention and EU Regulations: multilateral or unilateral? – II.2. Post legislative guidance and the real world of implementing EU assistance. – II.3. The European Investment Bank: what role for voluntary policies? – III. Court and EO practice: setting the limits of procedural discretion. – IV. Audit and development co-operation: a means to ensure political accountability. – V. Thinking outside the box: towards a broader accountability concept.

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

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

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I. INTRODUCTION

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

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

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

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

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

¹ Art. 21 TEU.

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

³ *Ibid.*, para. 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. LEGAL FRAMEWORK

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁶ Cotonou Agreement of 23 June 2000, cit.

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

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

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

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

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

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

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

⁴¹ *Ibid.*, Art. 66, para. 9.

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

⁴³ *Ibid.*, Section 2.1.

⁴⁴ *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵¹ *Ibid.*, Art. 2, para. 1.

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

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

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

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

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

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

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

⁵⁴ *Ibid.*

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

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

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

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

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

⁵⁸ *Ibid.*, p. 66.

⁵⁹ *Ibid.*, p. 74.

⁶⁰ Commission, *Practical Guide*, cit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷¹ *Ibid.*, p. 9.

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

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

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

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

⁷² *Ibid.*, p. 10.

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

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

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

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

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

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

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

⁷⁷ *Ibid.*, para. 3.8.

⁷⁸ *Ibid.*, para. 2.2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁶ *Ibid.*, para. 51.

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

⁸⁸ *Ibid.*, para. 124.

⁸⁹ *Ibid.*, paras 124-125.

⁹⁰ *Ibid.*

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

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

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

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

⁹² *Ibid.*, paras 24-26.

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

⁹⁴ *Ibid.*, paras 121-122.

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

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

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

⁹⁵ *Ibid.*, para. 139.

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁴ *Ibid.*, para. 18.

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

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

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

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

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

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

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

¹⁰⁹ *Ibid.*, p. vi.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³¹ *Ibid.*, p. 952.

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

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

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

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

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

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

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



ARTICLES

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

PROCEDURAL RIGHTS IN THE CONTEXT OF RESTRICTIVE MEASURES: DOES THE ADVERSARIAL PRINCIPLE SURVIVE THE NECESSITIES OF SECRECY?

LIISA LEPPÄVIRTA*

TABLE OF CONTENTS: I. Introduction. – II. The legal framework concerning restrictive measures. – III. The development of the right of access to the file. – IV. Access to “secret evidence” by the CJEU. – V. Conclusions.

ABSTRACT: Safeguarding fundamental procedural rights in the context of security concerns has been topical in the EU ever since the increased threats of terrorism post-9/11. This *Article* revisits the landmark case law on *Kadi*, which provided the premise for balancing due process rights and security concerns in the context of restrictive measures. The focus of this *Article* is on the specific procedural right of access to the file. The *Article* begins with a description of the legal framework on restrictive measures to the extent it is necessary for understanding the production and flow of information in the sanctions context. It then proceeds to scrutinise the development of the right of access to the file in this context through the *Kadi* cases and subsequent case law. The *Article* moves on to deal with the new developments in the Rules of Procedure of the General Court, which introduced a new closed procedure in cases concerning security related information or evidence, something that has clear implications for the targeted person’s right of access to the file. The amendments to the Rules of Procedure challenge the traditional role of the Court and, so it is argued, pose some challenges to its legitimacy.

KEYWORDS: restrictive measures – procedural rights – access to the file – adversarial principle – closed material procedure – special advocates.

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I. INTRODUCTION

"Public administrators are often inclined to hold that extraordinary circumstances (such as war or terrorist attacks) call for extraordinary measures, regardless of the resulting threats to general legal principles, especially procedural safeguards".¹

This is how, in 2009, Giacinto della Cananea starts his analysis of the famous *Kadi* case (*Kadi I*). At the time this also reflected the reality in the UN context. Mr Kadi was faced with a situation where all his assets were frozen for years without him knowing why, what evidence existed against him or even what his procedural rights were. Then suddenly one day Mr Kadi learned that he had been taken off the list. The *Kadi* case law provides an illustration of the balancing between security interests and procedural rights in the context of the EU. The CJEU found in favour of at least some guarantee of due process and procedural safeguards, even in the context of security threats posed by terrorism.

The procedural rights referred to by della Cananea are explicitly codified in the Charter of Fundamental Rights of the European Union (CFR). The right to an effective remedy and to a fair trial are fundamental rights guaranteed by Art. 47 of the CFR, which essentially provides for the right to an effective remedy before a tribunal against violations of rights and freedoms guaranteed by EU law. It also entails the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Moreover, Art. 41 of the CFR provides for the right to good administration, which essentially includes the right to be heard, the right to have access to his or her file and the obligation of the administration to give reasons for its decisions. What is of interest in security-related matters is the way that the jurisdiction of the Court of Justice has been limited in the context of the Union's Common Foreign and Security Policy (CFSP), reflecting the special nature of the policy area in the EU. However, the Court has jurisdiction with regard to decisions providing for restrictive measures against natural or legal persons, which indicates an understanding that legal remedies are of a particular importance in this context, since sanctions address natural and legal persons, groups or non-State entities.

Della Cananea ends his article with a forward-looking conclusion about how it remains to be seen whether, post-9/11, the CJEU will eventually be capable of mediating these kinds of conflicts between collective interests and individual rights. Situations concerning public security are the ultimate crash test of the real effectiveness of procedural safeguards, where the realisation of the right of access to information might particularly threaten public security. The aim of this *Article* is to pick up where della Cananea's forward-looking conclusion left off and examine how the CJEU has mediated the conflict between the collective interests and individual rights in the con-

¹ G. DELLA CANANEA, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council*, in *Columbia Journal of European Law*, 2008-2009, p. 512.

text of security. The focus of this *Article* is on the procedural right of access to the file enshrined in the CFR. After a brief summary of the background and main legal challenges highlighted in the *Kadi* saga, and the status of file access in EU law, this *Article* will move on to discuss the new Rules of Procedure of the General Court. The new rules introduced the possibility of a so-called “closed procedure”, which provides for an exception to the adversarial principle: the General Court is essentially allowed to base its decision on material not disclosed to the party in question, when the information is sensitive from the perspective of security. In doing so, the CJEU effectively takes the role usually occupied by the individual in examining and verifying evidence, based on the adversarial principle. This *Article* argues that, when providing an accountability avenue for the EU executive, the CJEU might in fact undermine its own legitimacy, and thus create another accountability gap.

II. THE LEGAL FRAMEWORK CONCERNING RESTRICTIVE MEASURES

Sanctions are one of the foreign policy tools utilised by the EU to promote the objectives of the CFSP, i.e. peace, democracy and respect of the rule of law, human rights and international law. Although commonly referred to as “sanctions”, they are in fact formally called “restrictive measures” in the EU Treaties.² European sanctions policy started to evolve in the early 1980s when the EU members began to impose sanctions collectively and autonomously.³ Initially based on trade powers, these measures now have their own legal basis in Art. 215 TFEU and extend beyond trade restrictions to include e.g. capital movements, asset freezing and visa bans. The practice gradually increased in frequency and sophistication to the point that it is now possible to speak of an EU sanctions policy.⁴ There are three types of sanctions in the EU: those implementing sanctions imposed by the UN, those reinforcing UN sanctions through stricter or additional measures and those that the EU adopts autonomously, often in relation to situations where the UN Security Council has not been able to agree on sanctions.⁵ Sanctions may also be differentiated according to target. They may target a third country and its political regime, and these sanctions may also include individualised measures aimed at leading figures in the targeted government or regime. The EU also implements counter-

² Arts 215 and 275 TFEU.

³ C. PORTELA, *Where and Why Does the EU Impose Sanctions?*, in *Politique Européenne*, 2005, p. 84. See also P. KOUTRAKOS, *Trade, Foreign Policy and Defence in EU Constitutional Law*, Oxford: Hart Publishing, 2001, p. 7 *et seq.*

⁴ On the evolution of the sanctions policy and legal framework see C. PORTELA, *European Union Sanctions and Foreign Policy*, Abingdon: Routledge, 2010, p. 19 *et seq.*

⁵ C. ECKES, *EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions*, in *Common Market Law Review*, 2014, p. 873 *et seq.*

terrorist sanctions regimes, which are not geographically defined and which are based on individual listings received from the UN Security Council.⁶

The focus of this *Article* is on the counterterrorist sanctions imposing restrictive measures on individuals and legal persons, commonly known as terrorist listings, but reference is made to case law on third country sanctions as well.⁷ All sanctions, in particular those adopted outside the framework of the UN Security Council, raise questions of compatibility with international law, an aspect of their legality which will not be developed here.⁸

In general, the procedure for adopting restrictive measures in the EU operates in two stages. First, a decision is adopted under Art. 29 TEU in accordance with Chapter 2 of Title V of the TEU, which concerns the CFSP of the Union. All restrictive measures are included in the Council CFSP decision, however in order to give full legal effect to the decision, additional measures are sometimes needed. Arms embargoes and restrictions on admission are implemented directly by the Member States based on the CFSP decision, which is legally binding on the Member States.⁹ Economic measures, such as asset freezes and export bans, which fall within the competence of the Union, require the adoption of a regulation to implement the Council CFSP decision and ensure its uniform application throughout the Union. The regulation is adopted by qualified majority and the European Parliament is informed.¹⁰ In the case of Council regulations implementing UN-based sanctions, the Commission has been empowered to make changes through Commission implementing regulations to the annex containing the list of persons, groups and entities on the basis of determinations made by the UN Security Council or its Sanctions Committee, followed up by a Council decision under CFSP.¹¹

⁶ *Ibid.*, p. 869.

⁷ From the perspective of the right of access to the file, counterterrorist measures are more often based on classified or confidential information gathered e.g. through intelligence, that is sensitive particularly from the perspective of security. On the reluctance of sharing intelligence information with international organisations see S. CHESTERMAN, *The Spy Who Came in from the Cold War: Intelligence and International Law*, in *Michigan Journal of International Law*, 2006, p. 1118. In the context of third country measures, concerns about the confidential nature of the listing information are not as pertinent. For third country sanctions see M. CREMONA, "Effective Judicial Review is of the Essence of the Rule of Law": *Challenging Common Foreign and Security Policy Measures Before the Court of Justice*, in *European Papers*, 2017, Vol. 2, No. 2, www.europeanpapers.eu, p. 671 *et seq.*

⁸ See further C. BEAUCILLON, *Les mesures restrictives de l'Union européenne*, Bruxelles: Bruylant-Larcier, 2013.

⁹ Council, Guidelines 11205/12 of 15 June 2012 on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, para. 7.

¹⁰ *Ibid.*

¹¹ See e.g. Regulation (EC) 881/2002 of the Council of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.

The legal basis for adopting the regulation implementing the measures contained in the CFSP decision is Art. 215 TFEU, which is the legal basis for adopting all regulations containing sanctions, regardless of their autonomous or non-autonomous origin or type of sanction. The aim of the sanction is not relevant for the choice of legal basis. Both third country sanctions and those targeting terrorist regimes are adopted on the basis of this Article, which provides for the adoption of the necessary measures as well as stipulates an obligation to provide necessary legal safeguards in the regulation:

- “1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
3. The acts referred to in this Article shall include necessary provisions on legal safeguards”.¹²

Art. 275, para. 2, TFEU provides an exception to the general lack of competence of the Court of Justice in the area of the CFSP. Pursuant to this Article, the Court of Justice has jurisdiction with respect to decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU.

The adoption practice of Council regulations seems to vary with regard to the explicit references made to paras 1 and 2 of Art. 215 TFEU.¹³ The difference between the

¹² Art. 215 TFEU. Art. 75 TFEU also contains wording that could provide a legal basis for adopting restrictive measure with a counter-terrorist aim, but the Court of Justice has found Art. 215, para. 2, TFEU to be the appropriate legal basis for measures “directed to addressees implicated in the acts of terrorism, who, having regard to their activities globally and to the international dimension of the threat they pose, affect fundamentally the Union’s external activity”. See Court of Justice, judgment of 19 July 2012, case C-130/10, *European Parliament v. Council of the European Union* [GC], para. 78. See also C. ECKES, *EU Restrictive Measures*, cit., p. 880.

¹³ Christina Eckes has found a distinction in the practice of Council regulations, where third country sanctions are usually adopted on the basis of Art. 215 TFEU without distinguishing between paras 1 or 2, whereas terrorist sanctions against Al Qaeda were adopted specifically on the basis of Art. 215, para. 2. However, a recent Council Regulation imposing additional restrictive measures directed against ISIL (Da’esh) and Al Qaeda refers only to Art. 215 TFEU without distinction. Moreover, the General Court refers specifically to Art. 215, para. 2, TFEU also in the context of third country sanctions regardless of the fact that the legal instrument only refers to Art. 215 without making the distinction. Therefore, it would seem that the explicit reference to the paragraph of the legal basis in the legal instrument is irrelevant, at least from the perspective of judicial review. See Regulation (EU) 2016/1686 of the Council of 20 September 2016 imposing additional restrictive measures directed against ISIL and Al-Qaeda and natural and legal

two paragraphs has been described to be the individual and objective character of the sanctions regime. Para. 1 entails the objective measures in relation to third countries, such as embargoes, whereas para. 2 entails all targeted individual measures against natural or legal persons and groups or non-State entities.¹⁴ For the purpose of application of Art. 275, para. 2, TFEU, it is irrelevant whether the sanctions are connected to terrorist activities or third country measures.¹⁵ Thus, the Court of Justice has jurisdiction on both occasions, when natural and legal persons are targeted by sanctions.

The right to judicial review in the CJEU is now clearly established in the context of targeted restrictive measures, also at Treaty level. In practice, the right has been actively used by individuals and entities.¹⁶ However, the extent of judicial review has been the subject of debate.¹⁷ In the *Kadi* saga, the question of the right to judicial review in the CJEU of a targeted measure originating in a UN Security Council decision to list the person was extensively researched and given a fairly clear conclusion.¹⁸ One of the key issues concerning the extent of judicial review settled in *Kadi* was the question of the CJEU's competence to review a decision of the EU implementing a UN decision listing a person as a terrorist. According to the Court of Justice, a targeted individual has the right of judicial review in the CJEU also in these cases, and the extent of the review is "in principle full review".¹⁹ This is regardless of the fact that the EU institution might have very limited information on the background and the material evidence behind the listing decision.²⁰

The availability of the information is a key concern, particularly in the context of EU sanctions implementing UN sanctions, where the information seems to be inaccessible for the EU or its Member States.²¹ However, problems have also occurred in the context

persons, entities or bodies associated with them; and e.g. General Court, judgment of 15 September 2016, case T-348/14, *Yanukovych v. Council of the European Union*, para. 3; and compare with C. ECKES, *EU Restrictive Measures*, cit., p. 880 *et seq.*

¹⁴ C. ECKES, *EU Restrictive Measures*, cit., p. 882.

¹⁵ *Ibid.*

¹⁶ A search in the Court's database based on their classification scheme lists 192 cases as at 1 June 2017 under the classification of restrictive measures – freezing of funds and various prohibitions.

¹⁷ For a more in-depth analysis of the extent of judicial review, see M. CREMONA, "Effective Judicial Review is of the Essence of the Rule of Law", cit., p. 671 *et seq.*

¹⁸ Court of Justice: judgment of 3 September 2008, joined cases C-402/05 and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Kadi I)* [GC]; judgment of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC]. For a review of the case law see e.g. P. LEINO, "In Principle the Full Review": What Justice for Mr Kadi?, in R. LIIVOJA, J. PETMAN (eds), *International Law-making – Essays in Honour of Jan Klabbers*, Abingdon: Routledge, 2014.

¹⁹ *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 97.

²⁰ *Ibid.*

²¹ S. CHESTERMAN, *The Spy Who Came in from the Cold War*, cit.

of autonomous EU sanctions.²² The lack of access to information in the EU concerns not only the person targeted by the restrictive measures, but also the CJEU, which has been unable to gain access to relevant information.²³ Regardless of the ideal of the standard of review, the practical impediments regarding access to information are bound to set some limits upon the extent of review.

In the context of the UN, the criteria for listing are set out in a Security Council resolution. Following a proposal by a UN member, the Sanctions Committee, consisting of members of the Security Council, applies these criteria in its decisions on designation of organisations, entities and individuals whose funds and other economic resources are to be frozen. The Security Council advises that the listing requests:

“[M]ust contain a detailed statement of case in support of the proposed listing and the specific criteria under which the names of individuals, groups, undertakings and/or entities are being proposed for designation, including: 1) specific findings and reasoning demonstrating that the listing criteria are met; 2) details of any connection with a currently listed individual or entity; 3) information about any other relevant acts or activities of the individual/entity; 4) the nature of the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.); 5) supporting evidence or documents”.²⁴

Moreover, the UN Member State is advised to provide information to support the identification process. The Committee considers the listing request and makes a decision. If a name is added to the sanctions list, the Committee makes a narrative summary of reasons for listing available on its website, which is based on the information provided by the requesting Member State.²⁵ The Council of the EU takes the decision implementing the UN Sanctions Committee listing based on this summary of reasons. The Sanctions Committee does not have an obligation to make available to the competent EU authority any material other than the summary of reasons.²⁶

However, in *Kadi II* the Court of Justice held that the effectiveness of judicial review guaranteed by Art. 47 of the CFR requires that the CJEU ensures that the decision, which affects the person individually, is taken on a sufficiently solid factual basis. According to the Court, this entails verifying the factual allegations in the summary of reasons underpinning that decision. The Court further held that it is for the Court to request the competent EU authority to produce information or evidence – confidential or otherwise – relevant to such an examination. This requirement does not oblige the UN authority

²² C. ECKES, *Decision-making in the Dark? Autonomous EU Sanctions and National Classification*, in *Amsterdam Centre for European Law and Governance Working Paper Series*, no. 2, 2012; C. ECKES, *EU Restrictive Measures*, cit., p. 894.

²³ C. ECKES, *EU Restrictive Measures*, cit., p. 871.

²⁴ See the webpage ‘Procedures for Listing’ at www.un.org.

²⁵ *Ibid.*

²⁶ *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 107.

to produce all the information and evidence underlying the reasons alleged in the summary of reasons by the Sanctions Committee. The Court's review of the decision will be necessarily affected by the competent EU authority's inability to produce the relevant information or evidence.²⁷ These repercussions will be discussed in more detail in the following section.

In the case of EU sanctions implementing UN sanctions, at least part of the information and evidence provided by the UN member may never be communicated to the EU authority or the person concerned. The nature of the information provided by Member States is likely to be classified or at least confidential, as it necessarily relates to security and is likely to contain, for example, intelligence information. In the context of EU autonomous sanctions, the possession of information is not as problematic. The information and evidence is held either by the EU authorities or Member State authorities. Proposals for restrictive measures should be submitted by the EEAS or by the Member States.²⁸ According to the EU Council Guidelines, the proposals should include identifiers and reasons for listing. The reasons should be as specific and concrete as possible for each listing.²⁹ However, regardless of the possession of the information, the scope of access to one's file and the procedure for the concerned party's access in the EU does not seem to be as clear cut as one would expect given the CJEU's emphasis upon the right to effective judicial review and rights of defence.

III. THE DEVELOPMENT OF THE RIGHT OF ACCESS TO THE FILE

The right of access to information is two-fold. First, it can have a privileged character, where the right of access is limited to those who have a special interest in the information or the proceedings to which the information relates. In these cases, the right of access to the file is an essential procedural safeguard. Secondly, the right of access can have a public character, when it serves the public at large. The core legal instrument regulating public access to documents in the EU is Regulation 1049/2001.³⁰ It is available to any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State. In practice, the scope has been broadened in accordance with Art. 2, para. 2, of the Regulation to also cover non-EU natural and legal persons.³¹ Access granted on the basis of Regulation 1049/2001 is *erga omnes* by nature, so a document made public by request on the basis of the Regulation is public for everyone, not just for the applicant.

²⁷ *Ibid.*, paras 119-123.

²⁸ Guidelines 11205/12, cit., Annex I.

²⁹ *Ibid.*

³⁰ Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

³¹ See Council, *Comments on the Council's Rules of Procedure – European Council's and Council's Rules of Procedure*, 2016, Annex II, Art. 1; Art. 1 of Commission Decision (EC, ECSC, Euratom) 2001/937 of 5 December 2001 amending its rules of procedure.

According to Art. 6, para. 1, of Regulation 1049/2001 the applicant is not obliged to state reasons for the request.³² The Regulation does not explicitly provide for file access or address the relationship between public and privileged access.³³

Access to one's file has a solid legal backbone in the CFR, which establishes in Art. 41 the basic principle of access to file as part of the right to good administration. According to the Article, "[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union". The second paragraph specifies that the Article includes "the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy". Even though Regulation 1049/2001 does not contain rules on file access, there are various individual provisions on party or privileged access to documents in sectorial secondary law, which provide for privileged access to documents intended to enable parties to administrative proceedings to exercise their rights of defence.³⁴

The lack of clear horizontally applicable procedural rules concerning file access seems to have had a trickle-down effect on public access to documents. Some of the individuals listed in decisions freezing funds have resorted to Regulation 1049/2001 in attempting to access information regarding the grounds of their listing. Already in 2007, the Court of Justice clarified in *Sison* the functioning of Regulation 1049/2001 in the context of sanctions and in situations where the applicant is mostly seeking privileged access to documents, but makes the request under the rules of Regulation 1049/2001. The Court ruled that, in the context of Regulation 1049/2001, the particular interest of the applicant in obtaining a document cannot be taken into account by the institution. The Court also pointed out that, should the applicant have a right to be informed in detail of the nature and cause of the accusation made against him, and that that right entails access to documents, the right could not be exercised through Regulation 1049/2001.³⁵

Despite this fairly clear and early instruction given by the CJEU, individuals targeted by sanctions still appear to occasionally resort to Regulation 1049/2001 in their requests for access to documents concerning their listing.³⁶ One can only speculate as to the reasons

³² See also Court of Justice, judgment of 23 November 2011, case C-266/05 P, *Sison v. Council of the European Union*, para. 44.

³³ Technically different arrangements have been adopted in the Member States. For example, in Finland, the Act on Openness contains the rules on public access to documents but also a general provision on party access is included in the Act. In addition to the general provision providing for party access, some sectorial rules contain specific provision on party access.

³⁴ B. DRIESSEN, *Transparency in EU Institutional Law: A Practitioner's Handbook*, Alphen aan den Rijn: Wolters Kluwer Law and Business, 2012, p. 186.

³⁵ *Sison v. Council of the European Union*, cit., paras 47-48. See also General Court, judgment of 26 May 2016, case T-110/15, *International Management Group v. European Commission*, para. 56.

³⁶ The most recent example being several requests made by individuals targeted by the Ukraine sanctions. See Council decisions in documents: 11385/14; 11409/14; 11543/14; 11548/14; 11562/14;

why some applicants resort to the public access regime. One possible reason is that it entails a clearly stipulated administrative procedure with deadlines and the right of appeal: something missing in the context of privileged access to information in the sanctions procedures. This is regardless of the fact that the chances of obtaining access to information through the public access regime should surely be more limited than privileged access, taking into consideration the nature of the information, which relates to international relations or security: interests strongly protected by Regulation 1049/2001.

The function of privileged access has been summarised by the General Court in a case concerning competition law, where the Court emphasised that:

“Access to the file in competition cases is intended to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections. [...] Access to the file is thus one of the procedural guarantees intended to protect the rights of defence and to ensure, in particular, that the right to be heard [...] can be exercised effectively. Observance of those rights in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings”.³⁷

In fact, in the context of competition procedures, the rights of the targeted undertaking have been interpreted broadly so that it has been deemed inappropriate for the Commission alone to decide which documents are of use for the defence.³⁸ This assessment should be left to the targeted undertaking. However, the right of access to the file in this context is naturally balanced against the legitimate interest of protection of

11628/14; 11656/14; 13896/14; 15036/14; 15356/14; 15359/14; 15363/14; 15620/14; 15652/14; 15662/14; 15667/14 available at www.consilium.europa.eu. In 2014 these requests amounted to a quarter of all confirmatory requests of the Council. See Council, *Council Annual Report on access to documents – 2014*, 2015, p. 20.

³⁷ General Court, order of 5 December 2001, case T-216/01 R, *Reisebank v. Commission of the European Communities*, para. 44.

³⁸ General Court, judgment of 29 June 1995, case T-30/91, *Solvay v. Commission of the European Communities*, para. 81. See also J. FLAHERTY, *Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and Their Impact on the Right to a Fair Hearing*, in *The Competition Law Review*, 2010, p. 63. Competition enforcement procedures also make use of a hearing officer working as a mediator e.g. in questions of access to documents of interested parties other than the targeted entity. The hearing officer seems to bear some resemblance to the special advocate procedure used by the common law countries in the case of sanctions, which will be discussed in *infra*, section IV. See K.J. CSERES, J. MENDES, *Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits*, in *Common Market Law Review*, 2014, pp. 510-514.

business secrets, as provided by Art. 41, para. 2, let. b), of the CFR. These considerations are specifically pertinent in multi-party proceedings.³⁹

A similar broad approach to privileged access has not been deemed appropriate in the context of national security. In its analysis of the extent of judicial review of restrictive measures, the Court of Justice clarified that the rights of defence include the right to be heard and the right to have access to the file, which are, however, subject to legitimate interests in maintaining confidentiality.⁴⁰ The legitimate interests of confidentiality is a broader category than the more specific business secrets relevant in the context of competition procedures. According to the Court, the right to effective judicial protection – affirmed by Art. 47 of the CFR – requires that:

“the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons [...], so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question”.⁴¹

In the context of restrictive measures, the essential information relates specifically to the listing criteria and the evidence against the individual listed. This is the particular question that will be explored next, based on an examination of the CJEU’s case law in this specific area.

With regards to the right of access to the file of the individual targeted by the sanctions, the Court of Justice has found that overriding considerations concerning the security of the EU or of its Member States or the conduct of their international relations may preclude the disclosure of some evidence to the person concerned. In this context, the General Court and the Court of Justice have made specific reference to the case law of the European Court of Human Rights, which has held that, under Art. 6 of the European Convention of Human Rights, there may be restrictions on the right to a fully adversarial procedure. Restriction may be possible where it is strictly necessary in light of a strong countervailing public interest, such as national security, the need to keep secret certain police

³⁹ J. FLAHERTY, *Balancing Efficiency and Justice*, cit., p. 63. See also K. HAVU, X. TAN, *Procedure, Duration, Reasoning and Fines: Notes on the Basis of Case C-519/15 P Trafilerie*, in *European Competition Law Review*, 2017, p. 319.

⁴⁰ *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 99; Court of Justice, judgment of 21 December 2011, case C-27/09 P, *France v. People’s Mojahedin Organization of Iran* [GC], para. 66.

⁴¹ *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 100; Court of Justice, judgment of 4 June 2013, case C-300/11, *ZZ* [GC], para. 53. However, in *Kadi II* the Court’s reading of the CFR seems to mix these two elements, which can be taken as a token of the intertwined nature of these rights, see in particular paras 99-100 of the judgment.

methods of investigation or the protection of the fundamental rights of another person.⁴² It is noteworthy that the Court of Justice makes a distinction between its own right of access and the right of the individual concerned by stating that national security concerns are not a valid objection to withhold the information from the Court.⁴³ Thus the Court, with reference to the previous case law of *Kadi* and the case *ZZ*, reserves the right to obtain the information and the documents. Moreover, the Court assigns itself the task of applying techniques, which accommodate the legitimate security considerations about the nature and sources of information being taken into account in the adoption of the act concerned and the need to sufficiently guarantee the individual's procedural rights, such as the right to be heard and the requirement for an adversarial process.⁴⁴

In doing this, the Court places itself in a position where it determines whether the reasons provided for non-disclosure are well-founded. Should that not be the case, the Court will give the competent authority the opportunity to reconsider disclosure. Should the authority disagree with the Court on disclosure, the CJEU will then restrict itself in its examination of the lawfulness of the contested measure to only the material, which has been disclosed. In the opposite situation, where the Court agrees with the non-disclosure of the evidence or information to the individual concerned, it is for the Court to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular the adversarial process, and the security or international relations concerns of the EU or its Member States. In this balancing, the Court could resort to disclosing a summary outlining the content of the information or the evidence.⁴⁵ Due to the security framework, the Court is actually placing itself in the position of the targeted individual or entity and examines the evidence on its behalf. It is for the Court to assess whether and to what extent the failure to disclose confidential information or evidence to the person concerned, and the inability of the individual to submit their observations, are such as to affect the probative value of the confidential evidence.⁴⁶

This is the balance between, on the one hand, maintaining international security and, on the other, the protection of fundamental rights struck by the Court of Justice with regard to UN based sanctions. Contrary to the finding of the General Court, the Court of Justice has confirmed that the mere fact that the individual targeted by the sanctions does not have access to all of the information or evidence forming the basis

⁴² *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 125. For references to cases of the European Court of Human Rights, see General Court, judgment of 30 September 2010, case T-85/09, *Yassin Abdullah Kadi v. European Commission*, paras 146 and 176; and *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Kadi I)* [GC], cit., para. 344. The case law of the European Court of Human Rights will be further discussed below.

⁴³ *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 125.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, paras 126-128.

⁴⁶ *Ibid.*, para. 129.

of the listing decision is not as such an infringement of their relevant procedural rights.⁴⁷ However, these circumstances might be relevant with respect to the Court's examination of the lawfulness of the decision. From the perspective of the individual, the fact that access to all evidence is not granted, and that the Court assesses and uses such evidence in the way it deems appropriate in the procedure, leaves a fairly wide margin of discretion to the Court in its assessment of the legality of the decision.

Subsequent case law is helpful in clarifying some of the procedural aspects of how access is to be gained (following a specific request) and when it is to be gained (within a reasonable period) in the context of sanctions. The General Court has consistently held that the EU institutions do not have a duty to spontaneously give access to file.⁴⁸ Gaining access to your own file thus requires activity by the targeted person who needs to apply for access to receive the information forming the basis of the listing.⁴⁹ Another aspect that the General Court has emphasised in its scrutiny of the right of access is the timeliness of disclosure: access is to be granted in a timely manner so that the targeted person has the possibility to examine the evidence and prepare a defence. In the absence of clear procedural rules on the exact time limits for providing the information, the standard set by the General Court is that the information should be disclosed "within a reasonable period", which is in accordance with the general obligation flowing from Art. 41, para. 1, of the CFR.⁵⁰ However, what is a reasonable period remains vague. For example, in the context of third country sanctions, the General Court has found that 19 months of administrative silence on the part of the Council in responding to a request for file access constituted a breach of the "reasonable period" and thus also an infringement of the rights of defence.⁵¹ Flexibility of time limits, however, is a broader administrative law problem not specific to the context of sanctions.⁵²

A third procedural point clarified by the case law specifically with regard to restrictive measures is that, contrary to the general principle relating to the right to be heard

⁴⁷ *Ibid.*, paras 137-138.

⁴⁸ General Court: judgment of 14 October 2009, case T-390/08, *Bank Melli Iran v. Council of the European Union*, para. 97; judgment of 5 February 2013, case T-494/10, *Bank Saderat Iran v. Council of the European Union*, para. 53.

⁴⁹ After a listing decision is made and the relevant EU legal instruments have been published in the Official Journal, a notice is published in the Official Journal for the attention of the targeted individuals with information about the possibilities of review of the decision. The notice does not contain specific guidance about access to information. See e.g. Notice for the attention of the persons subject to the restrictive measures provided for in Council Decision 2014/119/CFSP and in Regulation (EU) 208/2014 of the Council concerning restrictive measures in view of the situation in Ukraine of 8 March 2016.

⁵⁰ General Court, judgment of 16 September 2013, case T-8/11, *Bank Kargoshaei et al. v. Council of the European Union*, para. 93.

⁵¹ See e.g. General Court, judgment of 22 September 2015, case T-161/13, *First Islamic Investment Bank v. Council of the European Union*, para. 83.

⁵² More broadly on the difficulty of determining a "reasonable time", see P. LEINO, *Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU*, in *European Public Law*, 2014, p. 695.

on matters that might affect your rights in an adverse manner, the specific nature of the restrictive measures and the importance of their element of surprise presupposes that the targeted person will not and does not have to be heard in advance.⁵³ The case law of the CJEU, however, makes a distinction between initial listing decisions and decisions keeping an individual on the list. In the former case, the individual will not be given the opportunity to effectively make known their views on the grounds advanced against him before the adoption of the decision. In the latter case, the procedural obligation needs to be complied with before the decision is taken.

However, the fact that the Court finds an infringement of the rights of defence does not automatically lead to an annulment of the decision. On the contrary, the General Court has deemed it necessary to scrutinise, if the procedural infringement constitutes such a breach of the rights of the defence that would justify the actual annulment of the act concerned. According to the General Court, this is the case only in situations where it is established that the restrictive measures could not have been lawfully adopted or maintained if the undisclosed document had had to be excluded as inculpatory evidence.⁵⁴ This conditionality with regard to the consequence of the infringement seems to be consistent with the case law of the CJEU in relation to other breaches of procedural rights in different substantive contexts. For example, in a preliminary reference concerning the extension of detention of a third-country national with a view to his removal from the country, the Court of Justice held that an infringement of the right to be heard will result in an annulment only if the outcome of the procedure might have been different in the absence of the irregularity.⁵⁵ The Court of Justice has emphasised the interest of effectiveness of EU law in that only irregularities that could have made a difference in the outcome are sufficient to amount to an annulment of the decision.⁵⁶

IV. ACCESS TO “SECRET EVIDENCE” BY THE CJEU

The *Kadi* case law clearly sets out that the right of access to the file is subject to limitations, which have been further defined by the General Court. Nevertheless, the CJEU

⁵³ *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., paras 112-113; and *France v. People's Mojahedin Organization of Iran*, cit., paras 61-67.

⁵⁴ See e.g. General Court, judgment of 6 September 2013, joined cases T-35/10 and T-7/11, *Bank Melli Iran v. Council of the European Union*, para. 100; and *First Islamic Investment Bank v. Council of the European Union*, cit., para. 84.

⁵⁵ Court of Justice: judgment of 10 September 2013, case C-383/13 PPU, *G. and R.*, para. 38; judgment of 14 February 1990, case C-301/87, *France v. Commission of the European Communities*, para. 31; judgment of 5 October 2000, case C-288/96, *Germany v. Commission of the European Communities*, para. 101; judgment of 1 October 2009, case C-141/08 P, *Foshan Shunde Yongjian Housewares & Hardware v. Council of the European Union*, para. 94; judgment of 6 September 2012, case C-96/11 P, *August Storck v. OHIM*, para. 80.

⁵⁶ *G. and R.*, cit., para. 41. See also General Court, judgment of 2 February 2017, case T-29/15, *International Management Group v. European Commission*, para. 139.

can be considered a proponent for procedural rights in the context of restrictive measures, particularly in comparison to the UN.⁵⁷ Moreover, it is remarkable that the CJEU opted for at least some protection of procedural rights even though the difficulties of realising these rights were obvious already when the *Kadi* cases were decided, since some of the procedural aspects, such as access to information, were questions that the EU had limited means of influencing.⁵⁸

In the case law of the CJEU, the principal interest has been in securing the Courts' right to all information forming the basis of a listing decision. The CJEU have emphasised the need for all possible information, confidential or not, relevant to the examination by the Court. The General Court has specifically noted that the Council is not entitled to base a restrictive measure on information or evidence in the file communicated by a Member State, if the Member State is not willing to authorise its communication to the Courts.⁵⁹ The lack of disclosure of the information to the CJEU has been the primary reason for repeated annulments of EU measures imposing sanctions on individuals.⁶⁰ However, with the recent introduction of the possibility of closed procedures in the Rules of Procedure of the General Court, the CJEU is now put in a position where it in principle has wider access to information than the targeted persons.

Departing from the adversarial principle and the equality of arms in the context of criminal procedures – and other procedures related to national security such as the issue of terrorist listings – has been a common concern of various jurisdictions. The European Court of Human Rights addressed this issue in the context of a case concerning the interpretation of Art. 6 of the European Convention of Human Rights on the right to a fair trial. The European Court held that the use of confidential material may be unavoidable where national security is at stake.⁶¹ However, the European Court emphasised in this context that it does not mean that the national authorities are free from effective control by the domestic courts whenever they choose to assert that national

⁵⁷ However, the review procedure of the Security Council has also been developed and can at least improve the handling of these cases by the CJEU. On this point see J. KOKOTT, C. SOBOTTA, *The Kadi Case - Constitutional Core Values and International Law - Finding the Balance?*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law*, Oxford: Hart Publishing, 2014, p. 221.

⁵⁸ On the interaction between the EU and the UN regimes as regards protection of individual rights, see C. BEAUCILLON, *Les mesures restrictives de l'Union européenne*, Bruxelles: Bruylant-Larcier, 2013. On judicial dialogue between the Strasbourg and Luxembourg courts, see J. LARIK, F. FABBRI, *Dialoguing for Due Process: Kadi, Nada and the Accession of the EU to the ECHR*, in *Leuven Centre for Global Governance Studies Working Paper*, no. 125, 2013.

⁵⁹ General Court, judgment of 21 March 2012, joined cases T-439/10 and T-440/10, *Fulmen and Fereydoun Mahmoudian v. Council of the European Union*, para. 100. See also C. ECKES, *EU Restrictive Measures*, cit., p. 894.

⁶⁰ E. NANOPOULOS, *European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source?*, in *Modern Law Review*, 2015, p. 930.

⁶¹ European Court of Human Rights, judgment of 15 November 1996, no. 22414/93, *Chahal v. The United Kingdom*, para. 131.

security and terrorism are involved.⁶² According to the European Court, there are techniques, which can be employed that accommodate both legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.⁶³

One of these techniques that the European Court of Human Rights is referring to is the use of a special advocate in closed material procedures, which is used in the common law countries, and has been justified on a due process basis. This is because they offer at least some elements of procedural fairness to the party excluded from the closed hearing of the Court.⁶⁴ A consensus appears to be emerging between common law countries that special advocates can be justified as a legitimate human rights safeguard.⁶⁵ Particularly in the UK, the scope of closed material procedures and special advocates has expanded into covering various types of cases and courts, even though the total number of these cases is relatively low: in total 22 cases in 2014.⁶⁶ While the closed material procedures may vary depending on the type of case or the handling court, the common feature of the procedure is that it allows material to be withheld from the non-governmental party on public interest grounds, such as national security, and excludes the party from the procedure by replacing the party with a special advocate.⁶⁷ The role of the special advocate is two-fold: the advocate tests the executive's case for non-disclosure and represents the interests of the targeted person in the proceedings. The advocate is not formally responsible to the party and can only have limited contact with the party after disclosure of the information to the special advocate.⁶⁸

The use of the special advocates has been criticised in the UK by various actors as jeopardising the fairness of the procedure.⁶⁹ However, the European Court of Human Rights has at least been interpreted as encouraging the use of the special advocate procedure. Eva Nanopoulos has argued that the case law of the European Court of Human Rights has not only validated but in fact normalised the use of closed material procedures and special advocates.⁷⁰ Indeed, the European Court has often referred to the

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ J. JACKSON, *The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition*, in *The International Journal of Evidence & Proof*, 2016, p. 345.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, p. 344.

⁶⁷ E. NANOPOULOS, *European Human Rights Law*, cit., p. 916.

⁶⁸ *Ibid.*; and A. KAVANAGH, *Cases: Special Advocates, Control Orders and the Right to a Fair Trial*, in *Modern Law Review*, 2010, p. 838.

⁶⁹ E. NANOPOULOS, *European Human Rights Law*, cit., p. 917.

⁷⁰ *Ibid.*, p. 924 *et seq.*

use of a special advocate as a means by which to counterbalance the procedural unfairness caused by the lack of full disclosure in national security cases.⁷¹

The use of special advocates in the context of restrictive measures in the CJEU has been discussed and proposed in the academic literature.⁷² However, the new Rules of Procedure of the General Court opted for a different solution, which has been criticised, from the perspective of fair trial rights, to be much worse than the use of a special advocate.⁷³ Art. 105 of the Rules of Procedure essentially consolidates the procedure and repercussions of the use of confidential security-related information not disclosed to the targeted person as established in *Kadi* and *ZZ*.⁷⁴ However, the Rules of Procedure go further than the case law in *Kadi* and *ZZ* and do not line-up with the principles set out in those cases.⁷⁵ The Article is not limited to cases of restrictive measures. It refers more broadly to information or material pertaining to the security of the Union or that of one or more of its Member States or to the conduct of their international relations. However, considering the limited jurisdiction of the Court of Justice in CFSP matters, it is likely that the Article finds its main relevance in the context of restrictive measures.

The EU closed procedure can be initiated if a main party intends to base its claims on information or material the communication of which would harm the security of the

⁷¹ See in particular European Court of Human Rights, judgment of 19 February 2009, no. 3455/05, *A. et al. v. The United Kingdom*, paras 209-211 and 220; and *Chahal v. The United Kingdom*, cit., para. 131.

⁷² See C. ECKES, *Decision-making in the Dark?*, cit., pp. 20-23; and C.C. MURPHY, *Secret Evidence in EU Security Law: Special Advocates Before the Court of Justice?*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, Cheltenham: Edward Elgar, 2013.

⁷³ E. NANOPOULOS, *European Human Rights Law*, cit., p. 930.

⁷⁴ A parallel provision has been inserted in Art. 190a of the Rules of Procedure of the Court of Justice to provide equal protection of information in situations, where an appeal is brought against the judgment of General Court in a case where the procedure in Art. 105 of the Rules of Procedure of the General Court has been used. See Amendment of the Rules of Procedure of the Court of Justice of 12 August 2016. Moreover, security rules have been adopted by the CJEU to facilitate the application of the new provisions in the Rules of Procedure. See Decision (EU) 2016/2386 of the Court of Justice of 20 September 2016 concerning the security rules applicable to information or material produced before the General Court in accordance with Art. 105 of its Rules of Procedure; and Decision (EU) 2016/2387 of the General Court of 14 September 2016 concerning the security rules applicable to information or material produced in accordance with Art. 105, paras 1 or 2, of the Rules of Procedure. These security rules entered into force in December 2016, so the practical use of these rules remains to be seen. On the EU classification system, see D. CURTIN, *Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?*, in *Common Market Law Review*, 2013, pp. 425-443.

⁷⁵ D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges*, Study for the LIBE Committee, 2014, www.europarl.europa.eu, p. 8. See also the Draft Rules of Procedure of the General Court submitted to the approval of the Council, where the General Court justifies the introduction of the new Art. 105 with reference to compliance with the case law of the European Court of Human Rights. This justification is made without further elaboration on the use of special advocates, which, more accurately, can be argued to be the technique endorsed by the European Court. See Council, Draft Rules of Procedure of the General Court 7795/14 of 17 March 2014, pp. 101-105.

Union or a Member State(s) or the conduct of their international relations. According to para. 1 of Art. 105 of the Rules of Procedure of the General Court the closed procedure starts with the production of a separate document and an application for confidentiality “setting out the overriding reasons which, to the extent strictly required by the exigencies of the situation, justify the confidentiality of that information or material being preserved and which militate against its communication to the other main party”. The General Court then examines the material with reference to its confidential nature. Should the General Court find the information or material relevant in order for it to rule on the case, but not confidential according to its estimation, it shall ask the party concerned to authorise the communication of that information or material to the other main party. According to para. 4 of Art. 105, if the main party objects to such communication within a period prescribed by the President, or fails to reply by the end of that period, that information or material shall not be taken into account in the determination of the case. In the opposite situation, where the General Court finds the information to be confidential, it will not communicate that information or material to the other main party. Rather, it will then weigh the requirements linked to the right to effective judicial protection, particularly observance of the adversarial principle, against the requirements flowing from the security of the Union or of one or more of its Member States or the conduct of their international relations.⁷⁶

After weighing up these matters, the General Court makes a reasoned order specifying the procedures to be adopted to accommodate the requirements of the right to effective judicial protection. As an example of such a procedure, Art. 105, para. 6, of the Rules of Procedure mentions the communication of a non-confidential version or a non-confidential summary of the information or material containing the essential content and enabling the other main party, to the greatest extent possible, to make its views known.⁷⁷ The Court is entitled to base its decision on such information despite the exception to the adversarial principle, if the information or material is essential in order for it to rule in the case. This particular provision has been criticised as going further than the principles set out in the case law of *Kadi* and *ZZ*.⁷⁸ One of the limitations set by

⁷⁶ In the UK context this is called the “Wiley balance”. Eva Nanopoulos points out that this balancing is “the only positive aspect of the new rules compared to the UK version”, which only provides for the Wiley balance in specific types of claims. E. NANOPOULOS, *European Human Rights Law*, cit., pp. 917 and 930.

⁷⁷ It can be argued that the wording of this paragraph does not exclude the possibility of using a special advocate when “adopting procedures accommodating the requirements of the right to an effective judicial protection”. However, literature seems settled with the fact that this possibility is excluded, when it is not specifically provided for in the Rules of Procedure. See E. NANOPOULOS, *European Human Rights Law*, cit., p. 930.

⁷⁸ D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence*, cit., p. 58. However, the use of such information is not foreign to the legal systems of the Member States such as Finland, where the Supreme Administrative Court has held that national security is a legitimate ground to limit privileged access, and it is for the court to assess the bearing of such undisclosed evidence on the

the European Court of Human Rights on the use of undisclosed evidence in the context of detention is that fair trial rights prevent basing a decision maintaining detention solely, or to a decisive degree, on closed material.⁷⁹ A similar clear limitation is not explicitly provided for in the Rules of Procedure, with its Art. 105, para. 8, stipulating that the Court is to be confined to what is strictly necessary. Moreover, when assessing that information or material, the General Court shall take account of the fact that a main party has not been able to make its views on the information or material known.

Art. 105 of the Rules of Procedure cements the Court's right of access in the context of restrictive measures. The wording of the Article also gives a fairly wide margin of discretion to the Court as to its use of the material or information not to be disclosed to the party, but which is still essential for the Court to rule on the case. The fact that the Court considers the information essential but the parties' access rights to such information are limited raises some concern from the perspective of accountability, even though the Court is to be confined to what is strictly necessary. The use of the term "necessary", again, leaves a fairly wide margin of discretion. Moreover, the Court has discretion with regard to, for example, requesting the other party to produce a summary of the non-confidential content of the information or material and how the other party then can make his views known. The Court also has discretion as to how it takes into account the fact that the main party has not been able to make its views on the information or material known.⁸⁰

It can be argued that, regardless of the lack of full access to the documents by the main party, the fact that the Court has wider access to these documents is an improvement from the perspective of effective judicial review. At least the Court is now in a better position to make informed judgments based on the widest possible material and evidence. However, from the perspective of the targeted individual, the undermining of the right of access to the file has immediate repercussions with respect to the strength of judicial review as an accountability measure and also from the perspective of "seeing justice to be done" in these cases. Eva Nanopoulos argues that the acceptance of the European Court of Human Rights and the CJEU of these limitations to fair trial rights of individuals has also contributed to the social acceptance of these limitations, which otherwise would not have been accepted.⁸¹

case and conduct a balancing between the conflicting interests. See the series of judgments of the Supreme Administrative Court of Finland of 12.7.2007 in KHO 2007:47, 2007:48 and 2007:49 concerning the right to reside (2007:47 and 2007:48) and citizenship (2007:49). I would like to thank Professor Ida Koivisto for highlighting these cases in our second workshop. On the ways different Member States tackle the issue of using intelligence information in the courts see D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence*, cit., pp. 20-35.

⁷⁹ *A. et al. v. The United Kingdom*, cit., para. 220.

⁸⁰ Eva Nanopoulos has also criticised the lack of definition of crucial terms in the Article. E. NANOPOULOS, *European Human Rights Law*, cit., p. 930.

⁸¹ *Ibid.*, p. 932.

V. CONCLUSIONS

A focus on access to documents reveals three layers of transparency in the context of sanctions. Privileged access rights are codified in the CFR and have been specifically established to be relevant in the context of review of restrictive measures. However, the case law and the Rules of Procedure of the General Court make it clear that these rights can be limited specifically in the interest of public security. With regard to public access to documents, it is fairly clear that this is the most limited sphere of access, even though in practice it still seems to be utilised for privileged access purposes. Of these three, the widest access is granted to the General Court, whose access rights seem to be fairly unlimited after the recent amendments to the Rules of Procedure. Moreover, it is not only the access rights of the Court that are unlimited. The Court is also given a fairly wide margin of discretion as to its use of the material it receives based on the wide access rights. However, there is still little experience on the use of this right. Essentially, it does not change the situation that the originators of the information still have the ultimate power to decide whether to disclose all the evidence to the EU institutions.

The question of access to information in this context raises some interesting shifts in the traditional administrative law paradigms. The introduction of the EU closed procedure significantly changes the role of the Court from a review institution to an institution that uses a fairly wide margin of discretion with regard to the assessment of information. This use of discretion is not controlled by another institution and not even mediated by a special advocate procedure. In a way, the EU Court partly absorbs the role of the executive, whose actions and use of discretion courts traditionally review. In the context of restrictive measures, the price to pay for making the executive – rightly so – accountable for its decisions concerning restrictive measures is that the Courts become less accountable, or at least can be seen to provide less efficient accountability from the perspective of the individual concerned.⁸²

The fact that the General Court is partly conducting its review in secret, and is given a fairly broad margin of discretion in its assessment of the secret evidence, is bound to undermine the legitimacy of the CJEU and requires a great amount of trust in the integrity of the Court. A general premise that has recently been challenged is that the CJEU enjoys a high level of normative and sociological legitimacy.⁸³ It remains to be seen if the introduction of the new closed procedure has had, or will have, some impact on the

⁸² For this formulation of the shift of the role of the Court, the author owes thanks to Professor Olli Mäenpää, who commented on a draft paper in the second workshop held in Helsinki in June.

⁸³ M.A. POLLACK, *The Legitimacy of the Court of Justice of the European Union*, in H. COHEN, N. GROSSMAN (eds), *Legitimacy and International Courts*, Cambridge: Cambridge University Press, Forthcoming, p. 56, available at www.papers.ssrn.com. See also J.H.H. Weiler's critique on simplifying the question of legitimacy, which mostly focuses on the crossing of the line between the judicature and legislature by the Court of Justice. J.H.H. WEILER, *Epilogue: Judging the Judges – Apology and Critique*, in M. ADAMS, H. DE WAELE, J. MEEUSEN, G. STRAETMANS (eds), *Judging Europe's Judges*, Oxford: Hart Publishing, 2013.

sociological legitimacy of the Court. Any effect is likely to be softened by the fact that many Member States have had to deal with a similar balancing act when it comes to the handling of secret evidence.⁸⁴

From a comparative perspective, the balancing adopted in the Rules of Procedure of the General Court can be regarded to be one of the strictest approaches, since it does not contain an explicit reference to the use of a special advocate to mediate the limitations placed upon the adversarial principle. Moreover, there are also Member States that do not allow for the use of secret evidence in courts.⁸⁵ However, as Mark Pollack notes, “the public legitimacy of the Court rests on a very thin base of public knowledge about the Court, which appears to borrow much of its legitimacy from more general attitudes towards Europe and the rule of law”.⁸⁶ This implies that a technical change of rules, such as that in question, will not have much of an effect on the public legitimacy of the Court.

⁸⁴ D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence*, cit., pp. 20-35.

⁸⁵ *Ibid.*, pp. 28-29.

⁸⁶ M.A. POLLACK, *The Legitimacy of the Court of Justice*, cit., p. 56.



ARTICLES

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

“EFFECTIVE JUDICIAL REVIEW IS OF THE ESSENCE OF THE RULE OF LAW”: CHALLENGING COMMON FOREIGN AND SECURITY POLICY MEASURES BEFORE THE COURT OF JUSTICE

MARISE CREMONA*

TABLE OF CONTENTS: I. Introduction. – II. The legal framework. – III. Limiting the Court's jurisdiction. – IV. The Exception: judicial review of CFSP acts. – V. Grounds for and intensity of review. – VI. Conclusion.

ABSTRACT: This *Article* discusses the role of the Court of Justice in reviewing acts adopted under the Common Foreign and Security Policy (CFSP), seeking to determine to what extent the “exceptionalism” of the CFSP, its characterisation as a field of executive action largely shielded from judicial scrutiny, is an accurate assessment. The Court's role is constrained in two ways. First, although the CFSP has been integrated into the overall legal structures of EU external relations by the Lisbon Treaty, it is still subject to “specific rules and procedures” (Art. 24, para. 1, TEU) and among these specific rules are limitations on the jurisdiction of the Court of Justice. Second, is the self-restraint of the Court itself when reviewing acts adopted within the framework of external policies in which the decision-making institutions have a wide discretion; this self-restraint is not specific to the CFSP but the CFSP is a clear case of broad policy discretion. Despite these constraints we are seeing a growing number of cases in which the Court is asked to assess the legality of CFSP acts. The *Article* will address three main questions: 1) What is the scope of the limitation to judicial review in the CFSP? 2) What is the scope of the Treaty-based exceptions to this limitation? 3) Does the degree and intensity of judicial scrutiny of CFSP acts demonstrate a particular judicial reticence with respect to CFSP?

KEYWORDS: Common Foreign and Security Policy – judicial review – rule of law – validity – interpretation – restrictive measures.

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I. INTRODUCTION

The range of EU action under the Common Foreign and Security Policy (CFSP) is broad, including international agreements, different types of restrictive measures (counter-terrorist, and different types of regime-sanctions), and civilian and military missions. These actions are implemented through administrative as well as operational action; thus for example, as we shall see, a CFSP civilian mission will entail many implementing decisions, including procurement decisions. Indeed, in the words of one Advocate General, “most of the acts envisaged in Chapter 2, Title V, of the TEU could be regarded as ‘administrative’, if by that is meant that they regulate the conduct of the EU or national administrations”.¹ This *Article* will discuss the role of the Court of Justice in reviewing acts adopted under and within the context of the CFSP, with the aim of exploring the degree to which administrative action in the CFSP is subject to judicial control.

The CFSP represents perhaps the most quintessential “foreign policy” of the Union and given the traditionally restricted role for courts in national foreign policies, it might be surprising that the Union’s CFSP is subject to judicial control at all.² However Art. 19 TEU requires the Court to “ensure that in the interpretation and application of the Treaties the law is observed”; this has been described by the Court itself as a “rule of general jurisdiction”³ and represents a fundamental constitutional characteristic of the EU as an international actor. It is certainly the case that in the external relations field in general the Court is restrained in reviewing the broad policy discretion of the EU institutions; it allows the institutions a wide policy space within which to act. The Court’s role is rather to ensure that the EU and its institutions operate within the limits of their powers, that the institutional balance is maintained, that the Member States adhere to their commitments and – most importantly – that the rule of law and fundamental rights are upheld.⁴

In the case of the CFSP, the position is complicated by the fact that, although the CFSP is integrated into the overall legal structures of EU external relations,⁵ it is still sub-

¹ Opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council and Commission*, para. 59.

² On the role of the Court of Justice in relation to the CFSP, see among others R.A. WESSEL, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*, in *European Papers*, 2016, Vol. 1, No 2, <http://www.europeanpapers.eu/it/e-journal/lex-imperfecta-law-and-integration-european-foreign-and-security-policy>, p. 439 *et seq.*; C. HILLION, *A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law - Constitutional Challenges*, Oxford: Hart Publishing, 2014.

³ Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council* [GC], para. 70.

⁴ M. CREMONA, *Structural Principles and their Role in EU External Relations Law*, in *Current Legal Problems*, 2016, p. 35 *et seq.*

⁵ See further M. CREMONA, *The CFSP-CSDP in the Constitutional Architecture of the EU*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *The EU’s Common Foreign and Security Policy. A Research Handbook*, Cheltenham/Northampton: Edward Elgar, 2018, forthcoming.

ject to “specific rules and procedures”,⁶ which both impact the administrative framework and place limitations upon the jurisdiction of the Court of Justice. These derogations from the rule of general jurisdiction are in turn subject to exceptions designed to preserve the Court’s ability to ensure respect for the rule of law and the balance of competences. Amid this complicated arrangement of a general jurisdictional rule, limitations of jurisdiction, and exceptions to the limitations, we are presented with the question: how exceptional is the CFSP within the overall framework of the EU’s legal order and, more particularly, within the constitutional and administrative framework of EU external action? The CFSP’s place within the EU’s constitutional architecture has a number of different dimensions; here we will take the possibility of judicial review as our focus since this perhaps represents the hard core of EU administrative law and also since the limitations on the Court’s jurisdiction in the CFSP represent – it might be argued – one of the clearest instances of an accountability gap. Whether this is indeed the case is the question at the heart of the *Article*. We will break it down into three questions. First, what is the scope of the “specific rule” which limits judicial review of CFSP acts? On what criteria is an act characterised as “CFSP” and thereby subject to the limitation (section III)? Second, what is the scope of the exception to the limitation? What types of act may be covered, and what types of jurisdiction (section IV)? Third, is the question of the degree or intensity of review where CFSP acts are subject to scrutiny, including examination of legal basis, compliance with procedural decision-making rules, as well as compliance with the rule of law and human rights (section V). Before turning to these questions, however, we should first briefly address the legal framework of the CFSP, and, in particular, the types of act that may be adopted within this policy field and the authors of those acts for the purposes of legal challenges, so as to provide the administrative and legal context necessary for the discussion of judicial review (section II).

II. THE LEGAL FRAMEWORK

Since the Lisbon Treaty, the CFSP has formed part of the EU’s external action, governed by the overall mandate established in Art. 3, para. 5, TEU and the “General Provisions of the Union’s External Action” set out in Arts 21-23 TEU. This means that it shares the principles, objectives, strategic interests and general orientations of EU external action,⁷ and is covered by the general principles of EU law, including respect for fundamental

⁶ Art. 24, para. 1, TEU.

⁷ See for example European Union, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union’s Foreign And Security Policy*, approved by the European Council on 28 June 2016, eas.europa.eu, which brings together the CFSP and other external policies, including trade and development.

rights and the rule of law.⁸ The European Code of Good Administrative Behaviour applies to the administration in its conduct of the CFSP.⁹ In terms of decision-making and institutional structures, it is subject to “specific rules”, but in the absence of such specific rules the general rules apply. Thus, for example, the procedure for negotiating and concluding treaties is governed by Art. 218 TFEU. This contains specific rules for the appointment of the EU negotiating team where the treaty “relates exclusively or principally” to the CFSP, and for the conclusion of treaties which relate exclusively to the CFSP (conclusion in such cases being by the Council without the consent or consultation of the European Parliament). But where Art. 218 TFEU does not establish a special rule, the general provision – for example, Art. 218, para. 10, TFEU requiring the European Parliament to be kept informed – will then apply.¹⁰

As this example suggests, the institutional balance within the CFSP is different from that within other external policies, which generally reflect the standard institutional roles defined in Arts 14-17 TEU. The Commission as an institution does not have a right of initiative in CFSP decision-making, although one of its Vice-Presidents, the High Representative of the Union for Foreign Affairs and Security Policy (HR), has the right to make proposals.¹¹ Primary responsibility for implementation of the CFSP lies with the HR and the Member States, “using national and Union resources”.¹² The HR is also responsible for external representation of the Union in matters relating to the CFSP, as opposed to the Commission which has general responsibility for ensuring the Union’s external representation.¹³

The treaty provisions that deal with the CFSP allow for the adoption of only one type of legally binding act: the decision.¹⁴ When used in the CFSP context, the decision is not a legislative act and is not therefore adopted according to the ordinary or special legislative procedures, but rather by either the Council or the European Council.¹⁵ The exclusion of legislative acts carries a number of implications for administrative law: delegated acts and comitology are also excluded, and the principles of subsidiarity and leg-

⁸ Court of Justice, judgment of 14 June 2016, case C-263/14, *European Parliament v. Council* [GC], para. 47: “As regards [...] compliance with the principles of the rule of law and human rights, as well as respect for human dignity, it must be stated that such compliance is required of all actions of the European Union, including those in the area of the CFSP, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), Article 21(2)(b) and (3) TEU, and Article 23 TEU”.

⁹ See for example Decision of the EU Ombudsman of 4 December 2014, case OI/15/2014/PMC.

¹⁰ *European Parliament v. Council* [GC], cit.

¹¹ Art. 27, para. 1, TEU. Member States may also propose Common Security and Defence Policy missions: Art. 42, para. 4, TEU.

¹² Art. 26, para. 3, TEU.

¹³ Arts 17, para. 1, and 27, para. 2, TEU.

¹⁴ Art. 25 TEU. See further R.A. WESSEL, *Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?*, in *European Foreign Affairs Review*, 2015, p. 123 *et seq.*

¹⁵ The European Council acts unanimously; the Council generally acts unanimously, although some possibility for qualified majority voting exists: Arts 24, para. 1, and 31 TEU.

islative transparency do not apply.¹⁶ On the other hand, the general principle of transparency is not excluded and the right of access to documents applies also to the CFSP. Regulation 1049/2001 governs public access to European Parliament, Council and Commission documents and there is no general exclusion for CFSP documents.¹⁷ Access is to be refused where disclosure would undermine the protection of the public interest as regards (*inter alia*) public security, defence and military matters, and international relations; while these grounds may of course apply to some CFSP documents they are not exclusively directed at the CFSP.¹⁸ The rules on access to documents are made applicable to the European External Action Service (EEAS) by means of the decision establishing the EEAS,¹⁹ implemented by a decision of the HR.²⁰

CFSP decisions may be used for a variety of purposes: they may define general guidelines and strategies;²¹ they may define operational action to be undertaken by the Union, including civilian and military missions,²² and positions of the Union on specific issues;²³ or they may conclude international agreements.²⁴ In addition to these binding acts, the Council frequently adopts formal but non-binding "Conclusions", which set out Union policy on specific issues. Additionally, the HR issues public statements taking a position on behalf of the Union. Although not binding in themselves, Council Conclusions will often prepare the way for the adoption of binding acts or will signal to the third country the conditions under which the Union will adopt (or revoke) a formal decision. Decisions of the type just mentioned, and implementing decisions, are binding acts and may be challenged on the basis of Art. 263 TFEU, as long as the Court has jurisdiction in the specific

¹⁶ Art. 24, para. 1, TEU. The Protocol on the Application of the Principles of Subsidiarity and Proportionality applies to legislative acts. On legislative transparency see Art. 15, para. 2, TFEU.

¹⁷ Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. The preamble, at para. 7, makes it clear that the right of access also applies to documents related to the CFSP.

¹⁸ Art. 4, para. 1, of Regulation 1049/2001. See also Art. 9 on the treatment of sensitive documents. One of the seminal cases on the application of these exceptions, proportionality and partial access in fact concerned the CFSP: Court of Justice, judgment of 6 December 2001, case C-353/99 P, *Council of the European Union v. Heidi Hautala*. See generally 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, 2018, forthcoming.

¹⁹ Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, Art. 11.

²⁰ High Representative Decision 2011/C 243/08 of 19 July 2011 implements access to documents for the EEAS. The Decision provides that the right of access to EEAS documents will operate "according to the principles, conditions and limits" laid down in Regulation 1049/2001.

²¹ Arts 25, let. a), and 26, para. 1, TEU. Note that decisions may be used for this purpose but not all strategic positions are adopted by binding decision; Council conclusions and public statements of the HR are frequently used.

²² Arts 25, para. b), let. i), and 28 TEU.

²³ Arts 25, para. b), let. ii), and 29 TEU.

²⁴ Art. 37 TEU and Art. 218, para. 5, TFEU.

case (as discussed in the following sections). Their challenge is subject to the usual standing requirements. Decisions in individual cases adopted by (for example) a Head of Mission may be challenged if they produce legal effects, although, as we shall see, it will be necessary to identify the institution to which the act can be attributed.

Implementation is of course important from the perspective of administrative law because it is in the process of implementation that the individual is likely to come into contact with the exercise of Union power. Within the CFSP, as already mentioned, implementation is primarily the responsibility of the HR, assisted by the EEAS,²⁵ in some cases by a Special Representative,²⁶ and Member States. A decision adopted by the Council under CFSP to impose restrictive measures against a third country may therefore be implemented directly by the Member States (a visa ban or arms embargo), or by Council Regulation adopted under Art. 215 TFEU (economic or financial restrictions). A decision launching an operational action will establish its “objectives, scope, the means to be made available to the Union, if necessary [its] duration, and the condition for [its] implementation”.²⁷ Implementation may involve EEAS staff based in Brussels or in Union delegations, staff seconded by Member States, or independent contractors, and financial commitments which are managed by the Commission. Implementing decisions may be adopted by the Council.²⁸

In the case of restrictive measures, amendments to the originating CFSP decision (for example, to amend the list of targeted individuals) is done by way of an amending decision adopted, like the original, on the basis of Art. 29 TEU. The subsequent regulation adopted under Art. 215 TFEU will normally contain provision for equivalent amendments to the Annexes by implementing acts of the Commission or Council on the basis of Art. 291, para. 2, TFEU.²⁹ In *National Iranian Oil Company*, the Court of Justice rejected an argument that amendments to a regulation imposing restrictive measures should be adopted under the primary legal basis (Art. 215 TFEU) rather than Art. 291, para. 2, TFEU.³⁰ In the first place it took the view that the adoption of implementing acts was not precluded by Art. 215 TFEU and that the difference in procedure between the two provisions was not a barrier since the joint proposal by the High Representative for Foreign Affairs and Security Policy and the Commission required by Art. 215 TFEU is not a procedural guarantee, and a listed individual was able to have re-

²⁵ Art. 27, para. 3, TEU.

²⁶ Art. 33 TEU.

²⁷ Art. 28, para. 1, TEU.

²⁸ Art. 291, para. 2, TFEU, referring to Arts 24 and 26 TEU. This is an exception to the general rule whereby implementing decisions are adopted by the Commission.

²⁹ For an account of the decision-making procedures for restrictive measures see L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures: Does the Adversarial Principle Survive the Necessity of Secrecy?*, in *European Papers*, 2017, Vol. 2, No. 2, www.europeanpapers.eu, p. 649 *et seq.*

³⁰ Court of Justice, judgment of 1 March 2016, case C-440/14 P, *National Iranian Oil Company v. Council*[GC].

course to the CJEU whichever of the two provisions was used as a legal basis.³¹ In the second place it held that the conditions for granting implementing powers to the Council under Art. 291, para. 2, TFEU were satisfied. The basic Regulation conferred implementing powers to amend the Annexes on the Commission in most cases (e.g. the lists of goods or technologies covered) but reserved to the Council the ability to amend the Annexes insofar as they listed natural or legal persons. The sensitive nature of individual listings and their impact on fundamental rights justified their adoption by the Council. Interestingly for our subject here, the Court of Justice also relied on the fact that the original listing decision is taken by the Council under the CFSP and that it is important that the CFSP decision (and any amendments) are reflected immediately in the implementing Regulation; the Court referred to the need "to ensure the consistency of the procedures" and held that coordination between the amendment of the CFSP decision and the Regulation is necessary to ensure speed: normally the two acts will be adopted on the same day.³² Here then we see the specific decision-making procedures of the CFSP impacting the allocation of implementing powers under the Regulation as a result of the close links between the two.

Under the Common Security and Defence Policy (CSDP), a decision may launch a civilian or a military mission (the "tasks" defined in Art. 43 TEU). These missions are implemented using Member States resources (civilian and military capabilities) and are subject to the political control and strategic direction of the Political and Security Committee and the coordination of the HR acting under the responsibility of the Council. Thus, even where Member State resources are used, the chain of command is headed by the HR, acting under the Council's authority. The Political and Security Committee may also be authorised by the Council to take decisions.

These structures – which contain multiple actors – have implications for judicial review: to whom is a decision attributed and against whom can a legal challenge be brought? Given the different actors involved, and the presence of seconded staff, the answer may not always be obvious. The case of *H* illustrates the issues well. A national official seconded to the EU's Police Mission in Bosnia and Herzegovina (EUPM) sought to challenge a decision taken by the Head of Mission; the action was originally brought before the General Court against the Council, Commission and the EUPM. In an Order refusing an application for the interim suspension of the decision, the President of the General Court held that, as a mission, the EUPM was a "simple activity" of the Union, and did not have the status of a body, office or agency within the meaning of Art. 263 TFEU; it thus did not have the capacity to defend legal proceedings and the case should have been brought against the Council and Commission.³³ As the staff member was se-

³¹ *Ibid.*, paras 33-46.

³² *Ibid.*, paras 47-58.

³³ General Court, order of 10 July 2014, case T-271/10 R, *H v. Council and Commission*, paras 18-21.

conded by a Member State, there was also the possibility of bringing an action in the relevant national court, something which the applicant had, in fact, also done. The General Court, taking the view that it lacked jurisdiction on the ground that the case did not fall within the Court's limited CFSP jurisdiction, pointed to the provision of the Council's decision establishing the EUPM, according to which:

"The State or EU institution having seconded a staff member shall be responsible for answering any claims linked to the secondment, from or concerning the staff member. The State or EU institution in question shall be responsible for bringing any action against the seconded person".³⁴

Under this decision, operational control is transferred by the seconding State to the Civilian Operation Commander and command and control is to be exercised by the Head of Mission; however, "[a]ll seconded staff shall remain under the full command of the national authorities of the seconding State or EU institution concerned".³⁵ The General Court's conclusion was that "whilst the contested decisions were taken by the Head of Mission, they can in principle be attributed to the Italian authorities" and that "[a]ccordingly the legality of those measures must be reviewed by the Italian court".³⁶ This enabled the Court to find that, although (in its view) judicial review before the General Court was excluded under Art. 275 TFEU, there would be no denial of the right to an effective remedy. We will return later to the question of complementarity of remedies before national and EU Courts; for now it should be noted that the Court of Justice, on appeal in the *H* case, held that the EU Courts did in fact have jurisdiction since the decision should not be qualified as a CFSP act.³⁷ In referring the case back to the General Court for decision, the Court of Justice took the view that the case was nevertheless inadmissible against the Commission, since it did not involve a contractual or budgetary issue and "the Commission is not involved in the chain of command of the EUPM in Bosnia and Herzegovina".³⁸ The Council, in contrast, is at the apex of that chain of command: the Head of Mission who actually adopted the decision acts under the authority of the Civilian Operation Commander who acts under the authority of the Political and Security Committee (PSC) and HR; the PSC exercises political control and strategic direction of the EUPM under the responsibility of the Council; the contested decision was therefore imputable to the Council.³⁹ On the other hand where a decision taken by

³⁴ Art. 8, para. 2, of Council Decision 2009/906/CFSP of 8 December 2009 on the EUPM in Bosnia and Herzegovina (BiH).

³⁵ *Ibid.*, Art. 5, para. 4.

³⁶ *H v. Council and Commission*, cit., paras 50 and 52.

³⁷ Court of Justice, judgment of 19 July 2016, case C-455/14 P, *H v. Council and Commission* [GC]. See further *infra*, section III.

³⁸ *Ibid.* para. 65.

³⁹ *Ibid.*, paras 66-67.

a Head of Mission concerns matters for which financial responsibility lies with the Commission – such as a procurement process – he or she will be acting under delegated authority from the Commission. In that case it is to the Commission that the act will be attributed.⁴⁰

This is also the approach taken by the EU Ombudsman when investigating cases of alleged maladministration in relation to CFSP missions, although in his decision on an own-initiative inquiry in 2013 the Ombudsman commented that "the situation was characterised by significant uncertainties as to which EU institution or body would be competent to remedy possible instances of maladministration in this type of situation (i.e., the Council, the Commission or the HR/EEAS)".⁴¹ His conclusion – which has since been applied in subsequent cases – was that:

"the Ombudsman will address himself, as regards future complaints and inquiries concerning the activities of EU missions, (i) to the Commission in so far as issues relating to budget implementation in civilian missions are concerned and (ii) to the High Representative/EEAS in so far as all other allegations of maladministration in relation to CSDP missions are concerned".⁴²

The same reasoning applies to Union delegations, which according to the General Court in *Elti* are not a "body, office or agency" within the meaning of Art. 263 TFEU.⁴³ In order to bring annulment proceedings with respect to an act adopted by a Head of Delegation, therefore, it is necessary to decide to which EU institution the act is to be attributed. Before the Treaty of Lisbon, representation in third countries was carried out by Commission delegations and acts of delegations could be imputed to the Commission for the purposes of legal responsibility.⁴⁴ Under the Lisbon Treaty, the position is more com-

⁴⁰ Court of Justice, judgment of 12 November 2015, case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo*, paras 56-67. Note that procurement by EU institutions and bodies falls under different (though not dissimilar) rules from procurement by Member State authorities; EU procurement, including in the context of external action, is governed by the Financial Regulation, i.e. by Arts 190 and 191 of Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation 1605/2002, and is subject to the European Court of Auditors. See further, especially on the difficulty of bringing non-contractual liability claims against the EU institutions in procurement cases, R. CARANTA, *The Liability of EU Institutions for Breach of Procurement Rules*, in *European Procurement and Public Private Partnership Law Review*, 2013, p. 238 et seq.

⁴¹ European Ombudsman Decision of 30 August 2013 closing his own-initiative inquiry OI/12/2010/(BEH)MMN concerning the Council of the European Union, the European Commission and the High Representative/European External Action Service, para. 28.

⁴² *Ibid.*, conclusions.

⁴³ General Court, order of 4 June 2012, case T-395/11, *Elti d.o.o v. Delegation of the European Union to Montenegro*, para. 73.

⁴⁴ General Court, order of 30 June 2011, case T-264/09, *Technoprocess Srl v. Commission and Delegation of the European Union to Morocco*, para. 70.

plicated. Union delegations, staffed by members of the EEAS and the Commission, are under the authority of the HR; the Head of Delegation is accountable to the HR.⁴⁵ Despite the fact that the Head of Delegation may conclude contracts and be a party to legal proceedings in the third country of accreditation, the delegation is not an independent entity from the point of view of liability before the EU Courts and is treated as a division of the EEAS, that is as “an integral part of its hierarchical and functional structure”.⁴⁶ Despite this hierarchical relationship with the HR and Council, where the decision taken in the delegation concerns financial or budget issues – such as procurement for which the Commission is responsible under the financial regulation – the Commission will be the proper addressee of a legal challenge before the EU Courts.⁴⁷ As the General Court put it in *Elti*, “the legal status of the Union Delegations is characterised by a two-fold organic and functional dependence with respect to the EEAS and the Commission”.⁴⁸

How does the European External Action Service (EEAS) fit into this picture? The EEAS is not an institution of the Union;⁴⁹ according to Art. 27, para. 3, TEU, the EEAS exists to assist the HR. It is a “functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives”.⁵⁰ It therefore qualifies as a “body” within the meaning of Art. 263 TFEU and those of its acts which have legal effects may in principle be challenged before the EU Courts. However, Gatti makes a convincing argument that we need to distinguish between the different aspects of EEAS action.⁵¹ In terms of its own administration, the EEAS is indeed autonomous and it should therefore take responsibility for its acts before the EU Courts. This would include staff disputes under Art. 270 TFEU, decisions on access to documents and the handling of confidential information, and the administration of its budget under the Financial Regulation. However, as Gatti rightly argues,⁵² the EEAS does not have autonomous powers when it comes to the implementation of EU policies; here, it assists the HR (acting under Council authority) and Commission. As we have seen in the case of EU delegations (which are themselves part of the EEAS) and EU missions, the precise nature of a measure needs to be assessed so as to impute an act to either the Council or the Commission.

⁴⁵ Art. 221 TFEU; Art. 5 of Council Decision 2010/427/EU, cit..

⁴⁶ *Elti d.o.o v. Delegation of the European Union to Montenegro*, cit., para. 35.

⁴⁷ Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the financial regulation applicable to the general budget of the European Communities, as amended by Regulation 1081/2010 of the European Parliament and of the Council of 24 November 2010 amending [the Financial Regulation] as regards the European External Action Service.

⁴⁸ *Elti d.o.o v. Delegation of the European Union to Montenegro*, cit., para. 46.

⁴⁹ EU institutions are listed in Art. 13, para. 1, TEU.

⁵⁰ Art. 1, para. 2, of Council Decision 2010/427/EU, cit.

⁵¹ M. GATTI, *Diplomats at the Bar: The European External Action Service Before EU Courts*, in *European Law Review*, 2014, p. 664 *et seq.*

⁵² *Ibid.*

In the case of CFSP missions and Union delegations, therefore, acts will need to be attributed to the appropriate institution for the purposes of legal challenge before the EU Courts. Measures may be imputed to the EEAS where they concern its own administration; however where it is implementing the CFSP (or other external policies) then it is not acting under independent powers and a legal challenge should be addressed to the Council or Commission. As expressed by Advocate General Jääskinen in *Elitaliana*, "[t]he present case illustrates [...] the extent to which the European Union's external action is fragmented, lacks transparency and makes it difficult to determine the legal liability of its various actors".⁵³ This complexity gives rise to the risk of error on the part of an applicant who may well wrongly attribute the act, resulting in the action being declared inadmissible.⁵⁴

In the foregoing discussion we have seen the CFSP operating within the general framework of legal accountability; the rules applied in attributing an act for the purposes of judicial review are not specific to the CFSP although as we have seen they may well be complex to apply given the multiplicity of actors involved in implementing CFSP, their sometimes ambiguous legal status and hierarchical relationships. The identification of the act and the question of attribution is of course only an initial step. If the act is found to "relate to" the CFSP, the CJEU's jurisdiction will be severely limited by the "specific rule" contained in Art. 275 TFEU. It is to this that we now turn.

III. LIMITING THE COURT'S JURISDICTION

According to the first paragraph of Art. 275 TFEU, "[t]he Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions". In the *Mauritius* case the Court held that this provision creates "a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and [it] must, therefore, be interpreted narrowly".⁵⁵ The reference to Art. 19 TEU is both logical and significant; it signals that the CFSP is part of the Union's legal order,⁵⁶ albeit subject to some special rules concerning procedure and institutional powers, and the

⁵³ Opinion of AG Jääskinen delivered on 21 May 2015, case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo*, para. 19.

⁵⁴ In *Elitaliana* the Court, in finding that the CFSP mission Eulex Kosovo did not have legal capacity and the action in question was to be attributed to the Commission, also rejected an argument that since "the complex legal situation of the contract in question made it difficult to identify the party to whom the measures at issue were attributable" the applicant's error was excusable (*Elitaliana SpA v. Eulex Kosovo*, cit., para. 71).

⁵⁵ *European Parliament v. Council* [GC], case C-658/11, cit., para. 70.

⁵⁶ See for example, R.A. WESSEL, *The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation*, in *European Constitutional Law Review*, 2009, p. 117.

general jurisdiction of the Court of Justice is an important part of that legal order. As a policy field, the CFSP is integrated into the Union's general principles, such as the rule of law, which pertain to the exercise of administrative discretion.⁵⁷

Indeed, in addition to its reliance on Art. 19 TEU, the Court has also based its interpretation of Art. 275 TFEU on the fundamental principles of the rule of law and effective judicial protection, in particular where an individual challenge to the validity of CFSP acts is concerned. The rule of law is found among the Union's values in Art. 2 TEU and its application to the CFSP is made clear by Arts 21, para. 1, and 23 TEU.⁵⁸ The principle of effective judicial protection is contained in Art. 47 of the Charter of Fundamental Rights of the European Union. As the Court of Justice pointed out in a recent judgment, "the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law",⁵⁹ and

"[w]hile, admittedly, Article 47 of the Charter cannot confer jurisdiction on the Court where the Treaties exclude it, the principle of effective judicial protection nonetheless implies that the exclusion of the Court's jurisdiction in the field of the CFSP should be interpreted strictly".⁶⁰

As a sign of this strict interpretation, despite the potential ambiguity in the reference to "these provisions" in Art. 24, para. 1, TEU, and in the phrase "provisions relating to" the CFSP in Art. 275 TFEU, they have been interpreted as including only the provisions of the CFSP chapter of the TEU (Chapter 2 of Title V, TEU) and acts based on them.⁶¹ Other treaty provisions which may be connected to CFSP action, including procedural provisions, are not covered by the exclusion of jurisdiction. This allows the Court – while granting the CFSP full scope as a policy field⁶² – to ensure that "CFSP exceptionalism" with respect to its own jurisdiction does not creep beyond its proper bounds. The *Mauritius* and *Tanzania* cases illustrate this well.

⁵⁷ R. GOSALBO BONO, *Some reflections on the CFSP legal order*, in *Common Market Law Review*, 2006, p. 347; P. ECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 498; C. HILLION, *A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy*, cit.; P. VAN ELSUWEGE, *Upholding the Rule of Law in the Common Foreign and Security Policy*: *H v Council*, in *Common Market Law Review*, 2017, p. 841.

⁵⁸ See also *European Parliament v. Council* [GC], case C-263/14, cit., para. 47.

⁵⁹ Court of Justice, judgment of 28 March 2017, case C-72/15, *PJSC Rosneft Oil Company* [GC], para. 73.

⁶⁰ *Ibid.*, para. 74.

⁶¹ See Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *PJSC Rosneft Oil Company*, paras 42-46, rejecting an argument that the phrase in Art. 275 TFEU could be interpreted more broadly.

⁶² Art. 40 TEU makes clear that the CFSP has equal status to other EU policies and is not a residual competence, a significant difference from the pre-Lisbon position expressed in Art. 47 TEU and Court of Justice, judgment of 20 May 2008, case C-91/05, *Commission v. Council* [GC].

Both cases concerned international agreements concluded by the Council under a CFSP legal basis, which was in both cases accepted by the Court.⁶³ The procedure for the conclusion of CFSP agreements is governed by the procedural rules of Art. 218 TFEU, a provision which "is of general application and is therefore intended to apply, in principle, to all international agreements negotiated and concluded by the European Union in all fields of its activity, including the CFSP".⁶⁴ The Court's jurisdiction over these procedural treaty-making rules is not affected by the derogation applicable to the substantive CFSP legal basis.⁶⁵ Thus it had jurisdiction to rule on the Council's compliance with Art. 218, para. 10, requiring the Parliament to be kept informed of the negotiation of all agreements, including – it was held – CFSP agreements. In this way, the Court preserves the power to adjudicate not only over the proper choice of substantive legal basis (Art. 40 TEU), but also to ensure respect for the powers of the institutions (institutional balance).⁶⁶

Art. 275 TFEU also limits the Court's jurisdiction over "acts adopted on the basis of" CFSP provisions. This covers acts adopted with a CFSP legal basis, such as Arts 28, or 29, TEU, but does not extend to acts simply because they were adopted *in the context of* a CFSP measure or mission. In *Elitaliana*, the Court held that its jurisdiction was not excluded since the act in question concerned the procurement of helicopters (for the CFSP mission Eulex Kosovo) and was covered by the EU's procurement rules and the general financial regulation.⁶⁷ Here the Court is ensuring that the CFSP derogation does not compromise its jurisdiction over the EU's general rules of administration:

"the measures at issue, whose annulment was sought on the basis of an infringement of the rules of EU public procurement law, related to the award of a public contract which gave rise to expenditure to be charged to the European Union budget. Accordingly, the contract at issue is subject to the provisions of the Financial Regulation. [...] [T]he scope of the limitation, by way of derogation, on the Court's jurisdiction [...] cannot be considered to be so extensive as to exclude the Court's jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement".⁶⁸

⁶³ *European Parliament v. Council* [GC], case C-658/11, cit.; *European Parliament v. Council* [GC], case C-263/14, cit. The agreements were concluded with the third country partners in the context of the EU's naval anti-piracy mission off the coast of Somalia (known as "Operation Atlanta") and concerned the conditions under which those suspected of piracy could be transferred to the third country for detention and trial. See S.R. SÁNCHEZ-TABERNERO, *The choice of legal basis and the principle of consistency in the procedure for conclusion of international agreements in CFSP contexts: Parliament v. Council (Pirate-Transfer Agreement with Tanzania)*, in *Common Market Law Review*, 2017, p. 899 *et seq.*

⁶⁴ *European Parliament v. Council* [GC], case C-658/11, cit., para. 72.

⁶⁵ *Ibid.*, para. 73.

⁶⁶ P. VAN ELSUWEGE, *Securing the Institutional Balance in the Procedure for Concluding International Agreements: European Parliament v Council (Pirate Transfer Agreement with Mauritius)*, in *Common Market Law Review*, 2015, p. 1379 *et seq.*

⁶⁷ *Elitaliana SpA v Eulex Kosovo*, cit.

⁶⁸ *Ibid.*, paras 48-49.

In *H* we again see the Court ensuring its general administrative jurisdiction, in this case relating to staff management, despite a CFSP context.⁶⁹ The Commission sought in this case to make a distinction between different types of CFSP act and to limit the Art. 275 TFEU derogation to “CFSP acts which are an expression of sovereign foreign policy (*actes de gouvernement*), as opposed to acts merely implementing that policy”.⁷⁰ The Commission also argued that the CFSP derogation only applies to cases where an act was alleged to breach a CFSP Treaty provision, but not where the alleged breach was of a non-CFSP provision; this latter argument was based on *Elitaliana* where, as was seen, the alleged breach was of the financial regulation and procurement rules. AG Wahl did not find the attempt to distinguish between the types of CFSP act as suggested by the Commission and the appellant convincing. On the one hand, he pointed out that since legislative acts are excluded from the CFSP much of its action is in fact executive, operational or implementing in nature:

“most of the acts envisaged in Chapter 2, Title V, of the TEU could be regarded as ‘administrative’, if by that is meant that they regulate the conduct of the EU or national administrations. ... By its very nature, the CFSP appears to be an operational policy: one by means of which the Union pursues its (broadly defined) objectives through a set of (broadly defined) actions, mainly of an executive and political nature”.⁷¹

If administrative acts were excluded from the CFSP derogation then – the Advocate General argued – its scope would be reduced to an extent not reconcilable with the wording of Art. 24, para. 1, TEU and Art. 275 TFEU. The Advocate General also argued that the distinction between “*actes de gouvernement*” and acts of implementation was both unclear and lacking any basis in the Treaties. The CFSP Chapter of the TEU contains a number of provisions which may form the legal basis for acts of implementation and “those acts may often be of great political significance and sensitivity”.⁷²

The Court in *H* did not pursue this line either. Instead it argued that the CFSP context in which an act is adopted “does not necessarily lead to the jurisdiction of the EU judicature being excluded”.⁷³ Its finding that it had jurisdiction was based on two somewhat different arguments. The first started from the principle of equality between EU and national seconded staff. Art. 270 TFEU grants the Court jurisdiction in relation to EU staff seconded to the CFSP mission; the Court referred to equality as a value of the Union alongside the rule of law,⁷⁴ and found that although staff seconded by the EU

⁶⁹ *H v. Council and Commission* [GC], cit.

⁷⁰ Opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council and Commission*, para. 33; see also *H v. Council and Commission* [GC], cit., para. 32.

⁷¹ *Ibid.*, para. 59.

⁷² *Ibid.*, para. 62.

⁷³ *H v. Council and Commission* [GC], cit., para. 43.

⁷⁴ *Ibid.*, para. 41.

and those seconded by Member States were not subject to the same rules in all respects, they were "subject to the same rules so far as concerns the performance of their duties 'at theatre level'", and the decision in question related to the allocation of such duties.⁷⁵ Second, the Court held that, although decisions on the allocation of staff have an "operational aspect" falling within the CFSP, "they also constitute, by their very essence, acts of staff management".⁷⁶ The conclusion brings together both these arguments: the limitation on the Court's jurisdiction

"cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions".⁷⁷

These cases, in which the Court has determined the scope of the derogation, are based on two types of argument. The first is based on general principles, including the rule of law, of which effective judicial review is an inherent part, but also including other principles such as equality. This is important in establishing that the CFSP is not excluded from the operation of these principles which form part of the EU *acquis*. The Court links its own jurisdiction to the protection of those principles. The second is based on distinguishing between CFSP acts and those which are adopted "in the context of" the CFSP. Although the Court is (ostensibly) not seeking to differentiate between types of CFSP acts, the *H* case is striking in this respect since the Court seems to accept that the decision under challenge could have a CFSP character – "an operational aspect falling within the CFSP" – while also constituting an act of staff management. And although the Court in *H* did not directly engage with the Commission's argument that it should take into account the higher norm which the act is alleged to violate, the fact that it was the staff management character of the decision which prevailed in this case was presumably linked to the fact that the alleged illegality related not to the management of the CFSP operation but to the operation of the Staff Regulations.

To the question of identifying the institution to which a CFSP act should be imputed, discussed in the previous section, we must therefore add the need to determine whether the act is in fact a CFSP act or whether it is adopted "in the context" of a CFSP policy, but essentially pertains to rules within the Court's jurisdiction. Where the act under challenge is adopted directly on a CFSP legal basis, then both authorship and the application of the derogation is clear and the task will be to decide whether one of the exceptions to the derogation – discussed in the next section – applies. It is where the act

⁷⁵ *Ibid.*, para. 50.

⁷⁶ *Ibid.*, para. 54.

⁷⁷ *Ibid.*, para. 55.

is a decision of a person in a hierarchical relation to the Council, HR, EEAS or Commission (such as a Head of Mission) that both the attribution of the act and its characterisation as a CFSP act becomes more difficult.

IV. THE EXCEPTION: JUDICIAL REVIEW OF CFSP ACTS

The scope of the limitation of the Court's jurisdiction is of course not the whole story. That limitation, or derogation, is itself subject to exceptions. Under the second paragraph of Art. 275 TFEU, judicial review of the validity of CFSP acts is possible in two cases. First, to "monitor compliance" with Art. 40 TFEU, and second in the case of "proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU] reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council" under CFSP powers. Art. 24, para. 1, TEU refers more generally to "jurisdiction [...] to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union".

Art. 40 TEU essentially requires the Court to ensure that the appropriate legal basis is used and is thus a constitutional rather than an administrative control. For that reason, we will make only brief reference to it here in order to show that the Court has not attempted to constrain the limits to its jurisdiction over the CFSP by limiting the scope of the CFSP as a policy field. Instead it has insisted on a strict reading of the derogation itself, as we saw in section III, combined with a flexible reading of the exceptions to the derogation, as we will see in this section.

Unlike its predecessor,⁷⁸ Art. 40 TEU does not establish a preference for using non-CFSP powers where possible. In fact it is striking that in its post-Lisbon case law the Court of Justice has applied its standard approach to legal basis, based on identifying the predominant aim or purpose of the measure, together with an analysis of content. Art. 40 TEU is cited in order to justify the Court's jurisdiction, but does not appear to influence the reasoning on legal basis one way or the other.⁷⁹ In contrast to the Court's insistence that the limitations on its own jurisdiction should be interpreted strictly, it accepts the limits on the role of the European Parliament in decision-making that apply where a CFSP legal basis is chosen as simply the result of the political choices made by the drafters of the Treaty. According to the Court of Justice, although Parliamentary participation in law-making is an expression of the principle of democratic representation, the Parliament's exclusion from CFSP decision-making should not influence the choice of legal basis, but is "the result of the choice made by the framers of the Treaty of Lis-

⁷⁸ Art. 47 TEU.

⁷⁹ See for example *European Parliament v. Council* [GC], case C-658/11, cit.; *European Parliament v. Council* [GC], case C-263/14, cit.

bon conferring a more limited role on the Parliament with regard to the Union's action under the CFSP".⁸⁰

These cases on legal basis have all involved the European Parliament, a privileged applicant under Art. 263 TFEU where its own prerogatives are concerned. In most cases where the validity of a legal act is in issue, an individual is unlikely to have an interest in pleading legal basis,⁸¹ but the case of the CFSP is different as a result of the Court's limited jurisdiction. Art. 40 TEU can also be pleaded by a natural or legal person seeking the annulment of a CFSP act on the ground of an incorrect legal basis, either via a direct action under Art. 263 TFEU or via a preliminary ruling. In *Rosneft*, the Court pointed out that, in referring to "monitoring compliance" with Art. 40 TEU, Art. 275 TFEU does not specify any particular type of action; the Court therefore has jurisdiction to rule on compliance with Art. 40 TEU on a request for a preliminary ruling.⁸² It will nonetheless prove difficult for an individual to successfully challenge the exercise of executive discretion under CFSP powers using Art. 40 TEU.⁸³

The second exception is more directly relevant to administrative law. It will be recalled that the Court has jurisdiction in "proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU] reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union [the CFSP chapter]". This provision, introduced by the Lisbon Treaty, reflects the *Kadi* case law on the need for effective judicial protection where restrictive measures are adopted against individuals. Measures adopted under Art. 215 TFEU are challengeable under the normal rules of standing set out in Art. 263, para. 4, TFEU, which require direct and individual concern. In practice, standing is not difficult to establish in the case of restrictive measures since the individuals concerned will be identified by name in Annexes:

"any inclusion in a list of persons or entities subject to restrictive measures [...] allows that person or entity access to the Courts of the European Union, in that it is similar, in

⁸⁰ Court of Justice, judgment of 19 July 2012, case C-130/10, *European Parliament v. Council* [GC], para. 82. As a result, the decision to choose a CFSP legal basis is ultimately in the hands of the Council and, given the breadth of the policy field, the application of the standard legal basis test makes it difficult in practice to challenge that choice. For further discussion on establishing the boundary between the CFSP and other external action, see M. CREMONA, *The CFSP-CSDP in the Constitutional Architecture of the EU*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *The EU's Common Foreign and Security Policy*, cit.

⁸¹ Exceptions would include cases where a possible legal basis contains limitations on the type of action that may be taken, such as excluding harmonisation. See e.g. Court of Justice, judgment of 10 December 2002, case C-491/01, *R v. Secretary of State for Health, ex parte British American Tobacco and Imperial Tobacco*.

⁸² *PJSC Rosneft Oil Company* [GC], cit., paras 62-63.

⁸³ See further discussion in section V below.

that respect, to an individual decision, in accordance with the fourth paragraph of Article 263 TFEU".⁸⁴

A regulation adopted under Art. 215 TFEU must be preceded by a CFSP decision, and the CFSP decision may contain measures – a visa ban for example – which will be implemented by the Member States directly rather than by the EU via Art. 215 TFEU. The exception in Art. 275 TFEU is then important to allow the individual to challenge the underlying CFSP decision, as well as the Art. 215 TFEU regulation which gives (some of) its effect.

The listing of natural and legal persons takes place in the context of two distinct types of restrictive measure. First, counter-terrorism measures, where the primary targets are the individuals or entities concerned (whether derived from UN listings or autonomous EU listings) and second, measures directed at a third country (sometimes called "regime sanctions") in which natural and legal persons may be targeted as members of, or closely connected to, the regime. From the point of view of the Court's jurisdiction, the exception in Art. 275 TFEU, and standing, the two types of restrictive measure are indistinguishable; from the point of view of intensity of review they differ in practice, as we shall see in section V. Here we will focus on restrictive measures directed at a third country which include sanctions directed at listed individuals.⁸⁵

The exception in Art. 275 TFEU only gives the Court jurisdiction to decide on the validity of the decision insofar as it actually refers to the listed individual bringing the action; it does not have jurisdiction in relation to any parts of the decision that are not targeted at specific individuals, for example those prohibiting the sale of specific products or the provision of specific services to the third country concerned. These are not "restrictive measures against natural or legal persons" within the meaning of Art. 275 TFEU.⁸⁶ Here we see a distinction in the reviewability of different types of restrictive measure which may be contained in the same decision. In principle this is not a question of the standing of a specific individual (direct and individual concern) but rather a determination of whether the particular restrictive measure is of individual or general application; however in practice the criteria are substantially the same.

A more open question concerns whether "restrictive measures against natural or legal persons", limits the exception to sanctions of the type envisaged by Art. 215 TFEU which must be preceded by a CFSP decision, or might be interpreted more broadly to cover other types of CFSP act prejudicial to an individual. In the *H* case, the Commission suggested that the more general wording of Art. 24, para. 1, TEU could include "any act

⁸⁴ *National Iranian Oil Company v. Council* [GC], cit., para. 44. On standing, see L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures*, cit., p. 649 *et seq.*

⁸⁵ For further discussion of counter-terrorist sanctions, see L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures*, cit., p. 649 *et seq.*

⁸⁶ General Court, judgment of 25 April 2012, case T-509/10, *Kala Naft v. Council*, paras 36-38, affirmed by the Court of Justice in judgment of 28 November 2013, case C 348/12 P, *Council v. Kala Naft*, para. 99. See also *PJSC Rosneft Oil Company* [GC], cit., paras 95-99.

adopted by an EU institution against a person which produces legal effects in relation to him that potentially infringe his fundamental rights" and that this interpretation was in line with the respect for fundamental rights required by the Treaties.⁸⁷ AG Wahl was not convinced by this argument.⁸⁸ The Court did not rule on the point but it seems unlikely that it would broaden the exception to the derogation by giving such an extensive interpretation to "restrictive measures"; instead it has preferred to narrow the scope of the derogation itself. As we have seen, the Court did cite fundamental rights (Art. 47 of the Charter of Fundamental Rights of the European Union, the right to an effective remedy) in support of its jurisdiction in the case.

A second question relates to the forms of action covered by the exception. At first sight this might seem clear: unlike the exception in respect of compliance with Art. 40 TEU, the exception in respect of restrictive measures against individuals makes an explicit reference to direct actions for annulment under Art. 263 TFEU. Art. 24 TEU, on the other hand, merely refers to "reviewing the legality" of certain CFSP decisions. The possibility of applying the exception where the validity of an act is challenged via preliminary ruling was raised by *Rosneft*. The Court, following AG Wathelet⁸⁹ and differing from the view of AG Kokott in Opinion 2/13,⁹⁰ held that, where the validity of a CFSP act is concerned, preliminary references are also covered by the exception. Its reasoning is revealing. The Court starts by referring to the two procedures for contesting the validity of EU acts (direct actions and preliminary rulings) as complementary and as ensuring "a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts".⁹¹ The language is of course familiar and the Court cites the classic cases on standing and judicial review, *Les Verts*, *Unión de Pequeños Agricultores* and *Inuit Tapiriit Kanatami*.⁹² It then argues that, while CFSP decisions on restrictive measures will need to be implemented by Member States, national courts do not have the jurisdiction to declare Union acts invalid; the preliminary ruling procedure enables the issue of validity to be referred to the Court of Justice.⁹³ This is

⁸⁷ *H v. Council and Commission* [GC], cit., para. 33.

⁸⁸ Opinion of AG Wahl, *H v. Council and Commission*, cit., paras 73-80.

⁸⁹ Opinion of AG Wathelet, *PJSC Rosneft Oil Company*, cit.

⁹⁰ View of AG Kokott delivered on 13 June 2014, opinion procedure 2/13.

⁹¹ *PJSC Rosneft Oil Company* [GC], cit., para. 66.

⁹² Court of Justice: judgment of 23 April 1986, case 294/83 *Les Verts v. Parliament*; judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*; judgment of 3 October 2013, case C-583/11 P, *Inuit Tapiriit Kanatami et al. v. Parliament and Council*.

⁹³ As our concern here is with judicial review, I will not enter into the question as to whether questions of interpretation of CFSP acts could also be referred to the Court via preliminary ruling. The Advocate General in *Rosneft* concluded that questions of interpretation would be covered: Opinion of AG Wathelet, *PJSC Rosneft Oil Company*, cit., paras 73-75; the references in the Court's judgment in the same case to the purpose of Art. 267 TFEU and the need to preserve the unity of Union law might suggest that the Court would also be open to this extension. In other cases the Court has been able to side-step the issue by interpreting the parallel provisions in the regulation and then referring to the CFSP decision and

significant in indicating that the Court is prepared to assess the scope of the exception in the context of the overall Treaty framework, and, in particular, of its role in ensuring the legality of Union acts: “That essential characteristic of the system for judicial protection in the European Union extends to the review of the legality of decisions that prescribe the adoption of restrictive measures against natural or legal persons within the framework of the CFSP”.⁹⁴

It had been suggested that were it not possible to apply the judicial review exception to the preliminary ruling procedure, national courts would be required, by the principle of effective judicial protection, to decide upon that validity themselves.⁹⁵ The Court explicitly rejects this argument, and its reasoning – which also refers to effective judicial protection – treats the Art. 275 TFEU exception as being as much concerned with its own judicial monopoly on controlling the validity of EU law and the unity of the Union legal order as with individual rights.⁹⁶

What of the wording of Art. 275 TFEU itself, containing as it does a reference to Art. 263 TFEU? According to the Court, “proceedings brought in accordance with the conditions laid down in the fourth paragraph of Article 263” refers not to the type of procedure “but rather the type of decisions whose legality may be reviewed by the Court, within any procedure that has as its aim such a review of legality”.⁹⁷ It seems also that the reference to “conditions” does not refer to standing, since the Art. 263 standing rules do not apply in the case of preliminary rulings; however, as already mentioned, the act must be directed at an individual and not of general application, so this particular consequence of *Rosneft* is not of great practical importance.

Therefore, while the CFSP decisions (or provisions of such decisions) which may be reviewed are limited to restrictive measures directed against natural or legal persons, the procedures under which such review may take place are aligned to non-CFSP review.

V. GROUNDS FOR AND INTENSITY OF REVIEW

In the scope of the Court’s jurisdiction as regards the CFSP, we can see the two dimensions to its role with which we started this *Article*: to ensure that the EU and its institutions operate within the limits of their powers and the institutional balance is main-

the regulation together; see for example Court of Justice, judgment of 14 March 2017, case 158/14 A, B, C, *D v. Minister van Buitenlandse Zaken* [GC], para. 97.

⁹⁴ *PJSC Rosneft Oil Company* [GC], cit., para. 69. P. VAN ELSUWEGE, *Judicial Review of the EU’s Common Foreign and Security Policy: Lessons from the Rosneft case*, in *Verfassungsblog*, 6 April 2017, verfassungsblog.de.

⁹⁵ View of AG Kokott delivered on 13 June 2014, opinion 2/13, paras 95-103. For the contrary position, see Opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council and Commission*, para. 33; see also *H v. Council and Commission* [GC], cit., paras 101-103.

⁹⁶ *PJSC Rosneft Oil Company* [GC], cit., paras 77-80.

⁹⁷ *Ibid.*, para. 70.

tained; and to uphold the rule of law and fundamental rights. These two dimensions are also unsurprisingly evident when we turn to the question of substantive review.

We have already seen that the Court is concerned with ensuring respect for the powers of the institutions under the relevant decision-making procedures. In the *Mauritius* and *Tanzania* cases, the Court stressed the importance of complying with the obligation in Art. 218, para. 10, TFEU of informing the Parliament of the negotiation and conclusion of CFSP agreements, thereby ensuring it can play its role in democratic scrutiny.⁹⁸ In its assessment of compliance with Art. 40 TEU in *Rosneft*, the Court assessed whether the CFSP decision disturbed the decision-making balance foreseen in the Treaties between the CFSP and Art. 215 TFEU, holding that in the case of restrictive measures, and given the broad discretion of the Council in the field of the CFSP, it was reasonable for the Council in its CFSP decision to specify, with a high degree of precision, the types of measures to be adopted and the identities of targeted persons, thereby circumscribing the scope of the regulation.⁹⁹

This emphasis on the Council's discretion has also influenced the Court's willingness to assess the reasons for imposing restrictive measures and more importantly, for listing an individual. Despite the importance of the *Kadi* case law, insisting on the right to effective judicial protection (which was the impetus for the exceptional jurisdiction over restrictive measures granted by Art. 275 TFEU), with its concomitant stress on the duty to state reasons, the Court of Justice's approach to reviewing restrictive measures targeting third countries, and companies and individuals associated with third country regimes, has been restrained. The difference is not a difference in the legal rules applicable – the rights of defence and the right to effective judicial protection apply in both types of case¹⁰⁰ – but reflects the different nature of counter-terrorism and regime sanctions. Counter-terrorism sanctions are directed at "persons, groups and entities involved in terrorist acts" and this criterion is defined in terms of specific types of activity.¹⁰¹ The listing of an individual therefore implies specific conduct and the case law has attempted to determine the degree of specificity of evidence required to substantiate the listing as well as the right of the individual to be aware of the factual evidence against him or her, based on the rights of defence and the right to effective judicial protection.¹⁰² The CJEU are to ensure that the decision has been taken on "a sufficiently sol-

⁹⁸ Although limited, this role includes scrutiny of appropriate use of legal basis and contributing to the overall coherence of Union policy. See further T. RAUNIO, *Control and scrutiny: parliaments as agents of administrative law*, in C. HARLOW, P. LEINO, G. DELLA CANANEA (eds), *Research Handbook on EU Administrative Law*, Cheltenham/Northampton: Edward Elgar, 2017.

⁹⁹ *PJSC Rosneft Oil Company* [GC], cit., paras 86-90.

¹⁰⁰ Court of Justice, judgment of 21 April 2015, case C-630/13 P, *Issam Anbouba v. Council* [GC], para. 46.

¹⁰¹ See for example Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, Art. 1.

¹⁰² See further L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures*, cit., p. 649 *et seq.*

id factual basis" and this "entails a verification of the allegations factored in the summary of reasons underpinning that decision".¹⁰³

Individual listings in the case of third country sanctions, on the other hand, are more various and may be based on broad grounds. They may target those who are members of a regime, or who are associated with a regime. The Council in each case has the discretion to determine the reason for the listing and the demonstration of a link to the regime does not require personal conduct: it may simply require being a member of a category of persons, inferred from a family relationship with a regime leader, from holding a position or simply from prominence in the country concerned.¹⁰⁴ The Court is concerned primarily with ensuring that there is consistency between the aim of the measure as stated and the reason given for the listing of the individual. In a recent example, in the context of the sanctions against Iran adopted in the context of nuclear proliferation, the Court upheld the inclusion of companies on the basis that they "supported the government of Iran", even if their activities had no direct or indirect connection with nuclear proliferation, rejecting an argument that the criteria were so broad as to grant the Council unconditional powers, thereby contravening the rule of law.¹⁰⁵ The Court relied heavily on the Council's objectives as stated in the regulation, in the light of an amendment to the regulation which broadened its scope:

"the objective of the amendment of the criterion at issue had been to expand the designation criterion, in order to target the relevant person or entity's own activity which, even if it has no actual direct or indirect connection with nuclear proliferation, is nonetheless capable of encouraging it".¹⁰⁶

The Court emphasised the "broad discretion" granted to the legislature "in areas which involve political, economic and social choices" and "complex assessments". The legality of a measure in such cases is affected "only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue".¹⁰⁷ In such cases, the Court is concerned with checking that the reason given for designating an individual or company matches the stated aims of the measure; it will not question the Council's discretion in adopting such broadly-targeted measures. In

¹⁰³ Court of Justice, judgment of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Council v. Yassin Abdullah Kadi* [GC], para. 119.

¹⁰⁴ See for example Court of Justice, judgment of 21 April 2015, case C-630/13 P, *Issam Anbouba v. Council* [GC], para. 52, in which the Court of Justice held that "the General Court was entitled to hold that Mr Anbouba's position in Syrian economic life, his position as the president of SAPCO, his important functions within both Cham Holding and the Chamber of Commerce and Industry of Homs and his relations with a member of the family of President Bashar Al-Assad constituted a set of indicia sufficiently specific, precise and consistent to establish that he provided economic support for the Syrian regime".

¹⁰⁵ *National Iranian Oil Company v. Council* [GC], cit.

¹⁰⁶ *Ibid.*, para. 80.

¹⁰⁷ *Ibid.*, para. 77.

some recent examples the aim of the measures is defined in such a way as to arguably take it outside the scope of third country sanctions altogether, but the Court has not raised any difficulty.¹⁰⁸

These cases are focused on due process within the EU's own decision-making procedures. However, under some circumstances the standards of due process in third countries may also be relevant. AG Sharpston has recently emphasised the importance of due process, including by the "competent authorities" of third countries for the purposes of Common Position 2001/931 in the context of the EU's counter-terrorism sanctions.¹⁰⁹ She argued that while the Council may be justified in presuming that the decisions of the competent authorities of a Member State will have been taken in compliance with fundamental rights, the same was not necessarily the case for third countries, and a case by case assessment should be made. It is worth citing the opinion at some length:

"When the Council relies on decisions of competent authorities of Member States acting within the scope of EU law, it is a given that those authorities are under a duty to respect the fundamental rights applicable in the European Union. Thus, the standards of protection and the level of protection — as a matter of EU law— are well established and subject to the Court's review. When relying on their decisions, the Council will normally be justified in presuming that those decisions have been taken in compliance with applicable fundamental rights, in particular, the rights of defence and effective judicial protection".¹¹⁰

"The situation is different where the Council decides to rely on a decision of a competent authority of a third State. Those authorities do not act within same constraints as the Member States in terms of fundamental rights protection, even if their legal protection of fundamental rights might be at least equivalent to that guaranteed under EU law. ...

It is for the Council to verify whether the level of fundamental rights protection is at least equivalent to that under EU law and whether there is evidence pointing to the possibility

¹⁰⁸ Recent restrictive measures concerning Egypt, Tunisia and Ukraine have targeted individuals on the ground that they were guilty of, or under investigation for, misappropriation of State funds. These measures are not targeted at an existing third country regime; on the contrary they are adopted after a change of government, with the support of the new regime. In *Al Matri* the grounds for including the applicant's name in the CFSP decision did not mention misappropriation of state funds but instead referred to actions which were under investigation 'as part of money laundering operations'. On the ground that money laundering was not necessarily the same as misappropriation of public funds, the Court annulled the particular decision as far as it concerned the applicant; however it did not question the appropriateness of the Council using restrictive measures to target those responsible, or under investigation, for misappropriation of State funds: General Court, judgment of 28 May 2013, case T-200/11, *Al Matri v. Council*. See also Court of Justice, judgment of 5 March 2015, case C-220/14 P, *Ezz and others v. Council*.

¹⁰⁹ Opinion of AG Sharpston delivered on 22 September 2016, case C-599/14 P, *Council v. LTTE (Tamil Tigers)* and Opinion of AG Sharpston delivered on 22 September 2016, case C-79/15 P *Council v. Hamas*.

¹¹⁰ Opinion of AG Sharpston, *Council v. LTTE (Tamil Tigers)*, cit., para. 62.

that the decision at issue may not have been adopted in compliance with the relevant and applicable standard of protection".¹¹¹

The existence of a duty on the part of the Union's decision-maker to assess and take account of the fundamental rights compliance of a third country and more generally of the fundamental rights implications in third countries when engaging in external action appears to be emerging more clearly as a principle of EU external relations law. The General Court in the *Front Polisario* case recognised the broad discretion of the institutions in conducting EU foreign policy. As a result, its review of the Council's decision to conclude an international agreement was concerned with ensuring that the Council had examined and taken account of all relevant facts. Among those facts were the implications of the agreement for fundamental rights in the territory affected by the agreement.¹¹² As expressed by AG Wathelet in the same case, the institutions have an "obligation under EU law to examine the general human rights situation in the other party to the international agreement, and more specifically to study the impact which that agreement could have on human rights".¹¹³ The Court of Justice did not rule on this issue, but – as important – it emphasised the need to interpret the EU's international agreement so as to comply with the right to self-determination and other peremptory norms of international law.¹¹⁴ This particular case concerned trade policy rather than the CFSP, but there is no reason in principle why the same reasoning should not apply to the CFSP. Indeed, in the different context of choice of legal basis, the Court has referred to the obligation on the Union to comply with fundamental rights in the context of all external action, including the CFSP.¹¹⁵ Although the issue was choice of legal basis, the Court was referring to substantive provisions in the agreement in question designed to ensure substantive human rights compliance by a third country; it refused to see these provisions as a reason for excluding the CFSP legal basis. So far, then, the need to take account of the human rights implications of external action (including the CFSP) has presented itself in terms of a procedural obligation: the need to examine all

¹¹¹ *Ibid.*, paras 65-67. In its judgment the Court of Justice agreed (upholding the judgment of the General Court on this point) that "the Council must, before acting on the basis of a decision of an authority of a third State, verify whether that decision was adopted in accordance with the rights of the defence and the right to effective judicial protection", and that it must "provide, in the statements of reasons relating to those decisions, the particulars from which it may be concluded that it has ascertained that those rights were respected". Court of Justice, judgment of 26 July 2017, case C-599/14 P, *Council v. LTTE (Tamil Tigers)* [GC], paras 22-38.

¹¹² General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council*, paras 223-228.

¹¹³ Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16P, *Council v. Front Polisario*, para. 257.

¹¹⁴ Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC], paras 118-125.

¹¹⁵ *European Parliament v. Council* [GC], case C-263/14, cit.

relevant facts. The Court of Justice in the *Tanzania* case and *Front Polisario* opens up the issue of substantive compliance and there is no doubt that the obligation to comply with fundamental rights applies to the EU institutions when acting within the frame of the CFSP.¹¹⁶ As pointed out by De Schutter, the principle is clear; it is its operationalisation which proves more difficult.¹¹⁷

VI. CONCLUSION

This *Article* has sought to explore the application of judicial review to challenge CFSP acts in the context of administrative law. We have seen that in fact the CFSP, in common with other external policy fields, operates through administrative and executive action. The CFSP is part of the EU legal order, albeit subject to some special rules and procedures which affect the institutional balance in decision-making. This means that general EU administrative law and administrative principles apply to the CFSP, including the right to an effective legal remedy. Nevertheless the CFSP's specific rules and procedures do affect the application of administrative law, especially legal accountability through judicial review, and there is no doubt that this is a field in which executive discretion is broadly defined. The absence of legislative acts and the very restricted powers of the Parliament when it comes to the negotiation and conclusion of international agreements in the CFSP underline the importance of executive action. Especially in the case of implementing acts the complex institutional structures and variety of actors in CFSP policy-making, including not only the Council but also the HR, the EEAS, EU Delegations, Heads of EU civil and military missions, and staff seconded by Member States but acting under EU operational control, can make it difficult to identify the author of an act and impute responsibility to the right institution or body for the purposes of judicial review.

Against this background, we considered the scope of the derogation from the Court of Justice's normal powers of judicial review. The Court has not sought to limit the use of the CFSP as a policy field, for example by regarding it as a residuary power to be used only when other external powers are insufficient. On the other hand, it has emphasized

¹¹⁶ Court of Justice, judgment of 14 June 2016, case C-263/14, *European Parliament v. Council* [GC], para. 47. In Court of Justice, opinion 1/15 of 26 July 2017, the Court ruled for the first time that a draft agreement could not be concluded in its current form as it contained provisions that were incompatible with the Charter of Fundamental Rights of the European Union. The Court held that the prior opinion procedure under Art. 218, para. 11, TFEU, must examine "all questions that are liable to give rise to doubts as to the substantive or formal validity of the agreement with regard to the Treaties" and that this includes "the compatibility of an international agreement with the first subparagraph of Article 6(1) TEU and, consequently, with the guarantees enshrined in the Charter, since the Charter has the same legal status as the Treaties." Opinion 1/15, cit., para. 70.

¹¹⁷ O. DE SCHUTTER, *The Implementation of the Charter of Fundamental Rights in the EU institutional framework*, Study conducted for the Committee on Constitutional Affairs of the European Parliament, November 2016, p. 63-66, available at www.europarl.europa.eu.

the generalized nature of its own mandate to ensure that the law is observed (Art. 19 TEU), the resulting need to interpret exceptions to its jurisdiction strictly, and the applicability of the rule of law and fundamental rights to CFSP action. In a series of cases it has limited the scope of the derogation and shown flexibility in interpreting the exceptions to that derogation. Thus many administrative acts adopted in the context of the CFSP, even in the operational context of a CFSP mission, will not be excluded from judicial review since they are not “CFSP acts” in the strict sense, adopted on a CFSP legal basis, but are instead part of the EU’s general administrative machinery, including in particular financial and personnel procedures. The jurisdiction to assess the validity of restrictive measures against natural and legal persons adopted under CFSP powers has been held to apply not only to direct actions for annulment (referred to expressly in the Treaties) but also to the preliminary ruling procedure. Standing is not in practice a problem in these cases. As a result the difficulties faced by individuals in seeking to challenge the validity of executive and administrative acts in the CFSP do not flow so much from Treaty-based (constitutional) obstacles or derogations but rather from the familiar administrative law problems of attribution of responsibility in complex administrations and the difficulty of challenging the exercise of wide discretionary powers.

There is little evidence that the Court is particularly sensitive to the CFSP when it comes to the degree and intensity of judicial review. There is no real difference in its approach to the two primary acts involved in adopting restrictive measures, the CFSP decision and the regulation adopted on the basis of Art. 215 TFEU. The difference lies more in the type of restrictive measure or sanction, and in particular between counter-terrorism sanctions and third country sanctions, albeit in both cases the Court is concerned with procedural safeguards for listed individuals. In the case of third country sanctions the Council has very wide discretion in framing the aim and scope of the measures and the Court is concerned to ensure that the reasons provided for listing an individual or legal person (such as familial, economic or political status) relate to those stated aims. In cases where the lack of such a link has led to the annulment of a measure in respect of a specific individual, the act may be amended to broaden its aim and the individual re-listed.

The focus of this *Article* has been judicial review, since that seemed to encapsulate the “exceptional” status of the CFSP. As a final point, however, we should remind ourselves that other types of administrative accountability also apply to CFSP, in particular the role of the EU Ombudsman in ensuring administrative good practice. The Ombudsman has indeed opened more than one procedure involving the CFSP, including an own-initiative inquiry on the EEAS handling of allegations of serious irregularities involv-

ing the EU Rule of Law Mission (Eulex) in Kosovo,¹¹⁸ and a decision on the way in which Eulex Kosovo implemented restructuring and organised internal competitions.¹¹⁹

Our conclusion must be that there is a rich administrative practice in the CFSP and that it is by no means an excluded zone either for administrative law or for the Court of Justice. The Court is far from reticent in ensuring that it has jurisdiction where the validity of EU acts is in question, and where procedural rights (both individual and institutional) are at stake. The Court's reticence with respect to policy substance and the exercise of discretion is by no means special to the CFSP but reflects its approach to external policy in general.¹²⁰ The decisions of the Ombudsman suggest that she has an important role to play in assisting the CFSP administration, including the EEAS, in developing good administrative practice.

¹¹⁸ EU Ombudsman Decision of 4 December 2014, case OI/15/2014/PMC.

¹¹⁹ EU Ombudsman Decision of 23 February 2016, case OI/2/2015/MG.

¹²⁰ M. CREMONA, *Structural Principles and their Role*, cit., p. 35.



ARTICLES

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

IS THERE AN ACCOUNTABILITY GAP IN EU EXTERNAL RELATIONS? SOME INITIAL CONCLUSIONS

What conclusions is it possible to draw from this research into the operation of EU administrative law in EU external action? It is clear, in the first place, both that this is a worthwhile object of study and that in this set of *Articles* we have only started to map some of the most important features of EU external action from an administrative law perspective: certainly more is needed to explore these features in more detail, and to draw out some more normative conclusions. Still, this research collaboration between scholars of EU administrative and external relations law has been able to build on promising earlier work and to begin to map some of the features of an administrative law of EU external relations.

It might have been thought that administrative law has little place in the conduct of foreign policy, and it is certainly true that constitutional law has dominated both scholarly discussion and litigation in this field, unsurprisingly given the emphasis in the EU Treaties on the central constitutional issues: power conferral, institutional balance, procedural rules and fundamental principles and objectives. But when we look at the ways in which external policies are implemented and given effect we find an extensive use of legal instruments, of legally-prescribed procedures (including financial procedures), which administrative law and the decisions of the CJEU have played an important role in developing and controlling. External policy is conducted through administrative or executive action – the preparatory and rule-making instruments discussed by Vianello for example – which create legal effects although they may not be formally legally binding, and in the formation and execution of these acts administrative law principles such as the duty of care apply. In many of the external policy fields considered here, from the neighbourhood policy (ENP) to anti-dumping and from development cooperation to restrictive measures, we see a tendency towards proceduralisation, constraining the ways in which policy discretion is exercised while avoiding interference with substantive policy choices. This proceduralisation may take legislative form (as in the case of anti-dumping and environmental protection) but may also derive from non-legislative in-

struments (as in the common foreign and security policy or migration) and institutional practice (as in the case of the enlargement and neighbourhood policies) – and of course combinations of these. We also see the influence in the external sphere – enlargement, environmental and climate change policies for example – of “new governance” techniques developed internally, and the administrative law challenges that these pose also challenge external action. This emphasis on procedure should not blind us to the symbiotic relationship between procedure and substance: procedural design will have a crucial impact on outcomes.

Conditionality has become a central feature of some external policies, notably enlargement and the neighbourhood policy, but also in the context of development cooperation where additional trade benefits are tied to implementation of international environmental and good governance standards and where financial assistance may be withdrawn in case of serious breach of the “essential elements” clause in the Cotonou Convention, which references key international human rights instruments. In the latter cases conditionality has been introduced into legislation or is explicit in the EU’s international agreement;¹ in the former it is still very much a matter of “soft law” instruments such as Progress Reports and Action Plans.² In both cases institutional practice of conditionality has led to the adoption of regular procedures, but even where these make provision for participation by third country actors or representation of the external interests involved the ultimate decision-making power lies with the EU institutions. Procedural rules now established in legislation such as anti-dumping or restrictive measures targeting individuals frequently originated in judgments of the Court of Justice applying general principles such as the right to be heard and the right to an effective remedy.³ Where procedures form part of administrative practice they may be enforced by the Ombudsman, an institution which appears to be playing an increasing role in scrutinizing the administration of external relations policies. External action is in fact a rich field in the application of administrative law.

This conclusion leads to the second question at the heart of our inquiry: to what extent and in what ways is the operation of administrative law within external action distinctive? As we indicate in the Introduction to this collection, the types of administrative

¹ Regulation (EU) 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences; Partnership Agreement 2000/483/EC between the African, Caribbean and Pacific Group of States of one part, and the EU, of the other part. See P. LEINO, *Administering EU Development Policy: Between Global Commitments and Vague Accountability Structure*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 617 *et seq.*

² See I. VIANELLO, *Acknowledging the Impact of Administrative Power in the EU External Action*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 597 *et seq.*

³ See further E. KORKEA-AHO, S. SANKARI, *External Participants v. Interests: Principles of EU Administrative Law in Anti-Dumping Investigations*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. ??? *et seq.*, and by L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures: Does the Adversarial Principle Survive the Necessities of Secrecy?*, *Ibid.*, p. 649 *et seq.*

act identified by administrative law scholars appear to be fully represented in external policy fields. Preparatory acts, investigations and fact-finding are common, as are non-legally binding ("soft law") instruments, nor is there any lack of legally binding acts, including single-case decisions. The Common Foreign and Security Policy (CFSP) is unusual in excluding the possibility of legislative acts,⁴ but CFSP decisions are legally binding and may give rise to implementing measures.⁵ With the exception of the CFSP, delegated and implementing acts, derived from legislation under Arts 290 and 291 TFEU, are widely used in each of the external policy fields we examined.

Notwithstanding, three types of executive act may be considered specific to external action and possess particular characteristics from the point of view of administrative law. The first is the decision to (sign or) conclude an international agreement, adopted under Art. 218 TFEU, including the possibility of a decision on provisional application. Such a decision may cover all external policy fields, including the CFSP and also including the external dimension of other policies such as environmental protection and migration. The decision is adopted by the Council under a variety of procedures, normally (except in the case of an exclusively CFSP agreement) involving the European Parliament. Although legally binding and as such subject in principle to challenge under Art. 263 TFEU, these decisions are not legislative acts but form part of the executive's international relations function.⁶ Legal challenge by a privileged applicant, such as a Member State, the Commission or the European Parliament is not very unusual,⁷ but is it possible for an individual (or organisation) to bring such a challenge? The attempt was made for the first time in *Front Polisario* and rather surprisingly the General Court accepted the standing of the Front Polisario to bring the action.⁸ In doing so it made two determinations, the first relating to the nature of the act (the Council decision) and the second relating to the standing conditions laid down by Art. 263, para. 4, TFEU. The nature of the Council decision was relevant since non-privileged applicants may bring an action against "a regulatory act which is of direct concern to them and does not entail

⁴ Arts 24, para. 1, and 31, para. 1, TEU.

⁵ Art. 31, para. 2, TEU. Unusually (see Art. 291, para. 2, TFEU) these are adopted by the Council.

⁶ See e.g. Court of Justice, judgment of 3 July 2014, case C-350/12 P, *Council v. Sophie In't Veld*, paras 76 and 105-107, where the issue was discussed in the context of transparency and access to documents.

⁷ See e.g. Court of Justice: judgment of 10 March 1998, case C-122/95, *Germany v. Council*; judgment of 11 June 2014, case C-377/12, *Commission v. Council* [GC]; judgment of 14 June 2016, case C-263/14, *European Parliament v. Council* [GC]. Note that the annulment of the concluding decision does not affect the validity of the agreement itself (in international law) but the agreement will no longer be binding on the institutions and Member States as a matter of EU law (cf. Art. 216, para. 2, TFEU). Depending on the defect, the decision may then be re-adopted and the Court may decide to preserve the legal effects of the wrongly-based decision until this has been done: see e.g. Court of Justice, judgment of 22 October 2013, case C-137/12, *Commission v. Council* [GC].

⁸ General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*.

implementing measures”; in other cases individual as well as direct concern must be demonstrated. According to the General Court (the point was not discussed directly by the Court of Justice on appeal), the decision was a legislative and not a regulatory act on the grounds that it was adopted according to a special legislative procedure as defined in Art. 289, para. 2, TFEU.⁹ This reasoning may be disputed; although it is true that the procedure laid down in Art. 218, para. 6, TFEU for the conclusion of an international agreement will – except in the case of the CFSP – meet the definition in Art. 289, para. 2, TFEU (a decision adopted by the Council with the participation of the Parliament), it does not necessarily follow that this is in fact a “special legislative procedure” within the meaning of Art. 289 TFEU. The Treaties habitually state explicitly when an act is to be adopted under a special legislative procedure and references to this procedure assume that it is explicitly required.¹⁰ Art. 218, para. 6, TFEU on the other hand does not define the procedure in this way. Indeed, were it to do so a substantial problem would arise in that decisions concluding CFSP agreements, also adopted under Art. 218, para. 6, TFEU, would have to be categorised differently given the prohibition on adopting legislative acts within the CFSP.

In our view, the decision concluding an international agreement should not be regarded as a legislative act but rather as an executive act, albeit in many (but not all) cases adopted with Parliamentary participation. They have certainly been treated as such in the context of the access to documents rules, where the distinction affects the Court’s approach to transparency.¹¹ Having categorised the Council decision, the General Court further held that the Front Polisario, albeit not possessing legal personality, was a “legal person” for the purposes of Art. 263, para. 4, TFEU and was directly and individually concerned in the Council decision, although in determining direct concern it employed some unorthodox reasoning.¹² This ruling is potentially important for our study since it opens the door to validity challenge of such acts by non-governmental and perhaps also civil society organisations, including those based outside the EU. The Court of Justice, on appeal, did not refer to this question directly, but based its annulment of the General Court’s judgment on its finding that the agreement in question did not apply to the territory of the Western Sahara and that therefore the applicant had no interest in bringing the action. By implication, therefore, the Court of Justice did not re-

⁹ *Ibid.*, paras 68-72.

¹⁰ See e.g. Art. 48, para. 7, TEU and Art. 333, para. 2, TFEU.

¹¹ See footnote 6.

¹² In *Front Polisario v. Council of the European Union*, cit., the General Court, although referring at para. 105 to the standard test for direct concern, then goes on to set out and apply the test for the *direct effect* of international agreements (at para. 107). For a critique see further 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. 53-55.

ject the possibility in principle of an individual application for review.¹³ Caution is needed, however: the position of the Front Polisario is very specific and although such an action might be possible in principle it would not be easy for a non-governmental organization to demonstrate direct and individual concern.

The second type of act which is specific to EU external action is a decision of a different kind: a decision adopted within an international forum (such as the conference of the parties to an international convention), which may have direct or indirect legal effects within the EU legal order. As Mendes' *Article* demonstrates, both the internal EU procedures for the adoption of the EU's position in such fora, which are based on Art. 218, para. 9, TFEU in cases where the international decision will have legal effects, and the legal status of such international decisions in EU law, pose a number of difficult questions.¹⁴ This is a form of delegated rule-making – characterised by Mendes as the “external administrative layer” of EU law-making – which may affect individual interests. Yet the simplified decision-making processes of Art. 218, para. 9, TFEU do not leave much scope for participation-centred procedures. Where the international rule-making is not formally binding the procedures and legal status are even less clear. As Mendes shows, these processes of external rule-making may take place within bilateral as well as multilateral contexts. Recent experiences with the negotiation of international agreements with a strong regulatory dimension (Transatlantic Trade and Investment Partnership and Comprehensive Economic and Trade Agreement) have demonstrated – partly following Ombudsman activity – that some space for transparency enabling a broader public debate does exist, and might in fact be vital for the survival of the agreements.

The third type of act specific to EU external action consists not in internal or external decision-making but in operational action. We find examples in CFSP military and civilian missions and in migration policy, typically taking place in third country territory. Despite the exclusion of the Court of Justice from jurisdiction over operational CFSP action, the *Article* by Cremona illustrates that such missions may in fact involve a variety of administrative decision-making on issues such as procurement and human resources which may still fall within the Court's jurisdiction. Nonetheless, the fact that such missions operate outside the territory of the EU; the operation of Status of Forces and Status of Mission agreements concluded with host States and containing liability limitation clauses;¹⁵ the complexity of command structures; and the questions over the applicability of the Charter of Fundamental Rights of the European Union explored by Rijpma all

¹³ Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC].

¹⁴ See e.g. Court of Justice, judgment of 7 October 2014, case C-399/12, *Germany v. Council* [GC].

¹⁵ A. SARI, *The European Union Status of Forces Agreement (EU SOFA)*, in *Journal of Conflict & Security Law*, 2008, p. 353 *et seq.*

impact on the determination of responsibility and accountability for the conduct of external missions and external operational action more generally.¹⁶

These three types of act are all examples of executive (not legislative or judicial) power and as the different *Articles* in this *Special Section* demonstrate, may entail administrative action.¹⁷ They also demonstrate characteristic features of executive and administrative action in the external sphere more generally. As we have seen in the context of several policy fields, including the CFSP and migration, external action is characterised by a multiplicity of actors. On the EU side we find examples of mixed administration involving Member States as well as the EU, and the case of the “deal” or arrangement with Turkey shows that it is not always easy for even the actors themselves to be clear as to whether an act is adopted by the EU or by its Member States. The European External Action Service has a degree of autonomy but is neither an institution in the formal sense nor an agency: its seconded national staff and its non-hierarchical relation to the Council and Commission can make it difficult to determine lines of accountability and responsibility or even to identify the proper respondent. The involvement of third countries and third country actors gives rise to a separate set of issues, and indeed we might define as a characteristic of administrative law in external relations the fact that it involves not only the familiar relationship between public authority (such as the EU institutions) and the individual but also the relationship between the EU institutions and (third) states. In some cases the legal answers may be relatively clear in a particular case but not necessarily uniform across policy fields: the extent to which administrative rights apply to non-EU nationals, for example (as discussed by Leppävirta, Hadjiyianni, Rijpma, Leino and Korkea-aho and Sankari) or jurisdictional questions where action takes place outside the territory of EU Member States (as discussed by Rijpma). Other issues are much less easy to determine, both legally and normatively: to what extent should the EU be required to consider as “relevant facts” the situation in a third country or the consequences of an EU action on third country nationals? To what extent is the EU required to take into account the interests of third country nationals affected by its action; what is the scope of its duty of care in such cases? In addition, it may not always be easy to identify the addressee of a (formal or informal) decision or those whose interests are affected: as Vianello points out, reports and other acts seemingly addressed to an EU actor such as the Council may in fact be intended to influence the conduct of a third country. In a number of external policy fields procedural rights are effectively established through individual notifications (such as opening tender procedures under development policy, or notifications of interest in anti-dumping cases)

¹⁶ S.Ø. JOHANSEN, *Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?*, in *International and Comparative Law Quarterly*, 2017, p. 181 *et seq.*

¹⁷ See *supra*, 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.*, for a discussion of what is meant here by executive and administrative action.

rather than secondary legislation, which may leave unclear who bears such rights, their precise scope and what obligations they create for the institutions.

Our second main conclusion, based on this mapping of the types of administrative action in external policy fields, is that while the pattern of administrative action is shared with EU action more generally, some distinctive types of action can be identified and external action tends to demonstrate some distinctive qualities resulting in part from the multiplicity of actors and fora (including external) involved.

The third central question addressed by this *Special Section* relates to the scope of executive discretion. We started with a hypothesis, based in part on statements from the Court of Justice, that the very broad discretion granted by the Treaties in the field of external relations challenged conceptions of accountability – political, legal and financial. We sought to test that hypothesis and to explore the ways in which administrative law may constrain that discretion. While the picture varies across different policy fields certain patterns emerge. It is clear that the institutions do indeed possess a great deal of policy discretion and that the Court is unwilling to engage in shaping substantive policy priorities.¹⁸ In some policy fields, including anti-dumping and development cooperation, even legislative goal-setting is very open-ended and leaves a great deal of scope for institutional (in practice, Commission) priority-setting and specific policy choices. The same is true of the softer forms of goal-setting through Commission strategy papers and Council Conclusions found in the enlargement and neighbourhood policies. It is less true in the CFSP; although the Treaties give very little guidance as to CFSP objectives (those found in the Treaties being not only general to all external action but also lacking in specificity and prioritisation),¹⁹ Council decisions imposing restrictive measures and launching civilian and military missions will typically contain a great deal of detail as to objectives and implementation.²⁰

The role of delegated and implementing acts adopted under Arts 290 and 291 TFEU are also relevant here. Where legislation establishes a broad policy frame it may not be easy to identify the “essential elements” of an act which should not under Art. 290 TFEU be subject to delegated power.²¹ It is also clear that in many policy fields (including enlargement and neighbourhood, development cooperation, anti-dumping) decisions which may appear on their face either highly technical or simply the result of drawing

¹⁸ M. CREMONA, *Structural Principles in EU External Relations Law*, Oxford: Hart Publishing, forthcoming 2018.

¹⁹ Arts 3, para. 5, and 21, TEU. This is not to say that they are unimportant; the Court has for example used these general objectives to guide its interpretation of the scope of external powers (see e.g. Court of Justice: judgment of 19 July 2012, case C-130/10, *European Parliament v. Council* [GC]; opinion 2/15 of 16 May 2017); however they have not (so far) been used to circumscribe policy discretion.

²⁰ See e.g. Court of Justice, judgment of 28 March 2017, case C-72/15, *PJSC Rosneft Oil Company* [GC], paras 86-90, holding that the level of detail in the Council's CFSP decision did not encroach on the powers of the High Representative and Commission under Art. 215 TFEU.

²¹ Art. 290, para. 1, TFEU.

conclusions from a technocratic assessment exercise not only contain substantial policy choices but also represent major consequences for individuals and third countries. Thus to some extent the policy direction and executive power granted to the Commission – for example in the case of development cooperation – may be concealed and correspondingly difficult to contest.

However this policy discretion is not without constraints. The constraints imposed by financial procedures and audit are important in some policy fields, including development cooperation where they represent an attempt to assess the matching of objectives to implementation (Leino). Most striking has been the proceduralisation already referred to as governing many types of external action, whether established by legislative act or developed through practice and non-binding instruments. And the Court's reticence towards substantive policy choice does not extend to procedure; it has proved willing both to enforce procedural rules laid down in legislation and to require compliance with procedural principles such as the duty of care. The framing of these procedural principles is important; the emphasis is on ensuring that the institutions have possession of the "relevant facts" to exercise their discretion and to make a decision in the Union interest rather than on ensuring (for example) the individual right to be heard. For example in anti-dumping, Korkea-aho and Sankari show that participation functions more as a vehicle for establishing relevant facts than as a vehicle for accountability.

Constraints may also be external in origin, the result of commitments in international agreements such as the WTO's Anti-Dumping Agreement, or the Aarhus Convention on access to environmental information, resulting from customary international law or international decision-making. Externally-derived norms may determine the operationalisation of general objectives, for example by establishing specific commitments in relation to climate change or development. In *Front Polisario* the Court of Justice ensured that its interpretation of the scope of the EU-Morocco Association Agreement was in compliance with the right of self-determination, "a legally enforceable right *erga omnes* and one of the essential principles of international law".²² It refused to accept that the administrative practice of the Commission in implementing the agreement could serve to alter that interpretation, and indeed the Court's interpretation will require a change to that practice.²³ External migration policy also provides the EU with a substantive challenge in living up to its Treaty commitments to international law in general and international human rights law in particular.²⁴

These examples, and the cases discussed by Mendes on the legal effects of international decisions, demonstrate the importance of judicial review as a central form of ac-

²² *Council v. Front Polisario* [GC], cit., para. 88.

²³ *Ibid.*, paras 123-124. An example of such practice would be the *de facto* application of tariff preferences under the EU-Morocco Agreement to products originating in the Western Sahara: *Ibid.*, para. 118.

²⁴ Art. 3, para. 5, TEU and Art. 78, para. 1, TFEU.

countability. Most of the *Articles* discuss this dimension. Administrative law has been the means of limiting the scope of the exception to the Court's jurisdiction over the CFSP (Cremona); judicial review has tested the ability of third country nationals to rely on administrative law (Hadjiyianni, Rijpma and Korkea-aho and Sankari), the operation of international norms as constraints on executive discretion (Mendes), and the balance between security and procedural and fundamental rights (Leppävirta). Alongside the courts, however, we are seeing the growing importance of other fora of financial and administrative accountability, including the Court of Auditors (Leino) and the Ombudsman (Leino, Vianello and Cremona). The importance of these additional forms of accountability in external relations and the degree to which they may impose a higher degree of scrutiny suggests the need for more detailed study.

As a final point, the policy-specific contributions to this collection invite us to think about the connection between procedures and outcomes in the light of the purposes of administrative law. On the one hand we may say that administrative procedures and rules are designed to ensure good administration in the sense of ensuring that outcomes match stated objectives and are achieved efficiently; the tendency towards result-based monitoring reflects this. On the other hand, administrative law is concerned with the exercise of executive power as it affects individuals, and as we have seen procedures play an important part in these structures of control and accountability. This dichotomy between effectiveness and individual rights is, however, more apparent than real and in reality the two are closely connected: procedures that take account of the interests and rights of individuals are more likely to frame objectives in ways which reflect agreed needs and to produce effective outcomes. This is not to suggest that it is possible to search for (still less to find) an administrative or procedural solution which will optimize every interest and objective. The different dimensions of accountability themselves may pull in different directions and may not always be reconcilable.²⁵

We are brought back to the fundamental question at the heart of this *Special Section*: to what extent should EU administrative law when operating in the context of external action allow space for the interests of the EU's third country partners and their citizens? As we have seen, mechanisms do exist in many cases for participation in administrative procedures and decision-making, but is the function of this participation primarily to vindicate external individual interests or to ensure outcomes which best reflect Union interests? The mandate given by the EU Treaties to the Union is to "uphold and promote" its values as well as its interests in its external relations, and the general objectives as expressed in Arts 3, para. 5, and 21 TEU suggest that wider global and third country interests should be a motivating force in Union external action. But the balancing of interests at the micro as well as the macro level is inevitably and rightly a

²⁵ M. BOVENS, *Analysing and Assessing Accountability: A Conceptual Framework*, in *European Law Journal*, 2007, p. 466.

matter for political determination. In the absence of that political debate there is only so much that administrative law can do.

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JUDICIAL COOPERATION, TRANSFER OF PRISONERS AND OFFENDERS' REHABILITATION: NO FAIRY-TALE BLISS. COMMENT ON *OGNYANOV*

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ABSTRACT: This *Insight* analyses the first preliminary ruling (Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov* [GC]) concerning a provision of the Council Framework Decision 2008/909/JHA on the cross-border transfer of prisoners in the EU. The Court of Justice clarifies the notion of enforcement of the sentence, for the purposes of the horizontal division of competences between the issuing State and executing authority. In this context, despite the quasi-automatic nature of judicial cooperation mechanisms, a prominent role is given to the issuing authority. In particular, the issuing State is entitled to assess unilaterally the prisoner's chances of social rehabilitation abroad. It is contended that this prudent approach, albeit reasonably inspired by the well-established principle of territoriality of criminal law, is capable of undermining the effectiveness of the Council Framework Decision 2008/909. This approach also blocks a gradual emergence of a common European approach to offenders' social rehabilitation, which is a key objective of judicial cooperation in criminal matters. A common attitude towards crime prevention through offenders' rehabilitation could be the feeding ground favouring future evolution of cooperation in criminal matters, besides the current overarching focus on *ex post* crime repression.

KEYWORDS: judicial cooperation in criminal matters – enforcement of a sentence – territoriality – penalty – more lenient national legislation – offenders' rehabilitation.

I. BETTER LATE THAN NEVER: THE FIRST CASE CONCERNING THE COUNCIL FRAMEWORK DECISION 2008/909/JHA ON THE TRANSFER OF PRISONERS IN THE EUROPEAN UNION

*Ognyanov*¹ is the first preliminary ruling concerning the interpretation of a provision of the Council Framework Decision 2008/909/JHA on the transfer of prisoners within the

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¹ Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov* [GC]. Another request for a preliminary ruling was made by the same Bulgarian Court, the Sofia City Court, in relation to a different aspect of the same proceedings. On that occasion, the *Sofiyski gradski sad* raised a series of interpretative

EU.² This act is a key tool for judicial cooperation in criminal matters, as it is intended to maximise the offenders' chances of social rehabilitation while ensuring deterrence, via the cross-border enforcement of custodial sentences and measures involving deprivation of liberty.³

The ruling addresses an important aspect of the Council Framework Decision 2008/909, namely the law applicable to the enforcement of a custodial sentence where a person is transferred. Pursuant to Art. 17, enforcement is to be governed by the executing State's law and procedures. However, the Council Framework Decision 2008/909 does not clarify if and to what extent such applicable law needs to consider the issuing Member State's prison regime, in order to tailor the punishment to the individual. Therefore, the judgment sheds light on the issuing and executing authorities' respective roles, when confronted with complex cross-border enforcement of sentences in a fragmented legal scenario.

Despite the systemic implications on the functioning of the mechanism set by the Council Framework Decision 2008/909, the question at issue was raised about six years after the expiry of the implementation deadline. In fact, the Council Framework Decision 2008/909 has been largely neglected by the Member States so far, mainly due to the legacy of the former Third Pillar. The frequent lack of timely implementation in national legal orders has been exacerbated by the absence of comprehensive studies on its theoretical implications and practical challenges.⁴ Following the expiry of the five years transitional period,⁵ the situation is now gradually improving,⁶ as confirmed by

questions concerning Art. 267 TFEU and Art. 94 of the Rules of Procedure of the CJEU, with regard to the content of the questions referred and the duties incumbent upon the national court after the delivery of the preliminary ruling: Court of Justice, judgment of 5 July 2016, case C-614/14, *Ognyanov* [GC].

² Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. The Framework Decision is intended to replace Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983.

³ The Council Framework Decision 2008/909, cit., at issue is complementary to other instruments, namely the Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between the Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures.

⁴ European Union Agency for Fundamental Rights, *Criminal Detention and Alternatives: Fundamental Rights Aspects in EU Cross-Border Transfers*, 2016, fra.europa.eu.

⁵ Art. 10 of Protocol no. 36 on Transitional Provisions.

⁶ Communication COM(2014) 57 final of 5 February 2014 from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, p. 6 *et seq.*

other preliminary rulings concerning this Council Framework Decision 2008/909 that were recently delivered by the Court of Justice.⁷

II. FACTS OF THE CASE

Mr. Ognyanov, a Bulgarian national, was sentenced to 15 years imprisonment for murder and aggravated robbery by a Danish Court. From January 2012, he served imprisonment in Denmark.⁸ While in prison, Mr. Ognyanov did a small amount of work in the general interest, which did not amount to grounds for remission of the sentence under Danish law. At the beginning of October 2013, he was eventually transferred to the Bulgarian authorities.⁹

The Bulgarian Criminal Code however provides for a more lenient regime concerning work done whilst in prison,¹⁰ pursuant to which two days of work equate to three days of imprisonment. The Bulgarian Supreme Court of Appeal also supports an extensive interpretation of the relevant national provisions. According to its settled case law, the prisoner can seek a reduction in the period of incarceration against work done abroad, as a means of enforcing a foreign criminal conviction, "even if that is not provided for in that State's national legislation".¹¹

⁷ Court of Justice, judgment of 11 January 2017, case C-289/15, *Grundza*; Court of Justice, judgment of 25 January 2017, case C-582/15, *van Vemde*.

⁸ It must be underlined that the Framework Decision at issue applies to all Member States, despite the opt-out regimes provided for by some Protocols annexed to the Treaties. In particular, the United Kingdom exercised the block opt-out pursuant to Art. 10, para. 4, of Protocol no. 36, but then included this Council Framework Decision 2008/909, cit., in the list of instruments it wanted to opt back in, under Art. 10, para. 5, of the same Protocol. See Commission Decision 2014/858/EU of 1 December 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen *acquis*. Moreover, Art. 2, para. 1, of the Protocol no. 22 on the Position of Denmark states that this Member State is exempted from any measure regarding Title V of the Third Part of the TFEU. However, Denmark is still bound by the acts adopted before the Treaty of Lisbon. In case these acts are amended, they continue to be binding upon and applicable to Denmark unchanged.

⁹ It is important to remark that Mr. Ognyanov's transfer was not carried out on the basis of the Framework Decision at issue, rather on the Council of Europe Convention on the Transfer of Sentenced Persons. In fact, whereas the deadline for implementing the Council Framework Decision 2008/909, cit., expired on 5 December 2011, Bulgaria has not transposed it yet. However, the preliminary questions referred focus on Art. 17 of the unimplemented Framework Decision and the Court of Justice considers that the Bulgarian regime can be interpreted in conformity with this act: *Ognyanov* [GC], C-554/14, cit., paras 54-70. Council of Europe, Convention on the Transfer of Sentenced Persons of 21 March 1983. See also the Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons of 18 December 1997.

¹⁰ See Art. 29, para. 1, of the *Nakazatelen Kodeks*, the Bulgarian Criminal Code.

¹¹ Opinion of AG Bot delivered on 3 May 2016, case C-554/14, *Ognyanov*, para. 33.

Under Bulgarian law, therefore, Mr. Ognyanov shall benefit from a more favourable regime and be entitled to early release. In this context, the referring Bulgarian Court raises some doubts on the interpretation of Art. 17 of the Council Framework Decision 2008/909.

On one hand, this provision endows the executing authority with the primary responsibility for governing enforcement of the sentence. On the other hand, enforcement has probably already commenced in the issuing Member State before the judicial cooperation mechanism is completed. So, in practice, the enforcement phase often requires the issuing and executing authorities' actions to be carefully coordinated.

This is why Art. 17, para. 2, urges the executing authority to deduct the time already served in another Member State from the total length of the sentence. In the light of this provision, the key question is whether the definition of the remaining period of detention requires the executing authority to assess the issuing State's enforcement regime and to consider the facts occurred during the first phase of enforcement. The question touches upon the peculiar features of the division of competences between national authorities codified by the Council Framework Decision 2008/909. However, it also requires more general reflections on the relationship between judicial cooperation mechanisms that are governed by the mutual recognition principle and the gradual emergence of truly European objectives in the EU judicial area. In particular, in the case at issue hand, the principle of territoriality of criminal law and the objective of facilitating social rehabilitation of a sentenced person, which is the cornerstone of Council Framework Decision 2008/909, lock swords.¹²

III. THE NOTION OF ENFORCEMENT OF A SENTENCE AND THE DIVISION OF COMPETENCES BETWEEN THE ISSUING AND EXECUTING STATES

The Court of Justice acknowledges that Art. 17 of the Council Framework Decision 2008/909 does not circumscribe the notion of enforcement. So in theory, the latter could encompass any measure adopted since the judgment has been delivered.¹³ Nonetheless, the Court upholds a restrictive approach to the concept at issue and limits its scope of application, along with the executing authority's subsequent responsibilities. According to the Court of Justice, the wording of the Council Framework Decision 2008/909 only refers to the deprivation of liberty within the Member State of transfer. Two main arguments lead to this conclusion: the contextual interpretation of the cooperation mechanism provided by the Council Framework Decision 2008/909 and the quasi-automatic nature of the principle of mutual recognition. The following subsections briefly illustrate these lines of reasoning.

¹² Recitals 8 and 9 of Council Framework Decision 2008/909, cit.

¹³ *Ognyanov* [GC], C-554/14, cit., para. 32.

III.1. WHICH ENFORCEMENT? THE APPLICABLE LAW IN THE LIGHT OF THE DIVISION OF COMPETENCES BETWEEN NATIONAL AUTHORITIES

Art. 17 needs to be considered within the overall mechanism of the Council Framework Decision 2008/909. In this wider context, the provision at hand is a specific aspect of a more complex procedure, which the act describes in chronological order.

Firstly, Arts 4 to 14 establish the requirements and duties incumbent upon national authorities when transferring a sentenced person. Secondly, Arts 15 and 16 govern the transfer and transit through other Member States' territories. These provisions mark a clear dividing line between the pre and post transfer regimes. As such, they also imply a logical division of competences between the issuing authority and the executing one. From this point of view, under Art. 13, the issuing authority retains the power to withdraw a certificate "as long as the enforcement of the sentence has not begun". Conversely, in the light of Art. 22, the issuing State may no longer exercise the sovereign *ius puniendi* "once [...] enforcement in the executing State has already begun". Therefore, the handover phase between the respective national authorities corresponds to the enforcement beginning in the executing State. Until then, the issuing authority retains its competence and the relevant national law applies.¹⁴

In order to prevent conflicts of laws and jurisdictions, the general scheme of the Council Framework Decision 2008/909 wards off any overlapping of competences: the cross-border enforcement of a sentence is the outcome of separate, but complementary efforts of the authorities involved.¹⁵ It follows that the notion of enforcement under Art. 17 of the Council Framework Decision 2008/909 refers only to imprisonment in the executing State.¹⁶

As far as reductions in sentences are concerned, this approach is more specifically reflected by the template certificate which the issuing authority transmits along with the

¹⁴ This is further confirmed by Art. 22, para. 2, of the Council Framework Decision 2008/909, cit., pursuant to which "the right to enforce the sentence shall revert to the issuing State" if the person has escaped from custody and enforcement is subsequently impossible in the executing State.

¹⁵ In this perspective, the AG Bot underlines the need to preserve the principle of territoriality in criminal law, which he considers an inherent expression of core aspects of national sovereignty, widely recognized by all Member States. Opinion of AG Bot, *Ognyanov*, cit., paras 79-81. The Court does not rest on this argument, at least *expressis verbis*, and prefers to lay out its line of reasoning on the basis of the wording of the Council Framework Decision 2008/909, cit. There again, the general scheme of the act at issue *de facto* identifies and protects the territorial competence of the issuing State and is intended to prevent territorial conflicts of law.

¹⁶ It is interesting to point out that the wording of Art. 17, para. 1, of the Council Framework Decision 2008/909, cit., corresponds in substance to Art. 9, para. 3, of the Convention on Transfers of Sentenced Persons of the Council of Europe of 1983. However, the title of Art. 9 offers additional interpretative guidance, since it refers to the "Effects of transfer for the administering State". Therefore, with regard to the territorial competence of the authorities involved, the scheme of the Framework Decision is patterned after the Convention at issue.

judicial decision. Section (i)2 collects all necessary information on the length of the sentence and its para. 2 requires the issuing State to indicate the days of deprivation of liberty already served in connection with the sentence at issue. Para. 3 also allows the issuing authority to quantify the number of additional days to be deducted from the remaining period of imprisonment due to supplementary reasons identified by the national legal order. Reductions for work carried out in detention are not explicitly specified in the non-exhaustive list of particular circumstances provided therein, but it is clear that they must be taken into account when filling in the template certificate.

It follows that the more lenient regime of the executing State is not retroactive. Instead, its scope of application is strictly limited to the post-transfer enforcement within that State's territory, as all remissions in sentence connected to the pre-transfer enforcement are to be considered by the issuing authority.¹⁷

III.2. MUTUAL RECOGNITION AND THE ROLE OF THE NATIONAL AUTHORITIES

The Court of Justice reaches the same conclusion by virtue of the "special mutual confidence in other Member States' legal systems" which characterises judicial cooperation in criminal matters in the EU.¹⁸ Falling to the country of origin to determine reductions in sentence connected to the period of detention served on its territory, the retroactive application of the law of the executing State would entail a re-examination of that phase of enforcement. The executing authority would then be entitled to revert the assessment made by the one issuing it, pursuant to different rules on remission of the sentence.¹⁹

According to the Court of Justice, such overlapping plainly undermines mutual trust and frustrates the principle of mutual recognition, which is the cornerstone of judicial cooperation mechanisms.²⁰ In fact, the receiving Member State has the duty to recognise and execute a foreign judicial decision in full compliance with its form and content, without additional formalities. Therefore, the case law underlines that national executing authorities are required to accept the implications of the law in force in the country of origin, even if "the outcome would be different if their own national law were applied".²¹

¹⁷ *Ognyanov* [GC], C-554/14, cit., para. 40.

¹⁸ Recital 5 of Council Framework Decision 2008/909, cit.

¹⁹ What is more, in the case at hand the Danish authorities had expressly stated in the certificate that they had not granted remission of the sentence on account of work done in detention.

²⁰ *Ognyanov* [GC], C-554/14, cit., paras 44-49.

²¹ Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügger*, para. 33. See also opinion of AG Bot, *Ognyanov*, cit., para. 119.

IV. NO FAIRY-TALE BLISS: IS THIS JUST A WATERED DOWN VERSION OF MUTUAL RECOGNITION, TO THE DETRIMENT OF A COMMON APPROACH TO OFFENDERS' SOCIAL REHABILITATION?

Judicial cooperation takes different shapes, depending on the nature of the decisions to be recognised, as well as the objectives underpinning each mechanism. The basic assumption is that execution is entrusted to the executing State's law, in the light of the principles of sovereignty and territoriality.

However, the issuing authority usually retains certain powers, ranging from light equivalence checks to more stringent controls over the executing authority's activity. For instance, some Framework Decisions and Directives stipulate that specific aspects of a country of origin's legal order must be respected even within an executing State territory.²² When the fragmentation of national laws blocks the execution of a foreign decision, the receiving authority is endowed with the power to adjust that decision, in order to reconcile it with its legal order.²³ Such adaptations affect how automatic the judicial cooperation mechanisms are and may incisively alter the nature and consequences of the judicial decision concerned. Therefore, they are usually made conditional upon strict requirements such as the consent of the issuing State, which can often play a prominent role.

From this point of view, the Council Framework Decision 2008/909 implements the principle of mutual recognition through a specific distribution of competences between the issuing and the executing authorities. In fact, in comparison to other similar tools, it gives remarkable discretion to the issuing authority regarding the outcomes of the judicial cooperation mechanism and, in particular, the forwarding of the certificate and its possible withdrawal.

²² For instance, pursuant to the Framework Decision 2005/214/JHA, the financial penalties issued against legal persons must be recognized and enforced even if the executing State criminal liability does not apply to such entities (Art. 9, para. 3, of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties). The influence of the issuing State is particularly evident in relation to the Directive on the European investigation order. Art. 9, para. 2, states that "The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority [...] provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State". It follows that the legal order of the country of origin prevails over the rules of the executing States, unless key principles of the latter are endangered (Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European investigation order in criminal matters).

²³ The Framework Decision on the European supervision order stipulates that if the supervision measure is incompatible with the law of the executing State, "the competent authority in that Member State may adapt them in line with the types of supervision measures which apply, under the law of the executing State, to equivalent offences". In any event, the adjusted measure shall not be more severe than the original one (Art. 13 of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention).

The judicial cooperation mechanism is initiated only insofar as the issuing authority is satisfied that enforcing the sentence in the executing State will enhance the offender's chances of social rehabilitation.²⁴ Such evaluation is unilateral and can also be made *in itinere*.²⁵ The Council Framework Decision 2008/909 provides for duties of consultation between the respective authorities. Accordingly, Art. 17, para. 3, of the Council Framework Decision 2008/909 provides for a discretionary power to withdraw the certificate when the issuing State does not agree with the executing State's rules on early or conditional release.

The distribution of competences between the States concerned aims at addressing the significant fragmentation of national procedural systems. At the time of negotiations preceding the adoption of this act, the comparative analysis of the relevant national laws highlighted a considerable variety of means to enforce sentences and alternatives to imprisonment.²⁶ The level of minimum and maximum penalties, prison regimes and prison conditions also revealed major differences. To a certain extent, the wording of the Council Framework Decision 2008/909 was watered down by the need to avoid conflicts and build mutual trust in a new national secret garden affected by the European integration process. This is reasonable and, indeed, the prudent approach has boosted the application of the Framework Decision. Even if a lot remains to be done and the potential of the mechanism still needs to be fully explored, national authorities resort to prisoners' transfers more often than to other complementary judicial cooperation tools.²⁷

However, much has changed since the preparatory work and subsequent adoption of this act. Sooner or later, some factors may urge a reconsideration of the mechanism outlined in the Council Framework Decision 2008/909 and urge a truly European attitude towards the objective of a prisoners' rehabilitation.

Firstly, the binding status acquired by the Charter of Fundamental Rights of the European Union has particular significance for judicial cooperation instruments.²⁸ In relation to the Council Framework Decision 2008/909, one of the most debated threats to a prisoner's rights is the partial removal of his/her consent to transfer, in certain situa-

²⁴ Art. 4, para. 2, of Council Framework Decision 2008/909, cit.

²⁵ The Council Framework Decision 2008/909, cit., provides for duties of consultation between the respective authorities. However, they are not bound by the outcomes of such consultations.

²⁶ For an in-depth analysis of national legal orders concerning the subject at issue see G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPEN, P. VERBEKE, W. DE BONDT, *Cross-Border Execution of judgments Involving Deprivation of Liberty in the EU. Overcoming Legal and Practical Problems through Flanking Measures*, Antwerpen: Maklu, 2011.

²⁷ European Union Agency for Fundamental Rights, *Criminal Detention and Alternatives*, cit., p. 34.

²⁸ T.P. MARGUERY, *The Protection of Fundamental Rights in European Criminal Law after Lisbon: What Role for the Charter of Fundamental Rights?*, in *European Law Review*, 2013, p. 444.

tions.²⁹ Therefore, the issuing authority is entitled to make a unilateral assessment and presume that the transfer will better serve the purposes of the Council Framework Decision 2008/909. The removal of consent has been harshly criticised and described as a veiled expulsion from the issuing State,³⁰ eluding the guarantees provided by EU law.³¹ A revision of this aspect would avoid any abuse and ensure that the Charter's essential provisions are respected, while pursuing the Council Framework Decision 2008/909 objectives more effectively. In fact, offenders' rehabilitation is considered to be closely linked to Arts 1 and 7 of the Charter, which enshrine the principle of human dignity and the right to a private and family life.³²

Secondly, approximation of national substantive criminal law has expanded and is showing a trend towards increasingly specific common rules concerning maximum penalties, the nature of penalties and the circumstances aggravating or alleviating penalties. Moreover, following the Lisbon Treaty's entry into force, the EU has mooted the possibility of harmonising minimum maximum penalties.³³ Even if this competence has not been exercised yet, it is capable of imposing stricter limits on national legislator's discretionary choices in this domain, in the near future.

To a certain extent, such a limitation can be considered an inherent consequence of the rise of truly European interests in need of protection through criminal law. Cross-border crimes, crimes against the financial interests of the EU and particularly serious crimes represent (and are increasingly perceived as) a common threat to cope with. These factors challenge the principle of territoriality and predict the slow emergence of a new model of criminal law and judicial cooperation in criminal matters, as shared tools to tackle common concerns in the light of EU objectives.³⁴

²⁹ Art. 6, para. 2, of Council Framework Decision 2008/909, cit. Consent is not necessary when the prisoner is transferred to the State of nationality where he lives, to the Member State where he will be deported after the enforcement of the sentence, to the Member State where he fled or otherwise returned in view of the pending criminal proceedings.

³⁰ V. MITSILEGAS, *The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?*, in *European Law Review*, 2009, p. 541 *et seq.* The problem is further amplified by the unclear meaning of the verb "lives", which is not reiterated elsewhere in similar EU acts.

³¹ See for instance, with regard to EU citizens and protection from expulsion, the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. For a critical analysis, U. BELAVUSAU, D. KOCHENOV, *Kirchberg Dispensing Punishment: Inflicting "Civil Death" on Prisoners in Oneukwere (C-378/12) and MG (C-400/12)*, in *European Law Review*, 2016, p. 557 *et seq.*

³² P. MENGOSI, *La cooperazione giudiziaria europea e il principio fondamentale di tutela della dignità umana*, in *Studi sull'integrazione europea*, 2014, p. 225 *et seq.*

³³ W. DE BONDT, S. MIETTINEN, *Minimum Criminal Penalties in the European Union: in Search of a Credible Justification*, in *European Law Journal*, 2015, p. 722 *et seq.*

³⁴ K. NICOLAIDES, *Trusting the Poles? Constructing Europe through Mutual Recognition*, in *Journal of European Public Policy*, 2007, p. 685; C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, pp. 270-275.

In fact, prisoners' re-socialisation features among the core objectives of judicial co-operation in criminal matters as a whole, its role and implications are largely underestimated and still need to be adequately assessed. As implicitly confirmed by the AG and the Court of Justice,³⁵ the current division of competences between the issuing and executing authorities is based on the assumption that offenders' rehabilitation through the enforcement of a sentence is solely a matter of national policy. Therefore, the Council Framework Decision 2008/909 merely sticks together national criminal policies and priorities that run in parallel and reflect the perception of a certain legal order concerning the (theoretically) common challenge of enhancing the prisoners' chances of rehabilitation.

It follows that the notion and perception of social rehabilitation elaborated within the issuing State's territory in principle prevails over the executing State's approach, despite its allegedly European scale.³⁶ From this point of view, paradoxically, the prominent role given to the issuing State can constitute a threat to mutual confidence and the full effectiveness of the Council Framework Decision 2008/909.³⁷ In fact, from a systemic perspective, it is exacerbated by the lack of in-depth analysis of the European dimension of offenders' rehabilitation and partitions the aim the Council Framework Decision 2008/909 is intended to achieve. The sum of national expectations of such a goal blocks the emergence of a truly EU approach to prisoners' rehabilitation, despite the strategic importance attached to such a common objective.

The watered-down version of mutual recognition codified by the Council Framework Decision 2008/909 is better than silence. However, in times of programmatic reflections on the future of the European integration process, a serious reconsideration of the scale and coherence of the objectives pursued in the European judicial area is needed, including in terms of a new balance between issuing and executing authorities. A common attitude towards crime prevention through offenders' rehabilitation could be the feeding ground that favours the future evolution of cooperation in criminal matters, besides the current overarching focus on *ex post* crime repression.

³⁵ Of course, the principle of mutual recognition requires a model of interaction between the authorities involved to be identified. It implies a distribution of powers as a means to govern a complex mechanism. However, this concern should not lead to underestimate the substantive problem at the basis of the judicial cooperation mechanism. This *a fortiori* applies in the event of a common objective identified by the European legal order, which all the authorities involved should contribute to. On the lack of a clear strategy as to the implications of offenders' social rehabilitation as well as on the interactions of this principle/objective with judicial cooperation mechanisms and the EU citizenship rights see L. MANCANO, *The Place for Prisoners in European Union Law?*, in *European Public Law*, 2016, p. 717 *et seq.*

³⁶ Art. 4, para. 3, of Council Framework Decision 2008/909, *cit.*

³⁷ On the national authorities' approach to the assessment of the chances of social rehabilitation abroad see G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPEN, P. VERBEKE, W. DE BONDT, *Cross-Border Execution of Judgments*, *cit.*, pp. 47-55.



THE DUBLIN III SYSTEM: MORE DEROGATIONS TO THE DUTY TO TRANSFER INDIVIDUAL ASYLUM SEEKERS?

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ABSTRACT: In the *C.K. et al. v. Republika Slovenija* ruling (judgment of 16 February 2017, case C-578/16 PPU), the Court of Justice ruled that the transfer of the asylum seeker should be suspended if the particular medical condition of the applicant is so serious as to provide substantial grounds for believing that the transfer would result in a real risk of inhuman or degrading treatment, within the meaning of Art. 4 of the Charter of Fundamental Rights of the EU. The Court thus qualifies its prior case law, ruling that not only risks stemming from systemic flaws but also circumstances affecting the individual situation of an asylum seeker can preclude the transfer under the Dublin system, in exceptional circumstances. After outlining the Court's reasoning, this contribution argues that this judgment changes the Court's approach to derogations under the Dublin system in a positive yet limited way; and that its case law on mutual trust as well as its approach to the case law of the European Court of Human Rights on the matter largely seems to remain unaffected.

KEYWORDS: CJEU – European Court of Human Rights – Dublin system – mutual trust – fundamental rights – systemic flaws.

I. INTRODUCTION

On 16 February 2017 the Court of Justice delivered its judgment in the case of *C.K. et al. v. Republika Slovenija*,¹ concerning the transfer of asylum seekers under the Dublin III Regulation.² The request for preliminary ruling has been made by the Slovenian Supreme Court in the proceedings between C.K., H.F. as well as their child and the Repub-

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¹ Court of Justice, judgment of 16 February 2017, case C-578/16 PPU, *C.K. et al. v. Republika Slovenija*.

² Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

lic of Slovenia. This is the first case in which the Court is given the opportunity to comment on the new versions of Art. 3, para. 2, and Art. 17, para. 1, of the Dublin III Regulation as they resulted from a legislative reform in 2013.

Art. 3, para. 2, now enshrines in legislation a compulsory derogation from the duty to transfer asylum seekers among Member States where

“there are substantial grounds for believing that there are *systemic flaws* in the asylum procedure and in the reception conditions for applicants in [the Member State primarily designated], resulting in a risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter of Fundamental Rights” [emphasis added].

This derogation is inspired from the ruling of the Court of Justice in *N.S. et al.*³ according to which the possibility for a Member State to deal with an asylum application itself by virtue of the early version of the so-called “discretionary clause” was turned into an obligation in case of systemic flaws such as now described in Art. 3, para. 2.

The *C.K.* case allows the Court to clarify the relationship between the requirement of “systemic flaws” in the designated receiving State under the said Art. 3, para. 2, interpreted previously as the only ground for preventing transfers,⁴ and the discretionary clause that now stands as a distinct mechanism in the new Regulation under Art. 17, para. 1. This opportunity came up in the context of diverging case law between the Court of Justice and the European Court of Human Rights on the conditions to be met for compulsory derogations to the duty to transfer asylum seekers. While the European Court of Human Rights merely requires the existence of flaws which affect the *individual* situation of applicants for asylum, the Court of Justice maintains a higher threshold based on the existence of *systemic* flaws. The Court of Justice seeks to thereby protect the principle of mutual trust among the Member States of the EU on which the Dublin system is based.

The underlying question in *C.K.* was therefore whether Art. 3, para. 2, containing the systemic flaws test established by the Court of Justice, is the only compulsory derogation based on fundamental rights’ violation to the obligation to transfer asylum seekers among Member States; or whether, instead, this threshold should be lowered to ensure compliance with the European Convention on Human Rights’ (ECHR or Convention) standards in which case provisions such as the discretionary clause in Art. 17, para. 1, could be constructed so as to add compulsory derogations. As we shall see, the ruling *C.K.* constitutes only a mild step towards convergence of the two lines of case law. The facts of the case are as follows.

³ Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. et al. v. Secretary of State for the Home Department*.

⁴ This was decided in the specific “procedural” context of the case of *Abdullahi*; see Court of Justice, judgment of 10 December 2013, case C-394/12, *Shamso Abdullahi v. Bundesasylamt*.

II. FACTS AND LEGAL ISSUES BEFORE THE COURT

Ms C.K., a Syrian national who was six months pregnant, and her husband, Mr H.F., an Egyptian national, entered the territory of the Member States via Croatia on 16 August 2015. They were in possession of tourist visas issued by Croatia. The following day Ms C.K. and Mr H.F. entered Slovenia with false Greek identity papers, and lodged an application for international protection. Following the application, the Slovenian authorities submitted a request to Croatia, the Member State responsible pursuant to the Dublin III Regulation, to take over the responsibility for examining the applications.

In the meantime, Ms C.K. gave birth to a son, A.S., and lodged an application for international protection on his behalf. In January 2016, the Slovenian authorities received the medical records of the applicants, which described Ms C.K.'s high-risk pregnancy and her difficulties following childbirth, providing that she and her new-born son should remain at the reception centre in Slovenia because they were in need of care. Further psychiatric assessments indicated that Ms C.K. had suffered depression and periodic suicidal tendencies, attributable to the uncertainty surrounding her status.

Due to the critical circumstances in the case, the Slovenian authorities sought assurances from their Croatian counterparts concerning the appropriate reception conditions for the applicants and the Croatian authorities confirmed that the applicants would be provided with accommodation, appropriate care and necessary medical treatment. Consequently, the Slovenian authorities requested transfer of the applicants to Croatia.

By judgment of 1 June 2016, the Administrative Court in Slovenia annulled the transfer decision and suspended its enforcement, pending the adoption of a final decision in the administrative proceedings. Subsequently, the Supreme Court set aside the judgment of the Administrative Court holding that the second subparagraph of Art. 3, para. 2, of the Dublin III Regulation was not applicable since the existence of systemic flaws in the asylum procedure and reception conditions in Croatia had not been established. A report by the United Nations High Commissioner for Refugees (UNHCR) made it clear that the situation in Croatia is good, the access to care is guaranteed and emergency situations are accounted for. This was especially true for the Kutina Centre in Croatia, which is intended for vulnerable groups of asylum seekers and which is the centre that the applicants would be transferred to.

The last step for the appellants was a constitutional complaint before the Constitutional Court in Slovenia. On 28 September 2016, the Constitutional Court set aside the Supreme Court's judgment and referred the case back to that court. While the Constitutional Court agreed that the second subparagraph of Art. 3, para. 2, of the Dublin III Regulation was not applicable, since there are no systemic flaws in the asylum procedure and in the reception conditions in Croatia which might result in a risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter of Fundamental Rights of the EU (Charter), it considered that the applicants could not be transferred to Croatia before the Slovenian authorities have examined all the relevant circumstances, including the person-

al situation and state of health of the applicants. The Court referred to recital 32 of the Dublin III Regulation, which states that Member States must respect the requirements of Art. 33, para. 1, of the Geneva Convention on *non-refoulement* as well as Art. 3 ECHR prohibiting inhuman or degrading treatment and the relevant case law of the European Court of Human Rights, and pointed out that the criterion for examination under those provisions is wider than that of “systemic flaws” provided in Art. 3, para. 2, of the Dublin III Regulation. In the Constitutional Court’s view, the transfer itself could be injurious to the state of health of Ms C.K. and her son and this something the Slovenian authorities needed to examine before executing the transfer.

Following the judgment of the Constitutional Court, the Supreme Court decided to stay the proceedings and refer four questions to the Court of Justice in Luxembourg. The main question, in the view of the Constitutional Court, related to whether Art. 4 of the Charter must be interpreted as meaning that, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment within the meaning of that article. If the answer to the latter question would be affirmative, the referring court also asked whether it would be required to apply the discretionary clause (Art. 17, para. 1, of the Dublin III Regulation) and examine the asylum application itself.

The following section presents the Court’s decision, including a brief consideration of the Opinion of AG Tachev.⁵

III. KEY ASPECTS OF THE OPINION OF THE ADVOCATE GENERAL AND THE JUDGMENT

The AG Tachev concluded that only systemic flaws in the asylum procedure and reception conditions of the Member State responsible could require the prevention of the Dublin transfer. This restrictive interpretation of the obligation not to transfer applicants under the new version of Art. 3, para. 2, in the Dublin III Regulation was based on the need to ensure effectiveness of the Dublin system and referring to the importance of the principle of mutual trust between the States.⁶ The Advocate General referred to the *N.S. et al.*⁷ and *Abdullahi*⁸ judgments. In the latter case, which pre-dates the Dublin III reform, the Court of Justice explicitly stated that *only* systemic flaws could justify

⁵ Opinion of AG Tachev delivered on 9 February 2017, case C-578/16 PPU, *C.K. et al. v. Republika Slovenija*.

⁶ *Ibid.*, para. 52.

⁷ *N.S. et al. v. Secretary of State for the Home Department*, cit.

⁸ *Shamso Abdullahi v. Bundesasylamt*, cit.

the prevention of the Dublin transfer.⁹ AG Tanchev acknowledged that his position did not meet the ECHR standards,¹⁰ but insisted that the Court of Justice is not required to follow the approach taken by the European Court of Human Rights and “it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter”.¹¹

Yet, the Court of Justice deviates in its judgment from the approach suggested by the Advocate General. The Court ruled that the transfer of the asylum seeker should be suspended if the particular medical condition of the applicant is so serious as to provide “substantial grounds for believing” that the transfer itself would result in “a real risk of inhuman or degrading treatment, within the meaning of Art. 4 of the Charter”.¹² National courts should determine if this is indeed the case and if so, suspend the transfer until the health of the applicant permits it.¹³

In this case, there was no evidence that there were “systemic flaws” in the asylum procedure and the conditions for the reception of asylum seekers in Croatia; on the contrary, it was clear from the assurances obtained that the appellants in the proceedings would receive accommodation, the necessary medical treatment and appropriate care.¹⁴

The Court, however, emphasised that it cannot be ruled out that the transfer itself, irrespective of the reception conditions in Croatia, could result in a real risk of inhuman and degrading treatment for the person concerned due to her particularly serious state of health.¹⁵ Accordingly, the authorities of the Member State concerned are under an obligation to assess the risk of such consequences before deciding on the transfer.¹⁶

The Court stressed that the change in its approach, whereby it now allows for a derogation to the duty to transfer besides that to be found in Art. 3, para. 2, of the Dublin III Regulation on “systemic flaws”, stems from the increased standard of fundamental rights protection in the Dublin III Regulation in comparison to the Dublin II.¹⁷ Moreover,

⁹ *Ibid.*, para. 60.

¹⁰ AG Tanchev pointed out that while the Court of Justice requires “systemic flaws” in the Member State responsible in order to prohibit the transfer of an applicant to that Member State, the European Court of Human Rights merely requires existence of flaws which affect the applicant’s individual situation (Opinion of AG Tanchev, *C.K. et al. v. Republika Slovenija*, cit., para. 47).

¹¹ Opinion of AG Tanchev, *C.K. et al. v. Republika Slovenija*, cit., para. 53.

¹² *C.K. et al. v. Republika Slovenija*, cit., para. 90.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 71. In addition, both the Supreme Court and the Constitutional Court considered in their judgments that there were no systemic flaws in the asylum procedure and in the reception conditions for asylum seekers in Croatia, which resulted in a risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter.

¹⁵ *C.K. et al. v. Republika Slovenija*, cit., paras 65-66 and 73.

¹⁶ *Ibid.*, para. 75.

¹⁷ *Ibid.*, paras 62-63 and 94. The expression “Dublin II Regulation” refers to Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member

this interpretation was held to fully respect the principle of mutual trust “since it ensures that the exceptional situations are duly taken into account by the Member State [requesting the transfer]”.¹⁸ Indeed, the Court’s solution is closely linked to the very exceptional situation of an asylum seeker whose state of health is particularly serious.¹⁹ As for the Member States’ responsibility under the discretionary clause contained in Art. 17, para. 1, of the Dublin III Regulation, the Court held that the Member State in question has the possibility to examine the asylum application itself if the state of health of the asylum seeker was not expected to improve. The Court emphasised, however, that this provision does not oblige a Member State hosting an asylum seeker to examine the said application itself, even when read in the light of Art. 4 of the Charter.²⁰

IV. COMMENTS

The *C.K.* judgment has been perceived as a positive development in the Court’s case law on the Dublin system.²¹ The Court qualifies its prior case law, ruling that not only risks stemming from systemic flaws but also flaws affecting the individual situation of an asylum seeker may preclude the transfer under the Dublin system in given circumstances.²² This is indeed a step in favour of greater fundamental rights’ protection (see, *infra*, sub-section IV.1). Yet, the ruling remains closely connected to the facts of the case and does not seem to affect the Court’s position on mutual trust (*infra*, sub-section IV.2). As a consequence, the relationship between the Court’s case law and that of the European Court of Human Rights on the matter remains a grey zone (*infra*, sub-section IV.3).

IV.1. ONE STEP FORWARD

In *C.K.*, the Court of Justice decided to allow a new form of derogation to the duty to return asylum seekers under the Dublin system besides that provided for in Art. 3, para. 2, on “systemic flaws” in the Dublin III Regulation. The Court has therefore interpreted the said Art. 3, para. 2, as not excluding the possibility that considerations linked to real and proven links of inhuman and degrading treatment, within the meaning of Art. 4 of the Charter, might, in exceptional situations such as those envisaged in this judgment, prevent the transfer of a particular asylum seeker. This approach brings the Court of Justice’s case law one step closer to that of the European Court of Human Rights.

State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

¹⁸ *C.K. et al. v. Republika Slovenija*, cit., paras 88 and 95.

¹⁹ *Ibid.*, para. 74.

²⁰ *Ibid.*, para. 88.

²¹ C. RIZCALLAH, *The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection*, in *EU Law Analysis*, 20 February 2017, eulawanalysis.blogspot.nl.

²² *Shamso Abdullahi v. Bundesasylamt*, cit., para. 60.

The Court of Justice stated that this change in its Dublin case law stems from the increased standard of fundamental rights protection in the Dublin III Regulation in comparison to the Dublin II Regulation, which was applicable in its earlier rulings. It emphasised that the Dublin III Regulation differs in “essential respects” from the Dublin II Regulation, in terms of the rights given to asylum seekers.²³ In this context, the Court first referred to recital 9 in which the EU legislature expressed the intention to make the necessary improvements in the Dublin system with respect to its effectiveness but also to the protection granted to asylum seekers. Furthermore, the Court referred to recital 32 and 39 which now explicitly provide that Member States are bound by their obligations under instruments of international law, including the relevant case law of the European Court of Human Rights, and by Art. 4 of the Charter.

These references to the European Court of Human Rights are noteworthy since this Court is more protective of applicants in asylum cases than the Court of Justice that only makes derogation to mutual trust when there exist “systemic flaws”, as noted in section I.²⁴ The disagreement between Luxembourg and Strasbourg on the application of, and derogations to, the principle of mutual trust has been one of the reasons why the Court of Justice rejected the Draft Accession Agreement and, ultimately, the EU’s accession to the ECHR. In Opinion 2/13,²⁵ the Court of Justice determined, *inter alia*, that accession is problematic because it would require EU Member States to check another Member State’s observance of fundamental rights notwithstanding the obligation of mutual trust, which governs the relationship between those States. The Court of Justice insisted that the principle of mutual trust is of fundamental importance in EU law and that it requires EU Member States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.²⁶ This imposed mutual trust does not sit well with the ECHR system, however, since ECHR Contracting Parties are required to ensure that the Convention rights are respected rather than relying on or trusting other States to comply with fundamental rights.²⁷

Unsurprisingly, Opinion 2/13 has caused much tension between the two courts. The former President of the European Court of Human Rights, Dean Spielmann, commented on the Opinion in unusually strong language, saying that Opinion 2/13 was a “great disappointment” and that the Court will do what it can in cases before it to “protect citizens

²³ *C.K. et al. v. Republika Slovenija*, cit., para. 62. See also Court of Justice, judgment of 7 June 2016, case C-63/15, *Ghezelbash*, para. 34.

²⁴ This was also pointed out in the judgment of the Slovenian Constitutional Court.

²⁵ Court of Justice, opinion 2/13 of 18 December 2014.

²⁶ *Ibid.*, paras 191-195.

²⁷ This is the *Soering* line of cases; see European Court of Human Rights, judgment of 7 July 1989, no. 14038/88, *Soering v. United Kingdom*. However, the Court has made exceptions too, e.g. European Court of Human Rights, judgment of 18 June 2013, no. 3890/11, *Povse v. Austria*.

from the negative effects of this situation”.²⁸ The Court of Justice’s approach in *C.K.* may thus be seen as an attempt to restore that relationship, which has generally been one of comity and cooperation.

IV.2. MUTUAL TRUST UNAFFECTED

While this reading of the Dublin III Regulation does allow for an alternative route to exclusive reliance on Art. 3, para. 2, in order to derogate from the duty to transfer, the Court of Justice’s approach in *C.K.* does not however seem to call into question the “systemic flaws” test, which will continue to apply in most cases. This is apparent in the wording of the Court throughout the judgment, where the Court stressed several times the exceptional nature of the situation and the seriousness of the state of health of the applicants.

Furthermore and importantly, the principle of mutual trust is not affected in this case. The obligation to ensure that Art. 4 of the Charter is respected lies solely on the Slovenian authorities having requested the Dublin transfer since they are required to ensure that the transfer *itself* would not result in inhuman and degrading treatment of the applicants, and thus does not raise questions of mutual trust between Slovenia and Croatia. The Slovenian court may decide to postpone the transfer because the transfer itself could result in inhuman and degrading treatment of the persons concerned, not because the Slovenian authorities do not trust the Croatian authorities’ compliance with fundamental rights.

The Court seems to exclude that the same derogation would apply if it is not the transfer itself that could lead to inhuman and degrading treatment of the applicants but rather the asylum procedure and reception conditions in the Member State responsible, where no systemic flaws have been established in those respects.²⁹ It remains to be seen, given the Court’s general reluctance to acknowledge any derogation to the principle of mutual trust,³⁰ to what extent and under which circumstances the Court will be willing to permit derogations such as that granted in *C.K.*, besides that provided in Art. 3, para. 2, of the Dublin III Regulation.

²⁸ Registry of the European Court of Human Rights, Annual Report 2014, March 2015, p. 6, echr.coe.int.

²⁹ The Court made this distinction too in paragraph 94 of the judgment, stating that the outcome in this case differs from the outcome in *Abduallah*, since the latter judgment involved a national who had not claimed that his transfer would, in itself, be contrary to Art. 4 of the Charter.

³⁰ E.g. Court of Justice, judgment of 29 January 2013, case C-396/11, *Radu*; Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*; and also Opinion 2/13, cit.

IV.3. THE RELATIONSHIP WITH THE ECHR AND THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: STILL A GREY ZONE

As a consequence, it is questionable whether this judgment is in full compliance with the Convention as interpreted by the European Court of Human Rights. In the present case, the Court of Justice placed specific emphasis on compliance with Art. 3 of the ECHR and stated that “case-law of the European Court of Human Rights relating to Article 3 of the ECHR [...] *must* be taken into account when interpreting Article 4 of the Charter” [emphasis added].³¹ This is quite remarkable as the Court has held previously that the ECHR “does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law”. While the Court has always recognised the importance of the ECHR and the Strasbourg case law in view of Art. 6 TEU and Art. 52, para. 3, of the Charter, it does not consider itself formally bound by it when interpreting EU law. The Court went as far as to hold that EU law must therefore be examined “solely in the light of the fundamental rights guaranteed by the Charter”.³² The situation is different in *C.K.*, presumably because recital 32 of the Dublin III Regulation unequivocally provides that in the context of this Regulation Member States are bound by the relevant case law of the European Court of Human Rights.

Nevertheless, the *C.K.* ruling by the Court of Justice as examined above seems to contrast with the approach of the European Court of Human Rights in its *Tarakhel* judgment. In *Tarakhel*, the European Court of Human Rights ruled that Member States must carry out a “thorough and individualised examination of the situation of the person concerned” before making the transfer when there is a risk of inhuman and degrading treatment, irrespective of the source of that risk.³³ This suggests a more flexible description of “exceptional situations” justifying a derogation to the duty to transfer under the Dublin system than the one provided in the *C.K.*, which remains case-specific and narrow. In that context, it is interesting to note that the Court of Justice did not refer to the *Tarakhel* ruling in its analysis and did not fully explain how its interpretation of Art. 4 of the Charter relates to the European Court of Human Rights interpretation of Art. 3 of the Convention.

³¹ *C.K. et al. v. Republika Slovenija*, cit., paras 67-68.

³² Court of Justice, judgment of 15 February 2016, case C-601/15 PPU, *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, paras 45-46. See also Court of Justice, judgment of 24 November 2010, case C-571/10, *Kamberaj*, paras 60-61 and Court of Justice, judgment of 26 February 2013, case C-617/10, *Akerberg Fransson*, para 44.

³³ European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*, paras 103-104.

V. CONCLUSION

The *C.K.* ruling thus introduces welcome flexibility in making derogations to the duty to transfer under the Dublin III Regulation possible. Yet, this flexibility is built in the transfer in itself having to comply with the prohibition of inhuman or degrading treatment within the meaning of Art. 4 of the Charter. The ruling does not affect the test to be applied when the asylum procedure and conditions for the reception of asylum seekers in another Member State are a threat to the said fundamental right. In that context, Art. 3, para. 2, of the Dublin III Regulation requesting the existence of “systemic flaws” is not exclusive of other derogations but continues to act as the gate keeper to mutual trust in the view of the Court of Justice of the EU.



EUROPEAN FORUM

The following *Insights* and *Highlights*, included in this issue, are available online [here](#).

INSIGHTS

Mercedes Curto Polo, <i>El destino de los libros olvidados</i>	p. 731
Romain Foucart, <i>La Cour de justice et la mise en balance des intérêts dans le contexte de crise financière: la décision Dowling</i> et al.	743
Marco Inglese, <i>Positioning Efler in the Current Narrative of European Citizens' Initiatives</i>	749
Romain Rousselot, <i>Recommandations à l'attention des juridictions nationales: changement et continuité</i>	759
Vera Squaratti, <i>L'accesso al mercato delle concessioni delle aree demaniali delle coste marittime e lacustri tra tutela dell'investimento ed interesse transfrontaliero certo</i>	767
Susanna Villani, <i>Atti di forze armate e terrorismo in tempo di conflitto possono coincidere? La sentenza della Corte di giustizia nel caso A</i> et al.	779

HIGHLIGHTS

Ricardo Rodrigues de Oliveira, <i>Careful Where You Log In. Handicaps of a Geographical Criterion</i>	791
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