EU External Action and the Administrative Rule of Law

A Long-Overdue Encounter

Ilaria Vianello

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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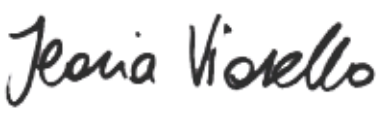

Far Away Proximity

Abstract

The thesis uses as case studies the Stabilisation and Association Process and the European Neighbourhood Policy in order to exemplify the increasing role played by the Union's administrative power in external relations. While seemingly harmless, the administrative power bears important legal consequences regarding the position of individuals, of third countries, and of the Union as a whole. In a system based on the rule of law (and committed to its respect in external relations), it is crucial to question whether implementing arrangements are in place or ought to be put in place with the aim of subjecting the external administrative power to administrative rules and principles. The analytical framework suggested by the thesis uses as a starting point the features and the impact of the administrative power externally. Based on this analysis, it identifies which administrative law principles (as developed within the framework of the internal market) have the potential of giving effect to the administrative rule of law externally once applied and operationalized in the external domain. Despite the increasing role granted to administrative power externally, administrative law in external relations is underdeveloped. Therefore, the analytical framework suggested by this thesis is relevant as it helps to ensure that the action of the Union in the international scene is carried out in compliance with its constitutional aspiration, i.e. upholding the rule of law in its relations with the outer world, and as it structures the relation between the Union and individuals, and between the Union and third countries. The 'long-overdue encounter' between EU external relations and EU administrative law ought to be encouraged. The thesis aims to offer a methodology for structuring such an encounter and for planning venues for future meetings.

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In a moment of history in which public attention is focused on the possible ways of leaving the EU, it is fundamental not to forget those countries at the Union's periphery which are instead trying to build stronger ties with the latter. I wish to thank the Italian Ministry of Foreign Affairs and the European University Institute for having provided me with the necessary financial support to reflect on such important topic.

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Introduction

'Altogether the external competences of the institutions and bodies of the EU/EC require more attention from EU law and administrative law expert communities than has been granted thus far.' [1]

1. The rise – and relevance – of administrative power in EU external relations

Emerging developments might not be defined as 'paradigm shifting', since they have not yet brought about a qualitative change; however, they may apply substantial pressure on our understanding of the existing legal world.[2] Indeed, they can cast doubt on the conventional legal categories that have helped us so far to comprehend the constructs that regulate the reality that surrounds us. The complex net of instruments that regulate the relations between the EU and third countries, which has so far been analysed from a constitutional and international law perspective, is gradually changing in nature.[3] The Union external action is no longer simply dominated by agreements regulated by international law; it is instead increasingly characterised by the proliferation of instruments produced by the Union's complex administrative machine. Substantially, these instruments mainly aim at assessing the development of third countries with which the Union has built ties, at determining the agenda of political and economic reforms that these countries need to pursue in order to intensify their relations with the EU, or at

[1] H.C.H. Hofmann and A.H. Türk, 'Conclusions', in H.C.H. Hofmann and A.H. Türk, (eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Cheltenham: Edward Elgar Publishing 2009), at 372.

[2] G. Bermann, 'The emergence of transatlantic regulation', in H.C.H. Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law Towards and Integrated Administration* (Cheltenham: Edward Elgar Publishing 2009), 168, at 168.

[3] S. Duke and S. Vanhoonacker, 'Administrative governance and CFSP', in H.C.H Hofmann and A.H. Türk (eds.), *EU Administrative Governance* (Cheltenham: Edward Elgar Publishing 2006), 361-387; G. Bermann, 'The emergence of transatlantic regulation', in H. Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law Towards and Integrated Administration* (Cheltenham: Edward Elgar Publishing 2009), 168-175; D. Thym, 'Foreign Affairs', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford: Hart Publishing 2009), 309, at 315; R. Wessel and J. Wouters, 'The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres: Towards a Research Agenda', in A. Follesdal, R. Wessel and J. Wouters (eds.), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Leiden: Martinus Nijhoff Publishers 2008), 9-47; H.C.H. Hofmann, 'Dealing with Trans-Territorial Executive Rule-Making', 78 *Missouri Law Review* 2013, 423-442; J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *American Journal of Comparative Law* 2014, 87-125*;* E. Chiti and B.G. Mattarella*, '*Introduction: The Relationships Between Global Administrative Law and EU Administrative Law', in E. Chiti and B.G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (Berlin: Springer 2011), 1-10; M. Cremona, 'Introduction', *Developments in EU External Relations Law* (Oxford, Oxford University Press 2008), 1-9; G. De Búrca, 'EU External Relations: The Governance Mode of Foreign Policy', in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The EU's Role in Global Governance The legal Dimension* (Oxford: Oxford University Press 2013), 39-58; S. Lavenex, 'EU External Governance in wider Europe', 11 *Journal of European Public Policy* 2004, 680-700.

evaluating the impact of the Union's action. While seemingly harmless, these instruments create expectations and bear important legal consequences for the position of individuals, of third countries, and of the Union as a whole. The unclear legal nature of these documents too often conceals their real function and impact. The way in which power is exercised (whether through legally binding or non-legally binding acts) ought not to mislead us. Non-legally binding acts too can constrain the freedom of other legal subjects.[4] Therefore, it becomes all the more important to flesh out the external administrative power in order to fully understand its significance; fundamental considerations as to its features and effects are in order.

Despite the increasing role granted to administrative power in EU external action and the increasing tensions as to how it is exercised, administrative law in external relations is underdeveloped. EU administrative law – to be understood as the body of law and principles governing the exercise of administrative power – does not seem to openly face the challenges posed by this new development. The power exercised by the administration of the Union in external relations escapes the review mechanisms and the structural guidance currently provided by EU administrative law. The Union is a legal system based on the rule of law, meaning that the exercise of public power is subject to or regulated by a set of substantive and procedural standards.[5] Consequently, the external administrative power cannot be left unbounded, deprived of guidelines as to how it should be exercised. This should particularly be the case especially after the entrance into force of the Treaty of Lisbon, which makes clear that the respect of the rule of law applies also to the development and implementation of the Union's external action.[6] This statement does not seem to cast doubt as to the legal obligation that the Union is required to respect, yet it becomes essential to understand concretely what this statement implies.

If internally the Court had (and still has) a crucial role in developing the principles giving effect to the administrative rule of law by deciding cases dealing with the validly of administrative decisions, externally this does not seem to be the most evident path.[7] The

[4] A. von Bogdandy, 'Common principles for a plurality of orders: A study on public authority in European legal area', 12 *International Journal of Constitutional Law* 2014, at 988.
[5] Article 2, Treaty of the European Union, *OJ* [2010] C 83/01, 30.03.2010 (hereafter TEU); Case 294/83 *Les Verts* v. *Parliament*, EU:C:1986:166, para. 23.
[6] Articles 3(5), 21(1) and 21(3) TEU.
[7] E.g. in some exceptional cases the principles giving effect to the administrative rule of law (like the right to be heard) were also developed and discussed by the Court in case of legislative acts having a high degree of individualisation: Case C-49/88 *Al-Jubail Fertilizer* v. *Council*, EU:C:1991:276, para. 15. See Nehl in respect

final decision as to whether to open accession negotiations for EU membership or to suspend economic relations with a third country due to human rights violations is political. Third countries cannot acquire a right as to how the Union should act towards them (e.g. they cannot challenge a decision not granting them candidate status), and third countries' citizens cannot acquire a right as to how the Union should behave towards their own states.[8] However, the administrative processes leading to this type of political decisions are not deprived of relevance. On the contrary, by acknowledging their shortfalls and their addresses it becomes clear why certain principles ought to be respected by the administration in the exercise of its powers. In the absence of a powerful judiciary that could take the lead in guaranteeing the respect of the administrative rule of law externally, its articulation might also be guaranteed by the EU legislature.[9] Nevertheless, as it will become clear in the first chapters of this thesis, only a handful of attempts have been made so far in this direction. In this gap of forces willing to give effect to the administrative rule of law externally, the debate as to what this obligation concretely implies ought to be initiated by EU and administrative law scholars.

It is outside the scope of this thesis to analyse the administrative power as exercised in all the Union's external policies. An investigation of the application of administrative law in a specific EU policy area requires concrete examples. It cannot be made in the abstract. This research will use the Union wider neighbourhood – comprising the Stabilisation and Association Process and the European Neighbourhood Policy – in order to exemplify the growing role of the Union's administration in external relations, and in order to understand its features and impact.[10] As it will become clear in the first part of

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of the development of the right to be heard. H.P. Nehl, *Principles of Administrative Procedures in EC Law* (Oxford: Hart Publishing 1999), 70-99.

[8] See cases: Case T-367/03 *Yedaş Tarim ve Otomotiv Sanayi ve Ticaret AŞ* v. *Council of the European Union and Commission of the European Communities*, EU:T:2006:96; Case T-346/03 *Krikorian* v. *European Parliament, Council and Commission*, EU:T:2003:348; Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97; Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418; Case C-581/11 *P Mugraby* v. *Council and Commission*, EU:C:2012:466.

[9] Administrative law scholars share the recognition that both the Court of Justice of the European Union and the EU legislature have gradually established an administrative rule of law applicable to the various components of the EU administrative system. E. Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?', *European Law Journal*, (forthcoming).

[10] The SAP and the ENP has so far been analysed from an international law and constitutional law perspective. C. Hillion (eds.), *EU Enlargement: A Legal Approach* (London: Bloomsbury Publishing 2004); A. Ott and K. Inglis (eds.), *Handbook on European Enlargement: a Commentary on the Enlargement Process* (The Hague: T.M.C. Asser Press 2002); N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (Oxford: Hart Publishing 2014); S. Blockmans and A. Lazowski (eds.), *The European Union*

the thesis, the Stabilisation and Association Process (SAP) and European Neighbourhood Policy (ENP) with their thick net of administrative activities exemplify best this phenomenon.[11] The analytical framework suggested by this thesis is topical to the extent that cases are currently litigated before the Court of Justice of the European Union and the European Ombudsman, which question the use of administrative power externally.[12]

2. What does this thesis have to add? A new perspective on EU external relations

The field of external relations law has been so far analysed from the perspective of constitutional and international relations law.[13] The relevance and significance of these analyses are unquestionable in as far as they offer a thorough understanding of the Union's decision-making machinery in external relations in terms of: division of competences between the Union and Member States; the scope of EU external competences and the choice of legal basis; inter-institutional relations; the interaction between EU law and international law; and the type of international actor the EU strives to be on the international arena. Nevertheless, these approaches seem to have disregarded the development of new forms of administrative activities in EU external action that have in this way so far escaped serious scrutiny as to how they are adopted and as to their impact on third states and individuals. Some authors have reflected on the

and its Neighbours: a Legal Appraisal of the EU's Policies of Stabilisation, Partnership, and Integration (The Hague: T.M.C. Asser Press 2006).

[11] The SAP is a 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 official candidate for membership. The Western Balkan states include: Albania, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro, Serbia and Kosovo. However, since 1 July 2013 Croatia is no longer a state taking part in the SAP because it became a member of the European Union. The European Union officially launched its ENP in 2003 with the objective of avoiding the emergence of new dividing lines between the enlarged EU and our neighbours; and it focused on strengthening the prosperity, stability and security of all. The ENP framework is offered to the EU's closest neighbours: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine.

[12] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953 (currently under appeal before the Court of Justice); Case C-660/13 *Council* v. *Commission*, EU:C:2016:616 (decided on the 28 July 2016); Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care; Decision on 2 September 2016 of the European Ombudsman on complaint OI/7/2015/ANA against the European Commission, external relations, breach of Article 23 ECGAB.

[13] Among others: P. Eeckout, *EU External Relations Law* (Oxford: Oxford University Press 2011); A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations* (Cambridge: Cambridge University Press 2008); R. Schütze, *Foreign Affairs and EU Constitution: selected essays* (Cambridge: Cambridge University Press 2014); M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing 2008); M. Cremona and A. Thies, *European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford: Hart Publishing 2014); P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing 2015); D. Kochenov and F. Amtenbrink, *The European Union's Shaping of the International Legal Order* (Cambridge: Cambridge University Press 2013).

use and impact of these new forms of EU external governance and have rightly made a comparison between the numerous instruments composing these new structures and soft law. However, these reflections have so far focused on the legal effects that these soft law measures have internally,[14] on their ability to enhance conditionality and promote change in the recipients' countries,[15] and on the type of governance they recreate in the external relations.[16] If EU external relations law scholars seem to have so far disregarded the increasing use of administrative power externally, the lack of interest for EU external relations law is also reflected in the administrative lawyers' community. EU administrative law has so far evolved on a policy-by-policy basis;[17] mainly ignoring the field of external relations law.[18]

The current thesis intends to advance the current literature by suggesting a new analytical framework for the study of EU external relations through the lenses of EU administrative law. This approach has the potential of regulating the use of administrative power externally, and of upholding the obligation that the Union has to respect the rule of law in developing and implementing its external action. European administrative law is not simply the right to enforcement; it is rather – and particularly in this project – the

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[14] B. Van Vooren, 'A case-study of soft law in EU external relations: the European Neighbourhood Policy', 34 *European Law Review* 2009, 698-719.

[15] D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Alphen aan Den Rijn: Kluwer Law International 2008).

[16] B. Van Vooren, *EU External relations law and the neighbourhood policy: a paradigm for coherence* (London: Routledge 2011); S. Lavenex, 'Experimentalist Governance in EU Neighbourhood Policies: Functionalist versus Political Logic', in J. Zeitlin (eds.), *Extending Experimentalist Governance?: the European Union and Transnational Regulation* (Oxford: Oxford University Press 2015), 24-47; E. Tulmets, 'Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy', in C.F. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford: Oxford University Press 2010), 297-324.

[17] Among others: P. Craig, 'History and Typology', *EU Administrative Law* (Oxford: Oxford University Press 2012), 4-34; H.C.H. Hofman, G.C. Rowe and A.H. Türk, 'The Idea of European Union Administration – Its Nature and Development', *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2012), 4-19; M.P. Chiti, 'Forms of European Administrative Action', 68 *Law & Contemp. Probs.* 2004-2005, 37-57; European Parliament, Directorate General for Internal Policies, Citizen's Rights and Constitutional Affairs, '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', Study for the European Parliament Juri Committee, December 2015, at 12. Available at: <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536487/IPOL_STU(2016)536487_EN.pdf > (Consulted on 07.08.2016).

[18] Some exceptions are: S. Duke and S. Vanhoonacker, 'Administrative governance and CFSP', in H.C.H Hofmann and A.H. Türk (eds.), *EU Administrative Governance* (Cheltenham: Edward Elgar Publishing 2006), 361-387; G. Bermann, 'The emergence of transatlantic regulation', in H.C.H. Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law Towards and Integrated Administration* (Cheltenham: Edward Elgar Publishing 2009), 168-175; H.P. Nehl, *Principles of Administrative Procedures in EC Law* (Oxford: Hart Publishing 1999), 73-77; H.C.H. Hofmann, G.C. Rowe and A.H. Türk, 'Part I: Foreign Relations and Affairs', *Specialized Administrative Law of the European Union – A Sectoral Treatment* – (Oxford: Oxford University Press forthcoming).

branch of a legal system that should make operational the ambitions of the constitutional order.[19] The legal framework suggested by this thesis is about using and adapting familiar European administrative law principles and rules in the admittedly less familiar setting of the Union's external relations, with the goal of subjecting the implementation of the external action of the Union to the rule of law. In this respect, the following questions will be addressed: how is the administrative power exercised in the Union external action? What are the types of instruments used? How are they drafted? Who are the actors involved? What is their impact? Which aspects of the rule of law are relevant in order to constrain the Union's external administrative action? Are there legal arrangements operationalizing the administrative rule of law principles externally? What are the means to enforce them? Is it possible to state that the current regulatory framework respects the rule of law?

This thesis ultimately suggests that the encounter between European administrative law and EU external relations should engender a deep understanding between two legal realities that have so far ignored each other. European administrative law ought to be ready to adapt its principles and rules to a new legal reality that presents features, functions, addresses and impacts that at first glance do not seem to fit the legal categories that have so far regulated the exercise of administrative power internally. The aspiration of the EU external action to respect constitutional values requires a hard look at the exercise of its own power. The Union needs to recognise the impact of its actions both on third countries and on individuals. At least initially, reconciliatory and open environments, like the office of the European Ombudsman, are recommended venues for the meeting of such different legal worlds.

[19] In this respect the thesis position itself within the literature which has so far tried to frame new modes of governance by taking into account the constitutional guarantees and constraints imposed by the Treaties. Among others: J. Scott and D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' 8 *European Law Journal* 2002; C. Kilpatrick, 'New EU Employment Governance and Constitutionalism' in B. de Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing 2006); C. Sabel and J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', 14 *European Law Journal* 2008; M. Dawson, *New Governance and the Transformation of European Law coordinating EU Social Law and Policy* (Cambridge: Cambridge University Press 2001); O. Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Alphen aan Den Rijn: Kluwer Law International 2012).

3. The structure of the thesis

The thesis is conceptually divided in two parts. Part I aims at fleshing out the features and the addresses of the Union's administrative power in the SAP and the ENP. Part II, by using as a starting point the characteristics of the administrative power identified in part I, aims at transposing the obligation that the Union has to respect the rule of law when acting externally from paper to the reality of the Union's external administrative action.

PART I

The administrative power externally: understanding its features and its impact

Chapter I opens by explaining the two main foundational claims of the thesis: first, the rise of administrative power in the Union' external action; and second, the obligation on the side of the Union to respect the rule of law when acting externally. In doing so, the chapter introduces the two case studies: the Stabilisation and Association Process and the European Neighbourhood Policy. Chapter I is meant to present the reader to the administrative dimension of the Union's external action, and to the obligation on the side of the Union to respect the rule of law in structuring its relations with third states and their natural and legal persons. Merging these two premises implies also highlighting the challenges that this thesis has to face in framing the Union external action within EU administrative law. The main challenge in this context is the lack of powerful forces determined to give effect to the administrative rule of law within the framework of the Union's external action.[20] However, these challenges should not stop the discussion; on the contrary they shall boost the debate. Implicit in the conception of the rule of law is the idea that principles and rules need at least to be considered in the creation of regulatory regimes, even if the current legal reality might seem hostile to this development.[21] In order to identify which principles are best suited to give effect to the administrative rule of law externally, the thesis will start by analysing the features and addresses of administrative power in the SAP and ENP.

[20] Internally EU administrative law has developed through the encounter of four main forces born out of the interaction between EU law (and its administration) and national administrative law. Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?', *European Law Journal* (forthcoming).
[21] J. Mendes, 'Rule of law and participation: A normative analysis of internationalized rulemaking as composite procedures', 12 *International Journal of Constitutional Law* 2014, at 386.

Chapter II is mainly descriptive; however, a detailed account of the numerous administrative activities is important in order to understand the nature of the administrative power exercised externally. Understanding how such power is exercised is a first fundamental step in order to select the administrative law principles which have the potential to bind the administration to the respect of the rule of law. For example, the duty of care is called in question by the Court of Justice of the European Union when the administration enjoys a wide margin of discretion.[22] Thus, understanding whether the administrative power aimed at implementing the SAP and the ENP enjoys a wide power of appraisal is essential in order to select (in chapter IV) the administrative principles that give effect to the rule of law externally. With this aim in mind chapter II begins by describing the basic parameters for the execution of administrative power in the SAP and the ENP; second, it maps the complex net of instruments, measures and acts characterizing the two policies according to their sector specific tasks; and third, it analyses the procedures leading to their adoption. Finally, the chapter tries to position and connect all the various actors involved in the enactment of all these measures.

Chapter III completes the analysis started by chapter II by identifying the addressees and the impact of the administrative power. This is an important passage in the study of administrative law in external relations, particularly in order to guarantee protection for affected parties. The chapter identifies and explains the different impacts that the administrative activities implementing the SAP and the ENP exercise on public power (of the Union and of third countries) and on natural and legal persons. In carrying out such analysis, the chapter also classifies 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 crystalised over time. Finally, Chapter III aims at demonstrating how the administrative power exercised by the Union in the SAP and ENP is significant and cannot be neglected – regardless of the legal forms it takes.

[22] See as an example the *TU München* case: '[…] where the Community institutions have such a power of appraisal [involving complex technical evaluations], respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.' Case C-269/90 *Hauptzollamt München-Mitte* v. *Technische Universität München*, EU:C:1991:438, para 14.

PART II

Giving effect to the rule of law: administrative law principles applied to the external action

Building upon the analysis developed by the thesis in part I, Chapter IV identifies the administrative law principles – as derived from the rule of law – which are best capable of guiding the exercise the administrative power externally, and of protecting the parties affected by it. In other words, the choice of principles is based on the characteristics that the administrative power assumes in the SAP and ENP; and on their ability to serve the two fundamental functions of the administrative rule of law: rationality of outcomes and individual protection. Once the principles are identified, the chapter continues by studying their operationalisation externally. It explores whether there are any rules in place stating what the application of the principles implies in the external relations context. The lack of powerful driving forces determined to give effect to the administrative rule of law externally does not imply a complete vacuum of norms. In this respect, the chapter tries to reconnect all the attempts made so far by the Court, the European Ombudsman, the European Parliament, the Commission, the EEAS, etc. in articulating the respect of the administrative rule of law in the Union external action. Based on this analysis, the chapter subsequently evaluates the current state of art and suggests which legal arrangements ought to be put in place in order to fully guarantee the respect of the administrative rule of law externally.

Upholding the administrative rule of law externally does not only require the identification of the principles giving effect to the rule of law in the external domain; it also demands that a comprehensive set of enforcement mechanisms are in place with the aim of ensuring that the external administrative power adopts measures in conformity with the principles identified, and that natural and legal persons are able to challenge (directly or indirectly) any act which affects them. Therefore, the last chapter of the thesis (chapter V) aims at analysing how the principles identified in chapter IV could be enforced. The chapter starts by questioning what the Court should review and examines any reasons to be concerned as to the Court's approach. In this context judicial control is certainly relevant, but it is only one component of the enforcement process. Based on this assumption the chapter continues by exploring other forms of out-of-court enforcement: the European Ombudsman and mechanisms of compliance building. Enforcement mechanisms need to take into account the context in which they operate. Ultimately, the chapter suggests that the European Ombudsman can work as catalyst in guaranteeing the

respect of the administrative rule of law externally – particularly in respect of the relations between the Union and natural and legal persons, and that compliance-building mechanisms are particularly suited for regulating the relations between the Union administration and third states.

The ultimate goal of the thesis is to offer to its readers a new way of looking at the external relations of the Union. It tries to make a case for a new path to be followed; it offers a new line of inquiry into the studying of the relations between the Union and third states – including their natural and legal persons. The increasing use of administrative activities aimed at regulating the relations between the Union and its external partners requires understanding the legal implications of such developments. In line with the *finalité* of this thesis, this manuscript will not end with a conclusion. It will instead end with an epilogue questioning the future of administrative law in external relations. It will apply the theoretical framework and methodology developed by the thesis to a case which was recently decided by the European Ombudsman.[23] The case deals with a natural person challenging the Commission's failure to disclose its comments on the draft Serbian Free Legal Aid Act, as contrary to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.[24]

[23] The initial idea for the Epilogue was to present a pending case, however, the case was decided ten days before the thesis formal submission. Therefore, the Ombudsman's decision will also be discussed. Decision on 2 September 2016 of the European Ombudsman on complaint OI/7/2015/ANA against the European Commission, external relations, breach of Article 23 ECGAB.

[24] Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* [2001] L145/43, 31.05.2001.

Chapter I: The increasing relevance of administrative power in external relations

…and the obligation to respect the rule of law when the EU acts externally

1. EU external action meets EU administrative law

The aim of this first chapter is to illustrate the two main premises upon which the thesis is based: the presence of significant administrative power in the way the EU manages its relations with its neighbours, and the obligation on the side of the Union to respect the rule of law when acting externally. In doing so, the chapter will try to explain why the time has now come to merge these two discussions, and will present the challenges faced by this thesis in embarking on this endeavor. Before starting the debate on the two foundational claims, the chapter will explain the choice of the two case studies: the Stabilisation and Association Process and the European Neighbourhood Policy.

2. The EU wider neighbourhood policies under analysis

For the purpose of this thesis the term 'Union wider neighbourhood' includes both the Stabilisation and Association Process and the European Neighbourhood Policy. These two policies have been chosen as case studies for three main reasons. First and foremost, they are two effective examples in understanding the increasing use of administrative power in external relations of the Union. The EU both with the SAP and with the ENP sets up a mode of foreign governance that sees the proliferation of administrative activities exercising a significant power in neighbouring countries. Second, there are many similarities between the pre-accession tools (exemplified in the SAP) and the ENP instruments, making the two policies a suitable comparable example.[1] Third, the fact that the SAP states agreed to prepare themselves to cede part of their sovereignty to the EU, while the ENP states remain sovereign states without accession perspective is an

[1] M. Cremona and C. Hillion, 'L'Union fait la force? Potentials and limitations of the European Neighbourhood Policy as an integrated EU Foreign Security Policy', *EUI Working Paper*, Law no. 2006/39, 8-15; G. Meloni, 'Is the Same Toolkit Used During Enlargement Still Applicable to the Countries of the New Neighbourhood? A problem of Mismatching Between Objectives and Instruments', in G. Meloni and M. Cremona (eds.), *The European Neighbourhood Policy: A Framework for Modernisation?*, *EUI Working Paper*, Law no. 2007/21; R. Dannreuther, 'Developing the Alternative to Enlargement: The European Neighbourhood Policy', 11 *European Foreign Affairs Review* 2006; J. Kelly, 'New Wine in Old Wineskins: Policy Adaptation in the European Neighbourhood Policy', 44 *Journal of Common Market Studies* 2006; B. Van Vooren, 'The European Union as an international actor and progressive experimentation in its neighborhood' in P. Koutrakos (eds.), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar Publishing 2011), 147-172; M. Cremona, 'The European Neighbourhood Policy: More than a Partnership?' in M. Cremona (eds.), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), 244, at 265.

interesting difference that is worth analyzing since it should be reflected in the way in which the administration implements the two policies.[2] The primary political choice in the SAP lies in the Council Conclusions clearly stating that the Western Balkan countries are 'bound to join the Union'.[3] This commitment is reiterated in the preamble of the Stabilisation and Association Agreements (SAAs).[4] The activities implementing the relations between the EU and the SAP countries aim at supporting the candidates and the potential candidates for accession in the final goal of membership. The situation is however different for the European Neighbourhood Policy; the ENP is a *jointly owned* initiative and its implementation requires action on both sides, by the neighbours and the EU.[5] The ENP primary political choice is embedded in a contractual agreement between two – at least in theory – equal parties. Thus, the administrative activities should reflect this reality.

Even though it seems straightforward that the countries under analysis can all be defined as Union neighbours due to their geographical position, it is at the same time important to highlight that the geographical dimension is not necessarily an objective criterion. Neighbourhood is a question of politics as well as geography.[6] It is up to the EU to decide which states are 'special neighbours' and thus entitled to be included in the pre-accession strategy, and which are 'simple neighbours' and thus are placed in the framework of the neighbourhood policy (even if according to article 49 TEU some of them are potential candidates for accession). The Union's choice to place a country in the ENP

[2] Arguably, for the current SAP states accession seems a mirage rather than a concrete perspective (i.e. for Bosnia and Herzegovina, Kosovo and Macedonia).

[3] 'The European Council, recalling its conclusions in Copenhagen (December 2002) and Brussels (March 2003), reiterated its determination to fully and effectively support the European perspective of the Western Balkan countries, which will become an integral part of the EU, once they meet the established criteria.' Presidency Conclusions, Thessaloniki, 19–20 June 2003.

[4] E.g. the preamble of the Stabilisation and Association Agreement concluded by the European Union with Albania states: 'RECALLING the European Union's readiness to integrate to the fullest possible extent Albania into the political and economic mainstream of Europe and its status as a potential candidate for European Union membership on the basis of the Treaty on European Union and fulfilment of the criteria defined by the European Council in June 1993, subject to the successful implementation of this Agreement, notably regarding regional cooperation.' Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, *OJ* [2009] L 107/166, 28.04.2009.

[5] Commission Communication of 11 March 2003, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and South Neighbours', COM(2003) 104 final.

[6] M. Cremona, 'The European Neighbourhood Policy More than a Partnership?', in M. Cremona (eds.), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), 245, at 251.

box rather than in the pre-accession one stems from the political significance that the EU gives to each particular neighbour.[7]

2.1 The Stabilisation and Association Process

The SAP is a 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 official candidates for membership.[8] The SAP does not provide an explicit promise of EU membership, however, at the Santa Maria de Feira European Council meeting in 2000 and again at the EU-Western Balkan Summit in Thessaloniki in 2003 the European Union stated that the SAP countries were 'potential candidates' for EU accession.[9] The SAP assumes that combining stabilisation, which necessarily implies regional cooperation, with accession could be a suitable choice for offering to these countries membership perspective.[10] In this way, stabilisation would remain the *conditio sine qua non* for any movement in the membership direction.

The SAP offers to each Western Balkan state enhanced trade liberalisation, improved financial and economic assistance, a regular political dialogue, cooperation in justice and home affairs, and a new tailor-made category of contractual relations: Stabilisation and Association Agreements.[11] The instruments and the benefits of the SAP are open to all Western Balkan countries; however, their actual availability depends on each country's compliance with the general and country-specific conditions. Therefore, conditionality is a fundamental pillar of the SAP. The process is aimed at helping the Western Balkan countries in speeding up their transition to a market economy and in adopting and implementing EU laws, as well as European and international standards.[12] The SAP

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[7] R. Aliboni, 'The Geographical Implications of the European Neighbourhood policy', 10 *European Foreign Affairs Review* 2005, at 3.

[8] The Western Balkan states include: Albania, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro, Serbia and Kosovo. Croatia as of 1 July 2013 is no longer a SAP states since it become the 28th member of the European Union. Commission Communication of 26 May 1999, 'The Stabilisation and Association Process for Countries of South-East Europe', COM(1999) 235 final. The promise of EU membership 'however vague and unconditional, cannot be withdrawn'. L. Friis and A. Murphy, 'Enlargement of the European Union: Impacts on the EU, the Candidates and the 'Next Neighbours'', 14 *European Community Study Association Review* 2001, at 2.

[9] Declaration of the EU-Western Balkan Summit at Thessaloniki, *Bull. EU* 6-2003, point 1.6.70.

[10] M. Maresceau, *Bilateral Agreements Concluded by the European Community*, Collected Courses (The Hague: Academy of International Law, vol. 309, 2006), at 366.

[11] S. Blockmans, *Tough Love: The European Union's Relations with the Western Balkans* (The Hague: T.M.C. Asser Press 2007), at 251.

[12] European Commission, Directorate General for Enlargement website, 'Stabilisation and Association Process'. Available at: <http://ec.europa.eu/enlargement/policy/glossary/terms/saa_en.htm> (Consulted

includes both overarching administrative instruments aimed at supporting the achievement of the overall goals of the policies (e.g. progress reports, financial assistance instruments, etc.); as well as sector specific instruments aimed at implementing specific areas of cooperation (e.g. visa liberalisation) within the whole framework of the policy.

2.2 The European Neighbourhood Policy

The EU officially launched the ENP in 2003, although its roots can be traced back to 1997 when the central eastern European enlargement began to gather momentum.[13] Arguably, the policy goes back even further to the EU's response to the break-up of the former Soviet Union in the early 1990s. Back then the EU started negotiating Partnership and Cooperation Agreements with the newly independent states and launched the Barcelona Process with the Mediterranean countries in 1995.[14] The Commission dealt separately with the different groups of neighbours (the eastern and the southern) until 2002 when in its strategy papers it became more specific about the need to establish a new coherent approach for all.[15] A Commission Communication on the new 'Wider Europe' policy was published in 2003 and endorsed by the Council in Thessaloniki in the same year. The Council summarised the overall goal of the new policy as follows:

> '[t]o work with partners to reduce poverty and create an area of shared prosperity and values based on free trade, deeper economic integration, intensified political and cultural relations, enhanced cross-border co-operation and shared responsibility for conflict prevention between the EU and its neighbours; [and to] anchor the EU's offer of concrete benefits and preferential relations […] to progress made by the partner countries in different areas, in particular political and economic reform as well as in the field of JHA [Justice and Home Affairs]'.[16]

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on 07.08.2016); A. Tatham, *Enlargement of the European Union* (Alphen aan Den Rijn: Kluwer Law International 2009), at 166.

[13] The Commission in 2001 attached to the Central Eastern European pre-accession country progress reports a Commission Strategy Paper in which it started to develop the concept of 'proximity policy' towards the new neighbours. The Strategy Paper made numerous references to the expanded range of common interests between the Union and the future neighbours, including economic reforms, alignment with the regulatory framework of the internal market, migration and border management. Commission Strategy Paper of 13 November 2001, 'Making a Success of Enlargement', COM(2001) 700 final, at 7; Commission Communication of 11 March 2003, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and South Neighbours', COM(2003) 104 final.

[14] For a comprehensive analysis on the origins of the policy see: M. Cremona, 'The European Neighbourhood Policy More than a Partnership?', in M. Cremona (eds.), *Development in EU External Relations Law* (Oxford: Oxford University Press 2008), 245-300.

[15] Commission Strategy Paper of 9 October 2002, 'Towards the Enlarged Union', COM(2007) 700 final, at 6-7.

[16] Commission Communication of 11 March 2003, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and South Neighbours', COM(2003) 104 final.

Subsequently, in June 2007 the Council set out what it called the 'key principles' of the ENP:

- A strategy based on joint ownership to promote modernisation and reform;
- A single, inclusive, balanced and coherent policy framework;
- A performance driven differentiation and tailor made assistance;
- A policy distinct from the question of EU membership which, however, does not prejudge any possible future developments.[17]

Once the core of the policy was established, the Commission together with the High Representative of the Union for Foreign Affairs and Security Policy (HR), and the European External Action Service (EEAS) continued to modify some aspects of the ENP with the aim of adapting it to changing circumstances. [18] For example, in 2011 after the outburst of the Arab Spring the Commission and the EEAS adopted a Joint Communication titled 'A New Response to a Changing Neighbourhood' according to which more support was to be provided to partner countries building deep and sustainable democracies.[19] Another more recent and radical example is the 2015 Commission and HR Consultation Paper demanding for a more profound revision of the policy.[20] The revision is aimed at challenging 'the assumption on which the policy is based, as well as its scope, and how instruments should be used'.[21] The revision of the policy finds its roots in the recent inability of the Union to offer adequate responses to rapid developments and changing aspirations of its neighbours. On the 11 November 2015 the Commission and High Representative adopted a Joint Communication elaborating a review of the ENP in light of the responses obtained from the consultations.[22] Despite the expectations raised, the Commission Communication on the new ENP did not manage to really break through its structural limitations.[23] However, it tried to take a more pragmatic and focused approach

[17] GAER Council conclusions on European Neighbourhood Policy, 18 June 2007.
[18] The European External action was established by the Treaty of Lisbon (article 27(3) TEU) and was created after its entrance into force. Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ* [2010] L 201/30, 03.06.2010.
[19] The renewed ENP focused on political association and economic integration, the mobility of people, more EU financial assistance, a stronger partnership with civil society and better cooperation on specific sector policies. Joint Communication of 25 May 2011, 'A New Response to a Changing Neighbourhood', COM(2011) 303 final.
[20] Joint Consultation Paper of 4 March 2015, 'Towards a New European Neighbourhood Policy', JOIN(2015) 6 final.
[21] Joint Consultation Paper of 4 March 2015, 'Towards a New European Neighbourhood Policy', JOIN(2015) 6 final, at 3.
[22] Joint Communication of 18 November 2015, 'Review of the European Neighbourhood Policy', JOIN(2015) 50 final.
[23] This view is also shared by H. Kostanyan, 'The European Neighbourhood Policy reviewed: Will pragmatism trump normative values', *CEPS European Neighbourhood Watch*, Issue 121, December 2015.

by listing all the policy objectives on which the relations between the Union and the neighbours should be based. The ENP, likewise the SAP, includes both overarching administrative instruments aimed at supporting the achievement of the overall goals of the policies, as well as sector specific instruments aimed at implementing specific areas of cooperation.

3. The administrative power in the EU wider neighbourhood policies

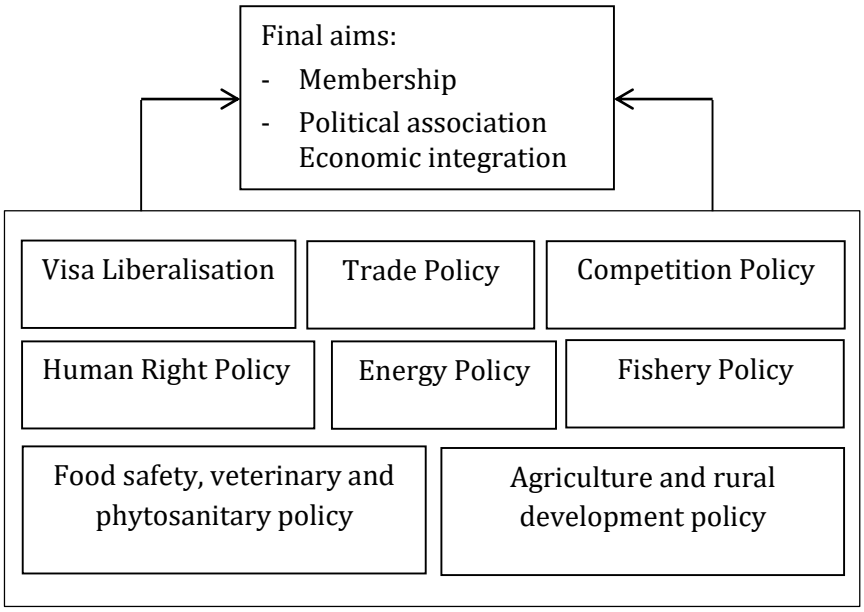
The SAP and the ENP are overarching polices which aim at integrating the neighbouring states within the EU. The SAP countries prepare themselves to become Member States while the EU works with the ENP states to achieve the closest possible political association and the greatest possible degree of economic integration. Therefore, the SAP and ENP are macro policies which embrace a number of other policies to achieve the final goal of integration – whether full or to the greatest possible extent (see some examples in figure 1). In order to achieve the ambitious goals set forth by the SAP and ENP, the EU has so far developed with its external partners what has been defined as 'governance mode of foreign policy'.[24] In other words, the EU strives to achieve with its neighbours stable, long-term, institutionalized relationships; which necessarily imply the need to create a regulatory framework foreseeing policy-making and norm generating structures as well as coordinating and monitoring institutions. It goes without saying that within this mode of foreign governance a pivotal role is played by the Union administration, which has constantly attempted to find solutions aimed at implementing the Union's primary political choices.

The Commission and the European External Action Service are required to administer complex, multi-layered and sectorial relations between the Union and its neighbouring states. However, the administrative tasks specific to the SAP and ENP can nowhere be found in the Treaties. It was the same administration which over the years has developed in the wake of changing circumstances *ad-hoc* solutions aimed at adjusting the Union's mode of foreign governance to the challenges posed by the external

[24] G. De Búrca, 'EU External Relations: The Governance Mode of Foreign Policy', in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The EU's Role in Global Governance The legal Dimension* (Oxford: Oxford University Press 2013), 39, at 42; See also M. Cremona: 'There is a bias, inherent perhaps in the EU system, towards institutionalizing relationships and policy-making to a degree with which we are familiar in the regulatory state but less so in the sphere of foreign policy.' M. Cremona, 'Introduction', *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), 1, at 9.

geopolitical context. The creation of *ad-hoc* solutions has, however, over the years crystallized to form a real array of administrative tasks and procedures aimed at implementing the SAP and ENP. This process has been the result of a constant dialogue between the Commission and the Council which welcomed suggestions made by the Commission communications with subsequent Council Conclusions. Consequently, both the SAP and ENP have been increasingly coordinated through the use of a great diversity of tools but have also shifted their core political nature to a more technocratic-driven administrative setting.

Fig. 1

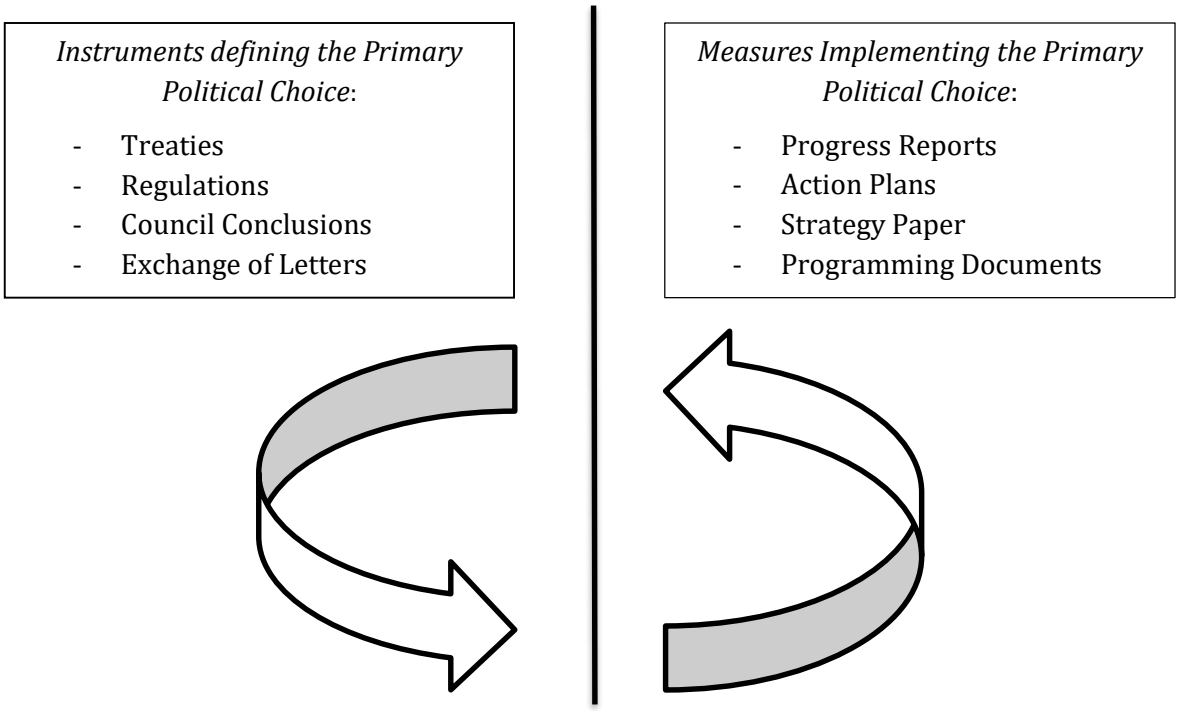


The Union's activities aimed at implementing the SAP and ENP are administrative in nature since they are essentially geared towards meeting the policy objectives of these two policies.[25] If we picture the decision-making machinery of the SAP and the ENP as a cycle (figure 2), on the left side of the cycle we have the instruments defining the Union's primary political choice; while on the right side of the cycle we have the administrative instruments aimed at their implementation. This cycle can also be replicated for the study of other EU external policies: the European Council sets out the strategic interest and

[25] H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013), at 11.

objectives of the Union in external relations, the Council defines those policies, and it is the Commission which executes them and gives them effect.[26]

Fig. 2



Some of the administrative activities aimed at implementing the SAP and ENP are envisaged and adopted within the regulatory framework established by the agreements concluded by the EU (and its Member States) with each neighbouring state. These activities are specifically adopted in order to guarantee the smooth functioning of the international agreements. Examples of this type would be 'Association Council Decisions' adopted within the intergovernmental framework established by the agreements.[27] Alongside these acts, other administrative activities are adopted outside the commonly agreed scheme – even if sometimes they make use of it – with the aim of implementing

[26] See in this respect Opinion of Advocate General Sharpston delivered on 26 November 2015 on Case C-660/13 *Council* v. *Commission*, EU:C:2015:787, para. 106.

[27] Each agreement concluded by the Union (and its Member States) with each neighbouring state establish an Association Council ('Stabilisation and Association Council', or 'Partnership and Cooperation Council' or 'Association Council' depending on the type of agreement) composed of members of the Council of the European Union and of the European Commission, on the one hand; and of members of the Government of the neighbouring state, on the other. Association Councils have the power to take decisions within the scope of the agreements in the cases provided for therein. Each Association Council shall establish its rules of procedures. Finally, the Association Council are assisted by a Committee and (if necessary) by other special committees or bodies. E.g. articles 119 to 124, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, *OJ* [2010] L 108/03, 29.04.2010.

the overall SAP and ENP goals. Examples of this type are progress reports, impact assessments and Memoranda of Understanding.[28] The focus of this thesis will be on the latter instruments. This choice is made since the activities concluded within the framework of the agreements are regulated by principles and procedures already agreed by the parties while the one adopted outside the regulated framework – despite their relevance – are adopted without clear legal guidance. The next two sub-sections will explain the development and the relevance that the administrative power has acquired within the SAP and the ENP over the years.

3.1 The ever-evolving rise of administrative power externally

The wars leading to the break-up of ex-Yugoslavia were a tremendous shock for the European Union, which found itself unprepared to deal with such an increase of violence at its borders. At the end of the 1999 Kosovo war the political leaders of the EU – against the backdrop of yet another violent crisis – reached the conclusion that the incentives for regional cooperation in the Western Balkans had to be tied to the prospect of Union membership.[29] With this objective in mind the Commission on 26 May 1999 presented its Commission Communication initiating the SAP.[30] The Communication proposed the content of the Process as well as its first instruments, which were a combination of previously existing tools and new initiatives. This initial Communication was then followed by others which adjusted and developed it. For example, the 2003 Communication on the 'Western Balkans and their European Integration' introduced the 'European Partnerships' as tools to better steer the membership process.[31] The SAP borrowed many of its tools from the pre-accession strategy as developed by the Commission in light of the needs faced by the Central Eastern European states on their path to membership.[32] However, the mode of foreign governance used for the Central Eastern European states was creatively modified by the same Commission in order to meet the demands of the Western Balkan region, especially in situations of domestic or

[28] Chapter II, section 3.
[29] S. Blockmans, *Tough Love: The European Union's Relations with the Western Balkans* (The Hague: T.M.C. Asser Press 2007), at 249.
[30] Commission Communication of 26 May 1999, 'The Stabilisation and Association Process', COM(99) 235 final.
[31] Commission Communication of 21 May 2003, 'The Western Balkans and European Integration', COM(2003) 285 final.
[32] M. Maresceau, *Bilateral Agreements Concluded by the European Community*. Collected Courses (The Hague: Academy of International Law, vol. 309, 2006), at 366.

bilateral deadlock. Over the years the Commission, with the aim of developing new incentive mechanisms for further supporting the SAP states on their road to membership, introduced further changes to the SAP implementing structure by introducing – among others – the High Level Accession Dialogue with Macedonia, the Structured Dialogue on Justice with Bosnia and Herzegovina, the Structured Dialogue on the Rule of Law with Kosovo, and the High Level Dialogue with Albania.[33]

The 2004 Central Eastern European 'big bang enlargement' saw the need to address both the relations between the EU and the new neighbours (i.e. Ukraine, Belarus, etc.) as well as the situation of the staff of Directorate General Enlargement (DG ELARG) which found itself 'task-less' from one day to another. Against this background in 2003 the 'Wider Europe' task force was formed within Directorate General for External Relations (DG RELEX) and was staffed with DG ELARG civil servants with the goal of addressing the challenges posed by the new geopolitical position of an enlarged EU.[34] The Wider Europe' task force, finding itself in a position to think about new modes of foreign governance that would implement the goals set forth by the ENP, determined that using the successful tools of the pre-accession process was probably the most suitable option.[35] This decision was probably very much influenced by the transfer of human resources from DG ELARG to what was DG RELEX which led to some direct mechanical borrowing of instruments and strategies from the successful enlargement experience to the newly established ENP.[36] The regulatory framework envisaged for the ENP in 2003 underwent over the

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[33] European Parliament, Directorate General for External Policies, 'The Western Balkans and EU Enlargement: Lessons learned, ways forward and prospects ahead', Study for the European Parliament Committee on Foreign Affairs, 5 November 2015, at 13. Available at: <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/534999/EXPO_IDA(2015)534999_EN.pdf> (Consulted on 07.08.2016). See also S. Kacarska, 'Losing the Rights along the Way: The EU-Western Balkans Visa Liberalisation', 16 *European Politics and Society* 2015, 363-378.

[34] E. Tulmets, 'Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy', in C.F. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the European Union Towards a New Architecture* (Oxford: Oxford University Press 2010), 297, at 315.

[35] 'Let me try to explain what model we should follow. I admit that many of the elements which come to my mind are taken from the enlargement process.' R. Prodi, 'A Wider Europe: A Proximity Policy as the Key to Stability', Brussels, SPEECH/02/619, at 4.

[36] This explains the many similarities between the ENP and the pre-accession instruments. M. Cremona, 'The European Neighbourhood Policy: More than a Partnership?', in M. Cremona (eds.), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), 245, at 265; N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU A Legal Analysis* (Oxford: Hart Publishing 2014), at 74; E. Tulmets, 'Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy', in C. F. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the European Union Towards a New Architecture* (Oxford: Oxford University Press 2010), 297, at 315; J. Kelly, 'New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy', 44 *Journal of Common Market Studies* (2006), at 31 and 32.

years some changes in light of the political evolutions in the Union's neighbourhood (e.g. the Arab Spring, the Crimea crisis, etc.). For the latest revision of the policy in 2015 the Commission and the High Representative held, as already mentioned, an open consultation. The Consultation Paper clearly shows the difficulties faced by the administration itself in adjusting its implementing instruments and procedures to changing realities in order effectively achieve the goals of the ENP. Some of the questions asked in the Consultation Paper specifically referred to the use of the Commission and EEAS powers.[37] The administrative actors – finding themselves in the position of constantly developing new tools and strategies to face changing realities without clear parameters – slowly but surely developed and increased their power in external action.[38]

3.2 The relevance of the administrative power externally

The ensemble of administrative activities (i.e. progress reports, action plans, impact assessments, Memoranda of Understanding, etc.) aimed at achieving the goals set forward by the SAP and ENP are not neutral. Regardless of their legal nature, these instruments have a significant impact on the Union, on third countries, and on natural and legal persons. Internally, they prepare and guide the Union's future action. Externally, some instruments have an undeniable regulatory function in as far as they are quite detailed as to which standard shall be used by third countries when passing legislation.[39] The guidance offered by these documents has to be followed because the advantages of compliance outweigh the costs of non-compliance and because implementation mechanisms exist whereby positive or negative sanctions can be imposed.[40] Any doctrine

[37] E.g. 'Are the ENP Action Plans the right tool to deepen our partnerships? Are they too broad for some partners? Would the EU, would partners, benefit from a narrower focus and greater prioritisation?'; or 'Can EU and/or partner interests be served by a lighter reporting mechanism? Should the reporting be modulated according to the level of engagement of the ENP partner concerned?'. Joint Consultation Paper of 4 March 2015, 'Towards a New European Neighbourhood Policy', JOIN(2015)6 final.

[38] Chapter II, section 2.

[39] For example, the Action Plan with Jordan requires the latter (among others):

- To sign a Memorandum of Understanding with the Monitoring and Information Centre (MIC) of the Community Civil Protection Mechanism;
- To 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.
- To 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).

[40] Examples of negative sanctions are: suspension of financial aid, postponement of the signature of an agreement, etc. Examples of positive incentives are: visa liberalisation, financial assistance granted with the aim of implementing the guidelines.

centred on the traditional principle of sovereignty neglects the impact that the most powerful legal orders have in acting as standard setters in the world, and runs the risk of being blind and deaf to such weighty phenomena.[41] The importance of these activities for third countries is evidenced by the springing up all over the neighbourhood states of think-tank and associations that have as one of their main aims the review of the various progress reports and action plans that the Commission and the EEAS compile.[42] Finally, the presence of administrative self-imposed rules for virtually every act that the administration adopts in order to implement its relations with the neighbouring states says something about the importance of the acts themselves. If progress reports, action plans, programming documents, impact assessments, etc. lacked impact, why would the administration develop internal guidelines for the adoption of simply staff working documents? The adoption of administrative self-imposed rules in a way shows that the administration acknowledges their relevance.

The impact of the administrative activities on the position of individuals can be clearly sensed by the cases that reached the CJEU and to the European Ombudsman in which individuals (especially from third countries) challenged the action or inaction of the European Commission in developing and implementing the Union's external action.[43] The adoption of administrative instruments increases the predictability of how a certain policy will be implemented; thus, the expectations of individuals increase as to the

[41] A. von Bogdandy, 'Common principles for a plurality of orders: A study on public authority in European legal area', 12 *International Journal of Constitutional Law* 2014, at 988.

[42] Some examples are the Inicijativa za monitoring europskih integracija BiH available at: <http://eu-monitoring.ba/> (Consulted on 21.01.2016); Solidar Global Network available at: <http://solidar.org/IMG/pdf/tunisia_v23.10.13_fr.pdf> (Consulted on 07.08.2016); Al Hayar Center for Civil Society Development available at: <http://www.hayatcenter.org/index.php/en/> (Consulted on 07.08.2016); Balkan Civil Society development network available at: <http://www.balkancsd.net/> (Consulted on 07.08.2016); NGO Monitor available at: <http://www.ngo-monitor.org/article/analysis_of_the_eu_s_report_implementation_of_the_european_neighborhood_policy_in_israel_progress_in_and_recommendations_for_actions_> (Consulted on 07.08.2016); Beogradski centar za bezbednosnu politiku available at: <http://www.bezbednost.org/Bezbednost/1/Naslovna.shtml> (Consulted on 07.08.2016).

[43] See cases: Case T-367/03 *Yedaş Tarim ve Otomotiv Sanayi ve Ticaret AŞ* v. *Council of the European Union and Commission of the European Communities*, EU:T:2006:96; Case T-346/03 *Krikorian* v. *European Parliament, Council and Commission*, EU:T:2003:348; Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97; Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418; Case C-581/11 *P Mugraby* v. *Council and Commission*, EU:C:2012:466; and Ombudsman decisions: Decision on 26 October 2000 of the European Ombudsman on complaint 530/98/JMA against the European Commission, external relations, breach of Article 4 ECGAB; Decision on 28 June 2005 of the European Ombudsman on complaint 933/2004/JMA against the European Commission, external relations, breach of Article 4 ECGAB; Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, General financial and institutional matters, Article 4 ECGAB and duty of care.

determination of the Union to enforce its policies.[44] For example, the Union made clear in a number of Commission communications that it has a clear conditionality policy according to which it will activate sanctions in case a third country fails to respect human rights.[45] The adoption of this type of communications, as well as of progress reports indicating the failure on the side of the third country to respect human rights, increases the expectations of individuals, whose human rights are violated, that measures – like suspension of aid – will be taken by the Union at the moment in which their country violates human rights.

3.3 The third step of waltz

If we visualise what has so far been described by this chapter as a three-step waltz, we will see that the third step is still missing. Mashaw evocatively suggests imagining the development of administrative law as a waltz, a three-step pattern repeated over and over again.

> 'First, something happens in the world. Second, public policymakers identify that happening as a problem, or an opportunity, and initiate new forms of governmental action to take advantage of or to remedy the new situation. Third, these new forms of action generate anxieties about the direction and control of public power. Means are thus sought to make the new initiative fit within existing understandings of what it means to be accountable to law.'[46]

If we transpose this three-step waltz to the discussion undertaken by this thesis, the dance would go in this direction. The fall of the Berlin wall, the Yugoslav wars, the '2004 big bang enlargement', and the subsequent political developments changed radically the power balance in the European continent. The EU policymakers identified in these occurrences opportunities to initiate new forms of governance with their neighbours, and associated with this event the need to develop an administrative apparatus capable of implementing such policies. These new forms of governance – as it will become clearer in the next two

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[44] H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013), at 536.

[45] Among others: Commission Communication of 23 May 1995, 'The inclusion of respect for democratic principles and human rights in agreements between the Community and third countries', COM(95) 216 final; Report from the Commission to the Council and the European Parliament on Common principles for future contractual relations with certain countries in South-Eastern Europe of 2 October 1996, COM(96)476 final; Commission Communication of 8 May 2001, 'The European Union's role in promoting human rights and democratisation in third countries', COM(2001) 252 final.

[46] J.L. Mashaw, 'Recovering American Administrative Law: Federalist Foundations, 1787-1801', 115 *Yale Journal* 2006, at 1337.

chapters – have started to shows signs that their implementation presents some tensions as to how the power is exercised and controlled; but administrative law considerations are still missing.

It is now, thus, time to take the third step of waltz and search for means to make sure that the action of the Union in external relations fit within the Union's understanding of what it means to be subject to the administrative rule of law. The SAP and the ENP are exemplary case studies in order to understand the challenges on the way of integrating the proliferation of these new forms of external administrative action into a coherent system of protection offered by the administrative rule of law. Before focusing on the identification of the principles and rules that shall guide the action of the administration externally, it is important to inquire as to whether the Union is actually under an obligation to respect the rule of law when acting on the international scene.

4. The obligation to respect the rule of law when the EU acts externally

In order to determine whether we can talk of the rule of law as a legal norm guiding the external relations of the Union, the argument will proceed as follows. First, the new Lisbon Treaty articles which make a clear reference to the rule of law in the context of external relations will be analysed; and secondly, the Court of Justice of the European Union (hereafter referred as the 'CJEU' or 'the Court') case law will be examined to stress how the rule of law is a principle that needs to be respected internally as well as externally.

4.1 The obligation in the Treaties

The Treaties of the European Union seem to be rather straightforward in establishing the obligation on the Union to respect the rule of law when acting externally. The most significant articles will be hereby analysed.

> Article 3(5) TEU: 'In its relations with the wider world, the *Union shall uphold* and promote *its values* […].' [emphasis added]

The values to which article 3(5) TEU refers are the ones listed in article 2 – among which is the rule of law. The Union under this article is not only required to promote the rule of law; it is also required to uphold it in its relation to the wider world. Even if it is easy to

belittle such idealistic ambition, it is a fundamental Treaty provision formulated in mandatory terms: *shall* uphold.[47]

> Article 21(1) TEU: '*The 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: democracy, the *rule of law*, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.' [emphasis added]
>
> Article 21(3) TEU: 'The *Union shall respect the principles* and pursue the objectives set out in *paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action* covered by this Title and by Part Five of the Treat'. [emphasis added]

Article 21 TEU is probably the most significant article. Differently from article 3(5) TEU, article 21 TEU uses the term principles as contrary to values. Even if it is doubtful that those responsible for the terminological variation between 'values' and 'principles' in the Treaties intended to introduce a theoretical distinction, it is still remarkable that while in article 2 TEU the rule of law is defined as a value, in article 21 TEU is defined as a principle. Values have a more indeterminate configuration and can be seen as part of the cultural patrimony or common heritage of Europe whereas legal principles possess a more defined structure which makes them more suitable for the creation of legal rules.[48] Most importantly, article 21(3) TEU makes a clear link between the respect of the principles and the development and implementation of the Union's external action. Again, also in this article the provision is formulated in mandatory terms: *shall* respect.

The respect of the rule of law, in the development and implementation of the different areas of Union external action, is not only a principle that constrains the action of the Union: it is also an objective. The Union according to article 21(2) TEU shall define and pursue common policies and actions in order to:

> Article 21(2)(b) TEU: 'consolidate and support democracy, *the rule of law*, human rights and the principles of international law.' [emphasis added]

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[47] P. Eeckout, 'A normative basis for EU external relations? Protecting internal values beyond the Single Market', in M. Krajewski (eds.), *Services of General Interest Beyond the Single Market: External and International Law Dimenstions* (The Hague: T.M.C. Asser Press 2015), 219, at 220.

[48] L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', 6 *European Constitutional Law Review* 2010, at 366; M.F. Esteban, *The Rule of Law in the European Constitution* (The Hague: Kluwer Law International 1999), at 40 and 41.

> Article 21(2)(h) TEU: 'promote international system based on stronger multilateral cooperation and *good global governance*.'[49] [emphasis added]

The fact that the rule of law is also an objective that the Union needs to pursue in its relation with the outer world simply strengthens the claim that the Union needs to respect the rule of law when interacting with third states. The conjunction of objectives and principles does not undermine the distinction between the rule of law as a principle and as an objective to be pursued.[50]

4.2 The obligation in the case law of the Court of Justice

In its very famous *Les Verts* judgment the CJEU already back in 1986 referred to the European Community as a 'a community based on the rule of law' to the extent that neither the Member States nor the Community's institutions could avoid review of the conformity of their acts with the Community's 'constitutional character'.[51] Subsequently in its *Opinion 1/91*, by contrasting the EEA agreement with the Community legal order, the Court stated that:

> '[…] the *EEC Treaty*, albeit concluded in the form of an international agreement, none the less *constitutes the constitutional charter of a Community based on the rule of law*.'[52] [emphasis added]

There seems to be widespread consensus among scholars that the rule of law has increasingly become an overarching and primary principle of Union constitutional law. Von Bogdandy concludes in his article on the founding principles of EU law that the 'values' listed in article 2 TEU – among which the rule of law – can be understood as 'constitutional principles and a constitutional legal discourse based thereon is viable both

[49] Good global governance (from a legal perspective) has increasingly been the subject of research of the new emerging Global Administrative Law project; which in its essence is a rule of law project. It aims at constitutionalising transnational public administration by binding it to general principles of administrative law. F. Schuppert, 'New Modes of Governance and the Rule of Law', in M. Zürn, A. Nollkaemper, and R. Peerenboom (eds.), *Rule of Law Dynamics: In an Era of International and Transnational Governance* (Cambridge: Cambridge University Press 2012), 90, at 103.

[50] A. Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch', 16 *European Law Journal* 2010, at 107.

[51] Case 294/83 *Les Verts* v. *Parliament*, EU:C:1986:166, para. 23; L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', 6 *European Constitutional Law Review* 2010, at 359.

[52] Opinion 1/91 *of the Court Pursuant to article 228 of the EEC Treaty on the Draft Treaty on the Establishment of the European Economic Area*, EU:C:1991:490, para. 21.

from a theoretical and technical legal point of view'.[53] Pech is of the idea that article 2 TEU ultimately clarifies that the Union is 'founded on' the rule of law and that this is a 'foundational principle of constitutional value'.[54] Compliance with the respect of the rule of law is not labelled as being an obligation to be respected only when the Union acts internally. Achieving this constitutional value demands that the Union – in the exercise of its powers – respects the rule of law both internally and externally. If the rule of law is to be understood as a legal principle having constitutional value in the EU polity, the latter should be upheld both to its actions having an external as well as an internal dimension. This assumption of legal unity of EU law can also be justified in light of the new growing importance of guaranteeing coherence in Union's action.[55] With the entry into force of the Treaty of Lisbon significant emphasis has been put on the importance of guaranteeing consistency between Union's policies and activities.[56]

As Cremona suggests, article 21 TEU – with its long list of principles and objectives for all external action – 'is intended to bridge policy divisions and to enhance policy coherence.'[57] Developing this line of argument, it can be added that article 21 TEU is also about guaranteeing consistency as to the obligation on the side of the Union to respect its foundational values when developing and implementing its action (both internally and externally). Article 21 TEU formally extends the obligation on the side of the Union to comply with its foundational value when acting in the external domain. Respecting the

[53] A. Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch', 16 *European Law Journal* 2010, at 111.
[54] L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* 04/09, at 61.
[55] A. Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch', 16 *European Law Journal* 2010, at 109.
[56] Some significant examples are: article 13(1) TEU 'The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.'; article 21(3) TEU 'The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.'; article 7 Treaty on the functioning of the European Union, *OJ* [2010] C 83/01, 30.03.2010 (hereafter TFEU) 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.'; and article 256(2)(3) TFEU '[…] Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected. […] Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.'
[57] M. Cremona, 'Coherence in European Union foreign relations law', in P. Koutrakos (eds.) *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar 2011), 55, at 89.

rule of law is not a competence that the Union has to achieve, but a value to be upheld. However, if a parallelism can be made with the principle of complementarity developed by Dashwood and Heliskoski, the respect of the rule of law as a constitutional value can only be achieved once the Union complies with the rule of law in the development and implementation of *all* its actions.[58] The Union, in respecting the rule of law when entering in international commitments, works towards upholding the rule of law in the Union legal order.[59] It complements the respect of the rule of law as a constitutional principle. The respect of the rule of law externally is to be read on the grounds of unity, coherence, and complementarity of the Union legal order.[60]

The CJEU seems to be of the same view. In both *Kadi I* and *Kadi II* it stressed the importance of reviewing any community measure in light of fundamental rights in order to ensure consistency with the expression 'a Community based on the rule of law'.[61] The expression 'Union based on the rule of law' instead of 'Community based on the rule of law' was for the first time used in the *E & F* case.[62] This new expression seems to reinforce the idea that the rule of law is a constitutional principle covering all actions of the Union and not only the ones under the old Community pillar. The Court in the *Air Transport* case reinforced the role of article 3(5) as obliging the Union to respect the Union's values when acting externally.

> '*Under Article 3(5) TEU*, the European Union is to contribute to the strict observance and the development of international law. Consequently, *when it adopts an act*, *it is bound to observe international law* in its entirety.'[63] [emphasis added]

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[58] A. Dashwood and J. Heliskoski, 'The Classic Authorities Revisited', in A. Dashwood and C. Hillion (eds.), *The General Law of E.C. External Relations* (London: Sweet & Maxwell 2000), 3, at 13.

[59] The principle of complementarity has been recently affirmed by the CJEU in Case C-658/11 *Parliament* v. *Council*, EU:C:2014:2025, paras 55-57.

[60] Eeckout in one of its recent pieces clearly stated '[t]he EU is required to act externally according to its own constitutionally determined normative basis: i.e. its values.' P. Eeckout, 'A normative basis for EU external relations? Protecting internal values beyond the Single Market', in M. Krajewski (eds.), *Services of General Interest Beyond the Single Market: External and International Law Dimenstions* (The Hague: T.M.C. Asser Press 2015), 219, at 226; see also E. Herlin-Karnell, 'EU values and the shaping of the international legal context', in D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (Cambridge: Cambridge University Press 2014), 89, at 97.

[61] By no means may EU measures challenge 'the principles that form part of the very foundations of the EU legal order'. Cases C-402/05 *P* and C-415/05 *P Kadi and Al Barakaat International Foundation* v. *Council and Commission*, EU:C:2008:461, para. 304.

[62] '[T]he European Union is based on the rule of law and the acts of its institutions are subject to review by the Court of their compatibility with EU law and, in particular, with the Treaty on the Functioning of the European Union and the general principles of law.' Case C-550/09 *E & F*, EU:C:2010:382, para. 44.

[63] Case C-366/10 *Air transport Association of America* v. *Secretary of State for Energy and Climate Change,* EU:C:2011:864, para. 101.

If the Court could make the link between the Union's obligation to contribute to the strict observance and the development of international law and the Union's obligation to observe international law when adopting an act, it would be very difficult to argue that the same link could not be established under the same article between the Union obligation to uphold its values – among which the rule of law – and the Union's obligation to respect them when adopting an act.

The Court in a recent case on a request from the European Parliament to annul a CFSP Council Decision on the signature and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to Tanzania; made the direct link between the obligation to respect the rule of law in 'all action of the European Union' and article 21 TEU.[64] The Court clearly stated:

> 'As regards, in particular, provisions of the EU-Tanzania Agreement concerning *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.*'[65] [emphasis added]

Furthermore, the Court in the *H* case extended its jurisdiction to disputes having a CFSP dimension. According to the Court, the Treaties provisions limiting its jurisdiction over CFSP measures (articles 24(1) TEU and 275 TFEU) need to be interpreted narrowly.[66] In reaching such important conclusion the Court refers to the Union's obligation to respect the rule of law in its internal and external action.[67]

In light of the analysis so far conducted, there can be little argument as to the validity of the Union's obligation to respect the rule of law as a legal norm structuring the Union's external action. However, even under the premise of uniform validity of the principle internally and externally, the question still arises as to whether this corresponds to a

[64] Case C-263/14 *European Parliament* v. *Council of the European Union*, EU:C:2016:435.
[65] Case C-263/14 *European Parliament* v. *Council of the European Union*, EU:C:2016:435, para. 47.
[66] Case C-455/14 *H* v. *Council, Commission and EUPM*, EU:C:2016:569, para. 40.
[67] '[I]t must be noted that, as is apparent from both Article 2 TEU, which is included in the common provisions of the EU Treaty, and Article 21 TEU, concerning the European Union's external action, to which Article 23 TEU, relating to the CFSP, refers, the European Union is founded, in particular, on the values of equality and the rule of law […]. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law.' Case C-455/14 *H* v. *Council, Commission and EUPM*, EU:C:2016:569, para. 41.

uniform content.[68] In order to construct the features that the rule of law assumes externally, it seems reasonable to use as a starting point the meaning that the rule of law assumes when operating internally and consequently adjust it to the external context.

4.3 The challenges in articulating the rule of law externally

The 'external rule of law', in the same way as the internal, is an organizational principle to the extent that it governs the exercise of Union's power by subjecting it to the respect of principles and rules. However, some structural differences between the external and the internal domains, and the conduct of specific subjects in respect of the external realm require re-thinking the application of the rule of law externally.

❖ Change of actors

The major difference between the two realms lies in the change of actors. Internally the principles giving effect to the rule of law regulate the relation between the Member States and the Union, and between the national or Union authorities and the persons under their jurisdiction. Externally the Union is required to respect the rule of law in its relations with those outside the EU legal system. Shall the right to be heard be granted to third countries when a measure is addressed to them? Shall the duty of care be respected when the Union makes complex evaluations having an impact on third countries? The change of interlocutors demands rethinking the application of the principles giving effect to the administrative rule of law internally in light of the distinctive characters of the decision making process in the external domain. This passage is necessary in ensuring that the principles giving effect to the rule of law internally would also serve their function externally. The necessity of possibly attuning the principles derived from the rule of law to the domain should not be seen as a heresy. As Cremona suggests 'principles operate in their particular context and the external context is simply a manifestation of that inherent contextual operation of principles'.[69] Principles giving effect to the rule of law can be understood as norms having a high degree of generality as to their content. They can be

[68] A. Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch', 16 *European Law Journal* 2010, at 109.
[69] M. Cremona, 'Structural principles and their Role in EU External Relations Law', in M. Cremona (eds.) *Structural Principles in EU External Relations Law* (London: Hart Publishing forthcoming).

valid for a whole subject (e.g. contracts) or for a general branch of law (e.g. administrative law), but can also acquire sector specific connotations.[70]

❖ The unclear legal nature of external acts

The external domain is characterised by the presence of a dense net of instruments of unclear legal nature. As clearly pointed out by AG Sharpston in one of her recent opinions on the use of non-legally binding instruments externally stated:

> '[…] unlike the internal Union action, the instruments through which the Union acts externally are not limited to those for which the Treaties expressly provide, establish the form and effects and lay down the procedural steps to be taken.'[71]

The conflict between the use of non-binding instruments and the rule of law is real and it should not be wished away by reference to these documents as being simply 'internal working paper documents' or 'internal coordinating documents'.[72] Even the Court, despite its tendency to privilege substance over form in deciding which measures may be challenged, has proven inefficient in giving effect to the rule of law in case of non-legally binding acts.[73] Finally, it should not be forgotten that in the EU discourse on the invasiveness of Union power in the activities of third countries is not perceived as harmful and – consequently – as not actionable.[74] The Union developed over the years this image of acting externally as a normative power reflecting in its action its values. A more thorough analysis as to the features and addresses of the power exercised by the administration externally is, thus, in order.

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[70] M. D'Alberti, 'Diritto Amministrativo e Principi Generali', in M. D'Alberti (eds.) *Le nuove mete del diritto amministrativo* (Bologna: Il Mulino 2010), at 67.

[71] See in this respect Opinion of Advocate General Sharpston delivered on 26 November 2015 on Case C-660/13 *Council* v. *Commission*, EU:C:2015:787, para. 107.

[72] On the conflict between soft law and the rule of law internally see M. Dawson, 'Soft Law and the Rule of Law in the European Union: Revision or Redundancy', in B. de Witte and A. Vauchez (eds.) *Lawyering Europe: European Law as a Trans-national Social Field* (Oxford, Hart Publishing, 2013), 221-242.

[73] In relation to the difficulties posed by the CJEU in reviewing no binding acts in the internal domain see: J. Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law', 48 *Common Market Law Review* 2011, 329-355.

[74] The idea of the EU as a Union of values is reflected in the Laeken Declaration: 'What is Europe's role in this changed world? Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions.' See also M. Cremona, 'Values in EU Foreign Policy', in P. Koutrakos and M. Shaw (eds.), *Beyond the established orders Policy interconnections between the EU and the rest of the world* (Oxford: Hart Publishing 2011), 275-315; and I. Manners, 'Normative Power Europe: A Contradiction in Terms?',40 *Journal of Common Market Studies* 2002, 235-258.

❖ A reticent Court

Besides these structural differences between the external and the internal domains, the respect of the rule of law externally is challenged by a reticent Court. As Cremona suggests, 'the Court appears to be reticent (non-interventionist) if not deferential as regards the policy choices of the political institutions in external relations; it does not question them'; even more it 'emphasise[s] the need for the political institutions to retain their policy discretion, their room for manoeuvre'.[75] In other words, if internally the Court has been the main driving force in giving effect to the rule of law,[76] externally this does not seem to be the most immediate solution. If on the one hand the Court in some instances showed its willingness to operationalise the rule of law externally by constraining the exercise of administrative power, on the other, it confined itself to stating that the Commission enjoys a wide margin of discretion without indicating any constraints to it. The Court in *Al-Jubail* – a case dealing with anti-dumping – was ready to extend the right to hear the other side also in case of acts of general application so as to protect external importers.[77] Moreover, in the *Front Polisario* case on the legality of a Council decision on the adoption of an agreement in the form of exchange of letters between the EU and the Republic of Morocco, the General Court established that the EU institutions even when enjoying a large margin of discretion – in this case deciding whether to conclude an agreement with a third state – have the obligation to comply the duty of care.[78] In contrast, in the cases of *Mugraby* and of a *coalition of Turkish citizens*, the General Court stated clearly that the implementation of suspension mechanisms is a matter of discretion of the Commission which excludes the right for an individual to

[75] M. Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice', in A. Thies and M. Cremona (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges*, (London, Hart Publishing 2014), 15, at 15.

[76] L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', 6 *European Constitutional Law Review* 2010, at 370.

[77] Case C-49/88, *Al-Jubail Fertilizer* v. *Council*, EU:C:1991:2, para. 15; see also H.P. Nehl, *Principles of Administraive Procedures in EC Law* (Oxford: Hart Publishing 1999), 74-75; Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, paras 224 and 225.

[78] '[J]udicial review must necessarily be limited to the question whether the competent EU institution, in this case the Council, by approving the conclusion of an agreement such as that approved by the contested decision, made manifest errors of assessment (see, to that effect, judgment of 16 June 1998 in *Racke*, C-162/96, ECR, EU:C:1998:293, paragraph 52). That being the case, in particular where EU institution enjoys a wide discretion, in order to verify whether it has committed a manifest error of assessment, the Courts of the European Union must verify whether it has examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached (judgments of 21 November 1991 in *Technische Universität München*, C-269/90, ECR, EU:C:1991:438, paragraph 14, and 22 December 2010 *Gowan comércio Internacional e Servios*, C-77/09, ECR, EU:C:2010:803, paragraph 57).' Case T-512/12 *Front Polisario* v. *Council of the European Union*, EU:T:2015:953, paras 224 and 225.

require the Commission to take a position in that connection. Even if one could agree that individuals have no right to require the Commission to take a position in respect of their claims, one could still expect from the Court to provide indications as to whether there are any constraints to the Commission's discretion – e.g. the duty to give reasons as to why it decided not to act.[79]

In the context of external relations, the Court might be reluctant to impose procedural obligations or grant procedural rights to third countries and third countries' citizens without a first step from the legislator or the administration itself. In fact, the Court after having decided in *Al-Jubail* to extend the duty to hear the other side to acts of general application, in the *CEUC* case limited the circle of beneficiaries of procedural protection to those parties which had a financial or economic interest at stake.[80] In the *Front Polisario* case, the General Court was probably ready to extend the duty of care since the action of the Union (i.e. the conclusion of agreements in the form of exchange of letters with Morocco) had the possible effect of violating human rights in West Sahara.[81] The decision to expand the duty of care to such a sensitive area of the Union's external action might have been the result of the Union's new emphasis on carrying out a human rights impact assessment before the Union concludes an agreement with a third state.[82] In

[79] Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418, paras 38-39; Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 50.

[80] Case C-170/89, *Bureau des Unions des Consommateurs (BEUC)* v. *Commission*, EU:C:1991:450, para. 24.

[81] '[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).' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 228.

[82] The 2012 Action Plan requires the Commission to incorporate human rights in all impact assessment when conducting negotiations on trade agreements that have significant economic, social and environmental impacts. Council Document of 25 June 2012 'Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12; European Commission, Directorate General for Trade, document of October 2015 titled: 'Trade for all, towards a more responsible trade and investment policy strategy' also stresses the importance of carrying out impact assessments, at 18, 23 and 26, available at: <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> (Consulted on 07.08.2016). Finally, DG TRADE itself established guidelines as to how to carry out human rights impact assessments 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016).

general, the CJEU in external relations has always been careful to understand the political sensitiveness of certain situations.[83]

❖ A divided legislator

Next to the Court, the articulation and operationalisation of the rule of law might also be guaranteed by inter-institutional conflicts or by a strong motivation on the side of the Union to maintain its role as normative power in the international arena.[84] The Council has not yet shown any real interest in effectively executing the respect of the rule of law when the Union acts externally; however, the European Parliament has shown in recent instances a real willingness to oversee the power of the Commission in external relations. During the negotiations for the IPA II regulation the European Parliament pushed for the introduction of a declaration according to which the Commission shall conduct a strategic dialogue with the Parliament on the strategising and programming of financial assistance.[85] The Commission according to the declaration, differently from the past, 'will have to take into account the position expressed by the European Parliament on the matter'.[86] The European Parliament resolutions on the evaluation of the EU's actions in the area of human rights protection in third countries provide another example. In these documents the European Parliament expresses some concerns as to how the Commission establishes benchmarks and monitors the respect of human rights, and as to the failure to take appropriate or restrictive measures in the event of a situation marked by persistent human rights violations.[87] Overall, the European Parliament demands a more principled and proceduralised approach in the way the EU implements its human rights policy.

[83] M. Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice', in A. Thies and M. Cremona (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges*, (London, Hart Publishing 2014), 15, at 15.

[84] See preamble of the Lisbon Treaty: 'Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

[85] Interview with EU civil servant working in the European Parliament's Committee on Foreign Affairs, 19.03.2014, Florence.

[86] 'Declaration by the European Commission on the strategic dialogue with the Parliament', Regulation (EU) No. 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument for Pre-accession Assistance (hereafter IPA II), *OJ* [2014] L77/13, 15.03.2014.

[87] The European Parliament '[c]onsiders that failure to take appropriate or restrictive measures in the event of a situation marked by persistent human rights violations seriously undermines the Union's human rights strategy, sanctions policy and credibility.' European Parliament resolution of 4 September 2008 on the 'Evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights', 2008/2031(INI), para. 21; see also paras 10, 48, 64, 72 and 77 of the European Parliament resolution of 13 December 2012 on the 'annual report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter', 2012/2145(INI).

Nevertheless, the mismatch of interests between the Council and the EU Parliament have the effect of limiting the possibility of adopting legally binding rules aimed at guiding the administrative action externally. Finally, it is the administration that has so far tried to impose on itself some guidelines on the procedures to be followed when drafting the policy instruments or when planning the disbursement of financial assistance.[88]

Conclusion

The present thesis is about suggesting a way to make 'the third step of waltz' and merge the increasing use of administrative power in the external context with the obligation that the Union has to respect the rule of law when acting externally. It is about concretely suggesting a way of giving effect to the rule of law in the way the Union develops and implements its relations with external partners. The thesis does not seek to critique the conception of the rule of law in the EU.[89] However, its articulation in the EU external relations domain does question the possibility of re-thinking its application in order to frame the most recent transformations of public power.[90] The point here is to apply the definition of the rule of law as developed internally by the Court (precisely the one applicable to internal administrative action) to the external action of the Union (specifically the administrative activities in the SAP and ENP) and to determine whether it assumes sector-specific nuances. The core idea of the rule of law entails the potential to adjust to changing realities.[91]

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[88] For example – among many others – see: European Commission, Directorate General for Enlargement, *Guidance Note Enlargement Package 2012*, Access to documents request GESTDEM Reference 2013/3857; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084; Commission Regulation No 718/2007 of 12 June 2007 implementing Council Regulation No 1085/2006 establishing an instrument for pre-accession assistance (IPA), *OJ* [2007] L170/1, 15.03.2014; European Commission, Directorate General for Enlargement, *Instrument for Pre-Accession Assistance* (IPA II) *Quick Guide to IPA II Programming*, Access to Documents request GESTDEM reference 2014/4443; European Commission, Directorate General for Trade, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016).

[89] For a critical view on the definition of the rule of law in the EU see: G. Palombella, 'The EU sense of the rule of law and the issue of its oversight', *RSCAS* 2014/125; and D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', 34 *Yearbook of European Law* 2015, 1-23.

[90] G. Palombella, 'The Rule of Law at its Core', in G. Palombella and N. Walker (eds.) *Relocating the Rule of Law* (Oxford: Hart Publishing 2009), 17, at 39.

[91] J. Mendes, 'Rule of Law and Participation: A Normative Analysis of Internationalised Rulemaking as Composite Procedures', *Jean Monnet Working Paper Series*, JMWP 13/13, at 21; M. Dawson, 'Soft Law and the Rule of Law in the European Union: Revision or Redundancy', in B. de Witte and A. Vauchez (eds.) *Lawyering Europe: European Law as a Trans-national Social Field* (Oxford, Hart Publishing, 2013), 221-242.

The absence of powerful forces working together in giving effect to the rule of law in the Union's external action demands developing an analytical framework which uses as a starting point the two foundational values of the administrative rule of law: driving the exercise of administrative power and protecting individuals affected by it.[92] In order to identify ways to guide the exercise of administrative power externally, and in order to protect individuals affected by it, it is necessary to become closely acquainted with the characteristics and relevance of the power itself. Once the features and the impact of the administrative power externally have been thoroughly grasped (chapters II and III), the thesis identifies which administrative law principles (as developed within the framework of the internal market) have the potential to give effect to the administrative rule of law externally (chapters IV and V). The analytical framework – by using as a starting point the commonalities between the exercises of administrative power internally and externally – will try to redefine and legally articulate the principles and rules giving effect to the administrative rule of law with the aim of meeting the specificities of the external reality.

[92] C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (London: Hart Publishing 2014), at 325; H.P. Nehl, 'Good Administration as procedural right and/or general principle?', in H.C.H. Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law Towards and Integrated Administration* (Cheltenham: Edward Elgar Publishing 2009), 322, at 343; H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013), 144-146 and 149-151; P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), 250-252.

Chapter II: How is the external administrative power exercised?

Administrative tasks, acts and measures, procedures, and structural organisation

1. The features of the administrative power externally

Like Ariadne gave Theseus a ball of red thread to find his way back out of the labyrinth, chapter II aims at accompanying the reader through the intricate web of administrative activities characterising the SAP and the ENP. The chapter tries to categorise the different instruments based on their objective, legal value, and adopting institution.[1] However, before entering into the specificities of each administrative act, the next section provides an overview of the basic parameters and tasks for the exercise of administrative power within the SAP and ENP; it sets the ground for the subsequent more detailed and technical discussion. In describing the different activities implementing the SAP and the ENP, the chapter not only aims at fleshing out the external administrative power, but it also studies how the power is exercised. A detailed account of the administrative activities implementing the SAP and the ENP is fundamental in order to understand the legal challenges they pose, and in order to identify the characteristics of the external administrative power as a whole. This is a crucial step for the subsequent selection of the administrative law principles aimed at guiding the exercise of administrative power externally. The last section of the chapter will describe the key actors within the EU wider neighbourhood policies by indicating their nature, status and composition. The final section of the chapter will also inquire as to the interactions between EU, international and local actors by giving a bird's eye view of the informal networks and cooperative arrangements between them. In sum, the two main objectives of chapter II are to orientate the reader in the constellation of administrative activities implementing the EU wider neighbourhood policies, and to describe the nature of the power they exercise.

2. Basic parameters and administrative tasks in the EU wider neighbourhood policies

This section aims at determining to what extent primary and secondary legislation are in place with the aim of guiding the exercise of administrative power in the SAP and ENP respectively.

[1] For an overview of all the instruments see the summary tables at the end of chapter III.

2.1 Basic parameters for the exercise of administrative power: are there any?

In June 1993 the European Council meeting in Copenhagen set forth the conditions of membership to the Union: '[a]ccession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required'.[2] Over the years, such political and economic conditions became known as 'Copenhagen criteria'.[3] The Copenhagen criteria have to be read jointly with the relevant Treaty provisions, which in 1993 were to be found in Article O of the Treaty on European Union signed in Maastricht.[4] Nowadays the enlargement provision is to be found in article 49 TEU. If on the one hand, article 49 TEU – as already recognised by the Court back in 1978 – provides for the main aspects of the enlargement procedure,[5] the Treaty does not contain any particular provision on the preparation for accession. The expression 'pre-accession' formally appeared for the first time in the Essen European Council of December 1994.[6] Pre-accession strategies have developed with the idea of supporting countries applying for EU membership in making the political, economic and legal adaptations requested by the Copenhagen criteria, before accession could be seriously contemplated.[7] The introduction of pre-accession strategies led to the development of additional instruments which concretised the rather abstract obligations envisaged by the Copenhagen criteria.[8] As it will be explained later in the chapter, for a long time the most important pre-accession act of the SAP were the European Partnerships. The latter include a set of priorities for potential candidates to meet the Copenhagen criteria. European Partnerships find their legal base in Council Regulation No. 533/2004, which in turn find its legal basis not in article 49 but in ex-article 181a(1) EC – now article 212 TFEU – on economic financial and technical cooperation with third

[2] Copenhagen European Council 21-22 June 1993, point 7, A, (iii).
[3] The three Copenhagen criteria include: 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership including adherence to the aim of political, economic and monetary union.' Copenhagen European Council 21-22 June 1993, point 7, A, (iii).
[4] The Copenhagen criteria developed over time; for a comprehensive overview see: C. Hillion, 'The Copenhagen Criteria and their Progeny', in C. Hillion (eds.), *EU Enlargement: A Legal Approach* (London: Bloomsbury Publishing 2004), 1-22.
[5] Case 93/78 *Mattheus* v. *Doego,* EU:C:1978:206, para 7.
[6] Essen European Council 9-10 December 1994, Annex IV, point III.
[7] M. Maresceau, 'Pre-accession', in M. Cremona (eds.), *The Enlargement of the European Union* (Oxford: Oxford University Press 2003), at 11.
[8] C. Hillion, 'The Copenhagen Criteria and their Progeny', in C. Hillion (eds.), *EU Enlargement: A Legal Approach* (London: Bloomsbury Publishing 2004), at 13.

countries.[9] Likewise, article 49 was not used as legal base for the adoption of the current 'Instrument for Pre-Accession Assistance' (IPA II) – the EU regulation aimed at financing the SAP – article 212(2) TFEU – was instead used.[10]

Until the entrance into force of the Treaty of Lisbon there was no specific reference in primary law to the European Neighbourhood Policy; therefore, article 8 TEU is a new neighbourhood-specific provision. Article 8 TEU does not refer to the ENP as such; however it was drafted with the latter in mind, giving grounds for it to be considered as a 'constitutionalisation' of the ENP.[11] Paragraph one of article 8 sets out the final objectives of the policy (i.e. 'develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union'); while paragraph 2 establishes that the Union – in order to achieve the objectives of paragraph 1 – may conclude specific agreements with neighbouring states and that these agreements may contain reciprocal rights, obligations and the possibility of undertaking activities jointly. Despite the introduction of this neighbourhood-specific provision in the Treaties the instruments implementing the policy do not use article 8 as legal basis. Action plans – an instrument comparable to the European Partnerships – which have a pivotal role in implementing the ENP, do not use article 8 as legal base.[12] As for IPA II, article 8 was not used as legal base for the adoption of the 'European Neighbourhood Policy Instrument' (ENI) – the EU regulation aimed at financing the ENP.[13] Even the Council Decisions on the signature of the latest Association Agreements concluded by the Union with Ukraine, Georgia and Moldova are silent on article 8.[14] The reasons for this are to be found in the presence in the Treaties of already detailed procedures as to how to adopt regulations providing financial assistance to third

[9] Council Regulation No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilisation and association process, *OJ* [2004] L 86/1, 24.03.2004.
[10] 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), *OJ* [2014] L77/13, 15.03.2014.
[11] P. Van Elsuwege and R. Petrov, 'Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?', 36 *European Law Review* 2011, at 690.
[12] The next section will further develop the choice of legal basis for action plans.
[13] Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L 77/30, 15.03.2014.
[14] E.g. see: Council Decision of 16 June 2014 approving the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (2014/495/Euratom), *OJ* [2014] L 261/744, 30.08.2014.

countries (articles 209(1) and 212(2)); and as to how to conclude association agreements (217 TFEU).[15]

As things stand at the moment of writing article 8 TEU can mainly be regarded as a political instrument, while article 49 TEU is only concerned with the accession procedures and the proper accession negotiations. Therefore, the two main articles on enlargement and neighbourhood are not *per se* basic parameters for the exercise of administrative power in the SAP and ENP. Nevertheless, as already pointed out, there are other Treaty provisions that have been used as legal base in order to adopt acts and measures implementing the SAP and the ENP. The question remains as to their appropriateness as legal basis. Beside Treaty articles there are other three categories of basic parameters for the exercise of administrative power externally which should be mentioned before concluding this section: the agreements concluded by the Union (and its Member States) with each neighbouring state, secondary law, and Council Conclusions.

Even if it is outside the scope of this thesis to analyse the administrative activities specifically aimed at implementing the agreements concluded by the Union with the SAP and ENP states, it ought not to be forgotten that the bilateral agreements can work as basic parameters for the adoption of the administrative instruments aimed at implementing the two wider neighbourhood policies. This is particularly the case for the ENP. Differently from the SAP, the ENP countries are not offered membership perspective. Therefore, if the EU administration for the SAP states knows that the final aim is accession and that it should support the SAP countries to achieve this goal; the same cannot be said for the ENP – which does not have a clear and concrete *finalité*. In implementing the ENP, the administration uses the agreements concluded by the Union with each neighbouring state as indicators against which to modulate its conduct. Moreover, the agreements can also establish *fora*, like association committees and councils, where administrative activities carried out by the Union administration can be discussed with the each neighbouring country.

The two financial regulations implementing the SAP and ENP respectively, together with the regulation laying down common rules and procedures for the implementation of the Union's instruments for financing external action, also offer parameters indicating to the administration the principles and the procedures that need to be respected when

[15] G. Van der Loo, P. Van Elsuwege and R. Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument', *EUI Working Paper Series*, Law Department, LAW 2014/09, at 9.

programming and implementing funds.[16] Council Conclusions are not *stricto sensu* basic parameters for the exercise of administrative power; nevertheless, in the SAP and the ENP context they are the main source of legitimacy as to how the administration is to develop and implement its action. In some instances, the European Council made specific demands as to which instruments the Commission was required to adopt. For example, progress reports were explicitly requested at the Luxembourg European Council.[17] However, in other circumstances it was up the Commission to suggest new instruments. The 'European Partnerships' were suggested by the Commission as instruments for the SAP upon invitation by the European Council in March 2003.[18] As Thym correctly points out, 'the Council prefers the informal vehicle of Council Conclusions, Declarations of the Presidency and internal strategy papers' to the adoption of legally binding acts.[19] These documents are as carefully drafted as legal instruments, although they lack binding character. Therefore, it should not come as a surprise that on certain occasions Council Conclusions work as basic parameters for the EU administration.

Finally, we can state that primary and secondary legislation are rather silent and ambiguous on certain crucial aspects of the exercise of administrative power in the EU wider neighbourhood policies. The legislator seems to intentionally leave different options open for the administration as to how to achieve the Union's primary political choice. For example, article 8 TEU is cast in mandatory terms 'the Union shall develop a special relationship with neighbouring countries; however, the objective to be attained is

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[16] 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), *OJ* [2014] L77/13, 15.03.2014; Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014; Regulation (EU) No 236/2014 of the European Parliament and the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, *OJ* [2014] L 77/95, 15.03.2014.

[17] 'From the end of 1998, the Commission will make regular reports to the Council, together with any necessary recommendations for opening bilateral intergovernmental conferences, reviewing the progress of each Central and East European applicant State towards accession in the light of the Copenhagen criteria, in particular the rate at which it is adopting the Union acquis. […] The Commission's reports will serve as a basis for taking, in the Council context, the necessary decisions on the conduct of the accession negotiations or their extension to other applicants.' Luxembourg European Council 12-13 December 1997, point d. 29.

[18] 'In this perspective [further enhancing the relationship between the EU and the Western Balkan countries], the European Council invites the Council and the Commission to examine ways and means, based also on the experience from the enlargement process, to further strengthen the Union's stabilisation and association policy towards the region.' Brussels European Council Conclusions 20-21 March 2003, point 84. Following the Council Conclusions, the Commission adopted a Communication on 21 May 2003 titled 'The Western Balkans and European Integration' introducing the European Partnerships as pre-accession instruments. Commission Communication of 21 May 2003, 'The Western Balkans and European Integration', COM(2003) 285 final.

[19] D. Thym, 'Foreign Affairs', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford: Hart Publishing 2009), 309, at 333.

set out at such a high level of generality that it cannot be simply achieved in one clear and linear way. The type of discretion granted to the administration under these conditions demands particular attention.

2.2 Administrative tasks: the three macro categories

The administrative tasks specific to the SAP and ENP can nowhere be found in the Treaties of the European Union; however, some specific administrative tasks are to be found in secondary law, like the financial assistance regulations IPA II and ENI, and other general Treaties provisions, and political declarations of intent.[20] The administrative tasks of the SAP and ENP can be grouped into three categories: the first group aims at coordinating the achievement of the main goal of the two policies (i.e. full integration in the EU or to the greatest possible extent); the second group – based on the assessment made by the measures of the first group – aims at financing the attainment of the final policies goals; and the last group includes the administrative activities that are carried out in order to achieve sector specific goals within the overarching policy framework of the SAP and the ENP.

The first group '*setting the agenda for action*' includes policy instruments such as progress reports, action plans, European partnerships, and Memoranda of Understanding. The peculiarity of these instruments is their ability not only to inform, regulate and implement the EU internal decision making machine; but also to indicate to third countries what they need to do in order to intensify their relations with the Union. The instruments of the second group '*financing the agenda for action*' coordinate the disbursement of financial assistance via strategy papers and annual programming documents.[21] These documents indicate the activities that will be financed in order to achieve the objectives identified by the financial assistance regulations, Commission communications, progress reports, and action plans.[22] The third group of administrative

[20] E.g. article 6, 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), *OJ* [2014] L77/13, 15.03.2014; and article 7, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[21] The Commission adoptes strategy papers and annual programming documents in accordance with comitology examination procedure as outlined in article 5, Regulation (EU) No 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, *OJ* [2011] L55/13, 28.02.2011.

[22] Article 6 and 4(1), 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), *OJ* [2014] L77/13, 15.03.2014;

instruments analysed by this thesis are those aimed at '*implementing sector specific objectives*'. Sector specific objectives may either be designed with the aim of further supporting third states in their road to full or partial integration within the Union; or might be carried out by the administration in order to ensure that the process of implementation of Union's external policies meets EU transversal policy objectives. This thesis takes as examples of administrative activities implementing sector-specific objectives visa liberalisation action plans and progress reports, and human rights impact assessments. Visa liberalisation action plans and visa liberalisation progress report are examples of administrative activities supporting third states in their path to full or partial integration within the Union by granting them visa liberalization free regime.[23] The Commission's obligation to carry out human rights impact assessments before it proposes a new policy initiative – such as the opening of a trade negotiation with third countries – has been chosen as a transversal obligation that the administration is obliged to respect in line with the Union's Human Right policy towards the outer world.[24]

The choice of this thesis to cover – alongside the classical ENP and SAP instruments – also sector-specific acts is a conscious attempt to provide the reader with a more comprehensive overview of the intricate net of administrative activities that cover the external action of the Union. The administrative activities aimed at implementing the Union external action do not run in parallel to each other as self-sufficient systems, but interact with one another. Ignoring such a complexity would run the risk of supporting what Chiti as defined as 'administrative instability'.[25]

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article 7 and 3(2), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[23] Visa Liberalisation Dialogues with Moldova, Ukraine, and Georgia including: visa liberalization action plans and progress reports; available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/visa-liberalisation-moldova-ukraine-and-georgia/index_en.htm> (Consulted on 07.08.2016); and for Kosovo (the last SAP state which hasn't completed the visa liberalization process) see Stabilisation and Association Process and Visa Liberalisation with the Western Balkans; available at <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/enlargement/index_en.htm> (Consulted on 07.08.2016).

[24] The 2012 Action Plan requires the Commission to incorporate human rights in all impact assessment when conducting negotiations on trade agreements that have significant economic, social and environmental impacts. Council Document of 25 June 2012 'Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12; European Commission, Directorate General for Trade, document of October 2015 titled: 'Trade for all, towards a more responsible trade and investment policy strategy' also stresses the importance of carrying out impact assessments, at 18, 23 and 26, available at: <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> (Consulted on 07.08.2016).

[25] Chiti uses the term in the context of the relation between the EU administration and private persons. However, such approach could also be used in respect of the relation between the Union and third states. This aspect will become clearer later in the thesis; specifically, in chapter IV. E. Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?', *European Law Journal*, (forthcoming).

3. Administrative acts and measures implementing the EU wider neighbourhood policies

The analysis carried out by this section will follow the tripartite division introduced by the previous one. Administrative measures will be presented according to their main task: setting the agenda for action, financing the agenda for action, and implementing sector-specific objectives. Each administrative activity will be presented following the same structure: objective, legal value, legal base (if any), and future developments.

3.1 Setting the agenda for action

❖ European partnerships

European partnerships (EPs) are Council decisions establishing for each SAP partner a list of tailor-made priorities in order to implement the goals of the SAP – which includes the gradual fulfilment of the Copenhagen criteria in view of future membership. The list of priorities is found in the annex of each Council decision. EPs find their legal base in Council Regulation No. 533/2004 'on the establishment of European Partnerships in the framework of the Stabilisation and Association Process', which in turn find its legal basis in ex-article 181a(1) EC – now article 212 TFEU.[26] European Partnerships – despite their ambitious goal of steering the pre-accession process – find their legal base in a Treaty article dealing with economic, financial and technical cooperation with third countries. This choice was probably justified by the fact that EPs were used as reference documents in order to establish which policy area should receive financial support.[27] Recent developments seem to indicate that EPs are slowly disappearing as instruments implementing the SAP. First, the new IPA II regulation no longer list European partnerships as a source of information when programming funding.[28] Second, EPs seem to have been replaced by the so-called Commissions' 'key priorities'. The Commission in its latest Opinions on the accession of Albania, Montenegro and Serbia introduced an alternative way of updating the key priorities for each SAP state without the need of

[26] Council Regulation No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilisation and association process, *OJ* [2004] L 86/01, 24.03.2004.
[27] Article 5, Council Regulation (EC) No. 1085/2006 of 17 July 2006 establishing an Instrument of Pre-accession Assistance (IPA), *OJ* [2006] L 210/82, 31.07.2006.
[28] Article 4 of the new IPA II regulation does not use European Partnerships as tools to frame assistance. 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), OJ [2014] L77/13, 15.03.2014.

adopting a Council decision.[29] All the three Opinions contain a clear list of priorities that countries need to respect in order to open accession negotiations.[30]

❖ Action plans

Action plans (APs) lay down the strategic objectives of the cooperation between each ENP country and the EU. Their implementation helps fulfil the provisions of the agreements concluded by the EU with each neighbouring state, build ties in new areas of cooperation, and encourage and support the objective of further integration of the ENP countries into the Union's economic and social structures.[31] APs are adopted within the joint bodies established by the agreements concluded by the Union and each ENP country (i.e. association councils).[32] Externally, they do not have a legally binding effect on third countries; they are political documents whose implementation is not subject to prior formal ratification by the parties. Internally, before being endorsed by the joint bodies, they are presented by the Commission to the Council which swiftly endorse them as Council decisions on the position to be adopted by the Union and the Member States.[33] In the past, the legal base for the adoption of the Council decisions was article 15 TEU (now article 29 TEU) dealing with the CFSP, together with the Council Decision on the conclusion of the agreement between the Union and the respective neighbouring state.[34] However, since 2009 the Council refused to continue the pre-Lisbon practice. Its main claim has been that action plans are political documents and they should be adopted also internally as recommendations. Nevertheless, with the adoption of the European Neighbourhood Policy Instrument – where it is clear and undeniable that action plans do

[29] The Commission delivers an Opinion when a third state presents its application for starting accession negotiations. At present, there are no clear legal rules regulating the formulation and structure of Opinions. The Commission is requested to make a comprehensive analysis on the application of each candidate on the basis of the country's capacity to meet the criteria set by the Copenhagen European Council of 1993 as well as the conditionality of the Stabilisation and Association Process.

[30] Commission Opinion on Albania's application for membership of the European Union of 9 November 2010, COM(2010) 680; Commission Opinion on Montenegro's application for membership of the European Union of 9 November 2010, COM(2010) 670; Commission Opinion on Serbia's application for membership of the European Union of 12 October 2011, COM(2011) 668 final.

[31] European Neighbourhood Policy, ENP action plans, available at: <http://eeas.europa.eu/enp/documents/action-plans/index_en.htm> (Consulted on 07.08.2016).

[32] B. Van Vooren, 'A case-study of soft law in EU external relations: the European Neighbourhood Policy', 34 *European Law Review* 2009, at 710.

[33] E.g. see Council Decision of 9 February 2005 on the position to be adopted in the Association/Co-operation Council Ukraine, Brussels, 5428/1/05 REV 1.

[34] B. Van Vooren, 'A case-study of soft law in EU external relations: the European Neighbourhood Policy', 34 *European Law Review* 2009, 709 - 710; Interview with Commission official from the Legal Service, 24.04.2015, e-mail exchange.

produce legal effects – once again the Council has been asked to change its position.[35] As the situation stands at the moment of writing, there is more or less consensus that the Council decisions on the position to be adopted by the Union and the Member States in the joint bodies will be adopted using article 218(9) as the procedural legal basis and as substantial legal base article 217 TFEU, or articles 209 and 217 together, leaving aside the legal basis dealing with CFSP.[36] Thus, another important question is raised here as to who will be responsible for drafting the action plans in the future: can the proposal be a joint one (Commission and High Representative) if there is no substantive CFSP legal basis?

Action plans have been succeeded (for some eastern neighbours) by 'Association Agendas'. Compared to action plans, association agendas were envisaged with the aim of broadening the areas of cooperation between the EU and the ENP states, including explicit reference to the *acquis* in their texts, and reflecting more fully the partners' own reform agenda.[37] Finally, the Commission proposed that these new documents should promote preparations for the implementation of the new agreements.[38] Now, after the entry into force of the latest Association Agreements with some of the eastern neighbours, the association agendas have been updated to prepare and facilitate the implementation of the agreement themselves.[39] Despite of these changes, association agendas are comparable to action plans. They aim at promoting further political association and economic integration of the neighbouring states into the EU, 'by creating a comprehensive and practical framework through which these overriding objectives can be realized'.[40] The adoption of the association agendas has not followed a linear path.

[35] 'The key points of reference for setting the priorities for Union support under this Regulation and for the assessment of progress as outlined in article 2(3) shall be: action plans or other equivalent documents such as the association agendas (…)'. Article 3(2), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[36] Interview with Commission official from the Legal Service, 24.04.2015, e-mail exchange.

[37] Commission Non-Paper on 'the successor documents to current ENP Action Plans' expanding on the proposal of the Commission Communication of 3 April 2008 on the 'Implementation of the European Neighbourhood Policy 2007', COM(2008) 164 final.

[38] Prior to the adoption of the latest association agreements, Association Agendas aimed at clearly identifying on a sector by sector basis the priorities which required urgent action in anticipating the entry into force of the new agreements.

[39] See G. Van der Loo, *The EU-Ukraine Association Agreement and the Deep Comprehensive Free Trade Area* (The Hague: Brill Nijhoff 2016), 93-95.

[40] See Association Agenda between the EU and Ukraine, available at: <http://eeas.europa.eu/enp/pdf/pdf/action_plans/2010_eu_ukraine_association_agenda_en.pdf> (Consulted on 07.08.2016).

Interestingly enough, a new EU-Morocco Action Plan was adopted in December 2013 –[41] instead of an association agenda – although the Union started negotiations for a DCFTA with Morocco and despite the existence of an Association Agreement with Morocco.[42]

❖ Progress reports

Progress reports for each SAP country are Commission working documents accompanying the yearly Commission Communication on the 'Enlargement Strategy'. The Communication is addressed to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions.[43] The reports are aimed at evaluating the candidates' and potential candidates' advancement in meeting the SAP requirements and the 1993 Copenhagen criteria. Progress reports are approximately seventy-page-long documents which review in great detail the situation in each SAP country.[44] The type of analysis carried out by these documents is rather complex and technical; the administration needs to determine, for example, the capacity of each SAP country to cope with competitive pressure and market forces within the Union or the existence of a functioning economy. Furthermore, the analysis requires an extensive knowledge of the Union *acquis* as well as of the legal systems of each SAP states.[45] A lack of knowledge of the SAP countries' legal systems might force the Commission to rely excessively on governmental and international sources. Finally, progress reports, like action plans, produce legal effects to the extent that they inform which area should receive financial support.[46] However, in contrast to action plans, no one has yet questioned their legal base.

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[41] The EU-Morocco action plan was formally adopted in December 2013, available at: <http://eeas.europa.eu/enp/pdf/pdf/action_plans/morocco_enp_ap_final_en.pdf> (Consulted on 07.08.2016).

[42] 'The [EU-Morocco] DCFTA negotiations were officially launched on 1 March 2013 by President Barroso in Rabat. The first round of negotiations was held in Rabat in April 2013. So far, four rounds of negotiations have taken place, the last one in April 2014.' European Commission Service Position Paper on the trade sustainability impact assessment in support of negotiations of a deep and comprehensive free trade agreement between the European Union and Morocco. Available at: http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153336.pdf (Consulted on 07.08.2016).

[43] See the latest Commission Communication of 10 November 2015, 'Enlargement Strategy', COM(2015) 611 final.

[44] E.g. see Commission Staff Working Document Albania 2015 Report of 10 November 2015, Accompanying the Commission Communication on the EU Enlargement Strategy, SWD(2015) 213 final.

[45] Stabilisation and Association Process, Strategy and Reports, available at: <http://ec.europa.eu/enlargement/countries/package/index_en.htm> (Consulted on 07.08.2016).

[46] Article 4, 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), *OJ* [2014] L77/13, 15.03.2014.

ENP progress reports are joint staff working documents accompanying the yearly Joint Communication on the 'Implementation of the European Neighbourhood Policy'. The Joint Communication is addressed to the Council, the EU Parliament, the European Economic and Social Committee, and the Committee of the Regions.[47] The aim of these documents is to assess, for each ENP country, the progress made in the implementation of the priorities listed in their respective action plans. Nonetheless they are not supposed to be a general review of the political and economic situation for each ENP country; a comparative analysis between each ENP action plan and their respective progress reports does not seem to suggest that the latter monitor the former.[48] ENP progress reports are rather an overall evaluation of the ENP countries reform process. Furthermore, instead of being tailor-made documents based on each ENP action plan, they all follow the same structure. They are approximately fifteen-page-long documents covering seven policy areas: political dialogue and reform; economic, social and development reforms; trade related issues, market and regulatory reforms; cooperation on justice freedom and security; transport, energy, environment, climate change, information society, research and development and innovation; people to people contact, education and health care.[49] The November 2015 review of the ENP suggests abandoning regular progress reports in favour of a 'new style of assessment, focusing specifically on meeting the goals agreed with partners'.[50] How this type of assessment will differ from the old progress reports remains unclear. However, one important difference is that these reports will be timed to provide the basis for a political exchange of views in the relevant high-level meetings with partner countries, such as Association and Cooperation Councils. In addition to the country-specific reporting the new ENP revision foresees transversal regular reports tracking developments in the neighbourhood.

[47] See the latest Joint Commission and High Representative Communication of 25 March 2015 on the 'Implementation of the European Neighbourhood Policy in 2015', JOIN(2015) 9 final.

[48] E.g. EU-Georgia Action Plan, available at: <http://eeas.europa.eu/enp/pdf/pdf/action_plans/georgia_enp_ap_final_en.pdf> (Consulted on 07.08.2016); and Joint Staff Working Document of 25 March 2015, Implementation of the European Neighbourhood Policy in Georgia: Progress in 2014 and recommendations for actions, SWD(2015) 66 final.

[49] European Neighbourhood Policy, ENP progress reports, available at: <http://eeas.europa.eu/enp/documents/progress-reports/index_en.htm> (Consulted on 07.08.2016).

[50] Joint Communication of 18 November 2015, 'Review of the European Neighbourhood Policy', JOIN(2015) 50, at 5.

❖ Memoranda of Understanding

Memoranda of Understanding (MoUs) aimed at implementing the SAP and the ENP are examples of international agreements of a non-legally binding nature. They reflect a political agreement between the Union and one or more third states, with the express intention not to become bound in a legal sense. The fields covered by these instruments are numerous, encompassing a wide range of topics, such as: energy,[51] political priorities for cooperation,[52] conditions of loans and the terms of repayment,[53] etc. The task of the MoUs is very much dependent on the fields they cover; they vary between exploratory arrangements and administrative ones.[54] Exploratory MoUs are the outcome of preliminary talks that might precede the negotiations of an international agreement. Administrative MoUs are functional to the cooperation between administration of the Union and the administration of third countries. Some of these documents are not available on the official website of the European Union; for some only the press release is accessible. The post-Lisbon practice seems to suggest that MoUs will now be adopted internally as Commission decisions and as Commission implementing decisions based on a mandate granted to the Commission by the Council and the European Parliament via a joint decision.[55] For example, the recent MoU on macro financial assistance concluded between the Union with Ukraine was adopted as a Commission implementing decision,[56] using as legal base the European Parliament and Council decision on macro-financial

[51] Memorandum of Understanding on a Strategic Partnership between the European Union and the Republic of Azerbaijan in the fields of Energy. Available at: <http://ec.europa.eu/dgs/energy_transport/international/regional/caucasus_central_asia/memorandum/doc/mou_azerbaijan_en.pdf> (Consulted on 07.08.2016).

[52] EU-Jordan Memorandum of Understanding on further cooperation. Press release available at: <http://europa.eu/rapid/press-release_STATEMENT-14-316_en.htm> (Consulted on 07.08.2016).

[53] EU-Ukraine Memorandum of Understanding establishing conditions of loans and the terms of repayment. Press release available at: <http://europa.eu/rapid/press-release_IP-15-5024_it.htm> (Consulted on 07.08.2016); Commission Implementing Decision of 18.5.2015 approving the Memorandum of Understanding between the European Union and Ukraine related to macro-financial assistance to Ukraine, C(2015) 3444 final; Commission Implementing Decision of 16.7.2014 approving the Memorandum of Understanding between the European Union and Tunisia related to macro-financial assistance to Tunisia, C(2014) 5176 final.

[54] B. Van Vooren and R. A. Wessel, *EU external relations law: text, cases and materials* (Cambridge: Cambridge University Press 2014), at 54.

[55] A. Ott, 'EU administration through international soft law: Does soft law breach the institutional balance in EU external relations?', *Conference title 'Soft Law before the European Courts: a common pattern?'*, 19 and 20 November 2015, Brussels.

[56] Commission Implementing Decision of 18 May 2015 approving the Memorandum of Understanding between the European Union and Ukraine related to macro-financial assistance to Ukraine, C(2015)3444/F1.

support to the country.[57] The entrance into force of the MoU requires – besides the signature of both parties – also the 'receipt by the European Union of written notification by Ukraine of fulfilment of internal procedures envisaged by the law of Ukraine'.[58] Likewise a similar procedure was used for Tunisia.[59]

3.2 Financing the agenda for action

The Instrument for Pre-Accession Assistance (IPA II) and the European Neighbourhood Instrument (ENI) are the current financial assistance regulations for the SAP and the ENP. IPA II covers the SAP states plus Turkey; while the ENI covers both the EU's eastern and southern neighbours. The overall goal of IPA II is to support the SAP countries in 'adopting and implementing the political, institutional, legal, administrative, social and economic reforms required' by those countries in order to comply with the Union's values and practices, with a view to Union membership.[60] The Union financial support under the ENI regulation has the overarching goal of further achieving the *finalité* of the ENP (i.e. the creation of 'an area of shared prosperity and good neighbourliness') and in particular of implementing the present and future agreements concluded by the Union with the neighbouring countries as well as the agreed action plans or equivalent documents (i.e. association agendas).[61] The IPA II and ENI regulatory frameworks are complemented by Regulation No. 236/2014 laying down common rules and procedures on the implementation of the Union's instruments for external financial assistance (Regulation No. 236/2014).[62] Under both the IPA II and ENI regulations the Commission is empowered to adopt delegated and implementing acts.

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[57] Article 3(1), Decision (EU) 2015/601 of the European Parliament and of the Council of 15 April 2015 providing macro-financial assistance to Ukraine, *OJ* [2015] L100/1, 17.04.2015.
[58] Annex to Commission Implementing Decision of 18 May 2015 approving the Memorandum of Understanding between the European Union and Ukraine related to macro-financial assistance to Ukraine, C(2015)3444/F1.
[59] Article 3(1), 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, *OJ* [2015] L151/9, 21.05.2014; Commission Implementing Decision of 16 July 2014 approving the Memorandum of Understanding between the European Union and Tunisia related to macro-financial assistance to Tunisia, C(2014)5176/F1.
[60] Article 1, 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), *OJ* [2014] L77/13, 15.03.2014.
[61] Article 1, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.
[62] Regulation No 236/2014 of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, *OJ* [2014] L77/95, 15.03.2014.

❖ Commission delegated acts

The Commission can adopt delegated acts (article 290 TFEU) under the IPA II and ENI regulations in order to amend their respective annex II.[63] Annex II in both regulations comprises a long list of priorities for Union support.

❖ Commission implementing acts

In accordance with the IPA II and ENI regulations, the Commission is granted implementing powers (article 291 TFEU) to adopt strategy papers, annual programming documents and the specific rules establishing the uniform conditions for the implementation of the IPA II and ENI regulations.[64] Strategy papers and annual programming documents can be country-specific or multi-country documents, and they identify the priorities and the projects to be financed by the Union with the aim of achieving the specific objectives identified by the two financing regulations.[65] The pool of objectives to be achieved comprises the list provided by article 2 of both IPA II and ENI, the list offered by their respective Annex II, and the priorities identified by progress reports, action plans, association agendas, and Commission communications.[66] While seemingly purely technical activities, these implementing instruments have a clear policy orientation nature – which is also acknowledged in the preamble of the regulation.[67] The objectives that the Union's financial assistance should strive to achieve are expressed in broad terms (e.g. reducing poverty); thus, they implicitly leave to the administration the

[63] Articles 10 and 11, 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), *OJ* [2014] L77/13, 15.03.2014; articles 13 and 14, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30.

[64] Articles 6 and 12, 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), *OJ* [2014] L77/13, 15.03.2014; and articles 7 and 12, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[65] Articles 6 and 7, 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), *OJ* [2014] L77/13, 15.03.2014; article 7, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[66] Article 4(1), 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), *OJ* [2014] L77/13, 15.03.2014; article 3(2), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[67] Preamble (point 16) 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), *OJ* [2014] L77/13, 15.03.2014; preamble (point 28) Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

discretion to choose which type of actions are better suited in order to achieve such elusive objectives. By providing a detailed list of specific objectives, the regulations offer the impression that the EU administration is bound by ascertainable goals when deciding what to finance, and is not engaged in a political process of adjusting to a range of possibly conflicting claims.

The Commission under the IPA II and ENI regulations adopts two types of implementing decisions. Under the IPA II regulation, country-specific 'Indicative Strategy Papers' for the period 2014-2020 are adopted as Commission implementing decisions for each SAP state, using as legal base article 6 IPA II.[68] Based on these documents the Commission again adopts as Commission implementing decisions 'Annual Country Action Programmes',[69] using as legal base article 2(1) of Regulation No. 236/2014.[70] Likewise, under the ENI regulation the Commission adopts 'Single Support Frameworks' for the years 2014-2017 as implementing decisions for each ENP country, using as legal base article 7 ENI.[71] Based on these strategizing documents the Commission subsequently adopts, again as implementing decisions, 'Annual Country Action Programmes' for each ENP state, using as legal base article 2(1) of Regulation No 236/2014.[72] Interesting to notice here is that the 'Single Support Frameworks' are Commission and EEAS documents, even if they are adopted as Commission Implementing decisions. The focus of the thesis will be on these Commission implementing documents; and it will not cover the cross-border and multi-country programming.

The Commission implementing powers under the ENI and IPA II regulation are comparable; however, there is one significant difference worth noticing. The ENI regulation tends to rely more on the policy instruments (i.e. action plans or their equivalent association agendas) in order to determine objectives and priority of Union support.[73] In the absence of such documents (e.g. in the case of Belarus) the regulation

[68] E.g. Commission Implementing Decision of 18 August 2014 adopting an Indicative Strategy Paper for Montenegro (2014-2020), C(2014) 5771.
[69] E.g. Commission Implementing Decision of 10 December 2014 adopting an Annual Country Action Programme for Montenegro for the year 2014, C(2014) 9387.
[70] Regulation No 236/2014 of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, *OJ* [2014] L77/95, 15.03.2014.
[71] E.g. Commission Implementing Decision of 11 June 2014 adopting a Single Support Framework for Georgia (2014-2017), C(2014)3994.
[72] E.g. Commission Implementing Decision 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, C(2014) 5020.
[73] Article 7, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

specifies that tailor-made comprehensive programming documents including strategy and multi-annual indicative programmes need to be adopted.[74] This difference – compared to the IPA II regulatory structure – can be explained by the fact that the ENP does not have a clear end goal, but rather moving targets depending on the willingness of the neighbouring states to integrate in the Union.

3.3 Implementing sector-specific objectives

This sub-section presents the two examples of administrative activities implementing sector-specific objectives. The first objective (visa liberalization) is aimed at further integrating the neighbouring states within the EU while the second is aimed at implementing an EU transversal objective: respecting human rights in the EU external action. Even if apparently presented as administrative practices distinct from the ones directly related to the implementation of the SAP and the ENP, they also involve the overarching relation between the Union and its neighbours.

❖ Visa liberalisation

The objective of the visa liberalisation dialogues that the Union established with both the SAP and the ENP countries is their removal from the so-called 'Schengen black list'.[75] The Schengen black list registers all the countries whose nationals must be in possession of visas when crossing the Schengen border.[76] The visa liberalisation policies for both the SAP and ENP countries foresee two key administrative instruments. The first instruments set out a comprehensive list of reforms that each neighbouring country is requested to implement to fulfil the requirements for a visa free regime. This type of instrument is called a 'roadmap' under the SAP, and a Visa Liberalisation Action Plan (VLAP) under the ENP. The second type of instrument is the visa liberalisation progress report (VLPR). Their objective is to monitor the implementation of the Road Maps and VLAPs. Roadmaps

[74] Article 7(3), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.
[75] See European Commission, Directorate General for Migration and Home Affairs, International Affairs, Enlargement and European Neighbourhood Policy, available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/enlargement/index_en.htm> (Consulted on 07.08.2016).
[76] Council Regulation (EC) No 539/2001 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, *OJ* [2001] L 81/1, 21.03.2001.

and VLAPs are non-classified documents, while VLPRs (both for the SAP and ENP) are Commission reports to the European Parliament and the Council.[77]

The SAP visa liberalisation strategy finds its foundation in the Thessaloniki agenda announced in June 2003.[78] However, it was only in January 2008 that the Council welcomed the Commission's intention to launch a visa dialogue with all the countries of the SAP with the aim of defining detailed roadmaps setting clear benchmarks to be met in order to gradually advance towards visa liberalisation.[79] The Visa Liberalisation Road Maps are organised in four blocks: document security, illegal migration, public order and security, and fundamental rights linked to the movement of persons.[80] The benchmarks of the first three blocks are related to justice, freedom and security *acquis* and reflect the content of Regulation No. 539/2001.[81] The last most recent, fourth, block is titled 'Fundamental rights and the right of free movement' and deals with the conditions and procedures for issuing identity documents, adopting and enforcing anti-discrimination legislation, and implementing policies regarding all minorities.[82] Besides evaluating the countries' progress through VLPRs, the Commission also makes a set of recommendations for the countries' authorities in areas where more decisive action is needed.[83] At the time of writing Albania, Bosnia and Herzegovina, Macedonia, Montenegro, and Serbia enjoy a visa liberalisation regime, while Kosovo is still waiting.[84]

VLAPs and their respective progress reports are foreseen only for the eastern neighbours, almost at indicating that visa liberalisation is not on the agenda with the

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[77] The first VLPRs for the eastern neighbouring states were joint Commission and HR working documents. See some example of VLAPs and VLPR, available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/visa-liberalisation-moldova-ukraine-and-georgia/index_en.htm> (Consulted on 07.08.2016).

[78] Thessaloniki Agenda 16 June 2003, General Affairs and External Relations Council, at 16.

[79] 2845th/ 2846th General Affairs and External Relations Council Meeting of 28 January 2008, at 17.

[80] E.g. see Visa Liberalisation Roadmap with Kosovo, available at <http://eeas.europa.eu/delegations/kosovo/documents/eu_travel/visa_liberalisation_with_kosovo_road map.pdf> (Consulted on 07.08.2016).

[81] Council Regulation (EC) No 539/2001 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, *OJ* [2001] L 81/1, 21.03.2001.

[82] S. Kacarska, 'Losing the Rights along the Way: The EU-Western Balkans Visa Liberalisation', 16 *European Politics and Society* 2015, at 364.

[83] See European Commission, Directorate General for Migration and Home Affairs, International Affairs, Enlargement, available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/enlargement/index_en.htm> (Consulted on 07.08.2016).

[84] On 18 December 2015 the Commission adopted the final visa liberalisation report on Kosovo, Press Release available at: <http://europa.eu/rapid/press-release_IP-15-6369_en.htm> (Consulted on 07.08.2016).

Mediterranean partners to who is instead offered visa facilitation.[85] The VLAPs are built upon the Justice and Home Affairs section of each ENP Action Plan.[86] The VLAPs are comparable in structure to the SAP visa liberalisation roadmaps; they also envisage the same four blocks of benchmarks.[87] The implementation of the VLAPs is monitored by the Commission through regular progress reports, which are transmitted to the European Parliament and the Council.[88] Currently, the EU conducts 'Visa Liberalisation Dialogues' with three Eastern Partnership countries, namely Ukraine, Moldova and Georgia. Finally, it has been argued that the benchmarks set by the VLAPs are much more specific and demanding than the roadmaps with the Western Balkan states.[89] This difference between the two policies might be explained by a more stringent approach developed by the Union over time, rather than a difference between the two policies. If we compare the latest SAP visa liberalisation roadmap with Kosovo and the VLAP with Moldova, it is possible to see that the two documents take a very similar approach.[90]

❖ Human rights impact assessments

Impact Assessments (IAs) are Commission staff working documents whose importance has been underlined by the latest 'Better Regulation Package'.[91] They were first introduced by the Commission in 2002 and have undergone continuous strengthening

[85] P. Dumas and I. Goldner Lang, 'EU Mobility Regimes and Visa Policy towards ENP Countries', *RSCAS 2015/79 Working Paper Series Migration Policy Center*, at 5.
[86] '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)', Visa Liberalisation Action Plan with Moldova, available at: <http://www.enpi-info.eu/library/content/action-plan-visa-liberalisation-moldova> (Consulted on 07.08.2016).
[87] See European Commission, Directorate General for Migration and Home Affairs, International Affairs, European Neighbourhood Policy, Eastern Partnership, available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/visa-liberalisation-moldova-ukraine-and-georgia/index_en.htm> (Consulted on 07.08.2016).
[88] See European Commission, Directorate General for Migration and Home Affairs, International Affairs, European Neighbourhood Policy, Eastern Partnership, available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/visa-liberalisation-moldova-ukraine-and-georgia/index_en.htm> (Consulted on 07.08.2016).
[89] P. Dumas and I. Goldner Lang, 'EU Mobility Regimes and Visa Policy towards ENP Countries', *RSCAS 2015/79 Working Paper Series Migration Policy Center*, at 5.
[90] Visa Liberalisation Action Plan with Moldova, available at: <http://www.enpi-info.eu/library/content/action-plan-visa-liberalisation-moldova> (Consulted on 07.08.2016); and Visa Liberalisation Roadmap with Kosovo, available at <http://eeas.europa.eu/delegations/kosovo/documents/eu_travel/visa_liberalisation_with_kosovo_roadmap.pdf> (Consulted on 07.08.2016).
[91] Commission Staff Working Document of 19 May 2015, 'Better Regulation Guidelines', SWD(2015) 111 final, available at: <http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf> (Consulted on 07.08.2016).

over the years.[92] IAs guide pre-political decision making with the aim of increasing the amount and quality of information available on the impacts of various policy options.[93] While the Commission has been doing IAs before opening trade negotiations with third countries since 2006, the practice only became systematic in 2010.[94] Since 2012 the Commission has been called upon by the Council to 'incorporate human rights in all impact assessments on an on-going basis'.[95] This initial obligation – which arguably was the follow-up of the Commission's strategy for the effective implementation of the Charter of Fundamental Rights by the European Union –[96] has further developed into concrete instruments and guidelines, especially in the EU trade policy.[97] Human rights impact assessments (HRIAs) are adopted in order to analyse the possible human rights impact of a trade-related initiative both in the EU and in the partner countries.

According to the Commission's guidelines 'on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', HRIAs should include consideration of civil, political, economic, social, and cultural and core labour rights. The guidelines provide a non-exhaustive list of international and regional human rights conventions that should be taken into account when carrying out the analysis.[98] The guidelines also establish that 'the depth and scope of the assessment should be calibrated to the type of trade measures included in the initiative, as well as to the magnitude of the

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[92] After a phasing-in, impact assessments became allegedly systematic in 2005 for initiatives set out in the Commission Legislative Work Programme (CLWP). Commission Communication of 5 June 2002, 'Impact Assessment', COM(2002) 276 final.

[93] A. Alemanno and A. Mauwese, 'Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in 'New Comitology'', 19 *European Law Journal* 2013, at 76.

[94] Interview with Commission official from Directorate General for Trade, 01.04.2016, e-mail exchange.

[95] Council Document of 25 June 2012 'Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12.

[96] Commission Communication of 19 October 2010, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM(2010) 573/4.

[97] 'On 25 June 2012 the Council adopted a Strategic Framework on Human Rights and Democracy accompanied by an Action Plan1. The Action Plan called on the Commission to 'incorporate human rights in all impact assessments on an on-going basis' (point 1) and to develop by 2014 'a methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements' (point 11a). In response to these commitments DG TRADE has developed in-house guidelines in order to help with examination of the potential impacts of a trade-related initiative on human rights in both the EU and the partner country/ies.' European Commission, Directorate General for Trade, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016); see also European Commission, Directorate General for Trade, document of October 2015 titled 'Trade for all, towards a more responsible trade and investment policy strategy', at 18, 23 and 26, available at: <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> (Consulted on 07.08.2016).

[98] 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016), at 5.

expected human rights impacts.' However, no further details are offered as to which type of trade measures should receive more or less attention in determining their human rights impacts. This lacuna – as it will be clear from the examples below – promotes uncertainties as to administrative action.

At the moment of writing there are no official records of IAs carried out before the Commission actually opened trade negotiations with the SAP and ENP states.[99] The launch of the negotiations with the Western Balkans countries predates the commitment to carry out impact assessments. As for the latest Association Agreements concluded by the Union with the eastern neighbours, an IA in support of a proposal for a Council decision to authorize the Commission to open negotiations with Ukraine for an Enhanced Agreement was carried out in 2006; however, it does not envisage a human right section.[100] In 2011 the Foreign Affairs Council and the European Council responded to the Arab Spring by calling for the launch of negotiations with Morocco, Tunisia, Egypt and Jordan.[101] Despite the fact that actual trade negotiations with some of the ENP states have started, no HRIAs have been adopted.[102] According to an official from Directorate General for Trade (DG TRADE), adopting HRIAs was unnecessary since the political decision to launch negotiations was already taken.[103] Finally, a last incongruence is the case of Azerbaijan, with whom the Commission started negotiations on an Association Agreement in 2010 without prior adoption of HRIAs.[104] According to the same DG TRADE official, HRIAs are a trade-specific instrument to be applied only to major trade negotiations; i.e. negotiations under the aegis of the EU Commissioner for Trade.[105] The approach of the Commission's official clearly highlights the level of discretion which is granted to the Commission under these circumstances.

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[99] European Commission, Better Regulation, Impact Assessment, List of Impact Assessments from 2003 to 2016, available at: <http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2016_en.htm> (Consulted on 07.08.2016).

[100] Commission Staff Working Document of 13 November 2006, Recommendation from the Commission to the Council authorising the Commission to open negotiations with Ukraine for a new Enhanced Agreement, Impact Assessment, SEC(2006) 1110. Access to Documents request GESTDEM reference 2016/046.

[101] Council Press Release on the Foreign Affairs Council Meeting of 14 December 2011 (Doc No 1868/11), at 8.

[102] E.g. negotiations for an association agreement with Tunisia were opened in October 2015 but no HRIA was adopted. European Commission, Directorate General for Trade, Countries and Regions, Tunisia, available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/tunisia/> (Consulted on 07.08.2016).

[103] Interview with Commission official from Directorate General for Trade, 01.04.2016, e-mail exchange.

[104] European Commission, Directorate General for Trade, Countries and Regions, Azerbaijan, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/azerbaijan/> (Consulted on 07.08.2016).

[105] Interview with Commission official from Directorate General for Trade, 01.04.2016, e-mail exchange.

4. The procedures governing the adoption of administrative acts and measures

The procedural rules governing the drafting and the adoption of administrative acts and measures implementing the Union wider neighbourhood policies are not always clearly defined. With the exception of the procedures leading to the adoption of acts aimed at 'financing the agenda for action', the majority are administrative self-imposed guidelines – whose availability is dependent on an official access to document request.[106] The strictness of these self-imposed rules is a matter of choice of the Commission and the EEAS, as distinct from externally imposed requirements. This section will follow the same tripartite division adopted by the previous section.

4.1 Setting the agenda for action: in search for the way

❖ European partnerships

The procedure for the adoption of the European Partnerships is included in the text of the Council regulation foreseeing their adoption.[107] The Council adopts European Partnerships by qualified majority on a proposal from the Commission.[108] EPs are intended to be the result of the Commission's consultations with the candidate and potential candidate states, and from a legal point of view they are not agreements but unilateral acts.[109] Despite implying a dialogue with the potential candidates and candidate countries, the latter were not always invited to participate in the drafting of the EPs.[110] The EPs, although adopted by the Council, are mainly the elaboration of the Commission, which is at the forefront when it comes to the establishment of the priorities.[111]

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[106] Some scholars define these internal norms as forms of 'internal administrative rule-making'; while others define them as norms composing the 'internal administrative law'. Despite the difference in terminology, these measures are an important tool for the administration to guide its own administrative procedures. See H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2012), Chapter 16; and J.L. Mashaw, *Bureaucratic Justice* (New Haven and London: Yale University Press 1983).

[107] Council Regulation No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilisation and association process, *OJ* [2004] L 86/01, 24.03.2004.

[108] Article 2, Council Regulation No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilisation and association process, *OJ* [2004] L 86/01, 24.03.2004.

[109] K. Inglis, 'The Europe Agreements Compared in the Light of their Pre-accession Reorientation', 37 *Common Market Law Review* 2000, at 1184.

[110] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan Den Rijn: Kluwer Law International 2008), at 75.

[111] K. Inglis, 'The Pre-Accession Strategy and the Accession Partnerships', in A. Ott and K. Inglis (eds.), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (The Hague: T.M.C. Asser Press 2002), 103, at 108.

Furthermore, the Commission is not bound to any negotiating mandate in its consultations with the SAP countries. The key role granted to the Commission in drafting these documents further reinforces its position in the pre-accession process.[112]

❖ Action plans

The elaboration of action plans is in the hands of the Commission and – since recently – also of the EEAS, who act without any particular negotiating mandate. Action plans are non-legally binding instruments; thus, the legal requirements of the negotiating procedure of article 218 TFEU is by-passed.[113] However, this approach might take a different turn in light of the latest discussions on the choice of legal base for action plans,[114] and in light of the Court's judgment in *Council* v. *Commission* which establishes the obligation to comply with the principles of conferral and institutional balance irrespective of whether the act negotiated with a third country is binding.[115] The procedure for the adoption of action plans is currently spelled out in EEAS internal self-imposed guidelines[116] and in the Council Decisions concluding the agreements between the Union and each neighbouring state – at least to the extent that they regulate the procedure to be followed by the Union before the formal adoption of the action plan in the joint bodies.[117]

Theoretically, action plans should be drafted in collaboration between the EU and each ENP state, and it is the joint body set up by the agreements concluded by the EU with

[112] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan Den Rijn: Kluwer Law International 2008), at 75.
[113] M. Cremona, 'The European Neighbourhood Policy: More than a Partnership?' in M. Cremona (eds.), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), 245, at 276.
[114] Section 3.1 on action plans.
[115] The case *Council* v. *Commission* discusses the obligation on the side of the Union to respect the principles of conferral and institutional balance for non-binding international agreements. Even if action plans are not strictly speaking non-binding international agreements, the obligation to respect a principled approach should extend to all forms of non-binding acts concluded with third states. The case will be further discussed under the heading 'Memoranda of Understanding'. Case C-660/13 *Council* v. *Commission*, EU:C:2016:616, para. 46.
[116] EEAS, *Non-Paper: Guidelines for Future ENP Action Plan* 05.01.2012, Access to Documents request SG1 - Corporate Board Secretariat; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.
[117] E.g. 'The position to be taken by the Community in the context of the Association Council and of the Association Committee, is to be defined by the Council, on the proposal of the Commission, or, if the case arises by the Commission, in conformity with the relevant provisions of the Treaties'. Article 2(1), Council Decision 2006/356 of 14 February 2006 concerning the conclusion of the Euro-Mediterranean Agreement establishing an Association between the Community and its Member States of the one part, and the Republic of Lebanon on the other part, *OJ* [2006] L 143/1, 30.05.2006.

each ENP country that endorses them as recommendations.[118] However, to what extent the drafting of the action plans is done in collaboration with the third country is very case specific. With some countries there are real negotiations while with some others this is not an option since they do not even have the technical expertise to engage in such negotiations. When this is the case, the EU team can shape action plans in line with its willingness and political drive and appetite.[119] Therefore, the negotiation of the action plans raises some doubts as to what extent the formal position of the third country is respected. For example, in the case of the first action plan concluded with Ukraine, Hillion writes that 'the content of the drafts forwarded to the Ukrainian authorities, and the EU position during the 'negotiations' were essentially the product of the Commission's own initiative'.[120] Van Vooren writes that the Commission, in an effort to reinforce the idea that action plans are not treaty, steadily used the term 'consultations' between the institutions and the third countries instead of term 'negotiations'.[121] If on the one hand this choice was made to underline the 'political nature' of the process, on the other the term consultation places the third country in a position of subordination. The third country is consulted; it does not actively negotiate the act.

❖ Progress reports

The procedures regulating the drafting and the adoption of progress reports are entirely regulated by Commission's (for the SAP) and EEAS' (for the ENP) self-imposed guidelines.[122] Progress reports are written in close cooperation with EU delegations in third countries, which are also responsible for preparing the first draft.[123] Progress

[118] EEAS, *Non-Paper: Guidelines for Future ENP Action Plan* 05.01.2012, Access to Documents request SG1 - Corporate Board Secretariat; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.
[119] Interview with Commission official from the Legal Service, 24.04.2015, e-mail exchange.
[120] C. Hillion, 'The EU's Neighbourhood Policy Towards Eastern Europe', in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations* (Cambridge: Cambridge University Press 2008), 309, at 315.
[121] B. Van Vooren, 'A case-study of soft law in EU external relations: the European Neighbourhood Policy', 34 *European Law Review* 2009, at 708.
[122] EEAS, *Non-Paper: Guidelines for Future ENP Action Plan* 05.01.2012, Access to Documents request SG1 - Corporate Board Secretariat; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084; European Commission, Directorate General for Enlargement, *Guidance Note Enlargement Package 2012*, Access to documents request GESTDEM Reference 2013/3857; European Commission, Directorate General for Enlargement, *Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.
[123] EEAS, *Non-Paper: Guidelines for Future ENP Action Plan* 05.01.2012, Access to Documents request SG1 - Corporate Board Secretariat; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

reports, however, undergo numerous reviews before they are made public, to the extent that EEAS and Commission officials in the delegations barely recognize their first draft once the reports are published.[124] During the process of drafting progress reports numerous stakeholders are required to provide inputs at different stages in the process.[125] The same reports specify that they are based on many sources which include: contributions from the governments, from the EU Member States, reports by the European Parliament and information from various international and non-governmental organisations.[126] In this respect, it should be highlighted that decisions as to which associations should be consulted and whose suggestions should be accepted conceal political and value judgments. Overall, progress reports are the result of ingenious work on the part of the Commission and of the EEAS, which often found themselves in the position to fill with content criteria that they were required to monitor (e.g. the rule of law, democracy, etc.)[127] by drawing inspiration also from international sources (e.g. the OECD).[128] Furthermore, the Commission and the EEAS decide how to monitor compliance, leaving open the question as to why it chooses to use certain instruments as benchmarks. The discretion is also visible when comparing human rights compliance in the progress reports across the SAP countries. The progress reports cover almost all the same rights but use very different standards for monitoring their implementation.[129]

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[124] Interviews with EEAS and Commission officials at the European Delegation in Sarajevo, 16.07.2013, Sarajevo.

[125] European Commission, Directorate General for Enlargement, *Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.

[126] 'The report is based on information gathered and analysed by the Commission. Many sources have been used, including contributions from the government of Albania, the EU Member States, European Parliament reports and information from various international and nongovernmental organisations.' Commission Staff Working Document Albania 2014 Report of 8 October 2014, Accompanying the Commission Communication on the EU Enlargement Strategy, SWD(2014) 304 final. Stakeholders varies from local NGOs, the Council of Europe, partner countries, international financial institutions (such as the IMF, the WB, the EBRD, etc.), and international organisation like the ILO, WHO, UNICEF, etc. EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

[127] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan Den Rijn: Kluwer Law International 2008); 85-119; E. Tulmets, 'Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy', in C. F. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the European Union Towards a New Architecture* (Oxford, Oxford University Press 2010), 297, at 312.

[128] E.g. OECD (1999), "European Principles for Public Administration", SIGMA Papers, No. 27, OECD Publishing. Available at: <http://dx.doi.org/10.1787/5kml60zwdr7h-en> (Consulted on 07.08.2016).

[129] See Annex I.

❖ Memoranda of Understanding

The conclusion of Memoranda of Understanding should not differ too much from the conclusion of international agreements. In *France v. Commission* the Court made clear that the non-binding nature of an act cannot be utilised to avoid the principle of conferred power or institutional balance. [130] This approach was confirmed by the Court in *Council* v. *Commission* a case concerning the distribution of powers between the Council and the Commission as regards approving and authorizing the signature of an addendum to a MoU between the Union and Switzerland.[131] The Court of Justice – in line with Advocate General Sharpston's opinion –[132] is of the view that the initial Council decision authorizing negotiations for a MoU does not extinguish the Council's power under article 16(1) TEU to decide whether or not the Union should become a party to the instrument resulting from those negotiations and sign it.[133] This is applicable even if the content of the non-binding agreement negotiated by the Commission with a third country corresponds to the negotiating mandate given by the Council. The Court stresses how the signature of a non-binding agreement entails the assessment by the Union of whether:

> 'the agreement still reflects its interest, as defined by the Council in particular in the decision to open negotiations on the conclusion of the agreement. That assessment requires, inter alia, verification of the actual content of the non-binding agreement resulting from negotiations with a third country […] and that content cannot be determined in advance or predicted when the decision to start such negotiations is made.'[134]

Therefore, according to the Court the decision as to whether or not to approve and sign a non-binding international agreement with a third state belongs to the Council. However, practice shows that the procedure has not always been clear.

If one takes a close look at the examples of MoUs within the wider neighbourhood context it is not always clear who was involved in the negotiations, who are the signatories of the documents, and for which subject areas this measure could be used. A MoU on a strategic partnership on energy was concluded by the Union with Egypt with the aim of

[130] C-233/02 *France* v. *Commission*, EU:C:2004:173, para. 40.
[131] Case C-660/13 *Council* v. *Commission*, EU:C:2016:616.
[132] Opinion of Advocate General Sharpston delivered on 26 November 2015 on Case C-660/13 *Council* v. *Commission*, EU:C:2015:787, para. 112-113.
[133] Case C-660/13 *Council* v. *Commission*, EU:C:2016:616, para. 46.
[134] Case C-660/13 *Council* v. *Commission*, EU:C:2016:616, paras 42-43.

gradually integrating Egypt's energy market with that of the EU.[135] The MoU was signed by the Commissioner for External Relations and European Neighbourhood Policy, the Commissioner for Energy, and the Minister for Foreign Affairs of Egypt. The signature of the Presidency of the Council of the European Union was foreseen but not made. Differently, a very similar MoU on a strategic partnership in the field of energy between the EU and Azerbaijan was eventually signed by the Presidency of the European Council, the President of the Commission and the President of the Republic of Azerbaijan. Contrary to these examples, the latest MoUs have been adopted internally as Commission implementing decisions. For example, the Commission – on the basis of a European Parliament and Council joint decision on macro financial assistance to Tunisia – adopted, in accordance with the examination procedure and in agreement with the Tunisian authorities,[136] a MoU clearly spelling out the conditions for the provision of Union macro-financial assistance to the third country (e.g. economic and financial conditions, structural reforms, etc.).[137] Another example of a MoU concluded by the Union with an ENP state is the one between the EU and Belarus on a Mobility Partnership.[138] The MoU was adopted as a Commission Decision using as legal base articles 49 TFEU and 17 TEU.[139] The actual text of the MoUs is found in the annexes of the decisions.

This post-Lisbon practice, does not seem to fit comfortably with the Court's decision in *Council* v. *Commission*. In the case of the Swiss MoU discussed in *Council* v. *Commission* the Council did not explicitly empower the Commission to adopt the addendum; it only granted the Commission the power to negotiate it.[140] However, in the case of the MoUs granting macro financial assistance to Tunisia and Ukraine, the Council – together with

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[135] Memorandum of Understanding on Strategic Partnership on Energy between the European Union and the Arab Republic of Egypt, available at: <http://eeas.europa.eu/egypt/docs/mou_energy_eu-egypt_en.pdf> (Consulted on 07.08.2016).

[136] Comitology examination procedure of Article 5 Regulation No. 182/2011 of the European Parliament and the Council laying down the rules and the general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ* [2011] L55/13, 28.02.2011.

[137] Article 3(1), 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, *OJ* [2015] L151/9, 21.05.2014.

[138] Commission Decision of 15 June 2015 on Joint Declaration establishing a Mobility Partnership between the Republic of Belarus and the European Union and its participating Member States, C(2015) 3955 final.

[139] Commission Decision on Joint Declaration of 15 June 2015 establishing a Mobility Partnership between the Republic of Belarus and the European Union and its participating Member States, C(2015)3955/F1.

[140] 'On 20 December 2012, the Council and the Representatives of the Governments of the Member States adopted conclusions in which […] they invited the Commission, acting in close cooperation with the Presidency of the Council, 'to engage in the necessary discussions' with the Swiss Federal Council with a view to obtaining a Swiss financial contribution for the Republic of Croatia and to consult the EFTA Working Party regularly as to the progress of those discussions ('the 2012 Conclusions').' Case C-660/13 *Council* v. *Commission*, EU:C:2016:616, para. 8.

the Parliament – empowered the Commission to adopt such act.[141] Does this difference have any implication in respect of the approach taken by the Court? In my view the answer remains unclear. The macro financial assistance MoUs have political and legal consequences for the Union (and possibly the Member States); thus, in accordance with the Court's line of argument, the Council is under the obligation to check whether the content of the agreement and any relevant constraints have been respected by the Commission during the negotiations (before the Union signs it). However, if the joint Council and Parliament decisions (empowering the Commission to adopt the MoU) are interpreted as to imply that the Council has lost its prerogative to decide if the instrument resulting from the negotiations is in line with its mandate, then the Commission can adopt MoUs without the final approval of the Council. Whether this is the case or not, other questions also still remain unanswered: is the comitology examination procedure enough to guarantee Council supervision? What about the Parliament? Shouldn't it also have the obligation to check whether the Commission respected the relevant constraints in the final deal?

Despite the debate over the correct distribution of powers between the Commission and the Council, this discussion highlights how the lack of clear rules as to the exercise of power externally through administrative arrangements has the potential to create legal uncertainty within and outside the Union. For example, annulling the MoU between the Union and Belarus – due to the unclear rules – has the potential of delaying and potentially stopping the processes initiated by the EU to provide mobility for the citizens of Belarus.

4.2 Financing the agenda for action: is there an easier way?

❖ Commission implementing acts

As established by the IPA II and ENI regulations, strategy papers and annual programming documents are Commission implementing acts (article 291 TFEU),[142] and they are

[141] Article 3(1), Decision (EU) 2015/601 of the European Parliament and of the Council of 15 April 2015 providing macro-financial assistance to Ukraine, *OJ* [2015] L100/1, 17.04.2015; Article 3(1), 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, *OJ* [2015] L151/9, 21.05.2014.

[142] The following articles make a reference in their text to article 16(3) of Regulation No 236/2014 which in turn reference the Comitology examination procedure of Article 5 Regulation No. 182/2011 of the European Parliament and the Council laying down the rules and the general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ* [2011] L55/13, 28.02.2011. The articles are: article 6, 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), *OJ*

adopted in accordance with Comitology examination procedure.[143] Annual Country Action Programmes both for the SAP and the ENP states are also adopted in accordance with Comitology examination procedure.[144] The Comitology examination procedure requires that a qualified majority of the Committee members – either of the IPA II Committee or of the ENI Committee – approve the text of the documents. [145] As already mentioned, the IPA II and ENI regulatory frameworks are complemented by the regulation laying down common rules and procedures on the implementation of Union's external financial assistance (Regulation No. 236/20114). In some cases, these three regulations communicate well with one another; in others the synergy tends to create confusion. For example, the annual action programmes are envisaged by Regulation No. 236/20114; however, no reference to these instruments is found in IPA II and ENI. Alongside this regulatory framework, the Commission, together with the EEAS for the ENP, adopted internal guidelines on how to produce strategy papers and annual programming documents.[146] The purpose of these guidelines is to complement the regulatory framework and other relevant references on aspects related to programming of financial assistance. Finally, the Commission also adopted two Commission implementing regulations establishing specific rules for the implementation of the IPA II financial assistance and the ENI cross-border projects.[147] These documents regulate the

[2014] L77/13, 15.03.2014; and article 7, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[143] Article 5, Regulation (EU) No. 182/2011 of the European Parliament and the Council laying down the rules and the general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ* [2011] L55/13, 28.02.2011.

[144] Article 2, Regulation No 236/2014 of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, *OJ* [2014] L77/95, 15.03.2014.

[145] Article 13, 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), *OJ* [2014] L77/13, 15.03.2014; and article 15, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[146] IPA II Programming Guide (comprehensive set of guidance documents and tools) access to documents denied, Access to Documents request GESTDEM 2016/451; however, a Quick Guide to IPA II Programming serving as a digest of the IPA II Programming Guide was made available, Access to Documents request GESTDEM reference 2016/451, also available at: <http://abdigm.meb.gov.tr/projeler/ois/014.pdf> or <http://www.evropa.gov.rs/Documents/Home/DACU/12/78/248/ipa-quickguide_v0%202.pdf> (Consulted on 07.08.2016); Instruction for the Programming of the European Neighbourhood Instrument (ENI) 2014-2020, available at: https://ec.europa.eu/europeaid/sites/devco/files/ENI%20programming%20instructions.pdf (Consulted on 07.08.2016).

[147] Commission Implementing Regulation (EU) No. 447/2014 of 2 May 2014 on the specific rules for implementing Regulation (EU) No. 231/2014 of the European Parliament and of the Council establishing an Instrument of pre-accession assistance (IPA II), *OJ* [2014] L 132/32, 03.05.2014; Commission Implementing Regulation (EU) No 897/2014 of 18 August 2014 laying down specific provisions for the implementation of cross-border cooperation programmes financed under Regulation (EU) No 232/2014 of the European

actual methods of implementation of the funds, once strategy papers and annual action programmes are adopted.[148]

4.3 Implementing sector specific objectives: the Commission's way

❖ Visa liberalisation

The procedure for the adoption of Visa Liberalisation Action Plans for Georgia, Moldova and Ukraine and for the adoption of Visa Liberalisation Road Maps for the SAP countries is specified in the texts of the same documents, under the headline 'methodology'.[149] They are based on a 'tailor made approach combined with good practice developed incrementally'.[150] The needs identified in the VLAPs and Road Maps are assessed in the exploratory phase of the visa liberalisation dialogue, with a gap-analysis based on the compliance by partner countries with chapters 23 and 24 of the EU *acquis*.[151] The exploratory phase takes into account both the EU 'fact finding' missions and the detailed information provided by the third countries governments related to the four blocks covered by the VLAPs and VL Road Maps.[152] Neither the documents themselves, nor the access to document request specify whether other sources – despite the governmental ones – are used by the Union in collecting information during the 'fact-finding' missions.

The procedure used in order to draft visa liberalisation progress reports is also specified in the texts of the VLAPs and in the ones of the Road Maps and partly in the text of the progress reports themselves.[153] The VLPRs evaluate the fulfilment of each set of benchmarks through on-site evaluations involving experts from EU Member states.[154] To

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Parliament and the Council establishing a European Neighbourhood Instrument, *OJ* [2014] L 244/12, 19.08.2014.

[148] The only provision dealing with programming is article 4 of the Commission Implementing Regulation for implementing IPA II which establishes that 'the ownership of the programming and implementation of IPA II assistance lays with the IPA II beneficiaries'. Commission Implementing Regulation (EU) No. 447/2014 of 2 May 2014 on the specific rules for implementing Regulation (EU) No. 231/2014 of the European Parliament and of the Council establishing an Instrument of Pre-accession Assistance (IPA II), *OJ* [2014] L 132/32, 03.05.2014.

[149] The access to document request inquiring on the procedure of conducting VLAPs and Road Maps did not add anything to what is already stated in the documents themselves.

[150] Visa Liberation Action Plan Methodology, application for access to documents – GESTDEM reference 2016/453.

[151] VLAP Methodology, application for access to documents – GESTDEM reference 2016/453.

[152] EU-Georgia Visa Liberalisation Action Plan available at: <http://migration.commission.ge/files/vlap-eng.pdf> (Consulted on 07.08.2016).

[153] The access to document request inquiring on the procedure of conducting VLPRs did not add anything to what is already stated in the documents themselves.

[154] The evaluation missions are focused on blocks that match the stage of advancement in implementation process. The 2013 VLPR for Georgia briefly states that its assessment was based on 'desk-work carried out

that end, third countries are expected to provide detailed information, including relevant statistical data and financial plans to support the implementation of action plans.[155] Also for progress reports neither the documents themselves, nor the access to document request specify whether sources – other than the governmental ones – are used by the Union in collecting information.[156]

❖ Human rights impact assessments

Human rights impact assessments for trade-related policy initiatives are to be adopted in accordance with the latest DG TRADE internal guidelines on the analysis of human rights impacts in impact assessment.[157] The guidelines are self-imposed rules, and they are particularly detailed as to the methodology to be followed when carrying out impact assessments. They indicate the normative framework of human rights instruments to be used in order to carry out the analysis, the steps to be followed during the first screening phase, and the type of approach (quantitative and qualitative) to be adopted in the final phase of the analysis.[158] The guidelines foresee consultations with stakeholders and recognise the link and possible overlap between HRIAs and the various administrative activities aimed at implementing overarching policy goals (e.g. ENP progress reports).[159] The ever-evolving administrative structures aimed at implementing the Union external

by the services of the Commission and the European External Action Service, including the EU Delegation to Georgia'. First Commission Progress Report on the Implementation by Georgia of the Action Plan on Visa Liberalisation of 15 November 2013, COM(2013) 808 final.

[155] EU-Moldova Visa Liberalisation Action Plan available at: <http://www.enpi-info.eu/library/content/action-plan-visa-liberalisation-moldova> (Consulted on 07.08.2016); EU/Georgia Visa Liberalisation Action Plan available at: <http://migration.commission.ge/files/vlap-eng.pdf> (Consulted on 07.08.2016).

[156] The Kosovo VLPR specify that the report draws upon 'reports submitted by the Kosovo government, reports drafted by EU Member States 'experts participating in an assessment mission […], information received from the EU Office in Kosovo, EULEX and EU Agency, as well as statistical data compiled by Eurostat and submitted by Member States.' Third Commission Report on Progress by Kosovo in fulfilling the requirements of the visa liberalization roadmap of 18 December 2015, COM(2015) 906 final.

[157] 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016).

[158] 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016), 4-11.

[159] 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016), at 7.

action start to recognise one another across policies. Finally, the DG TRADE guidelines are further supported by the better regulation package.[160]

5. Sectorial organisation, institution and structures

The Commission, together with the EEAS, are the main bodies responsible for drafting the administrative activities implementing the SAP and the ENP. The Directorate General responsible for coordinating and implementing the ENP and the SAP is the Directorate General for Neighbourhood Policy and Enlargement Relations (DG NEAR).[161] DG NEAR – alongside the EEAS – works closely with other Directorate Generals (DGs) in charge of thematic priorities (e.g. DG for Regional and Urban Policy, DG for Employment Social Affairs and Inclusion, DG for Agriculture and Rural Development, etc.) and with the Directorate General for International Cooperation and Development (DG DEVCO), which is responsible for the implementation of the ENP financial support under the ENI. The Directorate General for Migration and Home Affairs (DG HOME) and DG TRADE, are responsible for the implementation of sector-specific policies like visa liberalisation and human rights impact assessments.

The EEAS is a *sui generis* organ that is neither legislative nor judicial in nature; it constitutes a novel kind of administrative body. It is not a fully-fledged EU institution, but at the same time it is more than an agency or mere advisory body.[162] The EEAS does not work in isolation: it is closely linked to the work of the High Representative by being placed under her authority and by assisting her in her various functions.[163] The EEAS' substantive powers can only be defined by looking at the definition of the HR's mandate.[164] The most strongly formulated tasks of the HR are those of conducting the Common Foreign and Security Policy (CFSP), coordinating the EU external action,

[160] Commission Staff Working Document of 19 Maggio 2015 on 'Better Regulation Guidelines', SWD(2015) 111 final, at 16.
[161] In September 2014 DG ELARG changed into DG NEAR as to include also the Commission staff of DG DEVCO working on the ENP. Press Release available at: <http://europa.eu/rapid/press-release_IP-14-984_en.htm> (Consulted on 07.08.2016).
[162] Article 1(2), Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU). For more information, see: J. Larik, 'The EU on the Global Stage after the Lisbon Treaty: External Action and the External Action Service', in *Global Administrative Law: The Case Book*, edited by S. Cassese, B. Carotti, L. Casini, E. Cavalieri, and E. MacDonald, Institute for International Law and Justice, (IRPA and IILJ: New York 2012), at 21.
[163] Articles 1(3) and 2(1), Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU).
[164] B. Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service', 48 *Common Market Law Review* 2011, at 489.

ensuring its unity and effectiveness, implementing the decisions of the European Council, and finally proposing decisions in relation to the Common Security Defence Policy (CSDP).[165]

The Commission is the main institution responsible for drafting the instruments implementing the SAP; nonetheless, the EEAS is also involved in the implementation of the Union's policy towards the Western Balkans to the extent that it supports the coordination of the Union's external action, and to the extent that it contains CFSP and CSDP aspects.[166] The Commission and the EEAS work more closely in the implementation of the ENP. The ENP progress reports are Commission and EEAS documents; likewise, ENP strategy papers and annual programming documents – even if they are adopted as Commission Implementing Decisions – are Commission and EEAS documents. Moreover, the EEAS adopts internal guidelines for itself and the Commission on how to adopt ENP progress reports and action plans.[167] Action plans are presented by the Commission to the Council, thus, it is rather striking that the guidelines on their adoption are adopted by the EEAS. The EEAS under article 9 of the decision establishing the service is empowered to prepare Commission Decisions regarding the development of the programming cycle.[168] As already pointed out by Van Vooren, the power given to the EEAS, in the identification and prioritization of funding priorities aimed at implementing the Union's policy objectives, entails significant policy discretion – well beyond the scope of the *Meroni* doctrine.[169] The precise division of competences between the EEAS and the Commission when implementing the SAP and ENP is agreed in accordance with internal arrangements; however, this distribution is not always sharply delineated. The unclear division of tasks between the Commission and the EEAS is reflected in the administrative activities implementing the two wider neighbourhood policies. The Commission and the

[165] See articles 18(2)(3), 26(2)(3), 27(1), and 42(4) TEU.
[166] See the EEAS website, 'EU Relations with the Western Balkans', available at: <http://eeas.europa.eu/western_balkans/index_en.htm> (Consulted on 07.08.2016).
[167] EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084; EEAS, *Non-Paper: Guidelines for Future ENP Action Plan* 05.01.2012, Access to Documents request SG1 - Corporate Board Secretariat; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.
[168] Article 9, Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU), L 201/30 [2010], 03.08.2010.
[169] B. Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service', 48 *Common Market Law Review* 2011, at 491.

EEAS staff working on the SAP and ENP are organised between the headquarters in Brussels and the Union Delegations in third countries.[170]

Alongside the Commission and the EEAS staff, there are other actors providing inputs to the drafting of the different administrative acts and measures implementing the Union's wider neighbourhood policies. The 'unbounded administration'[171] taking part in the ENP decision making process varies from third countries' governments, international organisations, civil society, and non-governmental organisations (international and local). All these actors are required – either by positive law or in accordance with administrative self-imposed guidelines –[172] to participate at different stages and to different extents in the development and implementation of the SAP and ENP administrative acts and measures. The involvement of these actors is, however, not always proceduralised and harmonised. The Union administration creates with these actors information networks. The presence of this 'unbounded administration' raises some important questions as to the formal position of third countries in the decision making process,[173] and to the role granted to civil society and international organisations. In other words: who is invited? To what extent is their view taken into consideration?

Finally, it is important to point out how international organisations such as the United Nations (and its agencies), the World Bank, the International Monetary Fund, the Organisation for Security and Cooperation in Europe and some international NGOs are external to the institutional set up of the Union but formally associated therewith by reasons of their common specific interests in the SAP and ENP countries.[174] Alongside

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[170] Both an official from the EEAS and an official from the Commission working in Brussels on the ENP shared the view that despite internal arrangements on the division of tasks, their everyday work did not strictly follow the division of competences envisaged. Interviews conducted on 18.11.2013 and 19.11.2013, Brussels. The same holds true also for the Union delegations in third countries. During two interviews at the EU delegation in Sarajevo, it was clear that the staff of the delegation itself could differentiate between EEAS and Commission staff. Interviews conducted on 16.07.2013, Sarajevo.

[171] Curtin defines these actors as 'administration unbounded', i.e. 'the practice of actors other than the administration as such being included in a process of reaching decisions'. D. Curtin, *Executive Power of the European Union: Law, Practices, and Living Constitution* (Oxford: Oxford University Press 2009), at 19.

[172] E.g. article 4(5), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30; and EEAS, *Guidance Note ENP Package 2014* (section on sources, inputs and consultations), Access to Documents request GESTDEM reference 2013/5084.

[173] M. Maresceau, 'Pre-accession', in M. Cremona (eds.), *The Enlargement of the European Union* (Oxford: Oxford University Press 2003), at 33.

[174] E.g. article 5(4), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30; and EEAS, *Guidance Note ENP Package 2014* (section on sources, inputs and consultations), Access to Documents request GESTDEM reference 2013/5084.

institutionalised forms of interaction, officials both in Brussels and in the EU delegations in third countries tend to create with these international actors epistemic communities which try to go beyond their formal professional role as a group. Finding themselves in a 'bubble', individuals and groups interact, reason and judge within the boundaries of their established, albeit dynamic, knowledge. They are often able to determine common agendas – which are then reflected in the Union's external administrative activities – with the aim of persuading decision makers in third countries to change their policy goals.[175] Given the global emphasis on knowledge in power, the episteme takes the appearance of being scientific, technical, and universal.[176]

Conclusion

This chapter described in detail the various administrative measures aimed at implementing the Union's primary political choice towards its neighbouring states. The acts were grouped into three categories according to their main task. The three categories of instruments exemplify two different ways in which administrative power is exercised. The administrative power in setting an agenda for action (i.e. action plans, progress reports, MoUs, etc.) and in achieving sector-specific objectives (i.e. VLAPs, VLPRs, and HRIAs) is rather left unguided. Conversely, the administrative power financing the agenda for action (i.e. strategy papers and annual programming documents) is characterised by overregulation.

The regulatory gaps as to the procedures and parameters that the administration has to respect when setting the agenda for action and in implementing sector-specific objectives left the administration wide open to acting in a discretionary and unregulated fashion. Vague, general, or ambiguous parameters aimed at creating and guiding the administrative power inevitably grant the administration broad manoeuvring space.[177] Moreover, the lack of clear rules generates instability and uncertainty. The legal value and form of the administrative instruments was modified again and again over time: from

[175] M.K.D. Cross, 'Rethinking epistemic communities twenty years later', 39 *Review of International Studies* 2013, at 147.

[176] It is worth emphasising that epistemes that inform global governance are not simply reducible to the material power of and interests of dominant states, because they are embedded in institutions who participate in global politics. E. Adler and S. Bernstein, 'Knowledge in power: the epistemic construction of global governance', in M. Barnett and R. Duvall, *Power in Global Governance* (Cambridge: Cambridge University Press 2005), 294, at 317.

[177] R. B. Steward, 'The Reformation of American Administrative Law', 88 *Harvard Law Review* 1975, at 1676.

legally binding adopted according to formal procedures, to non-legally binding adopted informally, and then again to privilege bindingness and formality (e.g. for action plans and MoUs). Furthermore, regulatory lacunas incentivised the development of a thick net of self-imposed rules which often yielded paradoxical results. For example, the EEAS developed guidelines on how action plans should be prepared although formally they should be drafted and presented by the Commission to the Council. The approach taken by the legislator and the Council not to guide the exercise of administrative power in achieving the overall goals and the sector-specific goals of the SAP and the ENP seems to rest on two beliefs. The first of these is that greater flexibility is preferred over clear rules as to the way the Commission execute the Union's objectives externally. The second is the belief that, despite the relevance of administration action, the realm of external relations is governed by politics. However, such beliefs are slowly being challenged. The dispute between the Council and the Commission as to who is empowered to adopt MoUs is one example.

Conversely, the adoption of strategy papers and annual programming documents (instruments aimed at financing the agenda for action) is characterised by overregulation, which often seems to lead to greater confusion. Despite the poor bridges between the different instruments administering the IPA II and ENI regulatory frameworks, the abundant presence of vague objectives and priorities that should receive financial assistance does not help the administration in exercising its power in a linear manner. The bulk of regulations indicating to the Commission the exact steps to be taken in order to choose the projects to be financed promotes the idea that EU administration is bound by clear and ascertainable rules and are not engaged in the political process of adjusting a range of conflicting claims. As Chiti suggests, such an approach to 'EU administrative action is contrary to the reality of contemporary administrative systems, which cannot escape the task of implementing open-ended legislations and of making choices among competing interests.'[178]

The nature of the administrative power in implementing the SAP and the ENP (non-linear, discretionary, and informal) should not be perceived as bad per se, especially within the context of a policy which is not strictly reliant on scientific choices. It should rather be recognised and guided by relevant rules and principles. Finally, the

[178] E. Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?', *European Law Journal*, (forthcoming).

administrative power does not present significant differences as to how it is exercised in the SAP and ENP: it does not markedly reflect the difference in policy goals.[179] The analysis commenced by this chapter as to the characteristics of the administrative power externally is completed by chapter III, which focuses on the addresses and impact of the administrative action.

[179] As already discussed action plans are not always genuinely negotiated with third states, and the principle of joint ownership of the process is hardly reconcilable in that the monitoring process via progress reports is led by the Commission and the EEAS.

Chapter III: Who are the addresses of the external administrative power?

Acknowledging the impact of external administrative acts and measures

1. From the grammar to the pragmatics of external administrative action

As already discussed in chapter I, the two foundational values of the administrative rule of law are driving the exercise of administrative power, and protecting individuals affected by it.[1] Therefore, in order to fully understand how to guide administrative power and protect parties affected, it is essential to analyse its impact, and its addresses. The administrative power exercised by the Union in its external action clearly have an impact. However, at first glance, such impact seems to be legally irrelevant. In this respect, the study of the effects of the administrative power externally needs to bear in mind the specificities of the external relation's domain;[2] it might require moving from the 'grammar to the pragmatics' of the EU administrative action. The power exercised by the activities implementing the SAP and the ENP is capable of influencing the policy choices of the Union and of third counties and it incurs the risk of raising expectations about the Union's future conduct. The administrative activities implementing the Union's wider neighbourhood policies recreate processes that lead to the adoption of administrative and political decisions; they are themselves *de facto* administrative acts for third states, and they are likely to have an impact on the legally protected interests of natural and legal persons.

The aim of chapter III is to complete the analysis carried out by chapter II by empirically identifying the addressees and the impact of the administrative power in the SAP and ENP. It is about acknowledging the effects of the ever-increasing administrative power in EU external relations. In doing so, the chapter 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 the administrative activities is neither incidental nor unforeseeable; it is often the outcome of processes crystalised over time. The chapter will proceed as follows. First, it analyses with concrete examples

[1] C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (London: Hart Publishing 2014), at 325; H.P. Nehl, 'Good Administration as procedural right and/or general principle?', in H.C.H. Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law Towards and Integrated Administration* (Cheltenham: Edward Elgar Publishing 2009), 322, at 343; H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013), 144-146 and 149-151; P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), 250-252.
[2] Chapter I, section 4.3.

the impact that the administrative activities implementing the SAP and the ENP exercise on public power (both within the Union and in third states). Second, the chapter identifies and explains the impact that the same administrative activities exercise on natural and legal persons by presenting the cases that reached the CJEU in which individuals challenged the action (or better, the inaction) of the Commission.

2. The effects of administrative power on the exercise of public authority

The aim of this section is to determine the addresses and the impact of external administrative power on the exercise of public authority both within the Union and in the neighbouring states. The administrative acts implementing the SAP and the ENP can be grouped under two categories: preparatory acts and rule-making instruments (see summary tables at the end of the chapter). These categories are valid both internally and externally. Preparatory and rule-making instruments arguably belong to some of the most influential areas of administrative activity.[3] Preparatory acts inform final decisions and indicate which topic shall be put on th e policy agenda; rule-making acts – as we will see throughout this section – serve different roles. They can 'organise and systematise, even in some cases consolidate or codify, a body of legal rules emanating from diverse sources';[4] they may set out 'uniform conditions for implementing legally binding acts';[5] and they may indicate which projects the EU is committed to finance or the conditions of an MoU concluded with a third state.[6] The study of the impact of the administrative power goes hand in hand with the study of the internal procedures underlying the two policies.

2.1 In the Union

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

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[3] T. Larsson and J. Trondal, 'Agenda setting in the European Commission: How the European Commission Structure and Influence the EU Agenda', in: H.C.H. Hofmann and A.H. Türk (eds.), *EU Administrative Governance* (Cheltenham: Elgar Publishing 2006), 11-43.

[4] H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013), at 539.

[5] Article 291 TFEU.

[6] E.g. Commission Implementing Decision of 16 July 2014 approving the Memorandum of Understanding between the European Union and Tunisia related to macro-financial assistance to Tunisia, C(2014)5176/F1; Commission Implementing Decision of 10 December 2014 adopting an Annual Country Action Programme for Montenegro for the year 2014, C(2014) 9387.

❖ 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 status, opening of accession negotiations, starting negotiations for an agreement with a third state, etc.). They exercise pressure on the development of the Union's power. 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 they are used as reference documents by the Council 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.[7] 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 European Union contains a list of key priorities that needs to be fulfilled by the latter in order to commence accession negotiations.[8] The key priorities identified by the Commission Opinion are monitored by yearly progress reports.[9] The Council, based on the findings of the progress reports, decided to grant candidate status to Albania[10] and will later decide when to open accession negotiations.[11]

ENP action plans and progress reports are preparatory documents indicating the next steps to be taken in the policy implementation framework for each neighbouring

[7] On the 24 June 2014 Albania was granted candidate status, whilst as of today (07.08.2016) Albania as not yet started accession negotiations. See the following footnotes for reference documents.
[8] Commission Opinion on Albania's application for membership of the European Union of 9 November 2010, COM(2010) 680, at. 11.
[9] E.g. Commission Progress Report on Albania accompanying the EU Enlargement Strategy of 10 November 2015, SWD(2015) 213 final.
[10] At the Luxembourg General Affairs Council meeting of 24 June 2014 the EU Member States have agreed – based on the recommendation by the European Commission included in the Report from the Commission to the Council and the European Parliament on Albania's Progress in the Fight Against Corruption and Organised Crime and in the Judicial Reform of 4 June 2014, COM(2014) 331 final – to grant EU candidate status to Albania. 3326th Council meeting General Affairs Luxembourg, 24 June 2014, 11198/14.
[11] '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 Conclusion on Enlargement and Stabilisation and Association Process of 15 December 2015, 15356/15.

state. Action plans have been used in order to adopt other administrative acts like visa liberalisation action plans, which are based on their Justice and Home Affairs section.[12] Moreover, they have been used by the Commission as reference documents in 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 Ukraine[13] or the Visa Facilitation Agreements in general.[14] Action plans are also used as legal base for the conclusion of Memoranda of Understandings.[15] Thus, in accordance with post-Lisbon practice, they might be used as legal base for the adoption of Commission decisions and Commission implementing decisions.[16] Finally, action plans have also been used to justify the conclusion of agreements with ENP states.[17] Exploratory MoUs are also preparatory documents to the extent that they prepare the ground for concrete collaborative actions between the Union and third states.[18]

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[12] '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)', Visa Liberalisation Action Plan with Moldova, available at: <http://www.enpi-info.eu/library/content/action-plan-visa-liberalisation-moldova> (Consulted on 07.08.2016).

[13] 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.

[14] M. Cremona, 'The European Neighbourhood Policy: More than a Partnership?' in M. Cremona (eds.), *Developments in EU External Relations Law* (Oxofrd: Oxford University Press 2008) 245, at 276.

[15] 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 respecting 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.' EU-Azerbaijan Action Plan, available at: <http://eeas.europa.eu/enp/pdf/pdf/action_plans/azerbaijan_enp_ap_final_en.pdf> (Consulted on 07.08.2016).

[16] Chapter II, section 4.1.

[17] '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.' Council Decision 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 (2012/497/EU), *OJ* [2012] L 241/2, 07.09.2012.

[18] '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.' Memorandum of Understanding on a Strategic Partnership between the European Union and the Republic of Azerbaijan in the fields of Energy, available at:

The same analysis holds true also for Visa Liberalisation Action Plans and Visa Liberalisation Progress Reports. 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 external borders. Moreover, they work as safeguards in making sure that all required reforms are carried out by the neighbouring states before enjoying 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 adoption of VLAPs and VLPRs *de facto* proceduralises the process leading to the acceptance of a third state in the Union visa-free regime. 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 decision of delisting:

> '[…] the Commission considers that the Republic of Moldova meets all the benchmarks set out in the Visa Liberalisation Action Plan.'[19]

Human rights impact assessments 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.[20] Impact Assessments, with their section on human rights, are Commission staff working documents which accompany the Commission's recommendations for a Council Decision authorising the opening of negotiations of an agreements between the EU and a third state.[21] 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 been so far a matter of

<http://ec.europa.eu/dgs/energy_transport/international/regional/caucasus_central_asia/memorandum/doc/mou_azerbaijan_en.pdf> (Consulted on 07.08.2016).

[19] Regulation (EU) No 259/2014 of the European Parliament and of the Council of 3 April 2014 amending Council Regulation (EC) No 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, *OJ* [2014] L 105/9, 08.04.2014.

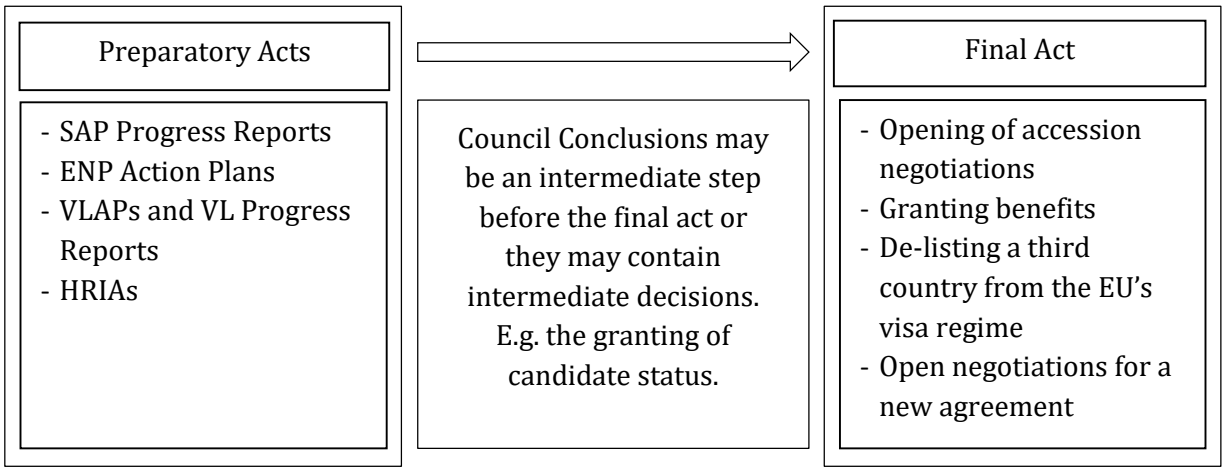
[20] 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016).

[21] Commission Staff Working Document 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', COM(2014) 84 final.

discretion of the Commission which has imposed on itself internal guidelines.[22] However, the General Court, in a recent case that will be discussed in section 3 of this chapter, 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.[23] In other words, the Court in the *Front Polisario* case 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.

Figure 1 tries to visualize 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



Progress reports, action plans, impact assessments, etc. not only fulfill a preparatory function within the *de facto* procedures just explained; they are also used as reference documents for the adoption of other EU acts. In other words, they are also instrumental

[22] Chapter II, section 3.3.

[23] '[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).' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 228.

for the achievement of other Union administrative and legislative activities. Hereby, some examples are presented.

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 IPA II and the ENI (as their predecessors IPA and ENPI)[24] make a clear reference in their policy framework article to the SAP and ENP instruments as being sources for guiding the programming of financial assistance.[25] For both EU wider neighbourhood policies we see that the programming of financial assistance is to take duly into account the administrative activities aimed at setting the agenda for the Union's action. The impact of the agenda setting instruments on the programming of financial assistance for both the SAP and the ENP is then concretized in their respective programming documents.

The Indicative Strategy Paper for Montenegro (2014-2010) clearly states that:

> 'The 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.'[26]

Furthermore, progress reports are used as indicators in order to monitor the achievement of the objectives identified by the same strategy paper and by the Annual Country Action Programme.[27] For example, the new IPA II Indicative Strategy Paper for Montenegro for

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[24] Article 5, Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), *OJ* [2006] L 210/82, 31.07.2006; article 3, Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, *OJ* [2006] L 310/1, 09.11.2006.

[25] '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.' Article 4, 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), *OJ* [2014] L77/13, 15.03.2014; '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 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 […].' Article 3, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

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

[27] 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 of 10

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 for the indicators to be used in order to monitor whether financial assistance achieved its goals.[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]

Likewise, the Annual Action Programme for Georgia states that:

> 'The action draws its objectives from key features of the current Georgia-EU policy dialogue which includes […] the Association Agreement (AA), expected to be signed in June 2014 and the Association Agenda.'[30]

Under the previous ENPI Regulation, progress reports had a peculiar role in the 'more for more' policy in the years 2011-2013. In the context of financial support, the Commission decided to set up a specific programme both for the eastern (EAPIC) and southern (SPRING) neighbours that would allocate extra financial support only to those neighbours taking clear and concrete steps on political reforms. In this context progress reports played a significant role. EAPIC and SPRING are two Commission Implementing Decisions based on article 13 of the ENPI Regulation.[31] Both Commission Implementing Decisions stated that the funding available for the programmes will be allocated to different partner countries based on the assessment carried out (among others) in the most recent ENP progress reports:

> 'The assessment will rely inter alia on the most recent ENP Progress Reports, on the EU's own evaluation of the most recent developments and on indicators compiled by international organisations.'[32]

December 2014 adopting an Annual Country Action Programme for Montenegro for the year 2014, C(2014) 9387.

[28] E.g. see Indicative Strategy Paper for Montenegro (2014-2020), adopted on 18.08.2014, 42-43. Available at: http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140919-csp-montenegro.pdf (Consulted on 07.08.2015).

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

[30] Commission Implementing Decision 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, C(2014) 5020.

[31] Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (ENPI), *OJ* [2006] L310/1, 09.11.2006.

[32] Commission Implementing Decision of 26 June 2012 on 'the Eastern Partnership Integration and Cooperation programme 2012-2013 in favour of the Eastern Neighbourhood to be financed under article

The ENP progress reports drafted by the Commission and the EEAS were, thus, used as a clear source of information in order to determine how to distribute funding to the ENP countries based on the 'more for more' principle. This idea of providing more support to the ENP state depending on their performance for multi-country umbrella programmes like the EAPIC and SPRING has been reintroduced also by the new ENI Regulation which (differently from article 13 ENPI) in its article 4(2) makes a clear reference to progress reports.

> '[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.'[33]

Finally, the last two examples of this section try to show how also informal administrative activities, conducted with the aim of implementing the Union's external action, can have an impact on the exercise of the Union's power even when they are not tied to *de facto* procedures. The first example is from the SAP while the second is from the ENP. The Stabilisation and Association Agreement (SAA) concluded by the EU with Bosnia and Herzegovina was signed in 2008, and it establishes of a sub-committee on Justice and Home Affairs.[34] The sub-committee is envisaged in order to have a structured forum where the EU institutions and the third country government could debate on crucial issues linked to the enhancement of the rule of law. The entrance into force of the SAA between the EU and Bosnia and Herzegovina was postponed until 2015. The Commission in 2011, while awaiting the entrance into force of the SAA, decided to establish a structural dialogue on Justice in order to cover the issues that should have been covered by the JHA sub-committee.[35] However, differently from what was foreseen by the SAA for the JHA

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19 08 01 03 of the general budget of the European Union', C(2012) 4170 final; Commission Implementing Decision of 26 September 2011 on 'Support for partnership, reforms and inclusive growth (SPRING) 2011-2012 in favour of the southern Neighbourhood region to be financed under article 19 of the general budget of the European Union', C(2011)6828.

[33] Article 4(2), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[34] See website of the government of Bosnia and Herzegovina dealing with EU integration and structures under the SAP. Available at: <http://www.dei.gov.ba/dei/bih_eu/sporazum/strukture/default.aspx?id=9816&langTag=en-US> (Consulted on 07.08.2015). The SAA concluded by the Union with Bosnia contains in its article 78 a JHA clause.

[35] For more information on the structural dialogue between the EU and Bosnia and Herzegovina, see: <http://europa.ba/Default.aspx?id=87&lang=EN> (Consulted on 07.08.2016).

committee, the structural dialogue guaranteed the participation of non-state actors (NGOs, civil society, international organizations, etc.) in the process. Now that the SAA with Bosnia and Herzegovina has finally entered into force, and the subcommittee on JHA is now established,[36] the question still remains as to what role will be given to non-state actors that have so far contributed to the structural dialogue.

The second example is taken from the *Front Polisario* case.[37] In the case, the applicant (the Front Polisario)[38] explains how the administrative activities of the Commission are a clear indication that the agreement between the EU and Morocco will also be applicable to the territory of the West Sahara. In other words, the nationalist movement claims 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 prove the numerous visits by the Directorate General for Health and Food Safety (DG SANCO) on the territory of West Sahara in order to establish whether the Moroccan authorities respect sanitary norms, and the list of Moroccan exporters agreed upon in the association agreement with Morocco, which includes a total of 140 enterprises which are established on the territory of West Sahara.[39] Preparatory acts have the effect of increasing the predictability of how the Union intends to implement its policies towards third countries. Preparatory acts often signal the direction in which the Union's action is intended to be developed.

❖ 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.[40] The Commission implementing regulations on the specific rules implementing IPA II and the cross-border cooperation programmes financed under ENI

[36] See European Council website: http://www.consilium.europa.eu/en/press/press-releases/2015/04/21-bih-conclusion-stabilisation-association-agreement/ (Consulted on 07.08.2016).
[37] A detailed account of the case is provided in the next section of this chapter.
[38] 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.
[39] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, paras 79 and 80.
[40] H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2012), Chapter 15.

are clear examples of Commission rule-making activities establishing uniform conditions for the implementation of IPA II and ENI.[41] These rule-making acts affect the exercise of Union's public power to the extent that they indicate in detail the rules and procedures to be followed when implementing financial support covering, among others, financial management, monitoring, evaluation and reporting, transparency and visibility.[42]

Multi-annual strategy papers and annual programming documents are Commission implementing decisions 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.[43] 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.[44] If 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;[45] however, 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.

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[41] Commission Implementing Regulation (EU) No. 447/2014 of 2 May 2014 on the specific rules for implementing Regulation (EU) No. 231/2014 of the European Parliament and of the Council establishing an Instrument of pre-accession assistance (IPA II), *OJ* [2014] L 132/32, 03.05.2014; Commission Implementing Regulation (EU) No 897/2014 of 18 August 2014 laying down specific provisions for the implementation of cross-border cooperation programmes financed under Regulation (EU) No 232/2014 of the European Parliament and the Council establishing a European Neighbourhood Instrument, *OJ* [2014] L 244/12, 19.08.2014.

[42] Article 1, Commission Implementing Regulation (EU) No. 447/2014 of 2 May 2014 on the specific rules for implementing Regulation (EU) No. 231/2014 of the European Parliament and of the Council establishing an Instrument of pre-accession assistance (IPA II), *OJ* [2014] L 132/32, 03.05.2014.

[43] 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 of 18 August 2014 adopting an Indicative Strategy Paper for Montenegro (2014-2020), C(2014) 5771; Commission Implementing Decision of 11 June 2014 adopting a Single Support Framework for Georgia (2014-2017), C(2014)3994.

[44] E.g. Commission Implementing Decision of 10 December 2014 adopting an Annual Country Action Programme for Montenegro for the year 2014, C(2014) 9387; Commission Implementing Decision 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, C(2014) 5020.

[45] Article 291 TFEU establishes that the Commission is granted implementing powers 'where uniform conditions for implementing legally binding acts are needed'.

Despite this lack of clarity, the annexes have a significant impact on the exercise of 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.[46] Moreover, the annual action programmes also indicate the specific arrangements to disburse financial assistance (e.g. budget support, direct management by the EU delegation, indirect management by the IPA II beneficiaries, etc.).[47] 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 as far as they establish how financial assistance shall be disbursed for each SAP and ENP states, whereas they are also preparatory acts since based on them other acts will be adopted (e.g. call for tendering, grant proposal, budget support, etc.). Figure 2 at page 88 tries to sketch the main procedural steps of the financial cycle for each neighbouring state.

The choices taken by the Commission as to which project and area of cooperation to finance are not neutral. As already explained in chapter II, the administration is granted significant discretion in selecting which project receives financial support.[48] Such discretion does not lack impact. An interesting case which was decided by the Court in 2004 exemplifies the relevance of the power granted to the administration in making such choices. The applicants to the case – B. Zaoui, L. Zaoui and D. Zaoui – are relatives of Mrs. Zaoui, who died on 27 March 2002 when a Palestinian terrorist carried out an attack on a hotel in Israel.[49] The applicants affirm 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'.[50] In this respect, they brought an action for compensation for damages (article 340 TFEU ex-article 288 read in conjunction with article 266 ex-article 233) against the Commission

[46] E.g. the annex of Commission Implementing Decision of 18 August 2014 adopting an Indicative Strategy Paper for Montenegro (2014-2020), C(2014) 5771; and the annex of Commission Implementing Decision of 11 June 2014 adopting a Single Support Framework for Georgia (2014-2017), C(2014)3994.
[47] E.g. the annex of Commission Implementing Decision of 10 December 2014 adopting an Annual Country Action Programme for Montenegro for the year 2014, C(2014) 9387; and the annex of Commission Implementing Decision 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, C(2014) 5020.
[48] Chapter II, section 3.2.
[49] Case C-288/03 *B. Zaoui, L. Zaoui and D. Zaoui* v. *Commission*, EU:C:2004:633.
[50] Case T-73/03 *B. Zaoui, L. Zaoui and D. Zaoui* v. *Commission*, Application, Notice for the Official Journal.

claiming that the Commission, by choosing to participate financially, in the education programmes of Palestine is responsible for the damaged caused to them by the terrorist attract. According to the applicants, the defendant also infringed other provisions applicable to the financial support programmes.[51] However, such infringements were not 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.[52] Without entering into 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 ones) bears important consequence on the choices that the Union takes in respect of its external action. The author is not here suggesting that only technical and politically neutral projects should be finance by the Commission in implementing the Union's external action. The author is only highlighting 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.

Other two examples – taken from the Union's Development Cooperation Policy – exemplify how the Commission's choices as to which projects to finance are not deprived of impact. Back in 1988, the European Communities decided to finance a Nature Forest Management and Conservation Project in Uganda. The project was part of a wider programme of the World Bank. During the implementation of the project, approximately 35,000 people were violently evicted from the region.[53] The Commission denied responsibility since it was not the implementing agency. However, scholars have highlighted how the project itself was interlinked with the policy of eviction.[54] Similarly, an EU-financed fauna-managing project aimed at addressing the problem of commercial poaching in the forests of the Congo basin caused the destruction of five hunting bases of the local population.[55] The Court of Auditors special report clearly stated:

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[51] '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 Palestinian refugees (UNRWA), Article 3 of Regulation No 1488/96/EC, and Amendment No 177 to the 2002 EC General Budget.' Case T-73/03 *B. Zaoui, L. Zaoui and D. Zaoui* v. *Commission*, Application, Notice for the Official Journal.

[52] Case C-288/03 *B. Zaoui, L. Zaoui and D. Zaoui* v. *Commission*, EU:C:2004:633, para. 3.

[53] K. Schmalenbach, 'Accountability: Who is judging the European Development Cooperation?', 2 *Europarecht* 2008, at 177.

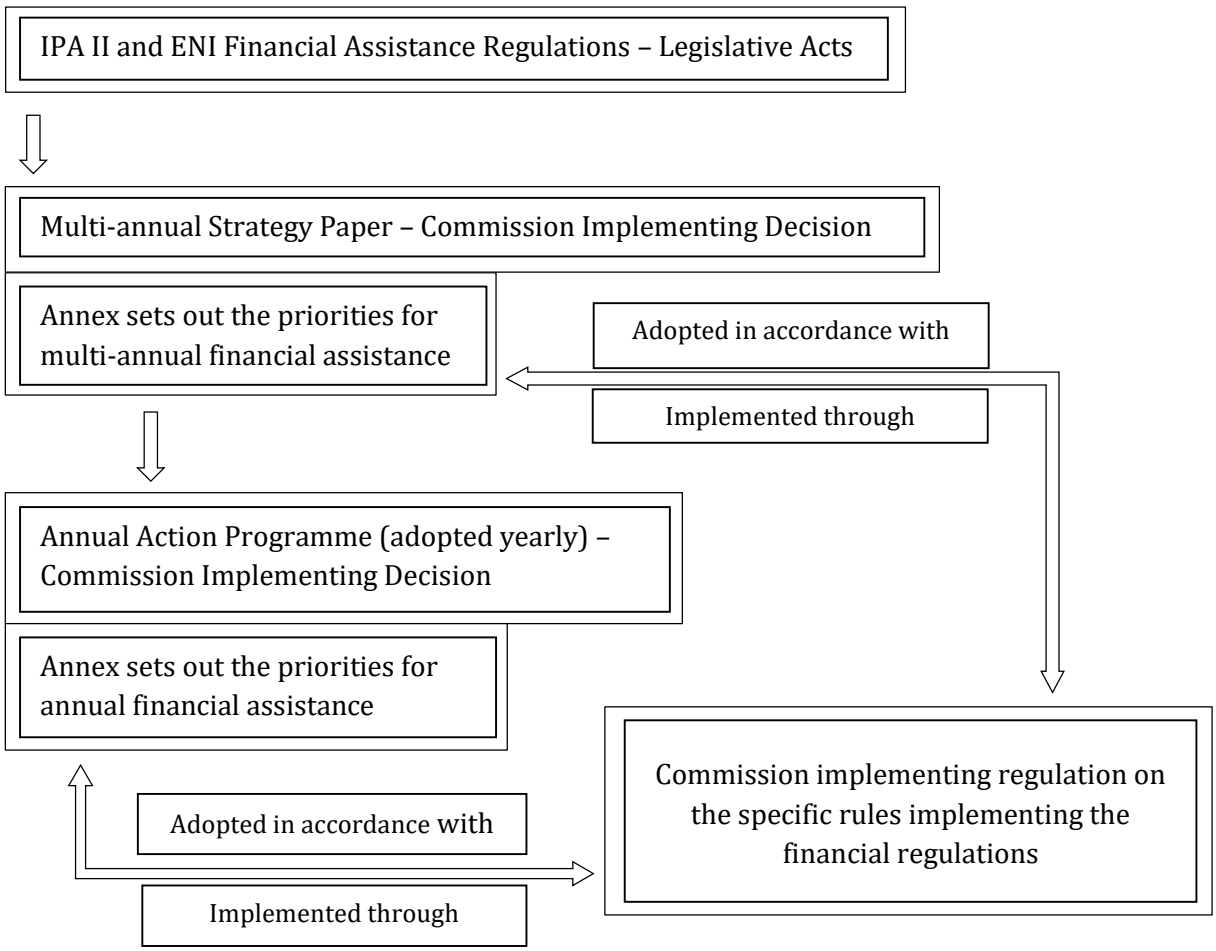
[54] B. Simma, J.B. Aschenbrenner, C. Schulte, 'Human Rights Considerations in the Development Co-operation Activities of the EC', in P. Alston, M. Bustel, J. Heenan (eds.), *The EU and Human Rights*, (Oxford: Oxford University Press 1999), 570, at. 618.

[55] Court of Auditors, Special Report No. 6/2006 concerning the environmental aspects of the Commission's development cooperation, together with the Commission's replies, *OJ* [2006] C 235/18, 29.09.2006.

> '[…] the project designers failed to recognise that most of the local communities were also involved in hunting. Because of this, the project had not identified ways to assist them.'[56]

These two examples not only stress the relevance of the Commission's action, but also signal the impact that the external administrative action has on individuals.[57]

Fig. 2



A final different 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.[58] 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

[56] Court of Auditors, Special Report No. 6/2006 concerning the environmental aspects of the Commission's development cooperation, together with the Commission's replies, *OJ* [2006] C 235/18, 29.09.2006.
[57] Section 3 of this chapter.
[58] 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.

settlements beyond Israel's 1967 borders.[59] 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 labeled. For example, even if the EU officially opposed sanctions, NGOs have used the guidelines for promoting boycotting campaigns.[60] Here again, the author is not suggesting that the Commission Interpretative Notice should have not been adopted. The author is rather highlighting 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.[61] EU administrative law ought to embrace this reality.

2.2 In the neighbourhood countries

The process of transformation of Union policies towards its neighbours 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, 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 do not have as a clear addressee the third country should not mislead us. The instruments, even if addressed to e.g. the Council, have as main addressee the third country which should follow the suggestion made in the document, adopt the standards indicated in the latter, and address the lacks identified unless they want to trigger negative sanctions or renounce benefits.[62] Moreover, the guidance offered by progress reports, action plans, MoUs, etc. more often than not is to be followed by the neighbouring countries because the advantages of

[59] Interpretative notes are examples of administrative rule-makings. See H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2012), at 555.
[60] Interview with NGO activist from medico international, 26.06.2016 Berlin; also affirmed by NGO Monitor 'NGOs, EU "Product Labeling" and BDS Warfare: What Next?' available at: http://www.ngo-monitor.org/reports/ngos-eu-product-labeling-and-bds-warfare-what-next/ (Consulted on 07.08.2016).
[61] Interview with official working at Directorate General for Trade, 10.12.2015, Brussels.
[62] 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.

compliance outweigh the costs of non-compliance. Third states will 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 contract international dealings.

As already mentioned in chapter I, the adoption of administrative activities has the potential to limit the freedom of third states by gradually becoming 'politically, socially and morally binding' on them.[63] 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 the SAP and ENP administrative activities, as forms of technocratic regulations, is their tendency to blur positivist distinctions between non-binding and binding obligations.[64] For example, action plans aim both at supporting third states in implementing the agreement which they concluded with the Union, while 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 as to which standards must be adopted by the third states because they flow from obligations contained in their respective agreements with the EU, and ones which are only suggestions to further advance their relation with the Union. It is outside the scope of this thesis to determine under which conditions a third state is more inclined to adopt an 'EU friendly' agenda.[65] 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.

❖ Preparatory acts: take it or leave it

The instruments aimed at implementing both the SAP and the ENP are preparatory insofar as they assist third countries to evaluate a situation or circumstance and take appropriate action. They guide the third country in the transformation of general *telos* (i.e. membership or partnership) into more concrete acts applicable, at times, to single

[63] K. Jacobsson, 'Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy', 14 *Journal of European Social Policy* 2004, at 358.
[64] D.M. Leive, *International Regulatory Regimes: Case Studies in Health, Meteorology, and Food* (Lexington: Lexington Books 1976), at 561.
[65] F. Schimmelfenning, 'Europeanization beyond Europe', 7 *Living Reviews in European Governance* 2012; S. Lavenex, 'EU External Governance in wider Europe', 11 *Journal of European Public Policy* 2004, 680-700; O. Anastasakis, 'The Europeanization of the Balkans', 12 *Brown Journal of World Affairs* 2005, 77–88; D. Chandler, 'The EU and Southeastern Europe: the rise of post-liberal governance', 1 *Third World Quarterly* 2010, 69-85.

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.[66] 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.[67] Hereby 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) will be presented.

Progress reports have an impact on how relations between the Union and third states develop. The reports of the Commission, as already discussed in this chapter, 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 lacks identified therein, with the hope that this will bring them closer to the Union. The Albanian National Action Plan for European Integration makes multiple references to the Commission progress report in order to plan its reforms agenda:

> 'Following the European Commission Progress Report 2015 on Albania, the Albanian Government has prepared an Action Plan to address short-term recommendations of this report.'
>
> 'The 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.'
>
> 'In 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.' [68]

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

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[66] This definition of preparatory acts is shaped around the meaning given by Hofmann, Rowe and Türk with regard of internal preparatory acts. H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013), at 546.

[67] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan Den Rijn: Kluwer Law International 2008), at 80.

[68] Albanian National Plan for European Integration 2016 – 2020, January 2016, available at: <http://www.integrimi.gov.al/en/documents/strategic-documents/national-plan-for-european-integration1455720883&page=1> (Consulted on 07.08.2016), at 21.

example, Croatian governmental officials affirmed in separate instances how their expectation that Croatia would join the Union earlier than 2014 did impact their decisions as to how, for instance, programme financial assistance.[69] 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.[70]

The function of progress reports, action plans, etc. as preparatory documents for third countries goes hand in hand with the programming of financial assistance. The priorities identified in the instruments establishing the agenda for action should normally become the target of Union financial support.[71] 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 is hereby provided. The progress report for Albania identifies a lack of improvement in the implementation of the public administration reform, and the implementation of the public administration reform is a key priority for EU membership.[72]

> 'As concerns public administration reform, Albania is moderately prepared. […] However, efforts are needed to achieve the objective of a professional and depoliticised public 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.'[73]

Consequently, the document programming the distribution of financial assistance to Albanian indicates that funds will be disbursed in order to support the public administration reform.

[69] Interviews with Croatian government officials from the IPA operating structure, 18.05.2015 and 19.05.2015, Zagreb.
[70] Interview with an Albanian government official from the ministry of Justice, 20.05.2015, Zagreb.
[71] Article 4, 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), *OJ* [2014] L77/13, 15.03.2014; article 3, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.
[72] 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.
[73] Commission Staff Working Document Albania 2015 Report of 10 November 2015, Accompanying the Commission Communication on the EU Enlargement Strategy, SWD(2015) 213 final, at 4.

> 'Regarding the action to be supported, EU assistance will include technical assistance and capacity building for public administration reform and for democratic institutions, including the parliament the various independent institutions.'[74]

It is in this context that the government of Albania found itself in the position of putting the implementation of the 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.'[75]

Moreover, the latest IPA II regulation introduced the idea of budget support.[76] According to the budget support strategy, financial support can only be provided to beneficiary countries which, among other point, must have adopted an appropriate sector reform plan on one of the topics identified in the Commission programming documents.[77] 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.[78]

The Commission within the SAP also developed new strategies which indicate to third countries what they should address when formulating their economic and fiscal policies.[79] A recent example comes from Bosnia and Herzegovina, where the Commission,

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[74] Commission Implementing Decision of 18 August 2014 on 'Indicative Strategy Paper for Albania (2014-2020)', C(2014) 5770, at 15.

[75] Albanian National Plan for European Integration 2016 – 2020, January 2016, at 20.

[76] European Commission, Directorate General for Enlargement, *Quick Guide to IPA II Programming*, Access to Documents request GESTDEM reference 2014/4443, also available at: <http://abdigm.meb.gov.tr/projeler/ois/014.pdf> (Consulted on 07.08.2016), 54-56.

[77] 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.' European Commission, Directorate General for Enlargement, *Quick Guide to IPA II Programming*, Access to Documents request GESTDEM reference 2014/4443, also available at: <http://abdigm.meb.gov.tr/projeler/ois/014.pdf> (Consulted on 07.08.2016), at 54.

[78] See the example of Bosnia and Herzegovina available at: <http://eu-monitoring.ba/en/the-initiative-warns-blocking-ipa-funds-does-not-punish-those-responsible-for-political-obstruction/> (Consulted on 07.08.2016).

[79] The Commission developed a completely new instrument which was welcomed by the Council after its adoption. This pact is the first envisaged for the region. 'The Council […] welcomes Commission initiatives to improve economic governance and strengthen competitiveness as well as stimulate economic growth. As an immediate action, it supports the launch on the ground of a "Compact for Growth", aimed at assisting the

in cooperation with the International Monetary Fund, the World Bank, the European Bank for Reconstruction and Development and the Embassy of the United States of America, decided to convene a major conference aimed at helping the economic recovery of Bosnia and Herzegovina. The conference proposed a concrete set of urgent measures which have now been endorsed in the 'Compact for Growth and Jobs in Bosnia and Herzegovina'.[80] The likelihood that the government of Bosnia and Herzegovina will be able ignore such a document – endorsed as it is by all its major donors – when implementing its action on economic and fiscal policies seems rather low. 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.[81]

❖ 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 in so far as they are quite detailed as to which standard shall be used by third countries when passing legislation, if they wish to intensify their relations with the Union. The moment in which the content of the instruments can be found in the text of legally binging measures adopted by a third state, it becomes clear how they constitute forms of 'extra territorial' rule-making. Regulations using non-binding forms often proves highly effective in practice.[82] 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.[83]

BiH institutions in identifying concrete socio-economic structural reforms in order to reinvigorate the economy and spur the creation of jobs in the short to mid-term.' Press Release, 3309th Council meeting Foreign Affairs, Luxembourg, 14 and 15 April 2014.

[80] Delegation of the European Union to Bosnia and Herzegovina, Compact for Growth, Available at: <http://europa.ba/?page_id=547> (Consulted on 07.08.2016).

[81] A. Khvorostiankina, 'Legislative approximation and application of EU law in Moldova', in P. Romanov and P. Van Elsuwege (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Abington: Routledge 2014), 159, at. 176.

[82] Global Administrative Law, Concept and Working Definition, available at: <http://www.iilj.org/gal/GALworkingdefinition.asp> (Consulted on 07.08.2016).

[83] Interview with Georgian Ministry of Justice official, 1.03.2016, Berlin.

The tool-box for standard-setting created by the instruments implementing the SAP and the ENP includes traditional sources of international law,[84] an ever-expanding set of soft law instruments,[85] but also materials that on their face do not purport to set normative standards at all, including policy programmes for action,[86] and even conditions attached to loans.[87]

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.[88] 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 ENP agreements).[89] Based on the European partnerships, SAP countries have to adopt their National Programmes for the Adoption of the Acquis (NPAA).[90] While on the one hand SAP states agreed to prepare themselves to cede part of their sovereignty to the EU

[84] 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', available at: <http://eeas.europa.eu/enp/pdf/pdf/action_plans/armenia_enp_ap_final_en.pdf> (Consulted on 07.08.2016).

[85] E.g. the EU-Armenia action plan 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', available at: <http://eeas.europa.eu/enp/pdf/pdf/action_plans/armenia_enp_ap_final_en.pdf> (Consulted on 07.08.2016).

[86] E.g. the EU-Georgia Visa Liberalisation Action Plan establishes that Georgia should proceed with the '[a]doption of the national lntegrated 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', available at: <http://migration.commission.ge/files/vlap-eng.pdf> (Consulted on 07.08.2016).

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

[88] 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, 15.10.2014, Florence.

[89] 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*.

[90] 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 of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Albania and repealing Decision 2006/54/EC (2008/210/EC), *OJ* [2008] L 80/1. See also M. Maresceau, 'Pre-accession', in M. Cremona (eds.), *The Enlargment of the European Union* (Oxford: Oxford University Press 2003), 9, at 31.

and thus are compelled to pass those reform and accept the standards in order to join,[91] the ENP states remain sovereign states without accession perspective – for the southern neighbours accession will never be an option since they do not qualify as European states.[92] 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.[93]

The reforms covered by the action plans include a wide range of policy areas ranging from transport, energy, conflict prevention, human rights, 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 (among others):

> 'To sign a Memorandum of Understanding with the Monitoring and Information Centre (MIC) of the Community Civil Protection Mechanism.'
> 'Further 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).'
> 'To 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.'
> 'To 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)'.[94]

The content of the action plans (and of the association agendas) is then transposed, in some cases, in government decrees. For example, the Georgia National Action Plan for the Implementation of the EU-Georgia Association Agenda (Decree № 59 of the Government

[91] Arguably also for the current SAP states accession seems a mirage (i.e. for Bosnia and Herzegovina, Kosovo and Macedonia).
[92] 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. See point III, European Parliament, Legal Questions of Enlargement, available at: <http://www.europarl.europa.eu/enlargement/briefings/23a2_en.htm#F7> (Consulted on 07.08.2016).
[93] M. Cremona, 'The European Neighbourhood Policy: More than a Partnership?' in M. Cremona (eds.), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), 245, at 269.
[94] EU-Jordan Action Plan, available at <http://eeas.europa.eu/enp/pdf/pdf/action_plans/2013_jordan_action_plan_en.pdf> (Consulted on 07.08.2016).

of Georgia 26 January 2015) indicates to transpose in national legislations the standards identified in the association agenda.[95]

Another example is the SAP progress reports in the area of human rights compliance. The standards used by the Commission in order to monitor compliance by the SAP counties with human rights are numerous and varied, covering different instruments (e.g. regional and international). Progress reports are offering a clear indication as to which regional and international convention the SAP countries have to sign and ratify. Based on the Commission progress report, the Albanian government adopted an order addressing the recommendations made therewith.

> 'Based on the recommendations of the European Progress Report aiming at strengthening of respect to human rights in the prison system, it is approved the Action Plan "On recommendations of the European Commission Progress Report", (by the order no. 10427 Prot. dated 23.04.2015), which addresses specific measures, according to well-defined deadlines.'[96]

The author does not question whether the promotion and protection of human rights is a good or bad thing, but rather stresses the fact that progress reports work as standard-setting instruments for SAP countries and there is a lack of clear and coherent approach as to which international and regional human rights instruments third states need to comply with.[97]

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.[98] SAP and ENP countries must

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[95] Available at: Minister of Georgia on European and Euro-Atlantic integration, available at: <http://www.eu-nato.gov.ge/en/eu/association-agreement> (Consulted on 07.08.2016).

[96] Albanian National Plan for European Integration 2016 – 2020, January 2016, at 40.

[97] B. De Witte, 'The EU and the International Legal Order: The Case of Human Rights', in M. Evans and P. Koutrakos (eds.), *Beyond the established legal orders: policy interconnections between the EU and the rest of the world* (Oxford: Hart Publishing 2011), 127, at 139; J. Hughes and G. Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in CEECs', *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 1/2003, at 17.

[98] For example, the EU-Republic of Moldova Visa Liberalisation Action Plan requires (among others):

- Consolidation of the legal framework for the issuing of machine readable biometric passports in full compliance with highest ICAO standards […],
- Adoption of a National Migration Management Strategy for effective implementation of the legal framework for migration policy and an Action Plan, containing a timeframe, specific objectives, activities, results, performance indicators and sufficient human and financial resources;

achieve all the objectives established by their respective Road Maps and VLAPs if they wish 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;'
>
> […]
>
> 'Signature, 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.'[99]

Based on its VLAP, Moldova adopted and implemented more than 40 laws.[100] Not all these laws have been peacefully accepted by the Moldovan society, and caused unprecedented civil protests. As experts have stated, without the EU pressure and promise of reward the Moldovan lawmakers would never have adopted the progressive Law 'On ensuring Equality' of 25 May 2012.[101]

The latest Union practice of providing macro-financial assistance to the ENP states also represents a new mechanism of setting standards over 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

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- Adoption of relevant UN and Council of Europe conventions in the areas listed above and on fight against terrorism.

Available at: <http://www.enpi-info.eu/library/content/action-plan-visa-liberalisation-moldova> (Consulted on 07.08.2016).

[99] EU-Georgia Visa Dialogue, Action Plan on Visa Liberalisation, available at: <http://migration.commission.ge/files/vlap-eng.pdf> (Consulted on 07.08.2016).

[100] A. Khvorostiankina, 'Legislative approximation and application of EU law in Moldova', in P. Romanov and P. Van Elsuwege (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Abington: Routledge 2014), 159, at. 170.

[101] V. Ursu, 'How the European Union Persuaded Moldova to Fight Discrimination', 12 September 2012. Available at: <https://www.opensocietyfoundations.org/voices/how-european-union-persuaded-moldova-fight-discrimination> (Consulted on 07.08.2016).

and in the Memoranda of Understanding agreed with the borrowing states,[102] can result in enforcement. In other words, the third state could be denied macro-financial assistance due to its inability to fulfill the conditions set out in the MoUs concluded with the Union, without having the guarantee of being heard.[103] 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.[104] 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.[105]

The administrative activities implementing the SAP and the ENP exercise a tangible pressure on the usage of public power, both within the Union and in third countries. The power cannot be discharged, despite its apparent non-legally binding nature. Internally, the external administrative power channel and influence important Union's choices as to the development of its external relations. It informs single-case decisions, and it constitutes the basis for the adoption of political, administrative, and legislative acts. Furthermore, administrative acts serving a rule-making function internally produce undeniable impacts on the Union's action in the world. 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

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[102] '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.' Article 3(1), Decision (EU) 2015/601 of the European Parliament and of the Council of 15 April 2015 providing macro-financial assistance to Ukraine, *OJ* [2015] L100/1, 17.04.2015; Article 3(1), 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, *OJ* [2015] L151/9, 21.05.2014. See also Chapter II, sections 3.1 and 4.1.

[103] E.g. see 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 of 18 May 2015 approving the Memorandum of Understanding between the European Union and Ukraine related to macro-financial assistance to Ukraine, C(2015)3444/F1.

[104] J. E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press 2006), at. 242.

[105] D. Bradlow, 'Stuffing New Wine Into Old Bottles: The Troubling case of the IMF', 3 *Journal of International Banking Regulation* 2001.

encouraging third states to align their government agenda to the one suggested by the EU. In other words, third states have to adapt their reform and legislative plan in accordance with the guidelines provided to them by progress reports, action plans, MoUs, etc., unless they want to trigger sanctions or renounce to benefits. In some cases, the Union's activities implementing the SAP and the ENP work as regulatory and standard-setting instruments for third states who adopt the measures contained in their text. The legal freedom for third states to refrain from following a merely conditioning act is often a mere fiction.[106]

3. The effect of administrative power on individuals and legal persons

The adoption of administrative acts implementing Union external action is not without consequences for natural and legal persons – who often are the first to be affected by the Union's action, and who may be themselves the victims of abusive regimes. The Court of Justice of the European Union in the past years was faced with four interesting cases of natural and legal persons challenging the action (or inaction) of the Commission in the EU wider neighbourhood.[107] Among many interesting aspects, the cases show that the activities implementing the Union's wider neighbourhood policies are not neutral: they create expectations and provide a certain degree of certainty as to how the EU will implement its action in the neighbouring state. The question then becomes, of course, whether the Court's approach should be deemed a satisfactory one – especially in light of the obligation on the side of the Union to respect the rule of law when acting externally, but this will be addressed by the next chapters. The aim of this section is solely to highlight the impact that these activities have on natural and legal persons.

The first three cases that will be hereby presented deal with natural and legal persons challenging the inaction of the Commission. The applicants further claimed that the Union breached their legitimate expectations by departing from the numerous administrative activities implementing the Union external action.

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[106] A. von Bogdandy, 'Common principles for a plurality of orders: A study on public authority in European legal area', 12 *International Journal of Constitutional Law* 2014, at 988.

[107] See cases: Case T-346/03 *Krikorian* v. *European Parliament, Council and Commission*, EU:T:2003:348; Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97; Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418; Case C-581/11 *P Mugraby* v. *Council and Commission*, EU:C:2012:466; Case T-512/12, *Front Polisario* v. *Council of the European Union,* EU:T:2015:953.

❖ No right, no legitimate expectation: human rights victims expecting EU action

The first case sees as claimant Mr. Muhamad Mugraby, a Lebanese citizen who himself claims to have suffered human rights violations in his home country.[108] The applicant filed an action for failure to act seeking a declaration that the Council and the Commission unlawfully omitted to take a decision on the applicant's request concerning the adoption of measures against the Republic of Lebanon on account of the alleged violations by the latter of the applicant's fundamental rights. Mr. Mugraby claims that the Community, the Commission and the Council have incurred non-contractual liability as a result of their failure to effectively utilise the available resources and instruments towards effective enforcement of the human right clause present in the Association Agreement concluded by the European Community and its Members with the Republic of Lebanon (the Association Agreement).[109] In this respect, the General Court affirmed that the implementation of suspension mechanisms is a matter of discretion of the Commission, which excludes the right for an individual to require the Commission to take a position in that connection.[110] The Court, however, does not provide any indication as to whether there are any limits to the Commission's discretion. Moreover, Mr. Mugraby claimed to have developed:

> '[…] *strong and legitimate expectations* that his fundamental rights would be protected by all the institutions of the European Union, including the courts of law, and that those institutions would hold the parties to the Association Agreement to their obligations.'[111] [emphasis added]

The question to be asked now is: how could Mr. Mugraby expect that the Union would suspend its relations with Lebanon due to the violations of human rights by the latter? He claims to have derived his legitimate expectations from the various public statements that the Commission and the Council have made in the context of the management of the European Union's external policy, the respect of the Association Agreement, and in

[108] Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418; Case C-581/11 *P Mugraby* v. *Council and Commission*, EU:C:2012:466.
[109] The available resources being: the suspension of aid granted by the Community to Lebanon in accordance to article 28 of the ENPI regulations, and the suspension of Community aid programs granted under the Association Agreement.
[110] 'Therefore, it must be concluded that, taking account of the Commission's discretion as regards the submission to the Council of a proposal under Article 28 of the ENPI Regulation, its failure to address such a proposal to the Council cannot be relied on in an action based on the third paragraph of Article 232 EC.' Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418, paras 38-39.
[111] Case C-581/11 *P Mugraby* v. *Council and Commission*, EU:C:2012:466, para. 78.

relation to the protection of human rights.[112] The General Court, however, observed that such assertions are:

> '[…] not precise enough to identify, firstly, the conduct complained of with any certainty and, secondly, its possible unlawfulness. In any event, the applicant *does not establish how he could acquire a right* from those expectations.'[113] [emphasis added]

❖ No right, no legitimate expectation: human rights activists expecting to be believed

The second case sees as applicants 'a coalition of non-governmental organisations and Turkish citizens'.[114] The coalition filed an application for the annulment of the Commission's Regular Report of 5 November 2003 (the progress report) concerning Turkey's progress towards accession, insofar as, according to the applicants, it contains a Commission decision refusing to make a recommendation to the Council concerning pre-accession aid granted to Turkey and, rather, for a failure to act in that regard. The General Court reformulated their claim by stating that the applicants did not seek the annulment of the Regular Report as such, but of a Commission decision refusing to propose to the Council to take appropriate measures concerning the assistance granted to Turkey in light of its failure to comply with its pre-accession obligations.[115] Before starting the lawsuit, the applicants contacted by letter the Commission to act in connection with Turkey's breaches of pre-accession criteria.[116] Nevertheless, the progress report on Turkey was adopted without mentioning the violations reported by the coalition of non-governmental organisations and Turkish citizens. The applicants succeeded neither in their claim for annulment nor in their claim for failure to act. Also in this case the General Court was clear in stating that:

> '[…] the question as to whether an essential element for continuing to grant pre-accession assistance is lacking or otherwise and, consequently, whether it is appropriate to propose that the Council apply Article 4 of Regulation No 390/2001 is a matter of discretion *excluding the right*, for an individual, to require the Commission

[112] Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418, para. 52.
[113] Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418, para. 71; also confirmed on appeal Case C-581/11 P *Mugraby v. Council and Commission*, EU:C:2012:466, para. 27.
[114] Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 11.
[115] Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 34.
[116] Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 13.

> to take a position in that connection or, where such a position exists, to bring an action for annulment against it.'[117] [emphasis added]

The General Court also in this case does not give any guidelines as to how the discretion should be exercised. The core of the dispute lies in the frustration on the side of the coalition not to have seen their views taken seriously once they contacted the Commission. The coalition expected that the latter, by virtue of its duty to monitor the pre-accession process, would have conducted more adequate research in respect of their allegations. The applicants claimed that the Union should have suspended financial assistance to Turkey due to its failures to respect its obligations as a candidate country for Union accession. The obligations were: making sufficient progress to satisfy the Copenhagen criteria concerning human rights, respect for and protection of minorities, and adopting the relevant *acquis communautaire*.[118]

❖ No right, no legitimate expectation: expecting acknowledgement for past atrocities

In the third case the applicants do not claim to derive their legitimate expectations from an administrative act but from a European Parliament resolution. However, the case is still interesting since it shows how the numerous acts characterising the EU external action might create expectations, and because it tells us something about the approach and criteria used by the Court in arguing the case. The applicants – Grégoire Krikorian, Suzanne Krikorian, and Euro-Arménie ASBL – brought an action for damages in which they seek compensation for the harm caused to them by the recognition of Turkey's status as a candidate for accession to the EU, despite the State refusal to acknowledge the genocide perpetrated in 1915 against the Armenians living in Turkey. In this respect, the applicants claimed that the defendant institutions – European Parliament, Council of the European Union, European Commission – blatantly failed to have regard to the resolution of the European Parliament of 18 June 1987 on a political solution to the Armenian question (the 1987 resolution). In that resolution, the Parliament declared that the Turkish Government's refusal to acknowledge that genocide constituted an

[117] Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 50.
[118] The infringements were connected with the implementation of a project by Turkey for a pipeline linking the cities of Baku, Tblissi and Ceyhan to enable oil to be carried from the Caspian Sea to the Mediterranean. Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 13.

insurmountable obstacle to the examination of the Republic of Turkey's possible accession. According to the applicants, the 1987 resolution is a legal act which, in the same way as recommendations and opinions, can produce legal effects, and that it intends to publicly lay down a special condition for the Republic of Turkey's accession – namely the prior acknowledgement by that State of the genocide in question.[119] It is in this context that the applicants argued that the 1987 resolution gave rise to a legitimate expectation on their part that the Parliament would exercise its right of veto on the Republic of Turkey's accession.[120] The Court disposed that the 1987 resolution could not have given rise to a legitimate expectation, on the part of the applicants, since:

> '[…] the 1987 resolution is a document containing *declarations of a purely political nature, which may be amended by the Parliament at any time*. It *cannot therefore have binding legal consequences for its author* nor, a fortiori, for the other defendant institutions.'[121] [emphasis added]

However, if instead of a European Parliament resolution the applicants in the last case would have relied on a Commission progress report – thus not a political document – would the conclusion of the Court be the same? Or would it have at least imposed on the Commission an obligation to state reasons as to why it decided to depart from its position as stated in the progress report?

The three cases just discussed were not presented accurately by the applicants. Third countries' citizens clearly cannot acquire a right as to how the Union should behave towards their own states; Mr. Mugraby was not precise enough in identifying how the Union's conduct conflicted with his expectations; the coalition of Turkish citizens was confused as to the Union's decision-making process; and in the last case the applicants relied on a political document instead of an administrative one for which – possibly – the Court would have used a different argument. Nevertheless, in these cases the Court ignored – or maybe thwarted? – the opportunity of going beyond a purely formalistic approach in favour of one that would take into account the social reality, the implication of the Union's activities outside its borders, and the context in which the administrative activities operate. While it is true that Mr. Mugraby could have been much clearer as from

[119] Case T-346/03 *Krikorian* v. *European Parliament, Council and Commission*, EU:T:2003:348, para. 6.
[120] The applicants stress that since the entrance into force of the Single European Act the Parliament had the power to object to the Republic of Turkey's accession; they state that the requirement of the assent of the Parliament is now laid down in article 49 of the Treaty on European Union. Case T-346/03 *Krikorian* v. *European Parliament, Council and Commission*, EU:T:2003:348, para. 7.
[121] Case T-346/03 *Krikorian* v. *European Parliament, Council and Commission*, EU:T:2003:348, para. 19.

which documents he developed strong and legitimate expectations, it is also true that both the General Court, and the Court on appeal, could have recognised how the numerous instruments aimed at implementing the Union external action, and particularly its action towards its neighbour, do have the effect of making third countries' citizens believe that the protection of human rights is at the forefront of the Union's action towards the rest of the world. As a matter of fact, human rights clauses are virtually present in all agreements concluded by the Union with third countries together with a so- called 'suspension clause', which allows for the suspension of the agreement in case one of the parties violates human rights. Nevertheless, despite the creation of enforcement mechanisms and of monitoring reports denouncing human rights violations, very little enforcement has taken place so far to punish those countries which violate them. The coalition of Turkish citizens in essence challenged how the progress report was drafted; they believed the Commission, in light of is pivotal role in the monitoring the pre-accession process, deliberately decided not to denounce the human rights violations they reported. Nevertheless, the Court did not even address this issue.

❖ From reticence to recognition: the Front Polisario

The *Front Polisario* case is different from the ones just analysed. This case underlines the relevance of external administrative activities as preparatory acts leading to a final decision within the *de facto* procedures developed by the Union. The function of the external administrative activities is recognised in light of the potential impact that final acts have on third states.[122] In this case, the Front Polisario asked the General Court to annul the Council Decision on the adoption of an agreement in the form of exchange of letters between the EU and the Republic of Morocco. The agreement was aimed at modifying the Association Agreement already in force since 2000 between the Union and Morocco. In particular, it was trying to accelerate the process of trade liberalisation of agricultural products, process agricultural products, fish, and fish products. The agreement concluded by the Union with Morocco did not contain any reference in its text as to its application to the territory of West Sahara. The agreement was to apply to the territory of Morocco; however, there were no doubts that the agreement was going to be applicable also to the territory of West Sahara – where Morocco *de facto* exercises its

[122] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953.

sovereignty.[123] The General Court in this case recognises the impact that the Council Decision has on the territory of West Sahara and establishes that until the international status of the West Sahara remains undecided the Front Polisario, like the Republic of Morocco, must be considered as directly and individually concerned by the measure.[124] The approach taken by the Court is not undisputed, however, and it will be further discussed in chapter V. For the time being it is important to highlight the link between the recognised impact that the Council Decision has over the territory of the West Sahara, and the obligation on the side of the Union to carry out a human rights impact assessment when concluding an agreement with a third state.

Towards the end of the case, the General Court established that EU institutions, even when enjoying a large margin of discretion – in this case deciding whether to conclude an agreement with a third state – have the obligation to comply with the duty of care.[125] In other words, the institutions have an obligation to examine with impartiality all the issues relevant to the case before taking a decision. Particularly in the case at stake, the General Court stated that the Council has an obligation to examine all the elements of the case with the purpose of making sure that the activities of the Union do not have the effect of violating human rights in West Sahara.[126] The Council, on the other hand, affirmed that the fact of having concluded an agreement with a third country does not make the Union

[123] Chapter IV, section 5.2.2; see also E. Chiti, 'Le relazioni esterne dell'Unione e il diritto amministrativo europeo' – Commento alla causa T-512/12 - Giud. rel. M.D. Gratsias - Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) c. Consiglio dell'Unione europea, 2 *Giornale di diritto amministrativo* 2016, 231-238.

[124] 'Those provisions produce effects on the legal position of the whole territory to which the agreement applies (and, therefore, the territory of Western Sahara controlled by the Kingdom of Morocco), in that they determine the conditions under which agricultural and fishery products may be exported from that territory to the European Union or may be imported from the European Union into the territory in question.' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 109 and paras 110-111.

[125] '[J]udicial review must necessarily be limited to the question whether the competent EU institution, in this case the Council, by approving the conclusion of an agreement such as that approved by the contested decision, made manifest errors of assessment (see, to that effect, judgment of 16 June 1998 in *Racke*, C-162/96, ECR, EU:C:1998:293, paragraph 52). That being the case, in particular where EU institution enjoys a wide discretion, in order to verify whether it has committed a manifest error of assessment, the Courts of the European Union must verify whether it has examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached (judgments of 21 November 1991 in *Technische Universität München*, C-269/90, ECR, EU:C:1991:438, paragraph 14, and 22 December 2010 *Gowan comércio Internacional e Servios*, C-77/09, ECR, EU:C:2010:803, paragraph 57).' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, paras 224 and 225.

[126] '[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.' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 228. For a more detailed account on the issue see chapter IV, section 4.2.

responsible for the actions that might eventually be committed by the third state – whether or not they might imply human rights violations.[127] The General Court, in answering to the Council, affirms that the:

> '[…] argument is correct, but it ignores the fact that, if the European Union allows the export to its Member States of products originating in that other country which have been produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate, it may indirectly encourage such infringements or profit from them.'[128]

The answer of the General Court is straightforward. By recognizing the effect of the Union's action, it becomes clear why imposing an obligation on the Union to carry out human rights impact assessments is essential. In other words, the Union, by allowing a third state to export its products to its Member States without making sure that the latter makes its products in compliance with human rights, indirectly encourages and takes advantage of human rights exploitations. Recognising the effect of the Union's action in third states is an essential first step in understanding the function and relevance that human rights impact assessments have. If the EU institutions do not carry out human rights impact assessments before concluding an agreement with a third state, the Union might encourage and exploit human rights violations in third states. The General Court does not make a direct reference to human rights impact assessments; nonetheless the bottom-line message of the case is clear: in taking into account all the aspects of the case when concluding an agreement, the EU institution has to make sure that its action does not violates human rights. The next chapter of the thesis will better clarify how the Court derived this obligation on the side of the Union from the duty of care.

In order to protect individuals affected by the exercise of external administrative power beyond the obvious obstacles, it is fundamental to frame its impact within the context of the Union external action. The expectations of Mr. Mugraby might not be defined as 'legitimate' under EU law and, thus, lack legal protection. However, other obligations imposed on the administration might come as a safety net in order to protect individuals from wrongfully relying on the administrative activities implementing the Union external action. Alongside the 'Mr. Mugraby' type of situation, the *Front Polisario*

[127] '[T]he fact of having concluded an agreement with a non-member State does not and cannot make the European Union liable for any actions committed by that county, whether or not they correspond to infringements of fundamental rights.' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 230.
[128] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 231.

case is an interesting example exemplifying how a legal person can also be directly impacted by the action (or rather inaction) of the Union administration. The Commission, by ignoring the role of the Front Polisario in West Sahara, indirectly encouraged violations of human rights in the territory. The Republic of Morocco does not administer the territory of West Sahara, but occupies it militarily. Therefore, no assurance is in place as to whether the products originated in West Sahara are made or obtained in conditions which respect the fundamental rights of the population of the territory. Overall, the impact that the administrative activities implementing the Union external action have on individuals should receive greater attention.

Finally, it is important to highlight how the cases just presented all deal with human rights violations. In other words, the applicants were either direct victims of human rights violations or joined their voices in order to denounce violations of human rights. This fact ought not to be neglected. Victims of human rights violations cannot appeal to their own state in order to demand justice. Their own state is the perpetrator of the very human rights violations they suffer. Mr. Mugraby, the coalition of Turkish citizens, the Armenians, and the Font Polisario by addressing their cases in front of the Court of Justice clearly indicate how they entrust the Union with the role of human rights protector, or at least how they expect the Union to take action in order to punish their state in case of human rights violations. Individuals derive their expectations by the net of instruments that the Union adopts in order to implement its external policies. The Union, by adopting progress reports denouncing human rights violations, by endorsing action plans which put at the fore front the importance of respecting human rights, by stating their willingness to conduct human rights impact assessments before concluding international agreements, and by investing funds in projects aimed at fostering the protection of human rights in a third country, cannot reasonably expect victims of human rights violations not to rely on these same instruments in order to seek Union's intervention. These instruments increase the predictability of policy intervention. Finally, territories and populations with unclear status, like West Sahara, are particularly affected by Union's action, despite the form it acquires, since the state which represents them at the Union level does not have any interest in acknowledging the impact that Union's action might have on them.

Conclusion

In light of the analysis so far carried out, it seems plausible to state that the activities described in chapter II are not without consequences. The power that they exercise is relevant and has the potential to affect the Union external action, the exercise of public power in third states, and natural and legal persons. The impact exercised by the activities implementing the SAP and the ENP expresses itself differently depending on the context. Internally, the activities have become over the years preparatory acts within *de facto* procedures leading to final outcomes. Moreover, in some cases they also have a clear rule-making function. For example, they indicate which projects the EU is committed to financing, or they regulate the disbursement of macro financial assistance to third states. The role acquired by the administrative activities within the Union, as internal steps informing final decisions, cannot be without implications for natural and legal persons. For example, progress reports, by denouncing violations of human rights, raise the expectations of individuals that these acts will eventually inform the choice of the Council to sanction third states found in non-compliance with fundamental rights.[129] The same reasoning holds true for Visa Liberalisation Action Plans, and the expectation that once all the criteria established therewith are fulfilled, then the Union will grant a visa liberalisation free regime to third states. Furthermore, financing certain projects might have direct impacts on the rights of local population. Finally, administrative activities have a significant impact on third states, which have to follow and adopt the guidance and rules contained in the documents, unless they want to trigger sanction or to renounce benefits. Identifying the addresses 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.

EU external relations' strategic interests and objectives are political decisions. However, the administrative activities executing and informing the Union's external

[129] The latest generation of Stabilisation and Association Agreements foresee their possible suspension in case of 'non-compliance' with human rights. E.g. Article 133 of the SAA with Montenegro states that: 'Either Party may (1) suspend this Agreement, (2) with immediate effect, (3) in the event of non-compliance by the other Party of one of the essential elements of this Agreement.' Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, *OJ* [2010] L 108/3, 29.4.2010. I. Vianello, 'Guaranteeing the respect for Human Rights in EU External Relations: What role for Administrative Law?', *CLEER Paper Series*, (forthcoming).

policies must be bound to the respect of the administrative rule of law.[130] The study of EU administrative law in external relations ought to take into account the features that the external administrative power assumes (non-linear, discretionary and informal), and ought to identify those principles derived from the administrative rule of law which have the capacity of facing such fallacies. In particular, the application of the administrative rule of law externally ought to recognise and face the significant discretion left to the administration in balancing important political choices. Giving effect to the administrative rule of law externally also requires taking into account the impact that administrative power exercises on third countries, and on their natural and legal persons. Applying EU administrative law to the external domain ought to demand identifying ways to protect individuals and third states beyond what would be the obvious obstacles (e.g. the expectations are not legitimate, or third states are sovereign entities); it requires embracing a pragmatic and contextual approach that would take into account the pivotal role that the Union plays in some third states. The key tension in this process is the mixed nature of EU external policies; namely, they are political processes which often rest on administrative mechanisms producing legal consequences.

[130] The fact that the impact of the administrative activities is not limited to the external world, but it also influences the Union's internal decision-making, is just another reason for pushing the Union to seek means to bind the exercise of external administrative to the rule of law.

Summary tables for chapters II and III

Setting the agenda for action

European partnerships

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Preparatory	Prepared by the Commission and adopted as Council Decisions.	Council Decisions	Binding
External - Preparatory - Rule making		They lead to the adoption of National Programmes for the Adoption of the Acquis (NPAA). Third States	Non-binding

Action plans

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Preparatory	Pre-Lisbon: Prepared by the Commission and adopted as Council Decisions. Post Lisbon: The procedure is unclear. Prepared by the Commission and adopted as Council Decisions. *(or)* Prepared by the Commission and EEAS adopted by the Council as recommendations.	Council decision on the position to be adopted by the Union and the Member States within each Council established by the agreements concluded by the Union and each SAP and ENP state. *(or)* Recommendations	Binding *(or)* Non-binding
External - Preparatory - Rule making		Third State Political Documents adopted by the Council established by the agreement conclude by each ENP state with the Union. *(or)* Documents adopted by European Union.	Non-binding

Progress reports SAP

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Preparatory	Commission	Staff working documents Council, EU Parliament, European Economic and Social Committee, and Committee of the Regions.	Non-binding
External - Preparatory - Rule making		Documents adopted by European Union. Third State	Non-binding

Progress reports ENP

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Preparatory	Commission Post Lisbon: Commission and EEAS	Joint staff working documents Council, EU Parliament, European Economic and Social Committee, and Committee of the Regions.	Non-binding
External - Preparatory		Documents adopted by European Union. Third State	Non-binding

Memoranda of Understanding

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Preparatory	Commission *(or/and)* Council	The procedure is unclear but should respect conferred powers and institutional balance. Post-Lisbon: some have been adopted as Commission Implementing Decisions	Non-binding *(or)* Binding
External - Preparatory - Rule making	Relevant Ministry	Non-binding international agreements sometimes envisaging ratification by the Constituent National Assembly.[1]	Non-binding

[1] E.g. 'The present MoU shall enter into force following its signature by the Republic of Tunisia and the European Union and upon its ratification by the Constituent National Assembly.' Annex to Commission Implementing Decision of 16 July 2014 approving the Memorandum of Understanding between the European Union and Tunisia related to macro-financial assistance to Tunisia, C(2014)5176/F1.

Financing the agenda for action

SAP strategy papers and annual programming documents

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Rule making - Preparatory	Commission	The Commission adopts the acts in accordance with comitology examination procedure Art. 5 Regulation 182/2011.	Binding
External - Preparatory		Documents adopted by European Union. Third State	Non-binding

ENP strategy papers and annual programming documents

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Rule-making - Preparatory	Commission and EEAS (Programming Documents) Commission (Annual Action Programmes)	The Commission adopts the acts in accordance with comitology examination procedure Art. 5 Regulation 182/2011.	Binding
External - Preparatory		Documents adopted by European Union. Third State	Non-binding

Implementing sector-specific objectives

Visa liberalisation action plans

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Preparatory	Commission		Non-binding
External - Preparatory - Rule making		Documents adopted by European Union. Third State	Non-binding

Visa liberalisation progress reports

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Preparatory	Commission		Non-binding
External - Preparatory - Rule making		Documents adopted by European Union. Third State	Non-binding

Human rights impact assessments

Function of the act	Adopting institution	Legal form and addressee	Legal value
Internal - Preparatory	Commission	Staff working documents Council	Non-binding
External - Preparatory		Documents adopted by European Union.	Non-binding

Chapter IV: The administrative rule of law applied to the Union external action

The rule of law form paper to the reality of the EU wider neighbourhood policies

1. Which principles and rules give effect to the administrative rule of law externally?

The power exercised by the Union administration in external relations has started to create anxiety as to its features and impacts. Despite these concerns, clear means have not yet been sought to make sure that the exercise of administrative power respects the administrative rule of law. It is now, therefore, crucial to take seriously the reality described so far by this thesis and frame it within the larger context of EU administrative law. This type of analysis is especially important – as already explained in detail in chapter I – after the entrance into force of the Treaty of Lisbon which makes clear that the Union, when acting on the international scene, shall not only promote the principles that inspired its own creation, among others the rule of law, but shall also respect them in the development and implementation of its action. The traditional forces which for the past have stimulated the process of giving effect to the Union's administrative rule of law internally (the Court and the legislator);[1] need now to be supported in their task of giving effect to the administrative rule of law externally. The present chapter aims at developing an analytical framework for the purpose of enhancing the respect of the Union's administrative rule of law in the development and implementation of the Union's external action.

1.1 The choice of principles

The CJEU has been able over the years to Europeanise the rule of law by using as starting point the legal traditions of the Member States.[2] When paraphrasing the famous *Les Verts* judgment it seems possible to state that the Community was said to comply with the rule of law because it allegedly offered a comprehensive set of legal remedies and procedures

[1] Administrative law scholars agree that both the Court and the Union legislature have established an administrative rule of law applicable to the various components of the EU administrative system. E. Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?', *European Law Journal*, (forthcoming); C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (London: Hart Publishing 2014), at 325.

[2] A. Arnull, 'The Rule of Law in the European Union', in A. Arnull and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press 2002), 239, at 254; L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', 6 *European Constitutional Law Review* 2010, at 365; T. Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press 2006), 5-6.

with the aim of ensuring that its institutions – including Member States – adopt measures in conformity with EU law, and that natural and legal persons are able to challenge (directly or indirectly) the legality of any act which affects their Community rights.[3] A remarkable development of the Court's more recent case law lies in linking explicitly the rule of law to the respect by the Union of more substantive requirements – i.e. general principles of laws.[4] General principles derive from the rule of law and their respect gives effect to the latter.[5] Some of the principles articulating the rule of law have an impact primarily on legislative institutions; while others are aimed at administrative action. The changing requirements and conditions for implementing EU policies have pushed the CJEU to develop, in parallel to the constitutional law principles, also administrative law specific principles: '[t]he rule of law tradition naturally fed into and informed the development of EU Administrative law.'[6]

Therefore, the Union's legal order already offers a set of administrative principles aimed at guiding and protecting affected parties from the exercise of administrative power. However, the application of these principles and rules externally mostly moves in uncharted territory.[7] Therefore, in order to identify which principles have the potential to give effect to the rule of law externally, it is necessary to look internally for those that in comparable situations have the potential to guide the exercise of administrative power. In other words, the methodology demands starting from commonalities of fact-patterns between the internal and external domain to determine which principles might be relevant. The principles selected by this chapter in order to give effect to the

[3] Case 294/83 *Les Verts* v. *Parliament*, EU:C:1986:166, para. 23.

[4] 'The European Community is a… Community based on the rule of law in which its institutions are subject to judicial review of the compatibility of its acts with the Treaty and with the general principles of law which include fundamental rights.' Case C-50/00 *P Unión de Pequeños Agricultores* v. *Council*, EU:C:2002:462, para. 38. Compliance with general principles, including fundamental rights, goes back to the *Internationale Handelsgesellschaft* case; however, in that case the CJEU did not make an explicit link to the respect of the rule of law. See Case 11/70 *Internationale Handelsgesellschaft* v. *Einfuhr und Vorratsstelle Getreide*, EU:C:1970:114.

[5] Advocate General Sharpston in her opinion on the case *Paul Miles and Others* v. *European Schools* stated that by upholding important principles of Community law the Community ensures that it remains one that is based on the rule of law. 'I respectfully applaud the Court's willingness, in Zwartveld, to have regard to the teleology of the Treaties and to insist on its jurisdiction to uphold important principles of Community law, thereby ensuring that the European Communities continued to be a 'Community based on the rule of law.' Opinion of Advocate General Sharpston delivered on 16 December 2010, Case C-196/09 *Paul Miles and Others Robert Watson MacDonald* v. *European Schools*, EU:C:2010:777, para. 71.

[6] P. Craig, 'EU Administrative Law and Tradition', in M. Ruffert (eds.), *Administrative Law in Europe: Between Common Principles and National Traditions* (Groningen: Europa Law Publishing 2013), 155, at 161.

[7] Chapter I, section 4.3.

administrative rule of law externally are the ones that in comparable situations would be applicable to the internal domain.

A narrow definition of the administrative rule of law implies that:

> '[…] administrative implementation occurs within the framework established by legislation, that subordinate legislation may be made by the administrative branch only where there is an enabling power in primary (Treaty) law or in European secondary legislation, and that such subordinate legislation must be within substantive limits and conform with procedural requirements of higher law.' [8]

Alongside this strict definition, the Court has developed other principles and rules directly relevant to the administrative function like the duty to state reasons, the duty of care and participatory procedures.[9] These legal parameters are now firmly rooted in the EU legal system,[10] and they are elaborated by legal doctrine in order to provide a reliable and useful yardstick for administrative conduct.[11] This understanding of the rule of law will be used as a starting point in order to develop the features that the principle acquires when guiding and constraining the exercise of power externally.[12] Without denying the relevance of maintaining the rule of law within its less-disputed realm, this chapter will question its ability to frame the most recent evolutions of public power. Giving effect to the administrative rule of law in external relations means studying the extension of its principles into the darker corners of governance.

In light of the features, functions, addresses and impacts that the external administrative power exercise externally, the following principles have been selected in order to give effect to the administrative rule of law when the Union develops and

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[8] H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013), at 150.

[9] See among others: article 13(2) TEU, article 296 TFEU; Cases T-211/02 *Tieland Signal Ltd* v. *Commission*, EU:T:2002:232, para 37; Case T-95/96 *Gestevisión Telecinco* v. *Commission*, EU:T:1998:206, para 53; Joined cases 142/84 and 156/84 *BAT and Reynolds* v. *Commission*, EU:C:1987:490, para 20; Case 46/87 *Hoechst* v. *Commission*, EU:C:1989:337, summary point 1; Case 85/87 *Dow Benelux* v. *Commission*, EU:C:1989:379.

[10] The principles derived from the administrative rule of law can be found in the Treaties, in the Charter of Fundamental Rights, and in the jurisprudence of the Court. These provisions are complemented by secondary legislation applicable in particular sectors or in relation to specific questions (e.g. access to documents).

[11] See among others: C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing 2014); H.P. Nehl, *Principles of Administraive Procedures in EC Law* (Oxford: Hart Publishing 1999), H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013); J. Schwarze, *European Administrative Law*, (London: Sweet and Maxwell 2006); M.P. Chiti (eds.), *Diritto amministrativo europeo*, (Milano: Giuffrè 2013); P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012).

[12] The author is aware that the definition of the rule of law as developed by the CJEU is not satisfactory; however, for the purpose of this thesis it will be used since it is the one enforced by the Court and recognised by the Union legal system. See introduction and chapter I for the complete reasoning behind this choice.

implements its external action: legality, the duty to state reasons, the duty of care, and the guarantee of participatory procedures. The choice of principles, besides addressing the features and the impact that the external administrative power exercises, also attempts to be comprehensive in upholding the two fundamental functions of the administrative rule of law: rationality of outcomes and individual protection.[13] The formality of the administrative decision-making process, coupled with the opportunity for participation of natural and legal persons within the process, are ranked among the values commonly recognized by any modern system of governance committed to the rule of law.[14] Participatory processes emphasise the protective function of the rule of law, whereas legality, the duty of care and the duty to state reasons constitute process standards in ensuring the rationality of the procedure's final outcome.[15] However, as will become clear from this chapter, the distinction is not always sharp. The interplay among the four selected principles has the potential to work both towards the achievement of better outcomes, as well as protect affected parties. In Fuller's theory too, there is an intuition that if we respect the formality of a procedure, we will likely find ourselves relatively safeguarded against more substantive assaults.[16]

Hereby the choice of the principles will be presented. However, the single choices will be further discussed throughout the chapter.

- **Legality**: According to the principle of legality, the public administration must act under and within the law. As discussed in chapter II, administrative power in the SAP and ENP is exercised in a non-linear manner in that administrative action is not always framed within parameters established by the legislator. It is in this context that the

[13] The enhancement of procedural rules likely to lead to adequate outcomes is a requirement mandated by the rule of law to the extent that material justice – substantive quality of the decision – is a value to be upheld beyond formal correctness of the procedures. The improvement of procedural rules guaranteeing participatory procedures is a requirement mandated by the rule of law to the extent that no one should be subject to a penalty or serious loss resulting from public action without being offered the opportunity to put forth their views of the facts. J. Mendes, 'Rule of Law and Participation: A Normative Analysis of Internationalised Rulemaking as Composite Procedures', *Jean Monnet Working Paper Series*, JMWP 13/13, at 17; J. Waldron, 'The rule of law and the importance of procedure', in J.E. Fleming (eds.), *Getting to the Rule of Law* (New York: New York University Press 2011), at 16 and at 22.

[14] H.P. Nehl, *Principles of Administraive Procedures in EC Law* (Oxford: Hart Publishing 1999), at 21.

[15] H.P. Nehl, 'Good Administration as procedural right and/or general principle?', in H.C.H. Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law Towards and Integrated Administration* (Cheltenham: Edward Elgar Publishing 2009), 322, at 349.

[16] 'To judge [people's] action by unpublished or retrospective laws…is to convey to [them] your indifference to [their] power to self-determination.' L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press 1969), at 162. See also J. Waldron, 'The rule of law and the importance of procedure', in J.E. Fleming (eds.), *Getting to the Rule of Law* (New York: New York University Press 2011), at 14-16.

principle of legality is chosen as a fundamental pillar in guaranteeing that administrative actors conduct their duties within power and for a proper purpose.[17]

- **Duty to state reasons and the duty of care**: Internally, the wide discretionary powers granted to the administration in choosing the most appropriate policy measures is coupled with a duty to place itself in the best possible conditions when assessing the propriety of the decision.[18] In this respect, the duty to state reasons and the duty of care are administrative procedures, derived from the administrative rule of law, aimed at controlling the Commission's power of appraisal.[19] As discussed in chapters II and III, the administration, in implementing the SAP and the ENP, enjoys significant discretion. The discretion enjoyed by the Commission when implementing the EU wider neighbourhood policies does not simply refer to a situation in which the administration enjoys a broad margin of manoeuvre; it also indicates the task granted to the Commission of balancing between different public interests.[20] Such relevant task has to be acknowledged in the application of the duty to state reasons and of the duty of care to the external administrative action of the Union. Finally, the duty to state reasons, by explaining and justifying an action taken in the exercise of authority, has the potential to protect individuals during the administrative processes of the SAP and ENP.
- **Participation**: Participation can generally be defined as the ability of natural and legal persons to take part in the decision-making process.[21] Participatory procedures on the one hand serve the function of controlling the exercise of administrative discretion; on the other, they rest on dignitary considerations. Imposing specific standards and a reform agenda on third states in exchange for macro financial assistance is not like deciding what to do about a rabid animal; it requires paying attention to the point of

[17] H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013), at 150.
[18] H.P. Nehl, *Principles of Administraive Procedures in EC Law* (Oxford: Hart Publishing 1999), at 116.
[19] '[W]here the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.' Case C-269/90 *Hauptzollamt München-Mitte* v. *Technische Universität München*, EU:C:1991:438, para. 14. H.P. Nehl, *Principles of Administrative Procedures in EC Law* (Oxford: Hart Publishing 1999), at 108.
[20] For example, when choosing which project to finance; see chapter III, section 2.1.
[21] Among others see M.P. Chiti, *Partecipazione popolare e pubblica amministrazione* (Pisa: Pacini Editore 1997), 34-35.

view of the third state. It is about respecting the personality of the entity the Union is dealing with.[22] As discussed in chapter III, the net of administrative activities implementing the SAP and the ENP have the potential of affecting third states as well as natural and legal persons. Therefore, granting the possibility to affected parties to put forward their argumentation can really do justice to the value we place on the respect of the rule of law in its protective function. Participation can take the form of 'participation at large', and of individual rights granted to holders of legally protected interests who are affected by the outcome of a decision.[23] Finally, participation plays an important role in respect of external administrative activities since it guarantees that in a system such as the EU external relations, where the mechanisms of judicial review are insufficient, stakeholders can have their views heard.[24]

At a first glance, the decision to exclude the principle of good administration from the choice of principles may seem odd. However, the principle does not seem to fit comfortably within the analysis carried out by this chapter. The principle of good administration overlaps with the rule of law; however, its meaning is still ambiguous. The principle, as many sustain, does not denote a specific procedural principle with a particular content and legal effect of its own.[25] The Court's case law does not treat it as an autonomous principle; it is, instead, often associated with other principles, rights and duties (e.g. the duty of care).[26] Article 41 of the Charter of Fundamental Rights (CFR) titled 'the right to good administration' does not seem to diverge from this understanding of the principle, although it might have further complicated its terminological and conceptual

[22] J. Waldron, 'The rule of law and the importance of procedure', in J.E. Fleming (eds.), *Getting to the Rule of Law* (New York: New York University Press 2011), at 16 and at 22.
[23] J. Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford: Oxford University Press 2011), 28-29.
[24] Chapter I, section 4.3 and chapter V, section 2.1.
[25] H.P. Nehl, 'Good Administration as procedural right and/or general principle?', in H.C.H. Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law Towards and Integrated Administration* (Cheltenham: Edward Elgar Publishing 2009), 322-351; F. T. Banfi, 'Il diritto ad una buona amministrazione', in M. Chiti e G. Greco (eds.), *Trattato di diritto amministrativo*, Tomo I, (Milano: Giuffrè 2003), 49-50; J. Mendes, 'Good Administration in EU law and the European Code of Good Administrative Behaviour', *EUI Working Papers Series*, Department of Law, LAW 2009/09, at 3.
[26] Case 32/62 *Alvis* v. *Council of the EEC*, EU:C:1963:15, para. 1; Case C-255/90, *Burban* v. *Parliament* EU:C:1992:153, paras 7 and 12; Case T-167/94 *Nölle* v. *Council and Commission*, EU:T:1995:169, para. 53. H.P. Nehl, 'Good Administration as procedural right and/or general principle?', in H.C.H. Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law Towards and Integrated Administration* (Cheltenham: Edward Elgar Publishing 2009), 327-338.

framework.[27] One novelty of article 41 CFR consists in raising good administration to a general category under which a whole set of subjective rights may be subsumed with the intention of limiting arbitrary administrative conduct in the Union.[28] However, the set of rights and principles subsumed by article 41 CFR are already protected by the Union legal order, that is, either by the Treaties or by the jurisprudence of the Court.[29] The meaning of good administration as an independent right still remains obscure.[30] Therefore, its application in an uncharted territory – like the one of external relations – becomes particularly problematic. What is, however, interesting to highlight in respect of article 41 CFR, is the lack of clarity as to whether it would even be applicable to the Union's administrative external action.

Article 41 CFR is positioned under the heading 'Citizens' rights' even if the wording of the article refers to '[e]very person'. Therefore, there seems to be lack of clarity as to whether the right is granted to every person or only to Union citizens. The commentary on the Charter does not seem to shed light on the issue. If on the one hand the commentary states that article 41 is particularly remarkable for its general nature that makes it applicable to every person independently of their nationality or citizenship; on the other, it states that the article must be related for the modalities of its application to the specific provisions of articles 42 and 43 CFR.[31] Articles 42 and 43 CFR are applicable to '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. Does this mean that the wording 'any individual' of article 41 is actually limited to the place of residence or to the registered office? If this is the case, why wasn't the same wording of articles 42 and 43 CFR used also for article 41 CFR? Would such an interpretation imply that the action of the Union administration cannot harm those outside the boundaries of the Union? Or, more generally, would such interpretation

[27] Article 41, Charter of Fundamental Rights of the European Union, *OJ* [2000] C364/1, 18.12.2000 (hereafter CFR); J. Mendes, 'Good Administration in EU law and the European Code of Good Administrative Behaviour', *EUI Working Papers Series*, Department of Law, LAW 2009/09, at 4.

[28] L. Azoulai, 'Le principe de bonne administration', in J-B. Auby, J. Dutheil de La Rochère (eds.), *Droit Administratif Européen*, (Bruxelles: Bruylant 2007), 496-511; quoted by J. Mendes, 'Good Administration in EU law and the European Code of Good Administrative Behaviour', *EUI Working Papers Series*, Department of Law, LAW 2009/09, at 3.

[29] P. Craig, 'Article 41 – Right to Good Administration', in S. Peers, T. Hervey, J. Kenner, A. Ward, *The EU Charter of Fundamental Rights A Commentary*, (Oxford: Hart Publishing 2014), 1069-1098.

[30] J. Mendes, 'Good Administration in EU law and the European Code of Good Administrative Behaviour', *EUI Working Papers Series*, Department of Law, LAW 2009/09, at 3.

[31] Commentary on the Charter of Fundamental Rights of the European Union, June 2006, 328-333. Available <http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf> (Consulted on 07.08.2016).

imply the absence of administrative action externally? The unclear formulation of article 41 CFR represents a genuine lacuna in the Union legal system in as far as it does not openly face the impact of EU administrative action externally.

1.2 Are there implementing arrangements operationalising the principles externally?

Once the key principles giving effect to the administrative rule of law externally have been chosen, the next step requires identifying the implementing arrangements in place (or which ought to be in place) with the aim of articulating their application within the external relations context. Identifying the implementing arrangements that operationalize the principles is a fundamental step in order for them to serve their functions also when framing the Union's external relations. The change in interlocutors from the internal to the external domain demands thinking about the operationalization of the principles in this new context. For example, the application of the duty to hear the other side has so far manly regulated the relation between the Member States and the Union; and between national or Union authorities and persons under their jurisdiction. Therefore, implementing arrangements are necessary for the duty to hear the other side to serve its function also when regulating the relations between the Union and third states, including their natural and legal persons. Even among internal policies, case law varies as to the conditions that need to be fulfilled in order for the duty to hear the other side to be applicable.[32] In some cases, the implementing arrangements operationalising the principles externally are to be found scattered in different documents (e.g. the Court's case law, Ombudsman decisions, secondary law, self-imposed guidelines, etc.); while in other situations their 'construction' might be necessary.[33]

The lack of driving forces determined to give effect to the administrative rule of law externally does not imply a complete vacuum of norms. For example, the application of the duty of care externally was recently operationalized by the General Court in the *Front Polisario* case.[34] As it will become clear later in the chapter, the General Court in this case

[32] The case law on the duty to hear the other side varies according to policy area. In this respect, different approaches are taken as to whether the right to be heard is accorded only where the contested measure is initiated against a claimant; or where there is an individual measure that adversely affects a person. P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), at 290.

[33] The duties that the administration ought to respect when acting externally should apply as a matter of principle not only when specifically envisaged. However, their operationalisation through internal implementing arrangements shows that out-of-court procedures are developing in order to give effect to the rule of law when the Union acts externally.

[34] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953.

established that the respect of the duty of care externally implies that the Council has an obligation to examine *carefully and impartially* whether the action of the Union in third states can potentially violate human rights.[35] Furthermore, the numerous self-imposed rules aimed at regulating how progress reports, action plans, human rights impact assessments, etc. need to be adopted, seem to fill a normative gap in the development of the two policies. The administration, over the years, in managing the growing complexity of the relations governing the Union and its neighbours had to impose on itself some internal guidelines as to how to adopt all the administrative acts implementing the two policies. The complexity and the level of details of the internal guidelines have increased over time.[36] However, in the absence of implementing arrangements aimed at operationalising the administrative principles externally, several questions need to be answered: Does this absence present a genuine lacuna in the legal system? Ought new implementing arrangements to be constructed? If the 'construction' of implementing arrangements ought to be envisaged, the chapter uses as a starting point the function of the principles internally and makes some suggestions as to what ought to be envisaged when applied in the external relation domain.

1.3 The interconnected sources giving effect to the administrative rule of law externally

This chapter takes a broad approach to the different sources that have so far tried to guide the exercise of administrative power externally. The implementing arrangements in place aimed at operationalising the principles giving effect to the administrative rule of law externally are to be found scattered in primary law, secondary law, the jurisprudence of the Court, decisions of the Ombudsman and in self-imposed guidelines. The chapter in its analysis also uses the European Code of Good Administrative Behaviour (ECGAB).[37] The Code is a non-legally binding instrument proposed by the European Ombudsman in 1999 to European institutions, agencies and bodies as a blue- print for the adoption of their own

[35] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 225.
[36] A comparison between the Enlargement package of 2012 with the one of 2015 clearly shows a substantial effort made by DG NEAR to clarify the procedure and methodology that needs to be adopted when compiling progress reports. European Commission, Directorate General for Enlargement, *Guidance Note Enlargement Package 2012*, Access to documents request GESTDEM Reference 2013/3857; European Commission, Directorate General for Enlargement, *Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.
[37] European Code of Good Administrative Behaviour, available at: <http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1> (Consulted on 07.08.2016).

codes of conduct.[38] It aims at concretising the rules and principles against which the Ombudsman could assess cases of maladministration, providing a guide for the staff of Union institutions and bodies regarding their relationship with the public, and informing individuals about the standards and rights of administration they may expect.[39]

The different sources have different legal implications for administration. Primary and secondary legislation, as well as the jurisprudence of the Court may impose legally binding obligations on the exercise of administrative power. Non-legal rules and decisions of the Ombudsman, for their part, define standards of conduct that the administration is invited to respect. Despite this difference, the chapter tries to provide a pragmatic picture as to how the administrative rule of law could be respected externally through the interconnection of all different sources: primary and secondary legislation, case law of the Court, decisions of the Ombudsman, and self-imposed guidelines. Such a comprehensive approach helps to structure the encounter between administrative law and policies which have so far been running mainly on European Council and Council conclusions, self-imposed rules, and crystallised practice. The chapter now continues in its analysis by taking into consideration each principle presented in section 1.1 separately.

The following proposals as to how legality, the duty to state reasons, the duty of care and participation ought to be applied externally are intended as blueprints of possible ways in which the meeting between administrative law and external relations could be structured, with the final goal of upholding the rule of law in the way the Union develops and implements its external action. The scheme used for each principle proceeds as follows. First, it identifies the meaning and the functions that each of the selected principles have internally (with a view to further explaining why they have been chosen for the external domain); second, it checks whether implementing arrangements are in place operationalising the principles externally; and finally, it evaluates the current state of art by questioning whether new implementing arrangements ought to be envisaged for the full operationalisation of the principle in the external relation context.

[38] The European Parliament endorsed it in 2001 by adopting resolution A5-0245/2001.
[39] For a detail account on the ECGAB see J. Mendes, 'Good Administration in EU law and the European Code of Good Administrative Behaviour', *EUI Working Papers Series*, Department of Law, LAW 2009/09 – published in French: J. Mendes, 'La Bonne Administration en Droit Communautaire et le Code Européen de Bonne Conduite Administrative', 131 *Revue Française d'Administration Publique*, 2009, 555-571.

2. Legality of administrative action

2.1 The principle internally: any chance of failing in its function externally?

The requirement of legality of administrative action includes a number of specific elements: acting within powers;[40] acting in conformity with legally mandated procedures;[41] correct exercise of discretion;[42] and responding to justified legal claims.[43] Article 236(2) TFEU, dealing with the review of legality of acts adopted by the EU institutions having legal effects, makes the application of these elements explicit.[44] The CJEU stated that 'any intervention by the public authorities must have a legal basis and be justified on the grounds laid down by law'.[45] Therefore, the administration must respect the primacy of legislation and conform to the stipulations contained in it. The office of the European Ombudsman has also defined 'lawfulness' in article 4 of its European Code of Good Administrative Behaviour (ECGAB). Article 4 ECGAB states the following:

> 'The official shall act according to law and apply the rules and procedures laid down in EU legislation. The official shall in particular take care to ensure that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law.' Article 4 ECGAB.'

As analysed in chapter II, the administration, in implementing the EU wider neighbourhood policies, is confronted with a general lack of basic parameters for the exercise of its power.[46] Much of the action of the administration in the SAP and the ENP is regulated by European Council Conclusions, Council Conclusions, or by administrative self-regulations rather than by positive law. Does the lack of primary and secondary law

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[40] Article 13(2) TEU establishes that 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.'

[41] The Court stated in relation to the satisfaction of the right of defence that respect for it 'must […] be ensured not only in administrative procedures which may lead to the imposition of penalties but also during preliminary inquiry procedures such as investigation which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertaking for which they may be liable.' Case 46/87 *Hoechst* v. *Commission* EU:C:1989:337.

[42] The CJEU has established the broad principle that where 'the administration enjoys a wide margin of discretion […] the Court is confined to examining whether the exercise of such a discretion contains a manifest error or constitutes a misuse of power or whether the administrative authority in question did not clearly exceed the bounds of its discretion.' Case 55/75 *Balkan Import Export GmbH* v. *Hauptzollamt Berlin Packhof*, EU:C:1976:8, para. 8.

[43] H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2013), at 151.

[44] '[…] lack of competence, infringement of an essential procedural requirement, infringement of the Treaties of any rule of law relating to their application, or misuse of powers.' Article 263(2) TFEU.

[45] Case 46/87 *Hoechst* v. *Commission* EU:C:1989:337, summary point 3; see also article 13(2) TEU.

[46] Chapter II, section 2.1.

imply that the principle of legality fails in its function externally? In the context of the EU wider neighbourhood policies the principle of legality of administrative action does not follow the same dynamics of the principle of legality internally; however, that does not mean that it lacks purpose. The administrative power exercised by the Union in implementing the SAP and the ENP is not completely without guidelines; rather, it finds its basic parameters mainly outside primary and secondary legislation.

2.2 Implementing arrangements in the external domain: scarcity does not mean absence

The principle of legality when applied in the realm of the EU wider neighbourhood ought to be stretched in order to include, alongside positive law, other typologies of acts aimed at guaranteeing that the action of the administration is exercised within the boundaries established by the Union's system of external governance and international law sources. This section aims at challenging the assumption that legality, in its operationalisation externally, is confined to the law as contained in primary and secondary legislation.

❖ As operationalised by the Court and by the European Ombudsman

The legality of external administrative action has been operationalised by the European Ombudsman. The three cases that will be hereby presented all deal with complainants asking the Ombudsman to establish whether the action or inaction of the Commission in the exercise of its administrative power externally amounted to maladministration. Specifically, the claimants wanted to ascertain whether the Commission did not respect its obligations to follow certain rules when acting externally in accordance with article 4 entitled 'lawfulness' of the ECGAB. The European Ombudsman was able in few instances to offer some guidance as to the boundaries that need to be respected by the administrative power when acting externally.[47]

In the first case, the claimant stated that the Commission had not respected its legal obligations in the way it developed the 'National Parks Rehabilitation Project' in southern Ethiopia. The legal obligations derived from the EU Development policy, the IV Lomé Convention, the OECD guidelines on resettlement, and international human rights agreements. The claimant listed a series of flaws in the way the Commission had

[47] C. Harlow and R. Rawlings, *Process and Procedure in EU Administration*, (Oxford: Hart Publishing 2014), 80-84; A. Tsadiras, 'Unravelling Ariadne's Thread: the European Ombudsman's Investigative Powers', 45 *Common Market Law Review* 2008, 757-770.

implemented the project (e.g. insufficient attention was given to cultural and social issues, lack of consultation with affected people, etc.).[48] Against this background, the Ombudsman checked whether the Commission in the implementation of the Ethiopian project had taken due account of the values that became essential in the EU development policy (i.e. cultural and social values through grass roots community participation), and whether it had complied with international law (in this case Human Rights Conventions).[49] In respect to the first point, the Ombudsman noted that environmental, cultural and social values have become essential values in the EU development co-operation policy, and that the IV Lomé Convention has made social issues a priority in the design, appraisal, execution and evaluation of any project.[50] Accordingly, he affirmed that 'the implementation of any project has to take due account of the existing cultural and social milieu, by means of community participation at a grass root level'.[51] Therefore, the Ombudsman seems to have used the values of the policy to determine the procedural obligations that need to be respected by the Commission when implementing its projects. As to the second point, the Ombudsman, by referencing to the case law of the Court of Justice, stated that 'EU development co-operation, as any other EU policy, has to be consistent with existing international law obligations'.[52] Moreover, he stated that the same IV Lomé Convention outlines the importance of this principle in the context of respect for human rights.[53] In the case at stake the human rights obligation to which the complainant was referring to are the one stemming from the UN International Covenant on Economic, Social and Cultural Rights. The Ombudsman, in assessing whether the Commission complied with the principle of legality in developing and applying the

[48] Decision on 26 October 2000 of the European Ombudsman on complaint 530/98/JMA against the European Commission, external relations, breach of Article 4 ECGAB.
[49] Decision on 26 October 2000 of the European Ombudsman on complaint 530/98/JMA against the European Commission, external relations, breach of Article 4 ECGAB, points 2.3-2.5.
[50] Articles 36, 142 and 144 of the IV Lomé Convention.
[51] Decision on 26 October 2000 of the European Ombudsman on complaint 530/98/JMA against the European Commission, external relations, breach of Article 4 ECGAB, point 2.3.
[52] Case C-286/90 *Poulsen and Diva Navigations*, EU:C:1992:453, para 9; see also, C-162/96 *A. Racke GmbH & Co.* v. *Hauptzollamt Mainz*, EU:C:1998:293, para 45; Decision on 26 October 2000 of the European Ombudsman on complaint 530/98/JMA against the European Commission, external relations, breach of Article 4 ECGAB, point 2.4.
[53] Article 5(2) of the IV Lomé Convention, Decision on 26 October 2000 of the European Ombudsman on complaint 530/98/JMA against the European Commission, external relations, breach of Article 4 ECGAB, point 2.4.

project, checked if it respected the values of the policy (and their engrained procedures) as well as international law.[54]

In the second case, the complainant alleged that, in the face of serious human rights violations by the Republic of Vietnam, the Commission failed to use its power to suspend the Cooperation Agreement with Vietnam.[55] In this context, the Ombudsman started his analysis with the text of the agreement in order to determine whether there were any guidelines for the implementation of the clause. Given that there were no such guidelines, the Ombudsman then turned to the Treaties of the European Union which again did not specify how the human rights clauses should be implemented.[56] However, the lack of binding rules did not stop the Ombudsman in his analysis. On the contrary, he stated that even if the Community legislator seemingly intended to confer a large degree of discretion upon the Commission for the interpretation and application of the clause, this did not imply a complete absence of legal limits.[57] In this context the Commission set out various principles for the operationalization of the human rights clause in its 1995 Commission Communication.[58] Thus, the Ombudsman assessed the legality of the inaction by the Commission against the principles outlined in the 1995 Commission Communication.[59] In both these first two cases, the Ombudsman found the action and the inaction of the Commission to be lawful.

The third case concerns the alleged failure of the Commission to carry out a human rights impact assessment (HR impact assessment) during the negotiations for a free trade agreement (FTA) between the EU and Vietnam.[60] In this case the Ombudsman decided that although there was no express and specific legally binding requirement to carry out an HR impact assessment during the negotiations for an FTA with Vietnam, it would nonetheless be in the spirit of article 21(1)(2) TEU to carry out an HR impact

[54] Decision on 26 October 2000 of the European Ombudsman on complaint 530/98/JMA against the European Commission, external relations, breach of Article 4 ECGAB, point 2.5.
[55] Decision on 28 June 2005 of the European Ombudsman on complaint 933/2004/JMA against the European Commission, external relations, breach of Article 4 ECGAB.
[56] Decision on 28 June 2005 of the European Ombudsman on complaint 933/2004/JMA against the European Commission, external relations, breach of Article 4 ECGAB, point 1.5.
[57] Decision on 28 June 2005 of the European Ombudsman on complaint 933/2004/JMA against the European Commission, external relations, breach of Article 4 ECGAB, point 1.6.
[58] Commission Communication of 23 May 1995, 'Inclusion of Respect for Democratic Principles and Human Rights in Agreement between the Community and Third Countries', COM 23/1995.
[59] Decision on 28 June 2005 of the European Ombudsman on complaint 933/2004/JMA against the European Commission, external relations, breach of Article 4 ECGAB, point 1.6.
[60] Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care.

assessment.[61] Moreover, she[62] stated that it would also be consistent both with the Commission's current practice of carrying out HR impact assessments and with the 2012 Human Rights Action Plan.[63] On the other hand, the Commission is of the view that since the negotiations with Vietnam took place under the legal framework established for the Association of South-Eastern Nations FTA (ASEAN FTA), the 2009 ASEAN Sustainability Impact Assessment was still valid and relevant in a bilateral context. The regional impact assessment provided country-level details and addressed the impact on individual countries.[64] Furthermore, the Commission argued that:

> 'Articles 21 TEU and 207 TFEU do not mandate a specific procedural instrument such as an HR impact assessment. Therefore, the EU institutions enjoy a wide margin of discretion in ensuring the general policy objective of consistency between different areas of external action'.[65]

The Commission warned against the possible retroactive application of a requirement to carry out an HR impact assessment. It noted that the Council authorised the negotiations with ASEAN FTA (including Vietnam) in April 2007, and that the bilateral negotiations with Vietnam were conducted in the framework of the 2007 authorisation, while the Commission submitted its new practice of systematically including its HR impact assessments in 2011.[66] It is in this context that the Ombudsman made it clear that the respect for human rights cannot be subjected to considerations of mere convenience.[67] Thus, she found that the Commission's refusal to carry out an HR impact assessment constituted an instance of maladministration in breach of article 4 ECGAB. The lack of hard-law measures did not prevent the Ombudsman from deriving procedural

[61] Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care, point 24.
[62] On the 1 October 2013 Emily O'Reilly took office as European Ombudsman as successor of Nikiforos Diamandouros.
[63] The 2012 Action Plan requires the Commission to incorporate human rights in all impact assessment when conducting negotiations on trade agreements that have significant economic, social and environmental impacts. Strategic Framework and Action Plan on Human Rights and Democracy, Council Document 11855/12, 25 June 2012; Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care, point 25.
[64] Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care, point 3.
[65] Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care, point 12.
[66] Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care, point 14.
[67] Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care, point 26.

obligations. On the contrary, if there had been hard law establishing the obligation then perhaps the retroactivity argument would have had a greater weight; but because the Ombudsman was concerned with the Commission's own self-regulatory practice it was easier to establish that the obligation to carry out HRIA should be applied retrospectively.

According to the Ombudsman, the power of the administration in external relations is not unbounded. The cases provide guidance as to the boundaries that need to be respected by the administrative power when acting externally, also in the absence of legally binding rules. When assessing whether the administration is in breach of article 4 ECGAB, the Ombudsman considered the following points: whether the administration has the responsibility to exercise a specific power; and whether the administration has to follow procedures – explicitly provided or implied – aimed at limiting the Commission's discretion or aimed at protecting values of overarching importance. If the primary and secondary law in place (which shall always be the starting point of the analysis) are not sufficient in determining the lawfulness of the action of the administration because they are silent as to how the administration shall carry out its tasks, then the door was opened by the Ombudsman to the values underpinning the policy; its consistency with international law;[68] the spirit of the articles dealing with the external action of the Union;[69] administrative self-regulations;[70] and the action plans adopted by the Council in areas dealing with the external action of the Union.[71]

❖ As operationalised by internal rules[72]

The scarcity of legally mandated rules aimed at guiding and constraining the exercise of administrative power in the Union' wider neighbourhood policies is accompanied by the values underpinning the policies and by an increasing body of self-imposed guidelines developed by the administration. Over time the Commission and the EEAS have imposed on themselves rules as to how they should exercise their own power in implementing the

[68] E.g. Human rights agreements like the UN International Convenant on Economic, Social and Cultural Rights.
[69] E.g. Article 21(1)(2) TEU.
[70] E.g. Commission Communication of 23 May 1995, 'Inclusion of Respect for Democratic Principles and Human Rights in Agreement between the Community and Third Countries', COM 23/1995.
[71] Strategic Framework and Action Plan on Human Rights and Democracy, Council Document 11855/12, 25 June 2012.
[72] Internal rules under this heading (and the following ones throughout the chapter) include: administrative self-imposed guidelines, European Parliament resolutions, European Council conclusions, and Council conclusions.

EU wider neighbourhood policies. An overview of all the documents shows the presence of procedural guidelines as to how the administrative power should be carried out. This internal framework exemplifies the need of the administration to find ways of constraining its own power in the absence of given rules. As it will become clear later in this chapter, this self-imposed rules, not only try to reflect the values underpinning the SAP and the ENP, but also operationalise some important principles of EU administrative law.

The essential values underpinning the SAP and the ENP can be found in various sources: Treaties articles, financial assistance regulations, self-imposed guidelines, etc.[73] The two overarching values underpinning the SAP are: conditionality and differentiation. Under the conditionality principle the EU's commitment and assistance to the SAP states are matched by a genuine commitment of the third countries' governments to make necessary reforms to advance its relations with the Union.[74] The principle of conditionality can either be enforced through negative sanctions or positive incentives. Particularly in the case of the SAP, the principle derives its significance primarily through incentives offered in case of compliance.[75] The Union's commitment to the SAP states also reflects the particular stage of development of each county; it is tailored to its specific needs.[76] The final goal for the SAP states is accession; however, the road to achieve the final goal may be tailor-made to the needs of each country. Besides these two overarching values, several others are tied to specific administrative activities. For example, while compiling progress reports the Commission should ensure 'consistency and a fair assessment across all the reports'.[77]

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[73] E.g. Article 8 TEU; Preamble (point 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), *OJ* [2014] L77/13, 15.03.2014; Preamble (point 5) Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[74] Commission Communication of 21 May 2003, 'The Western Balkans and European Integration', COM(2003) 285 final, at 3.

[75] C. Pippan, 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality', 9 *European Foreign Affairs Review* 2004, at 240; G. Pentassuglia, 'The EU and the Protection of Minorities: The Case of Eastern Europe', 12 *European Journal of International Law* 2001, at 25.

[76] Commission Communication of 21 May 2003, 'The Western Balkans and European Integration', COM(2003) 285 final, at 3; article 4: 'Assistance shall be differentiated in scope and intensity according to needs, commitment to reforms and progress in implementing those reforms.' 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), *OJ* [2014] L77/13, 15.03.2014.

[77] European Commission, Directorate General for Enlargement*, Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.

The two main values underlying the ENP are joint ownership and differentiation.[78] These two underpinning values have been reinforced by the latest Commission Communication on the review of the ENP.[79] The ENP is based on the joint ownership of the process, i.e. that the EU does not seek to impose priorities or conditions on its partners; instead, they will be defined by common consent and will vary from country to country. Differentiation within the ENP acquires a diverse meaning compared to the SAP. While for the SAP the common goal is accession, differentiation in the ENP also implies that the ambition of each partnership will depend on the third country's geographical location, political and economic situation, relations with the Union and the neighbouring countries, reform programmes, and perceived interests in the context of the ENP.[80] Differentiation is also linked to conditionality. More integration in the EU market and more financial assistance is granted to ENP countries that show particular willingness to respect the Union's funding values.[81] The two overarching values underlying the ENP become particularly relevant for the content of action plans. The guidance notice on how to draft action plans indicates the importance of respecting joint ownership by building them in accordance with the partner's reform plan and its particular circumstances.[82] As for the SAP, also for the ENP: alongside overarching values, several others are linked to the adoption of the single administrative acts. ENP progress reports shall be objective.[83] The ENI strategy papers and programming documents shall be coherent with the Union's external policy objectives and principles; they shall guarantee coherence between

[78] Communication from the Commission of 12 May 2004 on 'European Neighbourhood Policy', COM(2004) 373 final.

[79] 'Differentiation and greater mutual ownership will be the hallmark of the new ENP, recognizing that not all partners aspire to EU rules and standards, and reflecting the wishes of each country concerning the nature and focus of its partnership with the EU.' Joint Communication of 18 November 2015, 'Review of the European Neighbourhood Policy', JOIN(2015) 50 final, at 2.

[80] Communication from the Commission of 12 May 2004, 'European Neighbourhood Policy', COM(2004) 373 final, at 8.

[81] The Commission made explicit the conditionality attached to shared values, and the resulting priorities identified in the Action Plans in its Communication of 12 May 2004, 'European Neighbourhood Policy', COM(2004) 373 final, at 13. See also M. Cremona, 'The European Neighbourhood Policy: More than a Partnership?' in M. Cremona (eds.), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), 244, 283-285.

[82] EEAS, *Non-Paper: Guidelines for Future ENP Action Plan* 05.01.2012, Access to Documents request SG1 - Corporate Board Secretariat; Joint Communication of 18 November 2015, 'Review of the European Neighbourhood Policy', JOIN(2015) 50 final, at 2.

[83] EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

different financial instruments and the action of other donors; and they should be aligned to corresponding national or local strategy.[84]

Internal self-imposed guidelines provide for the procedural regime that needs to be followed by the Commission and the EEAS when implementing the SAP and the ENP. For example, the latest Guidance note for the 2015 Enlargement Package, in indicating the sources which shall be used by the Commission in drafting progress reports, specifies which actors shall be consulted.[85] Similarly, also the guidelines for future ENP action plans envisage a consultation process '[t]he Delegations in the respective ENP partner country and headquarters will also hold consultations with civil society in the respective ENP partner country prior to the start of negotiations'.[86] The same holds true also for internal documents indicating how programming of financial assistance under the ENI and IPA II regulations should be carried out. The Instructions for the Programming of the ENI 2014-2020 specify the procedures to be followed by the Commission and the EEAS when programming financial assistance for ENP countries, as well as for those with no action plan or association agenda (currently Belarus, Syria and Libya).[87] The IPA II Quick Guide also specify that extensive consultations between the Commission, the EU delegations, the beneficiaries and the wider donor community (including civil society and non-state stakeholders) need to be carried out in the preparation phase of country action programmes.[88]

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[84] See article 4(5) and points 13, 14, 16, 18 of the preamble of Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014; EEAS and European Commission, Directorate General for Development and Cooperation – EuropeAid, *Strategic Priorities 2014-2020 and Multi-annual Indicative Programme 2014-2017 European Neighbourhood-wide measures*, Access to Documents request SG1 - Corporate Board Secretariat.

[85] Among others: country authorities, international organisations, NGOs, think tanks, local organisations, etc. European Commission, Directorate General for Enlargement*, Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.

[86] EEAS, *Non-Paper: Guidelines for Future ENP Action Plan* 05.01.2012, Access to Documents request SG1 - Corporate Board Secretariat; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

[87] 'The formulation of an EU specific CSP [Country Strategy Paper] implies a prior assessment of the situation in the country and the national policies and implementation plans as well as the relations with the EU. This assessment will need to be carried out by the Delegations, in consultation with key actors, including civil society and private sector […].' Instruction for the Programming of the European Neighbourhood Instrument (ENI) 2014-2020, available at: <https://ec.europa.eu/europeaid/sites/devco/files/ENI%20programming%20instructions.pdf> (Consulted on 07.08.2016).

[88] European Commission, Directorate General Enlargement, *Quick Guide to IPA II Programming*, Access to Documents request GESTDEM reference 2016/451, also available at: <http://abdigm.meb.gov.tr/projeler/ois/014.pdf> (Consulted on 07.08.2016), at 25.

2.3 Evaluating the state of art: time for some stretching?

If on the one hand the definition of legality seems to be straightforward and as such is applicable in highly positivist traditions of legislative guidance of public power, on the other this same definition seems less obvious in dynamic and constant developing legal orders such as that of the European Union. Administrative power, when exercised externally, is often carried out through non-legally binding acts, which, despite their relevance, do not find a clear basis in primary and secondary legislation. The lack of legislative guidance does not imply a total lack of rules aimed at constraining the exercise of administrative power. The procedural and substantive structures developed by self-imposed guidelines implementing the SAP and the ENP are an example. The application of the principle of legality externally has been operationalised by the Ombudsman in order to face the challenges posed by the external realm. The Ombudsman stretched the definition of legality of administrative action to include international law, the respect of procedures deriving from the essential values underling a policy, Council's acts, and Commission crystallised practice, particularly if these are aimed at guaranteeing the Union's compliance with values of overarching importance. This approach should be praised because it recognises the existence of a relevant power which cannot be left unguided. It selects a series of identifiable and policy-relevant parameters both from EU and international sources, which have the potential of driving the exercise of administrative power externally.

Finally, an important element of legality of administrative action, namely, responding to individual claims, ought to be addressed. Natural and legal persons do contact the Commission in order to provide the latter with information concerning, for example, the human rights situation in their countries or whether Member States fail to comply with their obligations under the agreement. Mr. Mugraby and the coalition of Turkish citizens are just two examples.[89] Informal communication is rather frequent.[90] Nevertheless, no internal rules regulate such correspondence. The Commission is under no obligation to take into account individual complaints, since it is under no duty to take

[89] Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418; Case C-581/11 *P Mugraby* v. *Council and Commission*, EU:C:2012:466; Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97.

[90] During the author's traineeship at the European Commission, Directorate General for Enlargement (Unit Albania), individuals did contact the Commission complaining about e.g. the fact that Italy did not remove specific customs duties as envisaged by the Stabilisation and Association Agreement between the Union and Albania.

action in case neighbourhood countries fail to comply with their obligations under the agreements concluded with the Union.[91] However, as the Court acknowledged in the *Mugraby* case, the Commission is granted a significant power in monitoring the compliance by third states with the obligations contained in the agreements. According to the Court:

> '[…] it follows from Article 17(1) TEU that the Commission, as guardian of the EU and FEU Treaties and of the agreements concluded under them, must ensure the correct implementation by a third State of the obligations which it has assumed under an agreement concluded with the European Union, using the means provided for by that agreement or by the decisions taken pursuant thereto'.[92]

Therefore, it can be argued that the Commission, in light of its significant role as guardian of the agreements and of its monitoring duties under the SAP and ENP framework, ought to respect its internal guidelines 'on the treatment of individual complaints in respect of infringements of Union law' also when handling individual complaints from citizens of the SAP and ENP states.[93]

3. Duty to state reasons

3.1 The principle internally: it is not all about transparency

The duty to state reasons is a legally mandated procedure included in the Treaties and it is applicable exclusively to legal acts. Legal acts include legislative acts and administrative acts having legal effects.[94] Article 296 TFEU clearly states:

> 'Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.'

The Court has been interpreting the substance of the duty in a fairly flexible manner. In its early case law the Court took a rather mild approach, simply demanding that reasons shall explain 'in a concise but clear and relevant manner the principal issues of law and of fact upon which the decision is based.'[95] However, over the years the General Court in *Asia*

[91] Case T-54/99 *max.mobil Telekommunikation Service GmbH* v. *Commission*, EU:T:2002:20, paras 70-72.
[92] Case C-581/11 *P Mugraby v. Council and Commission*, EU:C:2012:466, para. 68.
[93] Commission Communication of 11 December 2002, 'Better Monitoring of the Application of Community Law', COM(2002) 725 final, at 13.
[94] P. Craig, 'Article 41 – Right to Good Administration', in S. Peers, T. Hervey, J. Kenner, A. Ward, *The EU Charter of Fundamental Rights A Commentary*, (Oxford: Hart Publishing 2014), 1074.
[95] Case 24/62 *Germany* v. *Council*, [1963] ECR 36, at 69.

Motor France II expanded the meaning of the word 'reason' to cover reasoning;[96] to shrink it again in *Omega Air* to reasons that would clearly disclose the essential objectives pursued by the institution without excessively requiring to make 'specific statement of reasons for the various technical choices made.'[97] The Court over the years has converted the principle 'from a very mild, essentially procedural requirement into a very draconian, substantive one' and then again – at its wish – into its former mildness.[98] In this context, Shapiro argued that the Court in interpreting the duty to state reasons has been 'heavily influenced by the most basically procedural root of the giving reason requirement – the desire of transparency in government affairs'.[99] A more comprehensive interpretation of the principle ought to be welcomed, especially in its operationalisation externally.

The operationalisation of the duty to state reasons externally displays a significance of its own. It is not simply a legally mandated procedure for legal acts; it has the potential to improve the rationality of the administrative action and of protecting individuals during the administrative processes executing the Union's external policies. The duty to state reasons combines two fundamental functions that administrative action ought to respect: the rationality of the decisions and individual protection. The duty has the potential to improve the quality of the final outcome by forcing the administration to explain its choices, and of respecting the persons affected by a measure by explaining and justifying an action taken in the exercise of authority.[100] This ought to be particularly the case if the persons affected might not be able to challenge the measure – either due to its non-legally binding nature or for the Court's restrictive standing rules.[101]

[96] See C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing 2014), at 73 on Case T-7/92 *Asia Motor France and others* v. *Commission*, EU:T:1993:52.
[97] Joined cases C-27 and 122/00 *Omega Air and others*, EU:C:2002:161, para. 47.
[98] M. Shapiro and A.S. Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press 2003), at 240.
[99] M. Shapiro and A.S. Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press 2003), at 235. See also C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing 2014), at 74.
[100] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press 1997), at 432.
[101] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press 1997), 430 - 438; P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), at 341.

3.2 Implementing arrangements in the external domain: a genuine lacuna

❖ As operationalised by the Court and by the European Ombudsman

The Court's case law and the decisions of the European Ombudsman do not provide any guidance as to the operationalisation of the duty to state reasons in the context of the administrative activities implementing the SAP and the ENP.[102]

❖ As operationalised by internal rules

The duty to state reasons seems to have been operationalised by the Commission when drafting financial assistance strategy papers and programming documents. As already discussed in chapter II and III, these documents are adopted as Commission implementing decisions; thus, they have to comply with the duty to state reasons by virtue of article 296 TFEU which applies to legal acts. However, a close look at the documents reveals that the actual statement of reasons, which are normally contained in the preamble of the implementing decisions, are instead spelled out in the text of the annexes of the decisions. The annexes are the actual Commission documents strategising and programming financial assistance. In doing so, the Commission explains in detail the reasons for the choices made both in terms of the substantial area to be financed and the methodology used for the disbursement of funds.[103] The operationalization of the duty to state reasons cannot be found in respect of the documents aimed at setting the agenda for action, and for those aimed at implementing sector specific goals.

In light of the absence of rules operationalising and acknowledging the relevance of the of the duty to state reasons externally, the next section – by using as a starting point the functions attributed to the duty to state reasons – will explain why the respect of such a duty is relevant for the exercise of administrative power externally and it will suggest how it ought to be operationalised.

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[102] The reasons are rather obvious. Most of the activities are not legal acts, and they do not take the form of a decision – despite being indirectly addressed to third states (Chapter III, section 2.2).

[103] E.g. Commission Implementing Decision of 18 August 2014 adopting an Indicative Strategy Paper for Montenegro (2014-2020), C(2014) 5771; Commission Implementing Decision of 10 December 2014 adopting an Annual Country Action Programme for Montenegro for the year 2014, C(2014) 9387; Commission Implementing Decision of 11 June 2014 adopting a Single Support Framework for Georgia (2014-2017), C(2014)3994; Commission Implementing Decision 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, C(2014) 5020.

3.3 Evaluating the state of art: the importance of taking a more holistic approach

The statement of reasons contributes to ensuring that all the relevant circumstances are duly balanced and taken into account when taking a decision.[104] The official who knows that his or her evaluation will have to be justified will try to make better choices.[105] The duty to state reasons ought to disclose in a clear and unequivocal fashion the reasoning followed by the institution in reaching a specific evaluation, and this may have beneficial effects on the rationality of the final decision. By stating reasons, the administration avoids being blamed for acting in an informal and discretionary fashion. Discretion shall not necessarily be banned, but even discretionary decisions shall be based on reasons that can be explained.[106] As the Ombudsman stated:

> '[…] discretionary power is not the same as dictatorial or arbitrary power. A public authority must always have good reasons for choosing one course of action rather than another. A normal part of exercising a discretionary power is to explain the reasons why a particular course of action has been chosen.'[107]

Imposing on the administration the obligation to state reasons when exercising its power not only poses some limits on its discretion since it would be forced to justify the reasons for its choices; but also supports the protection of affected parties. The duty to state reasons allows interested parties to overlook how the Commission applies its obligations under the two policies and allows them to decide if they have a claim in contesting official determinations. This is particularly valid for individual complaints. Affected parties might not have a right to a final outcome and might not be able to challenge the final decisions. However, the duty to state reason is about protecting them within the process leading to the final outcome. Some examples will be hereby presented in order to exemplify how the duty to state reasons has the potential to improve the rationality and efficiency of the administrative process, and to protect individuals within the context of the SAP and ENP.

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[104] J. Mendes, *Participation in EU Rule-Making: A Right-Based Approach* (Oxford: Oxford University Press 2011), at. 249.

[105] In Fuller's words: 'I also believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions towards goodness, by whatever standards if ultimate goodness there are.' L.L. Fuller, 'Positivism and Fidelity to Law: A Reply to Hart', 71 *Harvard Law Review* 1959, at 630.

[106] P.M. Shane, 'The Rule of Law and the Inevitability of Discretion', 36 *Harvard Journal of Law and Public Policy* 2013, at 23.

[107] Decision on 18 November 1998 of the European Ombudsman on complaint 995/98/OV against the European Commission, right of establishment and freedom to provide services, breach of articles 4, 18, 19 and 22 ECGAB, point 1.7.

In the context of the EU wider neighborhood policies, the quality of the decisions taken by the Commission and the EEAS is particularly important because of the influence that the administrative activities implementing the two policies have on the exercise of public power – both within the Union and in the neighbouring states.[108] In its progress reports the Commission makes precise overall evaluations has to the level of compliance by SAP states with, among others, the Copenhagen political criteria for accession.[109] Based on these documents the Council decides the next steps to take in the relations between the Union and the neighbouring states, and the neighbouring states use these documents as preparatory and rule-making acts.[110] In light of the impacts that these final evaluations have both within the Union and in third states, reasons ought to be stated not only as to how the Commission reached such an overall evaluation, but also as to why certain standards have been used to make the assessment. Based on which criteria has the Commission chosen the human rights standards against which compliance with the Copenhagen political criteria has to be evaluated? If on the one hand, there is uniformity as to the rights monitored by the progress reports for each Western Balkan country, on the other hand, there is a clear discrepancy as to the standards used by the Commission in order to determine their compliance.[111] Particularly, the Commission in the context of the SAP ought to explain the standards it chooses when monitoring criteria which are not covered by the *acquis*. This reasoning becomes all the more important for the ENPs which – instead of the *acquis* – need to use commonly agreed-upon standards to monitor compliance.[112]

Visa liberalisation action plans and progress reports are another example. The latter are used as reference documents to justify the Council and EU Parliament decisions to grant visa free regimes to third countries.[113] VLAP and VLPRs use numerous standards in

[108] Chapter III, section 2.
[109] E.g. 'Albania is moderately prepared with the reform of its public administration. Good progress has been made in areas falling under the key priority on public administration reform, especially with the adoption of a comprehensive reform strategy and a new Code of Administrative Procedures. However, further efforts are needed also in the areas outside the scope of this key priority, especially on improving policy development and coordination, and the capacity of administrative courts.' Commission Progress Report on Albania accompanying the EU Enlargement Strategy of 10 November 2015, SWD(2015) 213 final.
[110] Chapter III, section 2.
[111] Annex I.
[112] The *acquis* can be used in the context of the SAP since the final goal is accession.
[113] Regulation (EU) No 259/2014 of the European Parliament and of the Council of 3 April 2014 amending Council Regulation (EC) No 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, *OJ* [2014] L 105/9, 08.04.2014.

order to prepare Georgia, Moldova and Ukraine in joining the EU free visa regime. For example, the International Civil Aviation Authority (ICAO) standards need to be adopted by these three countries in order to secure identity management; however, no where it is stated why these standards have been chosen for such a purpose.[114] In light of the impact that these standards have both for the third states, which are to adopt them, and for the Union, which is to make sure that such standards are effective in securing identity management, it is fundamental for the Commission to explain the rationality of its choice. The effectiveness of administrative action, in relation to these two examples, will hardly be jeopardized by the obligation to state reasons since the they can be valid for more countries and for several years.

The administration, when acting externally, ought to state reasons as to why it would depart from its own acts. For example, the Commission ought to start stating reasons as to why, despite reporting on human rights violation in third countries, it does not suggest to the Council to take action, or as to why it does not carry out a human rights impact assessment before negotiating an agreement with a third state despite self-imposed guidelines and Council documents indicating that this is a mandatory procedure.[115] Reasons ought to be stated particularly when these acts are publicly available, since they are capable of raising expectations of individuals who themselves might suffer human rights violations. In this respect, the obligation to state reasons becomes all the more important when individuals directly address the administration, raising doubts as to the way in which it exercised its discretion.[116] In two of the four cases discussed in the previous chapter the complainants, contacted the Commission before deciding to bring their claims to the Court. The complainants claimed that the Union failed to act by not suspending the agreement between the EU and Lebanon, and by not suspending financial

[114] The ICAO standards appear in all the Visa Liberalisation Progress reports with Ukraine, Moldova and Georgia. See European Commission, Directorate General for Migration and Home Affairs, International Affairs, Enlargement, available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/enlargement/index_en.htm> (Consulted on 07.08.2016).

[115] E.g. the 2012 Action Plan requires the Commission to incorporate human rights in all Impact Assessment when conducting negotiations on trade agreements that have significant economic, social and environmental impacts. Strategic Framework and Action Plan on Human Rights and Democracy, Council Document 11855/12, 25 June 2012; the European Commission 'Trade for all, towards a more responsible trade and investment policy' strategy also stress the importance of carrying out impact assessments, (October 2015), at 18, 23 and 26, available at: <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> (Consulted on 07.08.2016).

[116] 'Reasons are given to negotiate, establish, repair, affirm, or deny relationships.' J.L. Mashaw, 'Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance', *Yale Law School Faculty Scholarship Series*, 1.1.2007, at 102.

assistance to Turkey due to human rights violations in those countries.[117] In these cases, is it possible to affirm that the Commission's responses to Mr. Mugraby and the coalition of Turkish citizens were adequate enough as to prevent them from initiating a lawsuit? Were the answers adequate enough that expectations would not be raised on the side of the applicants? Did the Commission react to the substantive submissions made by interested parties in an adequate manner? Providing reasons to third countries' citizens as to why the Commission decides not to suggest to the Council to take action in respect of failure by a third state to comply with e.g. human rights will help individuals to decide whether they have a real claim in contesting official (or absent) determinations.

As already argued above at the end of the section on legality, the Commissions in handling individual complaints by non-EU citizens ought to respect its internal guidelines 'on the treatment of individual complaints in respect of infringements of Union law'.[118] The Commission internal guidelines on how to better monitor the application of Union law maintains that the relations with complainants should be conducted:

> '[…] in accordance with its code of good administrative conduct, under which complainants are entitled to receive reply in line with their expectations, even if these exceed the Commission's prerogatives;' not only 'are careful reasons given' but also 'useful practical advice' on alternative means of readdress for complaints.[119]

A complete answer helps individuals to fully understand the reasons why the administration decided to act in a certain manner. Ultimately, by stating reasons, the administration allows interested parties to review how the Commission implements its obligations under the SAP and the ENP,[120] and tries to prevent individuals from developing expectations that the Union will always follow and be consistent with its own acts. The obligation to respect the rule of law when the Union implements its external

[117] Chapter II, section 3 discussing Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418; Case C-581/11 *P Mugraby* v. *Council and Commission*, EU:C:2012:466; Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97.
[118] Commission Communication of 11 December 2002, 'Better Monitoring of the Application of Community Law', COM(2002) 725 final.
[119] Commission Communication of 11 December 2002, 'Better Monitoring of the Application of Community Law', COM(2002) 725 final, at 13.
[120] This function of the duty to state reason was recognised by the Court – in a completely different context – in *Rewe-Zentrale*. 'In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to […] all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty.' Case 24/62 *Germany* v. *Council*, EU:C:1963:14, at 69; Case 37/83 *Rewe-Zentrale AG* v. *Direktor Der Landwirtschaftskammer Rheinland*, EU:C:1984:89; Case 22/70 *Commission* v. *Council*, EU:C:1971:32, at 42; Case C-370/07 *Commission* v. *Council*, EU:C:2009:590, para. 42.

action ought to demand from the administration to state reasons as to the rationality of its evaluations, particularly when approached by natural and legal persons.

Finally, the duty to state reasons might also play a role between the Union and third states. In the administrative phase of the SAP and ENP, the obligation to respect the rule of law when the Union acts externally ought to impose an obligation on the administrative power not to treat third states arbitrarily. Explaining and justifying an action taken in the exercise of authority shows respect for the parties affected by a measure.[121] This should particularly be the case in unbalanced power relationships based on conditionality.[122] For example, giving reasons as to why more or less is granted to a third state can help the third country itself as well as the other neighbours feel that they are treated fairly in their conditional relation with the Union. Neighboring states, by receiving reasons as to why the Union decided to grant, or not to grant, benefits, see that their cases have been dealt with properly and according to authoritative standards.[123] This approach might have the potential of reconciling the tension between the principle of conditionality and joint ownership as founding values of the ENP. In other words, it is hard to reconcile true joint ownership with the unequal relationship implied by conditionality, especially if third states have the feeling that they are being treated unfairly.[124] Conditionality is essentially based on the idea of a deal, or a bargain which might not necessarily work well in a 'joint ownership' environment.[125] However, if the bargaining process is carried out according to authoritative standards, then third states might feel that the relation – even if conditional – is based on fair grounds.

Reason giving alone does not necessarily burden the administration or provide opportunities for harassment through legal adversarialism; on the contrary, it might prevent adversarialism. It might be enough, in justifying a decision, to show that claims and arguments put forward have been looked at; that some of them are irreconcilable; and that finally a course has been settled on which is rational, reasonable, and in good

[121] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press 1997), 430-438; P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), at 341.
[122] Section 5.2.3 of this chapter.
[123] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press 1997), at 433.
[124] M. Cremona, 'The European Neighbourhood Policy: More than a Partnership?' in M. Cremona (eds.), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), 244, at 282.
[125] J. Kelley, 'New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy', 44 *Journal of Common Market Studies* 2006, at 36.

faith.[126] Moreover, accommodations to practical necessity may be made. Article 18 of the ECGAB is a good example. It recognizes the broad requirement that reasons should be given at any time a decision affects the interests of private persons; yet, it demands that where a large number of people are affected similarly by a decision, an official must supplement a standardised statement.[127]

4. Duty of care

4.1 The principle internally: counterbalancing the wide margins of discretion

Over the years the CJEU has developed the duty of diligent examination as a procedural guarantee to counterbalance the wide margin of discretion that the Commission enjoys in proceedings resulting in administrative rules involving complex evaluations.[128] It might in fact be argued that the wider the margin of discretion enjoyed by the administration, the more demanding the procedural constraints stemming from the duty of care should be. The duty of care requires institutions to make decisions on the basis of complete knowledge of all the relevant facts, thereby guarding against arbitrary decisions.[129] The case law of the CJEU seems to suggest that the duty of care is mainly a tool to revise the factual basis of the administrative decision. The General Court refers to the duty of care as an obligation on the side of the Commission to 'to gather, in a diligent manner, the factual elements necessary for the exercise of its broad discretion';[130] and to take 'account

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[126] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press 1997), 430-438.

[127] Article 18 ECGAB: '1. Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision. […] 3. If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore sent, the official shall subsequently provide the citizen who expressly requests it with an individual reasoning.'

[128] In these cases, judicial review is confined to examining whether a manifest error has occurred. '[W]here the Community institutions have such a power of appraisal [involving complex technical evaluations], respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case.' Case C-269/90 *Hauptzollamt München-Mitte* v. *Technische Universität München*, EU:C:1991:438, para 14; 'Compliance with the duty of the Commission to gather, in a diligent manner, the factual elements necessary for the exercise of its broad discretion as well as the review thereof by the European Union Courts are all the more important because the exercise of that discretion is only subject to a limited judicial review of the merits, confined to examining whether a manifest error has been committed.' Case T-333/10 *Animal Trading Company (ATC) BV and Others* v. *E Commission*, EU:T:2013:451, para. 84.

[129] A. Türk, 'Oversight of Administrative Rule Making: Judicial Review', 19 *European Law Journal* 2013, at 141.

[130] Case T-333/10 *Animal Trading Company (ATC) BV and Others* v. *E Commission*, EU:T:2013:451, para. 84.

of all the relevant circumstances and the facts of the matter with all due care'.[131] Moreover, in the *TU München* case, the Court made clear that whenever the Commission relies on a group to obtain the relevant information, it needs to ensure that the group has the necessary knowledge in the relevant field.[132]

The duty applies irrespective of whether the act under review is of individual or general scope. However, it is not an individual guarantee, nor does it arise from the right of sound administration.[133] The General Court in *Arizona Chemical* highlighted how the duty of care is not only a principle aimed at limiting administrative discretion, but is also 'an essential and objective procedural requirement, imposed in the public interest'.[134] As Mendes suggests, the Court by restricting the protective dimension of the duty has emphasised its objective dimension.[135] In the areas of risk regulation the Court has operationalised the duty of care into the duty of excellence i.e. transparency and independence on guiding scientific assessment.[136] The breach of such a duty can be invoked in Court by individuals directly and individually concerned.[137]

4.2 Implementing arrangements in the external domain: gaining acceptance

The duty of care plays a crucial role externally, since it has the potential of limiting the significant power of appraisal that the administration enjoys in implementing its external action.

❖ As operationalised by the Court and by the European Ombudsman

In the *Front Polisario* case, the General Court extended the respect of the duty of care to the external relations of the Union as a procedural guarantee that needs to be respected

[131] Case T-443/11 *Gold East Paper and Gold Huasheng Paper* v. *Council,* EU:T:2014:774, para. 164. See also: Case T-369/03 *Arizona Chemical and others* v. *Commission*, EU:T:2005:458, para. 85.
[132] Case C-269/90 *Hauptzollamt München-Mitte* v. *Technische Universität München*, EU:C:1991:438, paras 20-21.
[133] In the case T-Mobile, the Court of Justice strongly opposed the position of the General Court according to which the Commission's obligation to undertake a diligent and impartial examination of a complaint would arise from the 'right to sound administration of individual situations'. Case C-141/02 P, *Commission* v. *T-Mobile Austria GmbH*, EU:C:2005:98, para. 72.
[134] Case T-369/03 *Arizona Chemical and others* v. *Commission*, EU:T:2005:458, para. 88.
[135] J. Mendes, 'Discretion, care and public interests in the EU administration: probing the limits of law', 53 *Common Market Law Review* 2016, at 435.
[136] J. Mendes, 'Discretion, care and public interests in the EU administration: probing the limits of law', 53 *Common Market Law Review* 2016, at 433.
[137] Case T-369/03 *Arizona Chemical and others* v. *Commission*, EU:T:2005:458, para. 88.

when the EU institutions enjoy a wide margin of appreciation – in this instance deciding whether to conclude an agreement with Morocco.[138] According to the jurisprudence of the Court, the institutions of the Union enjoy a wide margin of discretion in the field of external economic relations.[139] In the context of the case the Court affirms that the wide margin of appreciation is even more justified since the rules and principles of international law applicable to the case are complex and imprecise.[140] In light of the wide margin of manoeuvre enjoyed by the Union institutions in deciding whether to conclude an agreement with Morocco, which will also be applicable over the disputed territory of West Sahara, the Court decided to limit its review to checking if the institutions committed a manifest error of assessment. The Court in this case, like in the *ATC* case, makes a link between its limited judicial review on the merits and the duty of care.[141] In other words, the judge, in establishing whether the Council committed a manifest error of assessment, checked whether the institution took into account all the elements of the case.

> 'That being the case, in particular where EU institution enjoys a wide discretion, in order to verify whether it has committed a manifest error of assessment, the Courts of the European Union must verify whether it has examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached (judgments of 21 November 1991 in *Technische Universität München*, C-269/90, ECR, EU:C:1991:438, paragraph 14, and 22 December 2010 *Gowan comércio Internacional e Servios*, C-77/09, ECR, EU:C:2010:803, paragraph 57).' [142]

It is striking that the General Court, in extending the obligation to carefully examine all the elements of a case to the external actions of the Union, makes a direct reference to the foundational case *TU München* and *Gowan comércio Internacional* without determining whether this is a case of proceedings resulting in administrative rules involving complex evaluations.[143] Instead, the Court connects the obligation to respect the duty of care to the impact that the agreement has on the population of West Sahara. It argues that even if the Charter of Fundamental Rights does not establish an absolute

[138] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953; for a more detailed account see chapter III, section 3.
[139] 'According to the case-law, the EU institutions enjoy a wide discretion in the field of external economic relations which covers the agreement referred to by the contested decision (see, to that effect, judgment of 6 July 1995 in *Odigitria* v *Council and Commission*, T-572/93, ECR, EU:T:1995:131, paragraph 38).' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 164.
[140] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 224.
[141] Case T-333/10 *Animal Trading Company (ATC) BV and Others* v. *E Commission*, EU:T:2013:451, para. 84.
[142] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 225.
[143] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 225.

interdiction to conclude an agreement with Morocco, guaranteeing the protection of fundamental rights is of such importance that it constitutes a 'question that the Council must examine before the approval of such an agreement'.[144] The Council has an obligation to examine all the elements of the case with impartiality, in order to make sure that the Union's actions do not have the effect of violating human rights before concluding an agreement.[145] The General Court seems to adapt the core function of the duty of care to the context of the case. Despite the emphasis on limited judicial review, the Court, in verifying whether the duty of care was compiled with, concretely suggested to the Council what it ought to have investigated and did not. The Court identified a list of rights which the Council should have taken into account when deciding whether to conclude the agreement.[146] It is also interesting to notice how the Court applies the Charter of Fundamental Rights of the Union to the external action of the Union without questioning its territorial application.

In this specific case the decision of the Court to expand the duty of care could be related to the current Union's commitment to conduct a human rights impact assessment before the Union concludes an agreement with a third state.[147] The Court, by indicating with clarity which human rights the agreement could not infringe, is indirectly telling the Commission which potential violations should be reviewed by its human rights impact

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[144] 'In that connection, although it is true, as stated in paragraph 146 above, that it does not follow from the Charter of Fundamental Rights, relied on by the applicant in its third plea, that the European Union is subject to an absolute prohibition on concluding an agreement which may be applicable on disputed territory, the fact remains that the protection of fundamental rights of the population of such a territory is of particular importance and is, therefore, a question that the Council must examine before the approval of such an agreement.' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 227.

[145] '[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 […].' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 228.

[146] '[T]he 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).' Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 228.

[147] Action Plan, 'Strategic Framework and Action Plan on Human Rights and Democracy', Council Document 11855/12, 25 June 2012; European Commission, 'Trade for all, towards a more responsible trade and investment policy strategy', (October 2015), at 18, 23 and 26, available at: <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> (Consulted on 07.08.2016). DG TRADE itself established guidelines as to how to carry out Human Rights impact assessments 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016).

assessments. In the *Schrems* case as well, the Court argued in favour of limiting the Commission's discretion when fundamental rights are at stake.[148] It is undeniable that the context of the *Schrems* case is very distant from the one discussed by this thesis: the rights at stake were those of EU citizens and there was a direct causal relationship between the Decision of the Commission allowing data flows between the European Union and the United States and the breach of the protection of personal data. Nevertheless, the framing of the Union's institutions duties where fundamental rights are concerned seems to demand a stricter understanding of what is provided in law.[149]

❖ As operationalised by internal rules

Overall, self-imposed guidelines try to operationalise the duty of care by underscoring the importance of gathering complete and objective evidence. The Guidance Notice on how to draft ENP progress reports states that 'authors are responsible for ensuring that facts mentioned in the reports are based on solid, rather than anecdotal evidence'.[150] The same is also stated in the 2015 Enlargement Guidance Notice on how to draft progress reports.[151] The guidance notices also offer a few inputs as to how information structures should be formed. They stress the importance of being based on the 'widest possible array of sources'[152] and stress that '[i]nformation received from the governments of the countries concerned should be confirmed where appropriate through other sources.'[153]

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[148] 'In this regard, it must be stated that, in view of, first, the important role played by the protection of personal data in the light of the fundamental right to respect for private life and, secondly, the large number of persons whose fundamental rights are liable to be infringed where personal data is transferred to a third country not ensuring an adequate level of protection, the Commission's discretion as to the adequacy of the level of protection ensured by a third country is reduced, with the result that review of the requirements stemming from Article 25 of Directive 95/46, read in the light of the Charter, should be strict (see, by analogy, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 47 and 48).' Case C-362/14, *Maximillian Schrems* v. *Data Protection Commissioner and Digital Rights Ireland Ltd*, EU:C:2015:650, para. 78.

[149] The Court argues that even if '[i]t is true that neither Article 25(2) of Directive 95/46 nor any other provision of the directive contains a definition of the concept of an adequate level of protection'; still 'it is incumbent upon the Commission, after it has adopted a decision pursuant to Article 25(6) of Directive 95/46, to check periodically whether the finding relating to the adequacy of the level of protection ensured by the third country in question is still factually and legally justified. Such a check is required, in any event, when evidence gives rise to a doubt in that regard.' Case C-362/14, *Maximillian Schrems* v. *Data Protection Commissioner and Digital Rights Ireland Ltd*, EU:C:2015:650, paras 70 and 76.

[150] EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

[151] 'Country units are responsible for ensuring that all facts mentioned in the reports are based on solid, not anecdotal evidence.' European Commission, Directorate General for Enlargement, *Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.

[152] EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084

[153] European Commission, Directorate General for Enlargement, *Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.

Both guidance notices stress the importance of carrying out consultation 'in order to ensure transparency and objectivity' of the reports;[154] however, no specific guidelines are offered as to procedures to be followed. The Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives also underlines the importance of gathering evidence-based information.[155] In this respect, it praises the use of different sources and particularly stakeholder consultation as a crucial element of the assessment of possible human rights impacts.[156] The choice of the General Court in the *Front Polisario* case to use the Union Charter of Fundamental Rights as a benchmark to determine if the action of the EU has the effect of violating human rights in third states is rather limited, especially when compared to the list of human rights instruments offered by the Commission DG TRADE's guideline on the conduct of HRIAs. Alongside the European human rights instruments, the guidelines also suggest human rights standards of a more international breadth.[157]

4.3 Evaluating the state of art: in search for a broader conception

Internally, the administrative activities implementing the SAP and the ENP are, to a certain extent, a concretization of the duty of care. In other words, progress reports, action plans, impact assessments, etc. are internally preparatory acts before reaching final decisions (see fig. 1 chapter III). By adopting these instruments, the Union demonstrates that it has taken all the facts into account before reaching a final outcome (e.g. granting candidate status, or visa-free regime). The General Court in the *Front Polisario* case has indirectly hardened the obligation on the side of the Union to carry out human rights impact assessments since by adopting them the Union respects the duty of care when concluding an agreement with third countries. More broadly, the case opens the door for

[154] EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.
[155] Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016), at 9.
[156] Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016), 9-10.
[157] Among others: the core UN human rights conventions, the fundamental ILO conventions on core labour standards, the European Convention on Human Rights (which applies to members of the Council of Europe) and other regional human rights conventions, as well as, where appropriate, customary international law. European Commission, Directorate General for Trade, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', at 5, available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016).

recognising the importance that administrative activities play internally as preparatory acts. The legality of the final act – in this case a Council decision concluding an agreement with a third state – requires the prior adoption of a human rights impact assessment. By analogy, the adoption of progress reports, impact assessments, action plans, etc. becomes a fundamental procedural step for the fulfilment of the duty of care in adopting final acts (e.g. Regulation of the European Parliament and of the Council de-listing a third country from the EU's visa regime).[158]

The respect of the duty of care within the realm of the EU external policies should not stop here. The external rule of law ought to impose an obligation on the side of the Commission and of the EEAS to draft progress reports, human rights impact assessments, strategy papers, programming documents, etc. with all due care required. Particularly, the duty of care ought to be respected when the administrative activities function as regulatory acts for third states, and when they have an impact on natural and legal persons. Even if the Union's institutions cannot be responsible for the actions of third states, the impact that these same documents have on them as regulatory and standard-setting documents cannot be neglected. It is the same structure and operation of the SAP and the ENP which encourages third states, though positive incentives and negative sanctions, to use these documents as regulatory and standard-setting acts.[159] Furthermore, as already discussed in chapter III, the Commission, in choosing which policy areas and projects should receive funding in third countries (e.g. projects aimed at supporting woman's empowerment, or at improving living conditions for Roma children; projects aimed at improving road transport, or on rail transport),[160] enjoys significant discretion which *de facto* conceals political considerations potentially affecting natural and legal persons.[161] In this context, the duty of care ought to be respected, not only in

[158] Chapter III, section 2.1.
[159] Chapter III, section 2.2; and more generally A. von Bogdandy, 'Common principles for a plurality of orders: A study on public authority in European legal area', 12 *International Journal of Constitutional Law* 2014, at 988.
[160] E.g. Strategy papers define the priorities for action towards meeting the general and specific objectives defined in articles 1 and 2 of IPA II regulation in the relevant policy area listed in article 3 of the same regulation. 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), *OJ* [2014] L77/13, 15.3.2014. Indicative Strategy papers for the SAP states cover a list of areas which require financial assistance: democracy and governance; rule of law and fundamental rights; environment and climate change; transport; competiveness; education, employment and social policies; agriculture and rural development; and territorial cooperation. Available at: <http://ec.europa.eu/enlargement/news_corner/key-documents/index_en.htm?key_document=080126248ca659ce> (Consulted on 07.08.2016).
[161] Chapter III, section 2.1.

light of the discretion granted to the Commission in making complex evaluations but also in light of the impact that the administrative activities might have on the local population and on third states.

Progress reports, action plans, MoUs, VLAP, VLPRs, human rights impact assessments, strategy papers and programming documents might not always require technical evaluations; however, the complexity of the analysis rests on the ability of the administration to gather a correct and balanced picture of the situation in third states. They require the Commission and the EEAS to have an in-depth understanding of a third country whose language they often do not even speak. The administration needs to make complex evaluations as to, for example, the existence of a functioning market economy in third states, or its capacity to cope with the pressure of market forces within the Union. It is enough to take a look at the table of content of a progress report to realise the complexity of the evaluations the Commission is required to undertake.[162] Likewise, action plans and the macro-financial assistance MoUs provide a list of structural reforms that each neighbouring country needs to adopt if they want to get closer to the Union or if they want to receive financial assistance. The policy fields that these reforms cover vary from the judiciary, to transport, to financial sector, to energy, etc.[163]

In light of the above, the duty of care ought not to be limited to a careful examination of facts; it ought to be extended to a careful examination of the structure of collecting information. The complexity of the evaluation rests on the ability of the administration to collect accurate information and obtain an objective and realistic vision of the situation in third countries. If it is true that the self-imposed guidelines as to how to draft the administrative activities implementing the SAP and the ENP try to operationalise the duty of care, it is also correct to state that it still leaves a significant level of discretion to the Commission and the EEAS as to how to build their information structures in order to ensure the respect of objectivity.[164] As Harlow underlines 'a substantial administrative discretion with important political implications is concealed in these evaluations [i.e.

[162] E.g. Commission Staff Working Document Progress Report on Bosnia and Herzegovina accompanying the EU Enlargement Strategy of 10 November 2015, SWD(2015) 214 final.

[163] See as an example the action plan concluded with Armenia, available at: <http://eeas.europa.eu/enp/pdf/pdf/action_plans/armenia_enp_ap_final_en.pdf> (Consulted on 07.08.2016); and Commission Implementing Decision of 18 May 2015 approving the Memorandum of Understanding between the European Union and Ukraine related to macro-financial assistance to Ukraine, C(2015)3444/F1.

[164] Objectivity is a value to be upheld by the administration when conducting its analysis. E.g. EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

building information structures], which should be subjected to the controls of administrative law'.[165] Therefore, the question remains open as to whether the duty of care should also imply that the way in which the factual information is collected should be done in accordance with the principles and rules guiding the exercise of administrative power externally.

A broader conception of the duty of care, as Mendes describes it, ought to demand that discretionary decisions are not only technically accurate but also inclusive and fair in so far as they 'ought to concretize, the values and principles of the legal order that ground and bind the authority to adopt them'.[166] In other words, the administration, in making discretionary choices, ought to be guided by legal criteria (e.g. enabling legal norms, the mandate of the decision maker, and the values and principles which underpin the legal order). The Court of Justice seems to timidly concretise this idea in the area of risk regulation:

> '[…] the duty of diligence is primarily an essential and objective procedural requirement, imposed in the public interest by legislation meeting the requirements of scientific objectivity and based on the principles of excellence, transparency and independence.'[167]

The idea of broadening the conception of the duty of care is consequently also about overseeing how the structure of collecting information has been conceived. It should not be enough for decisions to be technically accurate; the administration should also make sure that the process leading to their adoption respects and concretizes legally protected interests 'that, by force of law, ought to be balanced, protected and pursued'.[168] The way and methodology in which information are collected may vitiate the final decision. The Ombudsman in this context has made a distinctive contribution in structuring administrative discretion in developing information structures. The complainants to the case claimed that the public interests of 'environmental sustainability' and the 'human rights of local communities of agro-fuel producing countries' were not sufficiently taken into account in the Commission's energy policy, thus endangering the objectivity of the

[165] C. Harlow, 'Global Administrative Law: The Quest for Principles and Values', 17 *The European Journal of International Law* 2006, at 202.
[166] J. Mendes, 'Discretion, care and public interests in the EU administration: probing the limits of law', 53 *Common Market Law Review* 2016, at 442.
[167] Case T-369/03 *Arizona Chemical and others* v. *Commission*, EU:T:2005:458, para. 88.
[168] J. Mendes, 'Discretion, care and public interests in the EU administration: probing the limits of law', 53 *Common Market Law Review* 2016, at 450.

advice given and the impartiality of the Commission's decisions – from policy definition to its implementation.[169] It is against this background that the Ombudsman, reacting against the predominance of commercial interests, asked the Commission to specifically indicate whether there are any mechanisms that ensure the objectivity of the opinions on which the Commission relies when making policy choices; second, whether the public consultations and advisory groups are 'intended to, and actually ensure that sufficient attention is given to the issues of public interest raised by the complainant';[170] and finally, the extent to which the Commission takes into account various external inputs into decision-making.[171]

This broader conception of the duty of care becomes all the more important in the Union's wider neighbourhood policies which foresee numerous evaluations which should take into account the widest possible array of information. The complexities of the analysis undertaken by the administration externally do not only lay in the complicatedness of the analysis, but especially on the ability to gather the correct information on the ground. The information to be gathered is not of a scientific nature; rather, it needs to be collected by the Commission and the EEAS by communicating with stakeholders and relevant international organisations. Thus, as suggested above, in developing information structures the administration ought to take into account enabling legal norms, its mandate, and the values and principles underpinning the policies. The norms that the administration ought to take into account when developing information structures in the SAP and ENP are not all to be found in legal acts; nevertheless, their guiding power cannot be disregarded since they are the main parameters for the exercise of administrative power.[172] This understanding of the duty of care has the potential to ensure participatory processes for potentially affected parties. If the Union is under the obligation to respect human rights when acting externally, such an underlying value of the Union's external action needs to be taken into account by the administration when

[169] Decision on 9 July 2013 of the European Ombudsman closing its inquiry into complaint 1151/2008/(DK)ANA against the European Commission, energy, breach of Articles 8 and 9 ECGAB.
[170] Decision on 9 July 2013 of the European Ombudsman closing its inquiry into complaint 1151/2008/(DK)ANA against the European Commission, energy, breach of Articles 8 and 9 ECGAB.
[171] Decision on 9 July 2013 of the European Ombudsman closing its inquiry into complaint 1151/2008/(DK)ANA against the European Commission, energy, breach of Articles 8 and 9 ECGAB, point 40. J. Mendes, 'Discretion, care and public interests in the EU administration: probing the limits of law', 53 *Common Market Law Review* 2016, 444-449.
[172] Chapter II, section 2; and section 2 of this chapter.

building information structures.[173] Therefore, the Commission under the duty of care ought to be required to consult with local populations potentially affected by a project before deciding to finance it. Such approach could result in foreseeing possible evictions which violate human rights of local population.[174]

Finally, the duty of care in the EU wider neighbourhood context ought to play a role also in case of individual complaints. Although the Commission cannot be compelled to conduct an investigation based on individual complaints, the framework established by the SAP and the ENP ought to require to carefully examine the factual and legal particulars brought to the Commission's notice by individuals in order to decide whether they disclose information based upon which the Union should take action.[175] This statement implies that the Commission's discretionary power as to whether it wholly or partially rejects the complaint remains untouched, provided that the Commission examine carefully the factual and legal particulars brought to its notice by the complainant.[176] The Commission and the EEAS should, according to their mandate, constantly monitor the SAP and ENP states in order to check their compliance with accession criteria or with their respective action plans.[177] In this respect, third parties may provide valuable information on the basis of which the Commission might decide to start investigations. In other words, the coalition of non-governmental organisations of Turkish citizens should not have been dismissed by the Commission before it even inquired into whether their claims were founded. The framework established by the SAP and the ENP ought to impose a stronger obligation on the side of the Commission to analyse with due care individual complaints. More generally, the principle of careful examination in external relations should require

[173] Among others: Article 3(5), 21(1), 21(2)(b) and (3) TEU; Case C-263/14 *European Parliament* v. *Council of the European Union*, EU:C:2016:435, para. 47; Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 227.
[174] Chapter III, section 2.1 and section 2.1 of this chapter.
[175] By analogy: 'although the Commission cannot be compelled to conduct an investigation, the procedural safeguards provided for by ... Article 6 of Regulation No 99/63 oblige it nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between the Member States.' Case T-369/03 *Arizona Chemical and others* v. *Commission*, EU:T:2005:458, para. 35.
[176] The Commission in the *T-Mobile* case 'acknowledges that it is under an obligation to carry out a diligent examination of complaints which it receives'; however, 'considers that the Commission's decision as to whether to pursue the infringement of the competition rules is not amenable to judicial review.' The Court agrees with the Commission. Case C-141/02 P, *Commission* v. *T-Mobile Austria GmbH*, EU:C:2005:98, para. 53.
[177] Chapter II, sections 3.1 and 4.1.

the administration to engage with individuals on the ground and to carefully consider their claims.[178]

5. Participation

Participation is broadly understood as the possibility for non-institutional actors to take part in the decision-making process.[179] Participation in the decision-making process aims at fulfilling two main functions: defensive and collaborative. Participation has a defensive function in that it affords anticipated procedural protection to affected persons that might be subject to disproportionate intervention by the administration.[180] Participation has a collaborative function in that it structures the exercise of decisional tasks and the achievement of accurate and adequate results.[181] Properly framed participatory procedures have the potential to contribute to the impartiality of the administrative power, by providing a broad range of information to be taken into account.[182] In other words, participation helps the decision-maker to have a more complete and balanced view of the facts, and to protect affected parties. The distinction between the two functions – defensive and collaborative – is not always sharp.[183] Participation in its collaborative function also entails the protection of interests; likewise, individuals when intervening to defend their interests also collaborate in providing info in the decision-making process.

Consultation and the duty to hear the other side are two forms of participation mechanisms. The first is a form of 'participation at large' aimed at the intervention of natural and legal persons in decisional procedures. It involves the creation of public discussion fora in which either the public in general or particularly interested persons are asked to express their views on a specific act. The duty to hear the other side is instead granted to holders of substantive rights and interests who are affected by the outcome of

[178] A.H. Türk, 'Oversight of Administrative Rule Making: Judicial Review', 19 *European Law Journal* 2013, at 141.
[179] J. Mendes, 'Participation and the Rule of Law after Lisbon: A Legal View of Art. 11', 48 *Common Market Law Review* 2011, at 1849.
[180] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, (Oxford: Clarendon Press 1997), 140-143.
[181] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, (Oxford: Clarendon Press 1997), 131-132.
[182] D. Curtin, H.C.H. Hofmann and J. Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda', 19 *European Law Journal* 2013, at 14.
[183] J. Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford: Oxford University Press 2011), at 35.

a decision.[184] This last section will first analyse the duty to consult, and second, the duty to hear the other side.

5.1 The duty to consult

5.1.1 The principle internally: can there be a life after Atalanta?

EU Courts have made it clear that consultation rights only exist when enshrined in positive law.[185] The CJEU adopted this approach both for the Union's legislative process as well as for non-legislative procedures leading to acts of general application.[186] However, article 11 TEU seems to bring a about a normative shift regarding the role of consultation in the EU.[187] Consultation, after the adoption of the Treaty of Lisbon, acquires a normative founding function against which the exercise of public authority needs to be justified.[188] Despite having position article 11 TEU under title II on 'Provisions on Democratic Principles', not all of its provisions are restricted to citizens. It refers to representative associations without any specification regarding where they have their registered office; and it refers not only to citizens, but also to 'parties concerned', who arguably can be non-residents and legal persons without registered office in a Member State.[189] Nevertheless, the question still remains open as to which institutions should take responsibility for operationalising the principle and under which conditions.[190]

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[184] J. Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford: Oxford University Press 2011), 28-29.

[185] 'In the context of a procedure for the adoption of a Community act based on an article of the Treaty, the only obligations of consultation incumbent on the Community legislature are those laid down in the article in question.' Case C-104/97 *P*, *Atalanta AG and others* v. *Commission and Council*, EU:C:1999:498, para. 71.

[186] Case T-199/96 *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil* v. *Commission* EU:T:1998:176, paras 50 and 58; Case T-13/99 *Pfizer Animal Health SA* v. *Council*, T:2002:209, para. 487; and Case T-70/99 *Alpharma Inc.* v. *Council*, T:2002:210, para. 388.

[187] Article 11 TEU: '1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.' J. Mendes, 'Participation and the Rule of Law after Lisbon: A Legal View of Art. 11', 48 *Common Market Law Review* 2011, 1851-1858.

[188] J. Mendes, 'Participation and the Rule of Law after Lisbon: A Legal View of Art. 11', 48 *Common Market Law Review* 2011, at 1868.

[189] D. Curtin and J. Mendes, 'Article 42 – Right of Access to Documents', in S. Peers, T. Hervey, J. Kenner, A. Ward, *The EU Charter of Fundamental Rights A Commentary*, (Oxford: Hart Publishing 2014), 1099, at 1107.

[190] Türk has argued that the task of concretising the normative standards of article 11 TEU in instances of policy-making ought to be primarily in the hands of the legislator and not of the Court. According to him a distinction needs to be kept 'between (fundamental) rights granted to individuals by Union courts regardless of any statutory basis and (political) participation rights which are granted by the political bodies

5.1.2 Implementing arrangements in the external domain: establishing new pathways

❖ As operationalised by the Court and by the European Ombudsman

The General Court in the *Front Polisario* case recognised the existence of a duty to consult in the European legal order; however, it reduces the obligation to the right to be heard in case of individual measures, and to the principle of fair trial as established in article 41(1) and 41(2)(a) CFR.[191] The judge, with this reasoning, disregarded the collaborative function of the duty to consult. The General Court missed the opportunity to discuss and evaluate the numerous developments in European administrative law aimed at promoting consultations mechanisms. The latter could have been used as basis to argue in favor of an eventual development of the duty to consult.[192] The Court's case law and the decisions of the European Ombudsman do not provide any further guidance as to the operationalisation of the duty to consult in the context of the administrative activities implementing the SAP and the ENP.[193]

❖ As operationalised by internal rules

The Commission operationalises article 11 TEU in its latest Better Regulation Package by strengthening its commitment to carry out consultations.[194] The package builds upon and develops its 2002 consultation guidelines.[195] The package does not differentiate between policy fields; therefore, the provisions contained in the package are also applicable to the Union's external action. They provide detailed insight as to how consultations should be conducted. Nevertheless, the guidelines do not take into account the specificities of the external relations domain. Therefore, the operationalisation by the Union's institutions and bodies of the duty to consult in the SAP and the ENP is helpful in complementing the

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of the Union'. A.H. Türk, 'Oversight of Administrative Rule Making: Judicial Review', 19 *European Law Journal*, 2013, at 130.

[191] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, paras 132-137.

[192] See E. Chiti, 'Le relazioni esterne dell'Unione e il diritto amministrativo europeo' – Commento alla causa T-512/12 - Giud. rel. M.D. Gratsias - Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) c. Consiglio dell'Unione europea, 2 *Giornale di diritto amministrativo* 2016, 231-238.

[193] The reasons are rather obvious. Most of the activities are not legal acts, and they do not take the form of a decision – despite being indirectly addressed to third states (see chapter III, section 2.2).

[194] Commission Better Regulation Package. Commission Staff Working Document of 19 May 2015 on 'Better Regulation Guidelines', SWD(2015) 111 final, at 64. Available at: <http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf> (Consulted on 07.08.2016).

[195] Commission Communication of 11 December 2002, 'Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission', COM(2002) 704 final.

package.[196] The latest Commission internal guidelines on how to draft SAP progress reports require EU Delegations to organize broader consultations with local organisations and civil society. These meetings are 'crucial to ensure proper consultation of local partners'.[197] The function of these consultations is to guarantee that reports draw on the widest possible array of sources.[198] Likewise, the Commission internal documents on how to draft ENP progress reports requires EU Delegation to contact and collect information from the civil society organisations in partner countries.[199] According to the EEAS, the rationale for embracing such an inclusive approach is two-fold: ensuring transparency and objectivity of the reports; and to 'demonstrate the interest of the European institutions to make use of all sources available and help identify areas where further information needs to be collected.'[200] Also the EEAS internal guidelines on how to adopt ENP action plans states that EU Delegations have to hold consultations with civil society prior to the start of negotiations.[201] The Commission guidelines on how to carry out human rights impact assessments also stress the Commission obligation to consult widely on EU action. According to the guidelines, consultation serves three functions. First, it can provide very useful insights for the analysis of human rights impacts on individuals and groups that are likely to be affected. Second, the process of consultation improves the transparency of the trade initiative. Third, according to the guidelines, '[c]onsultations bolster the right to participate in the conduct of public affairs, a human right enshrined in the Covenant on Civil and Political Rights.'[202] The reference to article 25 of the Covenant on the right to participate in public affairs seems to suggest that the Commission is recognising the impact of its action on the public affairs of third states.[203]

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[196] Article 11 requires only institutions – and not bodies – to maintain an open, transparent and regular dialogue with representative associations and civil society. Nevertheless, the EEAS in its internal guidelines stresses the need to carry out consultation when adopting acts. E.g. EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

[197] European Commission, Directorate General for Enlargement, *Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.

[198] European Commission, Directorate General for Enlargement, *Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.

[199] EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

[200] EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

[201] EEAS, *Non-Paper: Guidelines for Future ENP Action Plan* 05.01.2012, Access to Documents request SG1 - Corporate Board Secretariat.

[202] Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at: <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> (Consulted on 07.08.2016), at 11.

[203] Article 25 of the Covenant on Civil and Political Rights establishes that the right and the opportunity to participate in the conduct of public affairs is a human right. The article states that 'every citizen' has the right to participate in the conduct of public affairs in his or her state.

The European Parliament has also stressed in its resolutions the importance of greater participation by civil society, non-state actors and social partners in the accession process and urged the Commission to keep up a continuous dialogue with them. The Parliament stressed how civil society 'can work as an important engine of approximation with the EU, create bottom-up pressure for the advancement of the European agenda, improve the transparency of the process and strengthen public support for accession'.[204] Also the High Representative emphasised the crucial role of civil society in the Union's foreign policy.[205] Finally, the legislator has concretised the duty to consult beneficiaries of aid in both SAP and ENP financial regulations. Article 4(5) of the ENI regulation clearly states:

> 'Union support under this Regulation shall, in principle, be established in partnership with the beneficiaries. That partnership shall involve, as appropriate, the following stakeholders in the preparation, implementation and monitoring Union support: (a) national and local authorities; and (b) civil society organisations, including through consultation and timely access to relevant information allowing them to play a meaningful role in that process.' [206]

Consultation is here targeted at beneficiaries of financial assistance; identified as being national and local authorities, and civil society. The Commission, when adopting implementing decisions that plan financial assistance, is, thus, required to carry out consultations and provide relevant information to these two groups of beneficiaries. This obligation is reflected in the Commission guidelines on how to plan financial assistance.[207]

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[204] European Parliament resolution of 22 November 2012 on Enlargement: policies, criteria and the EU's strategic interests (2012/2025(INI)).

[205] E.g. Address by High Representative/Vice-President Federica Mogherini at the EU-NGO Human Rights Forum, Brussels 04.12.2015, available at <http://eeas.europa.eu/statements-eeas/2015/151204_01_en.htm> (Consulted on 07.08.2016).

[206] Article 4(5), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014; see also article 5(6), 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), *OJ* [2014] L77/13, 15.03.2014.

[207] Quick Guide to IPA II Programming serving as a digest of the IPA II Programming Guide, available at: <http://www.evropa.gov.rs/Documents/Home/DACU/12/78/248/ipa-quickguide_v0%202.pdf> (Consulted on 07.08.2016), at 23; Instruction for the Programming of the European Neighbourhood Instrument (ENI) 2014-2020, available at: https://ec.europa.eu/europeaid/sites/devco/files/ENI%20programming%20instructions.pdf (Consulted on 07.08.2016), at 6.

5.1.3 Evaluating the state of art: not simply as means, always at the same time as ends

In the context of the EU wider neighbourhood policies, stakeholders' consultation is particularly important since it encompass numerous functions. First, it can help to structure the exercise of discretion by ensuring the plural and transparent configuration of the content of the act. Second, it has the potential to safeguard both private and public interests by recognising the meaningful role played by stakeholders in the process. Third, participatory procedures help to uphold the principles of partnership and joint ownership underlying the two policies. These three functions, as mentioned above, have been recognised – albeit not uniformly – by the institutions of the Union in their legislation and internal guidelines.[208] Ultimately, conducting consultations help to ensure that the information gathered in order to compile the different acts and measures implementation of the Union external action are based on a plurality of sources, and strive to portray the most accurate picture of the reality and needs of third countries.

Recognising the importance and the functions that consultations procedures play should not be without consequences. The recognition ought to demand that EU institutions sponsor and facilitate participation in public affairs. As correctly underlined by the Better Regulation Package, specific efforts should be made to ensure that consultations are carried out as openly as possible; ensuring effective and accountable participation.[209] For example, in order to ensure sincere consultations, the Union's institutions, bodies, offices and agencies, 'must conduct their work as openly as possible.'[210] This is particularly important in the context of international relations, which is historically a policy area protected by secrecy.[211] As sustained by the Ombudsman in the context of the TTIP negotiations, transparency facilitates participation: it ensures access to information, which in turn, is a fundamental means to take part in the process of governance to which individuals are subject.[212] Furthermore, the EU institutions ought

[208] All the activities exercised by the administration in the SAP and ENP envisage to different degrees of 'bindingness' the duty to consult stakeholders. Section 5.1.2 of this chapter.
[209] Guidelines on Stakeholders Consultation, Better Regulation Package, available at: http://ec.europa.eu/smart-regulation/guidelines/ug_chap7_en.htm (Consulted on 07.08.2016).
[210] Decision on 6 January 2015 of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission, external relations, breach of other rights and duties resulting from the Charter of Fundamental Rights and not covered by this list, point 9.
[211] A. Colson, 'The Ambassador, Between Light and Shade. The Emergency of Secrecy as the Norm of International Negotiation', *ESSE Research Centre Working Papers*, DR 07023, November 2007.
[212] Decision on 6 January 2015 of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission, external relations, breach of other rights and duties resulting from the Charter of Fundamental Rights and not covered by this list, point 38.

not to use as an excuse for non-disclosure simply the risk of undermining international relations with a third state. In this context, nothing prevents the Union's institutions from consulting the third country to understand its position on the issue. The arguments put forward by the Ombudsman in its own-initiate inquiry as to the respect of transparency during the TTIP negotiations are related to the importance of granting participation to the Union's citizens.

The argument put forward by this thesis extends the importance of granting participation also to third countries citizens, in light of the impact that Union's action have on their states and because they may provide valuable information to the Union for reaching a decision. In other words, the Commission and the EEAS by valuing the participation of individuals and of natural legal persons in the SAP and the ENP ought to facilitate access to documents to stakeholders. Individuals and legal persons ought not to be treated as means to an end, simply as sources of information, but as ends in themselves. Waldron in this context suggests that the rule of law protects a positive freedom of active engagement in the administration of public affairs.[213] This approach is potentially in line with article 11 which – in Mendes words – 'implies focusing on the relationships of the participants, be they citizens or person concerned, the EU institutions and bodies, taking the former as reference points irrespective of the presumed quality of policy outcomes'.[214]

The involvement of natural and legal persons in the exercise of public functions encompasses different forms. For example, participation can be foreseen as open consultations to whomever wishes to have a say in the matter at issue; more selective forms of involvement such as a dialogue with representative associations or civil societies, or it can acquire a more precise sense where persons external to the institutional set-up are formally associated therewith by reasons of a specific interest considered legally relevant for the subject matter being decided.[215] International organisations such as the United Nations (and its agencies), the Organisation for Stability and Cooperation in Europe, the Council of Europe, the International Monetary Fund, the World Bank, etc. are external to the institutional set up but formally associated therewith by virtue of formal

[213] J. Waldron, 'The rule of law and the importance of procedure', in J.E. Fleming (eds.), *Getting to the Rule of Law* (New York: New York University Press 2011), at 20.
[214] J. Mendes, 'Participation and the Rule of Law after Lisbon: A Legal View of Art. 11', 48 *Common Market Law Review* 2011, at 1862.
[215] J. Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford: Oxford University Press 2011), at 28.

and informal arrangements between the Union and these institutions.[216] Their participation in the SAP and ENP is also guaranteed by Commission implementing decisions, internal guidelines and by the financial assistance regulations.[217] In light of the functions that consultation plays in the EU wider neighbourhood context, consultation for other actors, which are not formally associated with the policies' institutional set up, ought to be opened to all relevant parties. Relevant parties ought to include those affected by the administrative activities implementing the SAP and the ENP, those who will be involved in implementation of these same activities, and those that have a stated interest in such measures. In this respect, the administration shall make sure that all relevant stakeholders will be invited to make their contribution via transparent and open calls. Openness and transparency in the way consultations are organised prevent the administration from inviting contributions only from associations and civil society organisations that reflect its own value judgment.[218] The administration is disingenuous in pretending that decisions as to which associations should be consulted and whose suggestions should be accepted are technical and value-judgment-free.[219] For example, the Union ought to better specify the reasons why certain international organisations are formally associated to the Union in conducting its external action.[220] The duty of care, in its broader understanding, has the potential to structure the multiple contacts that the

[216] For example, the EU concludes with the United Nations specific agreements on their interaction in a specific country. See the Financial and Administrative Framework Agreement between the European Union represented by the European Commission and the United Nations, available at: http://ec.europa.eu/echo/files/partners/humanitarian_aid/fafa/agreement_en.pdf (Consulted on 07.08.2015).

[217] See preamble and annex of Commission Implementing Decision of 16.7.2014 approving the Memorandum of Understanding between the European Union and Tunisia related to macro-financial assistance to Tunisia, C(2014) 5176 final; preamble, 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, *OJ* [2015] L151/9, 21.05.2014; article 4(4), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30; article 5(5), 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), *OJ* [2014] L77/13, 15.03.2014; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084; European Commission, Directorate General for Enlargement, *Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450.

[218] This approach is in line with the Commission Better Regulation Package. Commission Staff Working Document of 19 May 2015 on 'Better Regulation Guidelines', SWD(2015) 111 final, at 65. Available at: <http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf> (Consulted on 07.08.2016).

[219] F. Bignami, 'Creating Rights in the Age of Global Governance: Mental Maps and Strategic Interests in Europe', *bepress Legal Repository*, September 2004, available at: <http://law.bepress.com/expresso/eps/390/> (Consulted on 07.08.2016), at 21.

[220] Chapter II, section 5.

Commission and the EEAS establish with other international organisations, civil society, experts, interest groups, etc.

5.2 The duty to hear the other side

5.2.1 The principle internally: a fundamental principle…

The Court of Justice recognises the duty to hear the other side as a fundamental principle. The duty to hear the other side is recognised, even in the absence of a written rule, whenever an administrative act may have an adverse effect on the interest of an individual. The act should entail negative consequences, which are normally of an economic nature (e.g. application of sanction or a penalty, or the denial of an advantage sought by the applicant).[221] The duty to hear the other side has been also recognised by the Court for legislative acts in cases of anti-dumping and of individual sanctioning; here the legislative acts are of an individualised nature and their effects are similar to the one entailed in an administrative decision.[222] Overall, the duty to hear the other sides rests on four pillars: first, a procedure is initiated against a person; second, the bearers of the interest involved can be identified; third, the final decision entails a bilateral relationship between the author and the addressee of the act; fourth, the competent body has fairly broad power of investigation and of appraisal regarding the factual situation upon which it needs to decide.[223] The Court's approach to the duty to hear the other side has mainly been driven by competition law procedures as the archetype of administrative procedures in EU law, which is a very different realm from that of the SAP and the ENP.[224] However, it does represent a good starting point in highlighting the importance of the duty to hear the other side in respect to the relation that the Union develops with its neighbours. For the purpose of this last section, the duty to hear the other side will be analysed for third states, and for entities having an internationally recognised position as representative of a specific population (e.g. Front Polisario and Palestinian Liberation

[221] Case 17/74 *Transocean Marine Paint Association* v. *Commission*, EU:C:1974:106, para. 15; Case 85/76 *Hoffman-La Roche* v. *Commission*, EU:C:1979:36, para. 11.
[222] Case C-49/88 *Al-Jubail Fertilizer* v. *Council*, EU:C:1991:2, para. 15; Joined Cases C-402/05 P and C-415/05 P, *Yassin Adbullah Kadi and Al Barakaat International Foundation* v. *Council and Commission*, ECLI:EU:C:2008:461, paras 335-352.
[223] For a comprehensive analysis on the duty to hear the other side see J. Mendes, *Participation in EU Rule-Making: A Right-Based Approach* (Oxford: Oxford University Press 2011), chapter 4, section 4.2.
[224] J. Mendes, *Participation in EU Rule-Making: A Right-Based Approach* (Oxford: Oxford University Press 2011), at 187.

Organisation). This choice is made since the administrative activities implementing the SAP and the ENP have as addressee, or as *de facto* addressee, third states and any disputed territories therein.[225]

5.2.2 Implementing arrangements in the external domain: …interpreted narrowly

❖ As operationalised by the Court and by the European Ombudsman

In its early anti-dumping case law, the Court established that a company was directly and individually concerned by an anti-dumping regulation since, among others, the same company was heard during the procedure leading to the adoption of the antidumping measure.[226] In other words, the Court established a link between being heard during the procedure leading to the adoption of an anti-dumping regulation (legislative act) and standing.[227] However, the reverse reasoning was not upheld by the General Court in the *Front Polisario* case. The General Court remained of the view, taken in *Pfizer* and *Alpharma*, that direct and individual concern is no assurance of the right to be heard in legislative procedures.[228] In light of the Front Polisario's identifiable role in the procedure, and in light of the impact that the legislative act has on the people of West Sahara, the right to be heard ought to have been granted to the liberation movement. The General Court in this case should have followed its *Yusuf* and *Kadi* line of cases which extended the right to be heard in the context of procedures leading up to the adoption of legislative acts – even in the absence of Treaty basis – whenever the general act is of direct and individual concern to certain person identified in the procedure.[229]

The Commission before suggesting to the Council the conclusion of an Agreement in the form of an exchange of letters between the European Union and the Kingdom of

[225] Chapter III, section 2.2.
[226] Case 264/82 *Timex* v. *Council*, EU:C:1985:119, paras 12-16; Joined cases 239 & 275/82 *Allied Corporation* v. Commission, EU:C:1984:68, paras 11-12.
[227] Article 13(1), Regulation No 3017/79 provides that 'Anti-dumping or countervailing duties, whether provisional or definitive, shall be imposed by regulation'. Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidised imports from countries not members of the European Economic Community, *OJ* [1979] L 339/1, 31.12.1979.
[228] The Court denied the right to be heard to both *Pfizer* and *Alpharma* within the context of a legislative procedure despite them being directly and individually concerned by the measure. Case T-13/99, *Pfizer Animal Health SA* v. *Council*, T:2002:209 para 487; and Case T-70/99, *Alpharma Inc.* v. *Council*, T:2002:210, para. 388.
[229] Joined Cases C-402/05 P and C-415/05 P, *Yassin Adbullah Kadi and Al Barakaat International Foundation* v. *Council and Commission*, ECLI:EU:C:2008:461, paras 335-352; see also Case T-318/01, *Omar Mohammed Othman* v. *Council and Commission*, ECLI:EU:T:2009:187; J. Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford: Oxford University Press 2011), at 204.

Morocco ought to have consulted the Front Polisario.[230] Despite the Council and Commission claims, from the outset it was clear that the agreement was to be applicable to the territory of West Sahara.[231] As the Court rightly suggests:

> 'If the EU institutions wished to oppose the application to Western Sahara of the Association Agreement, as amended by the contested decision, they could have insisted on including a clause excluding such application into the text of the agreement approved by that decision. Their failure to do so shows that they accept, at least implicitly, the interpretation of the Association Agreement with Morocco and the agreement approved by the contested decision, according to which those agreements also apply to the part of Western Sahara controlled by the Kingdom of Morocco.'[232]

Furthermore, in this respect the same Commission cooperated with the Moroccan authorities by including undertakings established in Western Sahara in the list of exporters approved under the Association Agreement with Morocco.[233] DG SANCO also made a number of visits to Western Sahara to check compliance by the Moroccan authorities with health standards established by the European Union.[234] If the agreement with Morocco was to apply to the territory of West Sahara, than the Front Polisario ought to have been granted the right to be heard in light of its internationally recognised position in the procedure. Both the Council and the Commission recognise the international status and legal position of Western Sahara, therefore, the law applicable to it must be determined in the context of the UN-led peace process.[235] 'It is precisely the UN which considers the Front Polisario as being an essential participant in that process.'[236] Moreover, the choice of the Union not to hear the liberation movement, as already discussed, has had the effect of potentially incentivising human rights violations. The right to be heard ought to have been granted to the Front Polisario in light of its identifiable role in the procedure; and as holder of a legally protected interest (the protection of

[230] For a summary of the case see chapter III, section 3.
[231] 'All the factors mentioned in paragraphs 77 to 87 above are part of that context and show that the EU institutions were aware that the Moroccan authorities also applied the provisions of the Association Agreement with Morocco to the part of Western Sahara it controlled and did not oppose that application. To the contrary, the Commission cooperated to a certain extent with the Moroccan authorities with a view to that application and recognised the results of its application, by including undertakings established in Western Sahara among those included on the list mentioned in paragraph 74 above.' Case T-512/12, *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 99.
[232] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 102.
[233] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 86.
[234] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 79.
[235] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 59.
[236] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 59.

human rights in West Sahara) which ought to have been taken into account by the decision-makers as part of the overall assessment that finds the final decision.

❖ As operationalised by internal rules

The Commission and EEAS internal guidelines as to how to compile progress reports foresee the participation of third countries in the process. Third countries are invited to provide written inputs, and meetings are encouraged between the EU Delegation and third countries in order to clarify the written contributions.[237] However, the guidance notices stress the importance of consulting the neighbouring countries in order to gather information from the widest array of sources, rather than specifically acknowledging the self-defense aspect of it. In this respect, the visa liberalisation progress reports also indicate that the factual information included in the report is based on the contributions submitted by the respective countries.[238] The idea of proceduralising the duty to hear third countries as been endorsed by the Union in the agreement it concluded with Ukraine. The Association Agreement concluded by the Union with Ukraine foresees that access to the Union market shall be granted to Ukraine based on the level of approximation of Ukrainian legislation with EU law. In this respect, the Ukrainian government is obliged to provide reports to the EU in line with approximation deadlines specified in the Agreement; subsequently, the Commission and the EEAS are empowered by the agreement to adopt a report on the level of approximation of Ukrainian legislation with EU law.[239] Based on this report, the Association Council established by the Agreement will decide on further market opening. The agreement explicitly proceduralises the duty to hear Ukraine in the investigative process.

[237] European Commission, Directorate General for Enlargement, *Guidance Note Enlargement package 2015*, Access to Documents request GESTDEM reference 2016/450; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

[238] E.g. Report from the Commission to the European Parliament and the Council of the 15 November 2013 'First Progress Report on the implementation by Georgia of the Action Plan on Visa Liberalisation', COM(2013) 808 final, at 2.

[239] For example, the Commission, under the new agreement concluded between the EU and Ukraine, is required to compile numerous reports on the level of approximation by Ukraine with the EU *acquis*. See article 475(2), Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part, *OJ* [2014] L 161/3, 29.5.2014.

5.2.3 Evaluating the state of art: a relationship based on the wrong assumptions

The duty to hear the other side needs to be analysed in the context of the relation established by the administration of the Union and third states. The relation between third countries and the administration is based on two incorrect assumptions. First, the belief that the activities implementing the SAP and the ENP do not have as *de facto* addressee the third states; second, that the relation between the Union and the third state is one between two equal partners. By rebutting these two assumptions, it will become clear why the third state ought to be heard in the process of adoption of the administrative activities implementing the Union's wider neighbourhood policies.

Most of the administrative activities characterising the EU wider neighbourhood are not directly addressed to the SAP and ENP states; however, the fact that the instruments do not have as a clear addressee the third countries should not be misleading. As discussed in detail in section 2.2 of chapter III, the instruments – even if addressed to e.g. the Council – have as main addressee the neighbouring states, which should follow the suggestions made in the document; adopt the standards indicated in the latter; address the lacks identified; or adapt its political agenda to the strategy papers unless they want to trigger negative sanctions[240] or renounce benefits.[241] Administrative activities, whether binding or non-binding, acquire legal authority from the moment in which non-compliance or compliance has legal consequences.[242] The duty to hear the third state ought to be included as an essential element in the pre-legal relationship between the Union and the neighbouring states. The pre-legal relationship is the phase leading to an

[240] Examples are: suspension of financial aid, postponement of the signature of an agreement, etc. The 2014 Bosnia and Herzegovina progress reports states that: 'Bosnia and Herzegovina also still refuses to adapt this Agreement [i.e. SAA Interim Agreement] to take into account its traditional trade with Croatia before it joined the EU. The Commission has undertaken steps to suspend Bosnia and Herzegovina from certain trade benefits if the adaptation process is not finalised by the end of 2015.' Commission Staff Working Document Progress Report on Bosnia and Herzegovina accompanying the EU Enlargement Strategy of 8 October 2014 SWD(2014) 305 final.

[241] Budget Support is one among other types of financing available under IPA II. The rules allow the use of Budget Support provided the eligibility criteria are fulfilled. Support can be provided only in a sector which has been identified in the Country Strategy Paper as a priority and which is endowed by an appropriate sector reform plan. Such plan must be linked to the enlargement agenda. Therefore, if the country wants to make use of IPA II funds it needs to adopt a country strategy paper or action plan on a subject identified in the Commission country strategy papers, which in turn are based on Commission communications on the enlargement strategy and on the progress reports. Lack in adoption of an action plan on a specific sector could block IPA II financing. See the example of Bosnia and Herzegovina available at: <http://eu-monitoring.ba/en/the-initiative-warns-blocking-ipa-funds-does-not-punish-those-responsible-for-political-obstruction/> (Consulted on 07.08.2016).

[242] J. Mendes, 'Rule of law and participation: A normative analysis of internationalized rulemaking as composite procedures', 12 *International Journal of Constitutional Law* 2014, at 377.

eventual sanction or denial of benefits. Here the idea is that the entity whose situation is under scrutiny has a special status in defending itself.[243] The third state not only ought to defend itself from the potential action of the Union, which has the power to limit through conditionality its wellbeing by cutting down their relations, but also ought to be heard in light of the impact that the administrative activities have on the state itself.[244] In other words, the establishment of participatory rules at the administrative level affords anticipated procedural protection to actors that might be affected by the intervention or non-intervention of the Union. This should particularly be the case in light of the difficulties faced by third states in challenging the final decision.[245]

Believing that the relation between the Union and its neighboring states is one between two sovereign entities with equal powers is illusionary. It is the Union which decides when positive incentives are to be granted or negative sanctions are to be imposed. Therefore, the third state, depending on its willingness to integrate in the Union, will always find itself in a subaltern position. Visa liberalisation regimes are granted once the neighbor state respects the criteria identified by the Union in the visa liberalisation action plans. In several chapters of the Deep Comprehensive Free Trade Agreement between the Union and Ukraine, the process of legislative approximation is clearly linked to additional access to the EU Internal Market. For example, in the area of technical barriers, it is only when the Union has determined that Ukraine has fully approximated its legislation to the listed EU *acquis*, that additional access to its Internal Market will be offered.[246] It is only once the Union decides that SAP countries are ready that accession negotiations will be opened. Finally, it should not be forgotten that some states, like Ukraine and Tunisia, are also dependent on the EU for macro-financial loans.[247] The point here is not to question whether morally or legally it is correct to impose such a standard on a third state. Rather, the point here is to recognize the type or relation that the Union

[243] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, (Oxford: Clarendon Press 1997), at. 143.
[244] Chapter III, section 2.2.
[245] Third countries might not be able to challenge the measure either due to its non-legally binding nature or for the Court's restrictive standing rules.
[246] Article 57, Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part, *OJ* [2014] L 161/3, 29.5.2014.
[247] Commission Implementing Decision of 18.5.2015 approving the Memorandum of Understanding between the European Union and Ukraine related to macro-financial assistance to Ukraine, C(2015) 3444 final; Commission Implementing Decision of 16.7.2014 approving the Memorandum of Understanding between the European Union and Tunisia related to macro-financial assistance to Tunisia, C(2014) 5176 final.

has developed with the third state so as to grant to the third state some procedural protections.

The duty to hear the third state, alongside supporting the search for the right outcome, also allows the third country affected by a process to participate in it. The idea that an entity ought to be involved in defending and protecting its own interests is an intriguing attempt to link participatory procedures to the respect of that same entity. Here the rule of law is seen not just as a system of control imposed from above and external to the relationships developed between the Union and third states; but as a system of regulation occurring within the type of relationship developed between the Union and the third state over time.[248] The principle that an accused person should be able to respond and defend himself is rooted in the rule of law. There seems to be three instances where the duty to hear the third states ought to be respected: in case of sanctions, in case of delay in granting benefits, and in case of adoption of regulatory frameworks.

Progress reports – but also other informal forms of Commission and EEAS investigations –[249] might lead to actions against third countries. For example, progress reports can inform the Council of lack of progress by a third state in certain essential areas of cooperation between the latter and the EU. Based on these documents, the Council might decide to suspend the entrance into force of an agreement or the agreement itself. The act of suspension is a legislative measure adopted in accordance with article 218(9) TFEU but it is of an individual nature to the third state. The Council Decision names the third state as the subject of the sanction. In 2008 the Council decided to suspend the implementation of the Interim Agreement concluded between the EU and Serbia while waiting for the ratification of the formal Stabilisation and Association Agreement. The Council decision stated that:

> '[…] on the basis of a proposal from the Commission, the Council decided that the Interim Agreement with the Republic of Serbia will be implemented as soon as the Council decides unanimously that the Republic of Serbia fully cooperates with the ICTY.'[250]

[248] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, (Oxford: Clarendon Press 1997), at. 141.
[249] E.g. Reports on the level of implementation of the agreements concluded by the EU with third countries, 'ad hoc' investigative measures, and impact assessments.
[250] Council Decision, Meeting doc. 93/08, Luxembourg 29 April 2008. Act not published on the Official Journal.

The decision of the Council to suspend the implementation of the agreement is a political decision. The Council hopes that the suspension of the agreement will push Serbia to fully cooperate with the ICTY. However, the type of relation that the Commission develops with Serbia in the pre-legal phase ought to be taken into consideration before reaching the final decision. Before taking the final decision which directly affects the legal relationship between the Union and Serbia; was Serbia given the chance to explain the difficulties it faced in cooperating with the ICTY? As already stated above, the point here is not to defend Serbia for not collaborating with the ICTY. The point here, instead, is to recognize the context in which such an act is taken. The political decision is the tip of the iceberg; the underlying, ongoing administrative procedure and its impact on the third states needs to be acknowledged. The investigative process alone has effects on the neighbourhing states; it does not necessarily have to lead to a sanction being imposed. Third states, fearing possible sanction, follow the guidelines provided by the monitoring reports.

The Court, in a very different context from the one under analysis, ruled that the right to be heard under the CJEU is granted to Member States in all proceedings that are *liable to culminate* in a negative measure. The Court in *PTT* acknowledged that, under article 106 TFEU, Member States under investigation can rely on the right to be heard as a general principle of EU law even in the absence of statutory provisions. [251] They can rely on the right on the basis of the Court's general formula that the right must be guaranteed 'in all proceedings which are initiated against a person and which are liable to culminate in a measure adversely affecting that person'.[252] Since the final sanction is not a *conditio sine qua non* for the establishment of an obligation to hear the other side, it does not seem unthinkable to demand from the Commission to hear the third state while monitoring its progress – particularly in light of the significant effect that the morning process has on third states. Finally, according to Craig, the general trend of the case law on the right to be heard has been to require a hearing even where no sanction is imposed, provided that there is some adverse impact, or some significant effect on the applicant interest.[253]

Progress reports can also delay the opening of accession negotiations for candidates to Union membership, or can slow down the speed of integration of a neighbouring state

[251] Joined Cases C-48 & 66/90 *Netherlands and others* v. *Commission*, EU:C:1992:63.
[252] Joined Cases C-48 & 66/90 *Netherlands and others* v. *Commission*, EU:C:1992:63, para. 44; see also Case T-266/97 *Vlaamse Televisie Maatschappij* v. *Commission* T:1999:144, para 35; and Case 85/76 *Hoffman-La Roche* v. *Commission*, EU:C:1979:36, para. 11.
[253] P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), at 290.

in the Union internal market. Again it is undeniable that it is not a right to become a member of the Union or a close partner. Nevertheless, a delay in both processes can have a significant impact on the third countries to which these measures are addressed. The impact is not only related to the economy of the country but also to other issues such as visa liberalisation, the opening of exchange programmes, etc.[254] The difference between this example and the previous one is that in this situation the EU is not sanctioning the third state, but is rather delaying the reception of benefits. Nevertheless, the obligation to hear the third country ought to be demanded in light of its defensive and collaborative functions. The third country ought to be heard in order to defend itself from accusations made by the Commission in the e.g. visa liberalisation progress reports. Based on the Commission's scrutiny, the wellbeing of the third state and of its citizens may be delayed and potentially harmed. The third country ought to show its point of view to the Commission, which, based on its evaluation, might not find the state ready for a visa liberalisation regime. Moreover, hearing the other side allows the Commission to reach the most complete outcome, especially in light of the knowledge that third states have. The final outcome might result in a legislative act.[255]

In the *Technische Universität München* case the university concerned had applied for an exemption from customs duty on the import of a scientific instrument. The national customs authority refused the exemption on the basis of a Commission decision stating that a duty-free importation would be inappropriate. Before the Court of Justice, the university complained that, while the Commission had heard a group of experts, it had not given any opportunity to the university itself to submit technical information and observations. The Court ruled that even though the applicable regulation did not provide any opportunity to the importer of scientific apparatus to explain his position:

> '[…] the right to be heard in such an administrative procedure requires that the person concerned should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances'.[256]

According to the Court, this conclusion was justified by the circumstance that 'the importing institution is best aware of the technical characteristics which the scientific

[254] M. Cremona, 'The European Neighbourhood Policy More than a Partnership?', in M. Cremona (eds.), *Developments in EU External Relations Law* (2008), at 297.
[255] Chapter III, section 2.1.
[256] Case C-269/90 *Hauptzollamt München-Mitte* v. *Technische Universität München*, EU:C:1991:438, para. 25.

apparatus must have in view of the work for which it is intended'. [257] if we transpose – always acknowledging the difference in context – this case to the activities of the EU in its wider neighbourhood, we can state that if the decision by the Union on whether to increase its partnership with the third country is based on the report compiled by the Commission and the EEAS, then the third country ought to be heard in light of its central position in the process.

This last paragraph explores the possibility of extending the duty to hear the neighbouring states during the process of drafting action plans, European partnerships and Memoranda of Understanding. These documents are allegedly decided in partnership with third countries. Nevertheless, the third party, finding itself in a weaker position, might accept all the conditions established by the Union without exercising the right to be properly heard. In this respect, in order to fully guarantee the participation of a third country in the adoption of its action plan or of a Memorandum of Understanding, procedural guarantees need to be put into place. This is particularly important since neither action plans, nor Memoranda of Understanding are actual contractual relations where negotiations are guaranteed. With some countries there are real negotiations, while with some others this is not really an option since some states do not even have the technical expertise to engage in such negotiations. As pointed out at the beginning of this section, the process of governance here occurs in the context of a relationship which is egalitarian only from a theoretical perspective. Obliging the Union to hear the third state under these circumstances has the potential to structure their unbalanced relation. In this context, the dignity of the third state is not respected if they are treated as mere objects of decision. Respect for their dignity requires an opportunity for argumentation, and it requires acknowledging the type of relation the EU established with them.[258]

The case law of the Court of Justice is not immune from considerations stemming from the type of relations the Union develops with third states. There are a number of cases where the Court has referred to the relationship that the Union developed with non-EU states in order to interpret the EU-third countries agreements, particularly in interpreting the rights granted by them.[259] EU-third state agreements are nothing more

[257] Case C-269/90 *Hauptzollamt München-Mitte* v. *Technische Universität München*, EU:C:1991:438, para. 24.
[258] J. Waldron, 'The rule of law and the importance of procedure', in J.E. Fleming (eds.), *Getting to the Rule of Law* (New York: New York University Press 2011), at 20.
[259] Case C-81/13 *United Kingdom* v. *Council*, EU:C:2014:2449, para. 57; Case C-431/11 *United Kingdom* v. *Council*, EU:C:2013:589, para. 50; Case C-656/11 *United Kingdom* v. *Council*, EU:C:2014:97, para 55; C-221/11 *Leyla Ecem Demirkan* v. *Bundesrepublik Deutschland*, EU:C:2013:583, para 52; C-265/03 *Igor*

than a legally binding regulatory framework between the Union and a third state. Memoranda of Understanding, action plans, and European Partnerships form the regulatory framework upon which relations between the Union and the third state should develop.[260] As Mendes argues, '[i]mplicit in the conception of the procedural rule of law is the idea that procedural rules need at least to be considered in the creation of regulatory regimes'.[261] This ought to be particularly the case in situations where the opportunity to make arguments about what the law is has a direct bearing on the third state. The idea of self-protection within relations calls directly on the value of allowing a specific state, namely, one affected by a process, to participate in the latter. The internal guidelines on how to draft action plans envisage the participation of the neighbouring states in the process of drafting the documents.[262] However, the Council Regulation on the establishment of European partnerships in the framework of the SAP is silent on the matter.[263]

Conclusion

This chapter tried to give effect and to make operational the respect of the administrative rule of law eternally by using as an example the EU wider neighbourhood policies. The principles chosen in order to give effect to the administrative rule of law externally have been selected in light of their ability to tackle the features and impacts that the administrative power assumes when exercised in the external relation context, and in light of their ability to secure the respect of the two key functions associated with the administrative rule of law; to wit, rationality of outcomes and individual protection. The selected principles are mainly concerned with the procedures to be followed by the administration in developing and implementing its external action. However, procedures shall not be underestimated; they can have a decisive impact on substantive outcomes. Among others impacts, procedures channel the flow of information and they mitigate

Simutenkov v. *Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, EU:C:2005:213, para 28 and paras 30-36.

[260] Chapter II, sections 3.1 and 4.1.

[261] J. Mendes, 'Rule of law and participation: A normative analysis of internationalized rulemaking as composite procedures', 12 *International Journal of Constitutional Law* 2014, 381-387.

[262] 'Objectives should be jointly formulated upon a thorough discussion of the expected results' EEAS, *Non-Paper: Guidelines for Future ENP Action Plan* 05.01.2012, Access to Documents request SG1 - Corporate Board Secretariat; EEAS, *Guidance Note ENP Package 2014*, Access to Documents request GESTDEM reference 2013/5084.

[263] Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilisation and association process**,** *OJ* [2004] L 086, 24.03.2004.

possible information asymmetries between relevant actors. The application of the selected principles in the external relations context is starting to be operationalised by the Court, the Ombudsman, the legislators, and the administration itself.

Despite the attempts so far made to operationalise the principles externally, the process is not fully completed. The overall operationalisation of the principles externally ought not to stop here. As the chapter suggested, new implementing arrangements aimed at operationalizing the principles externally ought to be constructed. The process of operationalisation is challenged by the general lack of primary and secondary legislation regulating the exercise of administrative power in the SAP and ENP, and by the Court's reticent approach. The activity of the CJEU has been widely recognised as the focal driving force in operationalising the principles giving effect to the rule of law. However, under this approach the development of the rule of law externally will only be possible if European judges will embrace a more nuanced concept of the administrative rule of law, and will accept the complexity and relevance that the administrative power exercise in external action. Therefore, taking a more pragmatic approach that would embrace the role that can be played by the European Ombudsman and by non-conventional sources as parameters to be used in structuring the Commission's and EEAS exercise of administrative power is a first important step.

The respect of administrative law principles in the external relations domain has the potential to structure the relation between the Union and individuals, and between the Union and third countries. They are relational principles in that they indicate how the administration ought to interact and interface with external actors with whom the Union has built ties. In this respect, they support the administration in structuring its external activities. Furthermore, they guide and support the EU administration in executing and giving effect to the Union's external policies and objectives. The policies' *finalité* and underlying principles ought to be reflected in the role and operationalization of the administrative principles (e.g. the ENP rests on joint ownership, thus, participation is fundamental in the implementation of the policy). Ultimately, the respect of administrative law principles externally helps to secure the credibility that the Union's action on the international scene is developed and implemented in accordance with the values which have inspired its own creation – among others the rule of law. The task of the next chapter is to check whether enforcement mechanisms are in place, or ought to be

in place, with the aim of ensuring that the external administrative power acts in conformity with the framework presented by this chapter.

Annex I

Table 1 shows the rights monitored by the progress reports for the Western Balkan countries. The table does not differentiate among countries since, apart from minor variations, the progress reports cover the same rights. Table 2 shows the discrepancy as to the standards used by the Commission in order to determine their compliance. The table presents the selection of international instruments that the candidates and potential candidates have signed and/or ratified in order to comply with the accession criteria. The tables use acronyms for referring to the SAP states. [1]

Table 1

Civil and Political Rights	Economic and Social Rights	Minority Rights, Cultural Rights and the Protection of Minorities
- prevention of torture and ill-treatment - pre-trial detention - prison conditions - access to justice - religious freedom - freedom of expression and media - freedom of association - non-discrimination - property rights - civil society - fight against impunity - death penalty (BiH & HR) - arbitrary arrest (BiH, HR & AL) - restitution of dispossessed property (HR) - right of effective remedy and fair trial (HR & FYROM)	- gender equality - rights of the child - socially vulnerable and disabled persons - labour rights - social dialogue - woman's right - refugees - internally displaced persons - property rights - education - trade unions (BiH, FYROM & AL) - restitution of property (HR & FYROM)	- cultural rights - education (SER) - citizenship (BiH & HR)

[1] AL: Albania, BiH: Bosnia and Herzegovina, FYROM: Macedonia, HR: Croatia, MNE: Montenegro, SER: Serbia.

Table 2

Observance of international human rights law	
Instrument	Country
European Convention on Human Rights and Fundamental Freedoms Optional Protocol to the Convention against Torture Optional Protocol to the Convention on the abolition of the death penalty in all circumstances	SER, BiH, MNE, HR BiH, MNE, FYROM AL
European Convention for the Prevention of Torture	SER
European Convention on Trans-frontier Television	SER
European Charter on Regional and Minority Languages	SER, MNE, FYROM
European Social Charter Protocol 1 to the European Social Charter Revised Protocol No 2 to the European Social Charter	SER, MNE, FYROM FYROM FYROM
European Convention for the Prevention of Torture	MNE
Europe Conventions on Exercise of Children's rights	MNE, HR
Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence	MNE, AL
Council of Europe Convention on Suppression of Terrorism	HR
European Convention on the Compensation of Victims of Violent Crimes	HR
Council of Europe's Convention on Action against Trafficking in Human Beings	FYROM, AL
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism	AL
Council of Europe Convention on the Prevention of Terrorism	AL
Council of Europe Framework Convention on the Value of Cultural Heritage for Society	AL
Council of Europe Convention on Human Rights and Biomedicine	AL
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	MNE
Additional Protocol to the European Council Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems	HR
Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data	AL
International Covenant on Economic, Social and Cultural Rights	AL
International Covenant on Civil and Political Rights	AL
UN Convention on the Right of the Child	AL
UN Convention on the Status of the Refugees	AL
International Convention on the Elimination of All forms of Racial Discrimination	AL
UN Convention on the Elimination of All Forms of Discrimination Against Women	AL
UN Convention on the rights of persons with disabilities and its optional protocol	MNE, FYROM
UN Convention on the sale of children, child prostitution and child pornography, and on children in armed conflicts	AL

Chapter V: Enforcing the rule of law externally

Creating enhanced opportunities for out-of-court enforcement mechanisms

1. Enforcement mechanisms: beyond neutrality into the complexity of the policy domain

This chapter completes the analysis commenced by chapter IV by analyzing the mechanisms in place, and which ought to be in place, aimed at guaranteeing the enforcement of the administrative rule of law externally. Upholding the administrative rule of law externally not only requires the identification of the principles giving effect to the rule of law in the external domain; it also demands that a comprehensive set of enforcement mechanisms are in place with the aim of ensuring that the external administrative power adopts measures in conformity with the principles identified, and that natural and legal persons are able to challenge (directly or indirectly) any act which affects them.[1] Enforcement mechanisms are usually associated with coercion; i.e. compliance with the administrative rule of law can be obtained only through Court and sanctioning mechanisms. Nevertheless, such understanding of the enforcement mechanisms fails to take into account the context in which they operate, as well as the increasing variety of out-of-court enforcement mechanisms that combine authority with non-coercive mechanisms.[2]

Harlow and Rawlings have recently observed that enforcement 'raises important issues of administrative policy and process, or discretion, procedural design and trade-off.'[3] This statement, as Chiti underlines, reminds us that enforcement should not be treated as a neutral and somehow mechanical process. 'It should be rather considered as a complex process encapsulating specific strategies and normative preferences.'[4] Enforcement mechanisms regulating the relationships between EU subjects take place within the Union's legal order, which has historically developed as a space oriented towards compliance with EU law and its principles. Enforcement mechanisms regulating the relationships between EU and non-EU subjects, instead, are carried out in a legal

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[1] Case 294/83 *Les Verts* v. *Parliament*, EU:C:1986:166, para. 23; Case C-455/14 *H* v. *Council, Commission and EUPM*, EU:C:2016:569, para. 41.

[22] E. Chiti, 'The Governance of Compliance', in M. Cremona (eds.) *Compliance and Enforcement of EU Law* (Oxford: Oxford University Press, 2012), 32, at 32.

[3] C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing 2014), at 170.

[4] E. Chiti, 'Enforcement of and Compliance with Structural Principles', in M. Cremona (eds.) *Structural Principles in EU External Relations Law* (London: Hart Publishing forthcoming).

context which is partly within and partly outside the EU legal order. If it is certainly true that the difference between the internal and the external realm is reflected, and ought to be reflected, in the way the principles giving effect to the rule of law are enforced, it is also true that at times this divide has negatively influenced the approach of the Court and the responsiveness of EU institutions in developing enforcement mechanisms. In other words, sometime the divide has been used in a rather artificial manner in order to avoid entering into the merits of the case.

In the context of external relations, judicial control is certainly relevant but it is only one component of the enforcement process. The Court has the obligation to review the action of the administration to the extent that it might touch upon protected rights, and to the extent that it has a direct impact on the legal situation of third parties. However, the role of the Court needs to be carefully balanced to preserve the freedom of the Council to take political decisions. A middle course between the original view of the Court as external to the measures aimed at developing and implementing the Union external action and the spectre of 'juridification' of the governance mode of foreign policy ought to be sought. Next to the Court, other forms of enforcement mechanisms are in place and ought to be strengthened in order to give full effect to the administrative rule of law externally: the Ombudsman and 'compliance building'. The redress function of the European Ombudsman is one building block of the European rule of law.[5] 'Compliance building', as we shall see, is particularly suited to enforcing the relations between the Union and third states. In analysing the enforcement mechanisms, the chapter will first cover judicial review and secondly, quasi-judicial mechanisms (i.e. the Ombudsman and 'compliance building'). In developing the analysis, the chapter does not intend to enter the debate as to the different paths of compliance mechanisms (coercive strategy vs. problem-solving); it rather uses them as operational concepts.

2. Judicial review: a long steeplechase

The idea that the administration should be procedurally and substantively accountable before the Courts is a cornerstone principle stemming from the rule of law.[6] Notwithstanding the judiciary's decentralised role in giving effect to the rule of law in the

[5] A. Peters, 'The European Ombudsman and the European Construction', 42 *Common Market Law Review* 2005, at 723.
[6] P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), at 251.

new form of foreign governance as exemplified by the SAP and the ENP,[7] the Court still ought to play an important part in enforcing the rule of law when the administrative power acts externally. The Court ought to recognise that the administrative activities implementing the SAP and the ENP involve important political considerations; at the same time, it ought to hold EU institutions to their commitment to ensure that the administrative power acts within the boundaries established by the rule of law. The Court in this context ought to promote a principled approach to administrative activities, particularly if they lead to final decisions that directly impact on the legal situation of third parties or if they impinge on legally protected rights.[8]

Final decisions are of different types. Some are of a purely political nature (e.g. Council Conclusions), and others are legal acts (e.g. Council decisions, Commission implementing decisions, etc.). Ideally, the Court is not to act as final arbiter of the legality of political decisions; instead it ought to highlight the relationship between political decisions, administrative activities and their impacts on the exercise of public power and on individuals.[9] The enforcement of the rule of law as operationalised externally ought to catch the double impact that the administrative activities exercise both internally and externally. Internally final decisions are dependent on the content of administrative activities; externally they have preparatory and rule making functions. The General Court began to engage in this challenge in the *Front Polisario* case.[10] The case is an example in which the Court encouraged the Commission to carry out human rights impact assessments (administrative activities) before suggesting to the Council to conclude an agreement with a third state (a political choice) due to the impact that the action of the Union would have on individuals (potential violations of human rights). Moreover, the Court in her recent *H* decision also made a step in this direction by affirming that limitations to judicial review – in this case the one related to the CFSP – need to be interpreted narrowly in order to give effect to the rule of law.[11]

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[7] Chapter IV, and more generally see chapter I, section 4.3.

[8] Final decisions are of different types. Some are of pure political nature (e.g. Council Conclusions) others are legal acts (e.g. Council decisions). Here it is argued that the Court ought to review only the administrative activities leading to legally binding acts.

[9] Chapter III.

[10] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953.

[11] '[…] the aforementioned provisions [Article 24(1) TEU and the first paragraph of Article 275 TFEU] introduce a derogation from the rule of 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 they must, therefore, be interpreted narrowly […]. The very existence of effective judicial review designed to ensure

While one could argue that the application of judicial review would involve squeezing the pre-accession and neighbourhood policy instruments into the rigidity of the law, this argument should be viewed with some suspicion.[12] Surely introducing some level of judicial review – especially when the administrative power in external relations affects the position of third parties – would not have the effect of tightening the hands of the administration in developing and implementing the SAP and the ENP. Limited forms of judicial review could be designed without collapsing the whole pre-accession and neighbourhood projects, or undermining the goals for its emergence. However, there are reasons to suggest that judicial review – on its own – will do little in enforcing the principles giving effect to the rule of law in the system of foreign governance characterising the SAP and the ENP. The Courts' understanding of 'legally relevant impact' and 'protected rights' ought to be adapted to the realm of external relations. The complexity and relevance of administrative power in external action does not follow the same scheme it does internally. What is considered as being legally relevant internally ought to be analysed in the context of a system of governance that evades the use of legally relevant acts. The belief that the Court will enforce the rule of law in the way the Union develops and implements the SAP and the ENP rests on the assumption of 'a better Court'; however, the capacity of judicial review to effectively enforce the respect of the principles giving effect to the administrative rule of law externally presents several hurdles.[13]

2.1 The types of obstacles

Even if the EU is subject to various obligations under EU law, this by no means leads to the conclusion that these will be enforced. In the context of the SAP and ENP, there are two main ways of challenging the action of the Union before the Courts. First, in accordance with the conditions spelled out in article 265 TFEU, should Union institutions, offices, bodies, and agencies – in infringement of the Treaties – fail to act, natural and legal persons as well as Union institutions and Member States can challenge their action or inaction by filing an application to the Court for failure to act. Second, the Treaties provide

compliance with provisions of EU law is inherent in the existence of the rule of law.' Case C-455/14 *H* v. *Council, Commission and EUPM*, EU:C:2016:569, paras 40-41.

[12] J. Scott and D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', 8 *European Law Journal* 2002, at 18.

[13] Dawson makes a similar point in respect of the role of Court in reviewing the Open Method of Coordination. M. Dawson, *New Governance and the Transformation of European Law coordinating EU Social Law and Policy* (Cambridge: Cambridge University Press 2001), at 267.

the possibility of challenging the legality of acts of Union institutions, offices, bodies, and agencies intended to produce legal effects vis-à-vis third parties (article 263 TFEU). According to the Court, judicial review of measures adopted by the Union institutions is guaranteed by the complete system of legal remedies and procedures established by the Treaties.[14] However, in order for the principle of judicial review to be upheld, access to court needs to be guaranteed by this same system of legal remedies and procedures.[15] In other words, access to court is indispensable to the guarantee of judicial review.[16] However, for different reasons affected parties are essentially excluded from most actions.

In the first place, any direct action under article 263 TFEU is subject to the requirement of direct and individual concern – with the exception of regulatory acts not entailing implementing measures for which direct concern is sufficient. The Union's Court infamous rules on standing have severely restricted the possibility for non-privileged applicants from challenging Union acts. The problem with the 'direct and individual concern test' is less the wording of the Treaties than the Court's reading of it. The CJEU over the years has refused to follow the administrative law practice of national courts in liberalising standing rules in order to take account of new constituencies.[17] The Court stood firm on the interpretation of article 263 TFEU set out in *Plauman*. According to the *Plauman* test 'direct and individual concern' is recognised when a decision affects the individual or group concerned 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons'.[18] Standing aside, individual applicants may be precluded from directly challenging EU acts for two sector-specific reasons: their extraterritorial application and the Court's lack of recognition of their relevance externally.

[14] Case 294/83 *Les Verts* v. *Parliament*, EU:C:1986:166, para. 23.
[15] K. Lenaerts, I. Maselis, and K. Gutman, *EU Procedural Law* (Oxford: Oxford University Press 2014), at 111.
[16] P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), at 305.
[17] M. Dawson, *New Governance and the Transformation of European Law coordinating EU Social Law and Policy* (Cambridge: Cambridge University Press 2001), at 270.
[18] Case 25/62 *Plaumann* v. *Commission*, EU:C:1963:17, para 107. Extensive literature has been written on the topic. Among others see: P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), chapter 11; K. Lenaerts, I. Maselis, and K. Gutman, *EU Procedural Law* (Oxford: Oxford University Press 2014), 332-364; D. Chalmers, G. Davies and G. Monti, *European Union Law: Texts and Materials* (Cambridge: Cambridge University Press), 444-455.

❖ Extraterritorial application

In *Commune de Champagne*, applicants from Switzerland tried to challenge the Council's decision to conclude an agreement with Switzerland on trade in agricultural products in light of its external effects.[19] In this context, the General Court affirmed that the Union's rights and obligations are limited to the territory of the EU Member States. It bases the claim on two grounds: first, on the principle of sovereign equality enshrined in article 2(1) of the United Nations Charter. In this respect the General Court clearly stated that:

> '[…] it is, as a rule, a matter for each State to legislate in its own territory and, accordingly, that generally a State may unilaterally impose binding rules only in its own territory.'[20]

Second, the Court stated that in accordance with article 299 EC (now 355 TFEU):

> '[…] an act of an institution adopted pursuant to the Treaty, as a unilateral act of the Community, cannot create rights and obligations outside the territory [of the Union]'[21]

The applicants were, thus, not able to contest the Council's decision on the conclusion of an agreement between the Union and Switzerland on trade in agricultural products. The General Court was firm in stating that an act of an institution adopted pursuant to the Treaty, as a unilateral act of the Community, could not create rights and obligations outside the territory of the Union.[22] In this respect, the General Court did not even attempt to analyse whether the act did actually have a legal effect on the applicants. It stopped its analysis here by holding that contested act did not bring about a change in the applicants' legal position in Switzerland, such position being governed only by the third state in the exercise of its sovereign power.[23] The argument so expressed by the General Court presents some flaws. First, as Bartles argues, the principle of sovereign equality does not have the effects ascribed by the Court. Even if there might be a presumption that domestic legislation does not apply outside of the territory of the state, the presumption is often

[19] The external effect being the exclusion of the use of the name 'champagne', both in the EU and in Switzerland, for white non-sparkling wines produced in Swiss Champagne. Case T-212/02 *Commune de Champagne* v. *Council and Commission*, EU:T:2007:194.
[20] Case T-212/02 *Commune de Champagne* v. *Council and Commission*, EU:T:2007:194, para. 89.
[21] Case T-212/02 *Commune de Champagne* v. *Council and Commission*, EU:T:2007:194, para. 89.
[22] '[T]he scope of the contested decision is limited to that territory [the Union's territory] and it has no legal effect in the territory of Switzerland.' Case T-212/02 *Commune de Champagne* v. *Council and Commission*, EU:T:2007:194, para. 88.
[23] P. Eeckout, *EU External Relations Law* (Oxford: Oxford University Press 2011), at 292.

overridden.[24] The Union routinely exercises its power over third states. A strict interpretation of the territorial scope of the Union's Treaties might imply that EU law does not recognise any right in third countries, not even human rights.[25] This approach is not uncontested and the General Court in the *Front Polisario* case seems to counter this approach.[26]

The General Court in the *Front Polisario* case used a rather original reasoning in determining whether the Council decision concluding the agreement between the Union and Morocco was of direct and individual concern to the Front Polisario. The General Court affirmed that the Council decision concluding the agreement was able to produce legal effects on third parties outside the Union's territory in light of the actual ability of the agreement to have direct effect.[27] In other words, in order to determine if the Council Decision concluding the agreement was of direct concern to the liberation movement, the General Court – in an about-face from its approach in the *Commune de Champagne* – checked the ability of the agreement itself to create legal effects.[28] It methodically examined which provisions of the agreement were capable of having a direct effect, i.e. they contained 'clear and precise obligations, not subject, in their implementation or in their effects, to the adoption of subsequent measures'.[29] While the General Court in *Commune de Champagne* excluded *a priori* the possibility of the Union decision to create effects on the position of third parties, in the *Front Polisario* case the fact that the agreement contained provisions capable of having a direct effect was crucial in establishing that the decision concluding the agreement could produce effects on the position of the whole territory of Morocco, which includes West Sahara. Nevertheless, the approach taken by the Court in the *Front Polisario* might have dangerous consequences.

The General Court in the *Front Polisario* case seems to establish a connection between direct and individual concern and the direct effect of the provisions contained in the agreement. This approach is worrisome for two main reasons. First, the impact of the

[24] L. Bartel, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', 25 *European Law Journal of International Law* 2014, at 1088.
[25] K. Schmalenbach, 'Accountability: Who is Judging the European Development Cooperation?', 2 *Europarecht* 2008, at 181.
[26] Advocate General Cruz Villalón in *Salemink* affirmed that for EU law purposes the territory of a Member State is the area of exercise of EU competences; which does not necessarily coincide with its territory. Opinion of Advocate General Cruz Villalón delivered on 8 September 2011 on Case C-347/10 *Salemink*, EU:C:2011:562, para. 35.
[27] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 111.
[28] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 107.
[29] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 108.

Union's action – capable of producing legal effects on the position of the territory of a state – cannot be limited to situations in which the provisions of the agreements concluded by the Union and third states have direct effect. Second, linking standing considerations with the direct effect of the provisions of an agreement can be detrimental for natural and legal persons in light of the increasing adoption by the Council of decisions excluding the possibility, for parts of the agreements, to have direct effect.[30] Whether the Court will use these type of Council decisions as a biding constrain is not certain; however, it is likely that they will be used as a guiding tool in reaching the final decision – at least to the extent that they reflect the Council's will.

❖ The nature of the acts

Proving legal effects becomes all the more difficult in the case of non-binding acts. The role of non-binding instruments and the need for their judicial review is increasingly becoming a topic of debate within the EU internal realm. In fact, even if the European Court privileges substance over form in deciding which measures may be challenged, there are still reasons to be concerned. Scott, for example, shows how post-legislative guidelines – despite their practical impact on Member States – too often escape judicial review.[31] The *OIV* and the *OMT* cases signal a new opening towards recognizing the legal implications of non-binding acts. In the *OIV* case, the recommendations of the International Organisation of Vine and Wine have been found to be capable having legal effects in light of their ability to 'decisively influencing the content of the legislation adopted by the EU legislature in the area of the common organization of the wine markets'[32] in particular by reason of their incorporation on the European Union's acquis in that area.

The Advocate General Opinion in the *OMT* case seems to open the door for a new approach as to the reviewability of non-legally binding acts. The Advocate General in his opinion seems to suggest that general action programmes of public authorities may take

[30] E.g. article 7, International Agreements Council Decisions of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols, *OJ* [2014] L 278/1, 20.09.2014.

[31] See: J. Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law', 48 *Common Market Law Review* 2011, at 344.

[32] Case C-399/12 *Germany* v. *Council*, EU:C:2014:2258, paras 63-64.

atypical forms and yet still be capable of having a very direct impact on the legal situation of individuals. The addressee and type of the measure loses importance, and what becomes relevant is the ability of the programme to have an impact on the legal situation of third parties. Beside the objective aspect, the AG also suggested a contextual approach:

> 'The *context* in which an act is adopted may provide further indications which confirm either the author's intention that the act should produce effects vis-à-vis third parties or the fact that the author was aware of the potential external impact of the measure.'[33] [emphasis added]

This new contextual approach taken by the AG could be very well suited to draw a comparison with the administrative activities aimed at developing and implementing the SAP and the ENP. The Court in the *OMT* case simply stated that:

> '[…] the fact that the OMT decisions have not yet been implemented and that their implementation will be possible only after further legal acts have been adopted is not a ground for denying that the request for a preliminary ruling meets an objective need for resolving the cases brought before that court.'[34]

Since it is undeniable that the authors' intention behind the different activities characterising the Union wider neighbourhood is that of producing effects vis-à-vis third parties,[35] this approach could at least push the European Parliament to challenge the legality of progress reports. Natural and legal persons would still have to prove direct and individual concern.

❖ The Commission's wide margin of discretion

The few cases in which individuals from third countries challenged the inaction of the Commission under article 265 TFEU and demanded compensation for non-contractual liability caused by the EU institutions serve as very good examples of the Court's limited vision of the impact that the administrative activities implementing the Union's external

[33] Opinion of Advocate General Cruz Villalón delivered on 14 January 2015 on Case C-62/14 *Peter Gauweiler, Bruno Bandulet, Wilhelm Hankel, Wilhelm Nölling, Albrecht Schachtschneider, Joachim Starbatty, Roman Huber and Others, Johann Heinrich von Stein and Others, and Fraktion DIE LINKE im Deutschen Bundestag* v. *Deutscher Bundestag*, EU:C:2015:7, para. 80.
[34] Case C-62/14 *Peter Gauweiler, Bruno Bandulet, Wilhelm Hankel, Wilhelm Nölling, Albrecht Schachtschneider, Joachim Starbatty, Roman Huber and Others, Johann Heinrich von Stein and Others, and Fraktion DIE LINKE im Deutschen Bundestag* v. *Deutscher Bundestag*, EU:C:2015:400, para. 28.
[35] Chapter III, section 2.2.

action have on individuals.[36] The Court in these cases recognised the wide margin of discretion that the Commission enjoys in the management of Union external relations in so far as it involves complex political and economic assessments.[37] However, it did not provide any indication as to how such wide margin of discretion could be guided and constrained. On the contrary, the Court affirmed that in order for an action for compensation for non-contractual liability to be successful the individual has to prove how the Commission has 'manifestly and gravely disregarded' the limits of its discretion. This task is particularly challenging for an individual in the absence of clear and transparent rules operationalising the administrative principles constraining the exercise of the Commission's power externally.

In three out of the four cases discussed in chapter III (section 3), the applicants challenged the inaction of the Commission. The applicants believed that the Commission was obligated to suggest to the Council suspension of relations between the Union and their respective countries: Lebanon and Turkey. The application by the 'coalition of civil society and Turkish citizens' is quite peculiar. They sought the annulment of a progress report because they believed it contained a decision to propose to the Council to take appropriate measures against Turkey for failing to comply with its pre-accession obligations and, in alternative, for failure to act in that regard.[38] The General Court reformulated its claim by stating that the applicants did not seek the annulment of the Regular Report as such, but of a Commission decision refusing to propose to the Council to take appropriate measures against Turkey.[39] In this case the Court stated that:

> '[…] it is common ground that the regular report contains no express Commission decision refusing to propose that the Council suspend the financing granted to Turkey during the pre-accession period.'[40]

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[36] See cases: Case C-288/03 P *Zaoui* v. *Commission*, EU:C:2004:633; Case T-367/03 *Yedaş Tarim ve Otomotiv Sanayi ve Ticaret AŞ* v. *Council of the European Union and Commission of the European Communities,* ECLI:EU:T:2006:96; Case T-346/03 *Krikorian* v. *European Parliament, Council and Commission*, EU:T:2003:348; Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97; Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418; Case C-581/11 *P Mugraby* v. *Council and Commission*, EU:C:2012:466.

[37] Case T-292/09 *Mugraby v. Council and Commission*, para. 60.

[38] Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, for more details of the case see chapter III, section 3.

[39] Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 34.

[40] Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 37.

The Court, in making such statement, does not explain if, from a regular report, an implied decision could, instead, be inferred. The absence of an express Commission decision does not necessarily imply that no decision can be inferred from the regular reports. In any event, the General Court concluded that even if there was a refusal to submit a proposal to the Council, that refusal could not in itself be regarded as producing legal effects capable of affecting the applicants' interests by bringing about a significant change in their legal position.[41] However, interestingly enough, the General Court in this case stated clearly that:

> '[…] individuals are not deprived of access to the courts by reason of the fact that a measure not producing binding effects capable of affecting their interests by bringing about a significant change in their legal position cannot be the subject of an action for annulment, an action to establish non-contractual liability provided for in Article 235 EC and the second paragraph of Article 288 EC being available to them if such a measure is capable of causing the Community to incur liability.'[42]

Mr. Mugraby, in a comparable situation, filed an action for failure to act and an action for non-contractual liability against the inaction of the Commission. Yet, he failed to obtain judicial review of the inaction of the Commission since the exercise of Commission discretion excludes a right for an individual to require the Commission to take a position.[43] Moreover, non-contractual liability is only available when there has been a 'sufficiently serious breach of a rule of law intended to confer rights on individuals'[44] and again, the article foreseeing the possible suspension of the agreement concluded by the Union with Lebanon does not confer rights on the individuals. Further, even if it did, a breach is considered sufficiently serious only if the Union institution '*manifestly* and *gravely* disregards its discretion' [emphasis added].[45]

The cases were not presented sharply by the applicants; therefore, it is difficult to argue that the Court should have decided the cases differently. Nevertheless, a more comprehensive review would suggest that the Court ought to have recognised the impact that administrative activities implementing the Union external action have in raising the

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[41] Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 51.
[42] Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 55.
[43] An action for failure to act is only available when the failure to adopt a measure produces binding legal effects capable of affecting the interests of the applicants by bringing about a distinct change in their legal position. Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418, para. 38.
[44] Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418, para. 55.
[45] Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418, para. 55.

expectations of individuals. The Court in these cases underlined the Commission discretion in deciding when to trigger suspension of Union benefits in case of human rights violations by a third country; however, it does not suggest possible constraints that ought be imposed on the Commission as to how it ought to exercise its discretion, especially in light of the impact that the non-action could have on individuals' expectations.[46] The Commission's and EEAS' documents denouncing human rights violations and stressing the importance of their respect are not consequence-free. The Commission is essential for triggering the implementation of human right clauses. The Commission is the institution which monitors third states and which has the power under article 218(9) TFEU to suggest to the Council whether action needs to be taken.

In summary, challenging the impact of the administrative power externally faces numerous hurdles. Direct actions aimed at challenging a final act, due to the misuse of administrative power informing its content, may be precluded *ipso facto* on grounds of extraterritoriality of the final act. Moreover, even if the extraterritorial effect is recognised, such legal act will only be challengeable if individuals manage to prove direct and individual concern, and if the act violates concrete rights or if it was concluded in breach of recognised duties. In this regard, the case *Front Polisario* is a first exception. The Court, by denying that the administrative activities aimed at implementing the Union external action contain implied decisions, and raise expectations of individuals, precludes itself from the possibility of constraining the exercise of administrative power externally and of protecting affected parties. Recognising the impact that administrative activities have could open the way to the application of the duty to state reasons and duty of care. Such duties, as analysed in chapter IV, might prevent individuals from building expectations. Finally, the non-binding nature of the acts is an inevitable additional hurdle, despite the Court's approach to privilege substance over form.

2.2 Limiting access to remedies

The hurdles just described make enforcement through Court virtually ineffective. The Court's tendency to exclude most of the administrative activities implementing the Union's external action from judicial review prevents it from being able to evaluate and shape the process leading to the adoption of final acts as well as the impacts generated by

[46] E.g. Commission Communication of 23 May 1995, 'The inclusion of respect for democratic principles and human rights in agreements between the Community and third countries', COM(95) 216 final.

the process of governance. This is a concern for a number of reasons. In circumstances where review of final decisions would be difficult or even precluded due to the political sensitivity of the issue, it is especially important that the Court ought to be able to oversee the procedural aspects leading to the decision.[47] Annulling a Council decision suspending an agreement with a third state or annulling a decision not to act in case of human rights violations is virtually impossible.[48] Nevertheless, the respect of process principles in the procedures leading to the act of suspension (or non-suspension) is crucial for constraining the exercise of administrative power externally – especially in light of its impact on public power and on individuals.[49] The Court's role as catalyst in facilitating the realisation of process values in areas of normative uncertainty and complexity has been elaborated by Scott and Sturm in respect of internal forms of new governance.[50] According to the two authors, the role of the Court in these contexts 'is not to establish precise definitions or boundaries of acceptable conduct, which if violated, warrant sanction.'[51] Instead, the judicial function is to create occasions for normatively motivated inquiries and remediation in response to signals of problematic conditions or practises.[52] While the Court has arguably worked as a catalyst internally in promoting rule of law values in areas of normative uncertainty and complexity,[53] this is not fully the case externally. Despite the impact that the administrative power has externally, the Court has not yet fully 'proceduralised' the grounds of judicial review.[54]

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[47] Scott makes a similar point in respect of environmental guidance. J. Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law', 48 *Common Market Law Review* 2011, at 346.

[48] Mugraby and the Coalition of Turkish citizens show how difficult it can be to challenge a Commission and Council decision not to act in case of human rights violations in third countries. Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418; Case C-581/11 *P Mugraby* v. *Council and Commission*, EU:C:2012:466; Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97.

[49] Chapter III.

[50] J. Scott and S. Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance', 13 *Columbia Journal of European Law* 2007.

[51] J. Scott and S. Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance', 13 *Columbia Journal of European Law* 2007, at 571.

[52] J. Scott and S. Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance', 13 *Columbia Journal of European Law* 2007, at 571.

[53] According to the authors, the Court internally actively works as catalyst in introducing rule of law principles such as reasoned decision making, care and enhanced participation. Scott and Sturm refer (among others) to the following case law: Case T-135/96 *UEAPME*, EU:T:1998:128; Case T-13/99, *Pfizer Animal Health SA* v. *Council*, T:2002:209; Case C-269/90, *Hauptzollamt München-Mitte* v. *Technische Universität München*, EU:C:1991:438; Case C-320/03, *Commission* v. *Austria*, C:2005:684. J. Scott and S. Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance', 13 *Columbia Journal of European Law* 2007, 576-592; and J. Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law', 48 *Common Market Law Review* 2011, at 346.

[54] The only two exceptions are *Al-Jubai* and the *Front Polisario*. The Court in *Al-Jubail* proceduralised the duty to hear the other side for acts of general application in order to protect foreign companies directly

The concern regarding the unwillingness of the Court to adjudicate administrative activities leading to final acts extends also to the respect of legally mandated participatory procedures in decision-making processes. In other words, judicial review might be withheld from natural and legal persons who would want to challenge a Commission decision for failure to conduct consultation. For example, article 4(5) of the ENI regulation and article 5(6) of the IPA II regulation establish that Union support under these two regulations 'shall, in principle, be established in partnership with the beneficiaries.'[55] The partnership shall include, as appropriate, competent national and local authorities, as well as civil society organisations. Therefore, civil society organisations could be interested in challenging the Commission implementing decisions strategising and programming financial assistance in the event they had been drafted without their participation. However, it is not clear whether or not the Court will allow civil society organisations to challenge a Commission implementing decision programming financial assistance. First, the Court in *Bactria* makes it clear that a provision expressing conditions conferring procedural rights should not be interpreted broadly.[56] Therefore, even if both articles are expressed in mandatory terms, the expression 'in principle' might be used by the Court in limiting legally protected rights. Furthermore, the argument used by the Court in *UEAPME* to extend standing rules to meet the benchmarks required by the principle of democracy will doubtlessly be extended to the process of strategising and programming aid in third countries.[57] If this is the case, an NGO which would want to challenge a strategy paper or a programming document for failure to comply with legally mandated procedures still would have to prove direct and individual concern.[58] Participation opportunities (as seen in chapter IV section 5) are not always guaranteed by law, whether through legislation or general principle, but neither are they *ad hoc* or purely contingent. They arise by virtue of

affected by the anti-dumping regulation; in the *Front Polisario* it proceduralised the duty of care in light of the potential impact that the action of the Union could have on human rights of third countries' citizens. Case C-49/88, *Al-Jubail Fertilizer* v. *Council*, EU:C:1991:2, para. 15; Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953, para. 225.

[55] Article 4(5), Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014; article 5(6), 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), *OJ* [2014] L77/13, 15.03.2014.

[56] Case T-339/00 *Bactria Industriehygiene-Service Verwaltungs GmbH* v. *Commission*, ECLI:EU:T:2002:107, para. 51, upheld on appeal: Case C-258/02 *P, Bactria* v. *Commission*, EU:C:2003:675, para. 43

[57] Case T-135/96 *UEAPME*, EU:T:1998:128, paras 89-90.

[58] It is doubtful that the Commission implementing decisions strategising and programming financial assistance will be considered as regulatory acts not entailing implementing measures. Strategy papers and programming documents need further implementing acts for the disbursement of funds.

established procedures and practices, which are laid down and affirmed in documented form. In other words, over time participation has become consolidated as established entitlement to participate, and the parameters of participation are acknowledged as sound by all interested parties.[59] Therefore, in a system of external governance like that of the SAP and ENP, it would seem appropriate to acknowledge a party's entitlement to participate in a process even when it is not legally envisaged.

While the Court could potentially demand explanations, care and inclusivity from EU officials in implementing and developing the Union external relations, its own barriers to access, its limited understanding of the impact that external administrative activities have, and its short-sighted understanding of participatory rights may render many of the EU's most important remedies either meaningless, or available only to a portion of the privileged. The traditional dichotomy between means of enforcement internally and externally has influenced the approach of the Court in developing and re-evaluating its role as norm enforcer in the way the Union develops and implements its external action. In sum, the obstacles on the way to guaranteeing that the administrative machinery is procedurally and substantively accountable before the Court raise some concerns as to the respect of the rule of law in the way the Union develops and implements its external action. Based on this analysis, it is now crucial to look beyond judicial review into other forms of enforcement mechanisms. The next section will analyse the European Ombudsman and 'compliance building' as two examples of mechanisms which could step in when the SAP and ENP administrative machinery fails, and which could eventually work as catalyst in articulating benchmarks for review.

3. Creating enhanced opportunities for out-of-court enforcement mechanisms

Compliance with the administrative rule of law externally cannot be confined within the strict boundaries of coercive means of enforcement, i.e. judicial review. In the context of the analysis carried out by this thesis, the notion of compliance needs to be understood, not only as the final outcome, but as the 'whole of ongoing negotiations, political and legal processes, and institutional change'[60] that are involved in the execution of the

[59] A similar argument is made by Scott and Sturm in respect of the Water Framework Directive and its associated Common Implementation Strategy. J. Scott and S. Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' 13 *Columbia Journal of European Law* 2007, at 580.
[60] E. Chiti, 'The Governance of Compliance', in M. Cremona (eds.) *Compliance and Enforcement of EU Law* (Oxford: Oxford University Press, 2012), 32, at 32.

administrative rule of law externally. The next sub-sections present two mechanisms of enforcement that do not use coercion (in its strict sense) as a tool to achieve compliance: the European Ombudsman and 'compliance building'. The European Ombudsman is a form of quasi-judicial enforcement in that the office is a third party adjudicating the dispute. However, the Ombudsman does not impose compliance with its decisions through coercion (like sanctions); instead, its interaction with the Parliament and its role within the Union legal systems are crucial in securing compliance. 'Compliance building' exploits other mechanisms like the institutional structures of the agreement concluded by the Union with third countries, or the Commission and EEAS internal implementing arrangements, in order to gradually build compliance with the administrative rule of law externally.

3.1 Quasi-judicial enforcement: making a case for the European Ombudsman

While the external administrative power appears to be an uneasy space for the Courts, the European Ombudsman would *prima facie* not face the same complications. The institutional position, the means of action, and the mandate of the Ombudsman to act upon instances of maladministration – extending beyond the Court's understanding of legality – facilitate the possibility of reviewing the Union's external administrative activities.[61] Moreover, the Ombudsman's ability to decide upon inquiries without the need to determine whether the action of the EU institutions affected the legal position of the complainant or whether his or her rights have been respected, offers to the office a wider space of manoeuvre.[62] For example, the Ombudsman can accept individual complaints as to how progress reports are drafted, without needing to determine whether the administrative activity in question leads to final decisions that directly impact on the legal situation of third parties or it impinges on legally protected rights. More generally, the Ombudsman's tendency to recognise individuals as parties to administrative procedures, who ought to be recognised as such and should enjoy procedural safeguards, allows her

[61] Chapter IV, section 2.
[62] C. Harlow and R. Rawlings, *Process and Procedure in EU Administration*, (Oxford: Hart Publishing 2014), 80-84; A. Tsadiras, 'Unravelling Ariadne's Thread: the European Ombudsman's Investigative Powers', 45 *Common Market Law Review* 2008, 757-770.

to more accurately assess the impact that the activities have on natural and legal persons.[63]

❖ The European Ombudsman's challenge

The European Ombudsman is not intended to be a substitute for the Court; however, it ought to act in areas in which the Court cannot act, or in ones in which the Court has not yet decided to act. Clearly, in the mode of foreign governance established by the SAP and the ENP there will be instances in which the Court cannot interfere, or does not yet want to interfere. In these cases, the Ombudsman can prove a viable tool in enforcing the administrative rule of law. Moreover, in doing so the Ombudsman ought to function as a catalyst to identify rules and principles that should to be applicable in the way the Commission and the EEAS implement the Union's external action. The Ombudsman's recent decision on the Commission's failure to carry out a human rights impact assessment during the negotiations for a free trade agreement between the EU and Vietnam exemplifies how the office could work as catalyst.[64] The Ombudsman, by taking into account the values enshrined in the Treaties, the Council action plan on the promotion of human rights in the world, the Commission's crystallised practice and the advocacy of human rights activities, established that not carrying out a human rights impact assessment before concluding an agreement with a third state amounts to maladministration. The Ombudsman's ability to embrace a more holistic approach to legality of administrative action externally may help the Court to articulate benchmarks for review. It this respect, it can be argued that the Court's decision in the *Front Polisario* might have been influenced by the European Ombudsman. On 26 March 2015, the Ombudsman adopted a provisional decision (confirmed on 26 February 2016) stating that a Commission failure to adopt human rights impact assessments before concluding an agreement with a third state amounts to maladministration (breach of legality and the duty of care).[65] Eight months later, on 10 December 2015, the Court annulled the Council

[63] C. Harlow and R. Rawlings, 'Accountability and law enforcement: the centralized EU infringement procedure', 31 *European Law Review* 2006, 466-473.
[64] For further details on the case see chapter IV, section 2.2; Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care.
[65] Provisional decision reached on 26 March 2015 and was confirmed on the 26 February 2016. Decision of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care.

Decision concluding an agreement in the form of exchange of latter with Morocco for failure on the side of the Council to respect the duty of care, *inter alia* for not having conducted a human rights impact assessment before concluding the agreement.

The Ombudsman may be better suited than the Court to act as a catalyst in enforcing a principled approach in the way administrative action is exercised externally. The Ombudsman, by looking beyond the Court's understanding of legality, aims towards more accountable and responsive administrative procedures in a broader sense. In other words, the Ombudsman makes sure that administrative action occurs within the framework established, not only by the legislator, but also by other sources such as international law, Commission and EEAS internal guidelines, and crystallised practice. This is particularly important for the enforcement of the rule of law externally, which lacks a clear set of legally binding rules and procedures.[66] It is in this context that the Ombudsman could strengthen its review by being more open to communicating ideas and experiences aimed at the promotion of administrative rule of law principles externally, without being the source of their creation, and without being particularly prescriptive in relation to any particular form. In other words, the Ombudsman could act as a legitimate public intermediary between different sources. For example, studies conducted by civil society organisations from the SAP and ENP countries could be considered. More and more NGOs from the neighbourhood states are providing a nongovernmental perspective on the level of progress achieved by their states in the EU accession process, or in their level of implementation of the ENP policy. Some carry out fact-checking analysis, while others, by denouncing instances of wrong-doing, provide suggestions as to how the Commission and the EEAS should conduct their analysis.[67] These reports are used by the EEAS in Brussels to review the information gathered by the Union delegations in third

[66] Chapter IV, section 2.

[67] For example, an NGO from Israel every year provides shadow progress reports on the level of implementation of the ENP in Israel. Likewise, a coalition coalition of civil society organizations called the 'Initiative for Monitoring Bosnia and Herzegovina's European Integration' recently produced its first shadow progress report on the progress of BiH in its path to Union accession. Reports respectively available at: http://www.ngo-monitor.org/article/analysis_of_the_eu_s_report_implementation_of_the_european_neighborhood_policy_in_israel_progress_in_and_recommendations_for_actions (Consulted on 07.08.2016); and at: http://cps.ba/wp-content/uploads/2013/12/SHADOW-REPORT_final.pdf (Consulted on 07.08.2016).

countries;[68] and have pushed the Commission to adopt guidelines for EU support to civil society.[69]

Furthermore, the Ombudsman, by standing halfway between 'adjudicator' and 'government inspector', has a significant capacity to affect change in administrative procedures.[70] After adjudicating a case, the Ombudsman makes recommendations for reform and re-address; it does not simply aim at establishing who the winner is and who the loser is.[71] For example, in the *Mugraby* case the Court sought to determine whether Mr. Mugraby had a claim against the Council and the Commission rather than whether the behavior of the Commission respected a principled approach. For the time being, even assuming that the Court would have reviewed the action of the Commission against e.g. the duty of care; the revision, as discussed in chapter IV section 4, would have been focused on a factual analysis. If on the one hand a factual analysis is certainly relevant when reviewing the Commission's discretion, on the other, it should critically inquire as to how information has been collected. The Commission and the EEAS ought to ensure that they rely on a plurality of sources, representing different groups of individuals. This should particularly be the case since some of the evaluations are not based on a pure mathematical calculation, but rather on a comprehensive assessment of the situation on the ground (e.g. democracy, minority rights protection, level of implementation of market economy, etc.). The Ombudsman, in fulfilling its 'government inspector' function, does not have to interfere with the Commission's discretion on how to ensure pluralism in

[68] Interview with an EEAS civil servant working on the ENP, 18.11.2013, Brussels.

[69] A more principled approach to the SAP was advocated by the Balkan Civil Society Development Network in respect of how the Commission supported the development of civil society in the Balkans. The network developed a report titled 'The Successes and Failures of the EU Pre-accession Policy in the Balkans: Support to Civil Society' and wrote a letter to the Commission titled 'The Chance for a Real Partnership: Civil Society Facility as a Motor for Support to Grounded Democratic Reforms in the Western Balkans' urging the latter to better include local civil society organisations in the programming and implementation of the IPA Civil Society Facility. The action of the network was effective enough to push the Commission to adopt guidelines for EU support to civil society in enlargement countries for the years 2014-2020. European Commission, Directorate General for Enlargement, guidelines for EU support to civil society in enlargement countries for the years 2014-2020, available at: http://ec.europa.eu/enlargement/pdf/civil_society/doc_guidelines_cs_support.pdf (Consulted on 07.08.2016).

[70] C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing 2014), at 80.

[71] M. Dawson, *New Governance and the Transformation of European Law coordinating EU Social Law and Policy* (Cambridge: Cambridge University Press 2001), at 294.

information gathering, but it could help the Commission and the EEAS to address possible biases that undermine values that the EU legal order protects.[72]

Finally, the Ombudsman's role as catalyst in enforcing a principled approach in the way the administrative action is exercised externally can be supported by its own-initiative inquiry. Article 228(1) TFEU read in conjunction with article 3(1) of the Ombudsman Statute and article 9 of the Implementing Provisions, grant power to the European Ombudsman to conduct on her own volition enquiries to clarify any suspected maladministration in the activities of Union institutions, agencies and bodies.[73] Article 9 of the Implementing Provisions leaves the Ombudsman rather free in deciding to what extent she wishes to make use of the own-initiative inquiry tool.[74] The current Ombudsman made important policy statements with this tool. For example, she opened an inquiry with the aim of increasing the transparency and accessibility of the TTIP negotiations. The closure of the inquiry resulted in a set of recommendations as to how the Commission could improve the openness and transparency of the negotiation process. The recommendations are aimed at ensuring that the public can follow the progress of these negotiations as far as possible, and can contribute to shaping their outcome.[75] The Ombudsman, while conducting her own initiatives, has often consulted the public in order to gather ideas and understand the concerns of affected parties.[76] Therefore, the own-initiative inquiry is also a promising tool for individuals affected by the Union's administrative external action.

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[72] Decision on 9 July 2013 of the European Ombudsman closing its inquiry into complaint 1151/2008/(DK)ANA against the European Commission, energy, breach of Articles 8 and 9 ECGAB.

[73] European Ombudsman Statue, adopted by the Parliament on 9 March 1994, *OJ* L 113/15, 04.05.1994, and amended by its decisions of 14 March 2002, *OJ* L 92/13, 09.04.2002 and 18 June 2008 *OJ* L 189/25, 17.07.2008. Decision of the European Ombudsman adopting implementing provisions, adopted by Parliament on 9 March 1994 *OJ* L 113/15, 04.05.1994 and amended by its decisions of 14 March 2002 *OJ* L 92/13, 09.04.2002 and 18 June 2008 *OJ* L 189/25, 17.07.2008.

[74] Article 9: 'The Ombudsman may decide to undertake inquiries on his own initiative. The Ombudsman's powers of investigation when conducting own initiative inquiries are the same as in inquiries instituted following a complaint. The procedures followed in inquiries instituted following a complaint also apply, by analogy, to own initiative inquiries.'

[75] Decision on 6 January 2015 of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission, external relations, breach of other rights and duties resulting from the Charter of Fundamental Rights and not covered by this list.

[76] See as an example the open consultation launched by the European Ombudsman in relation to the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations, available at: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/56100/html.bookmark> (Consulted on 07.08.2016).

❖ Addressing criticism: the own-initiative inquiry and the European Parliament's role

For all the above reasons, the Ombudsman seems to be particularly well placed to review the administrative action externally when the Court cannot act or is not yet willing to act. Moreover, in doing so it has the potential to act as a catalyst in articulating benchmarks for review. In this respect, it might be argued that there are two limits to this reasoning. The first concerns the inadmissibility of complaints launched by natural persons who are neither EU nationals nor EU residents, and of those launched by legal persons with registered offices outside the Union territory.[77] The second potential limit concerns the non-legally binding nature of the Ombudsman's decisions. [78] However, both limits can be rebutted. If it is true that complaints launched by natural persons who are neither EU nationals nor EU residents, or by legal persons with registered offices outside the Union territory are rejected as inadmissible, it is also correct that the Ombudsman can initiate its own inquiry if the issues raised are important. Furthermore, international NGOs, associations, foundations, charities and initiative groups which have their registered offices in the EU can collect third countries' individual complaints and present a case before the Ombudsman on their behalf.[79] Recently the Ombudsman started an own-initiative inquiry following a complaint submitted by the Serbian Association People's Parliament, represented by Mr. Borivoje Djordjevic, in respect of the Commission's failure to disclose its comments on a draft of the Serbian Free Legal Aid Act, as contrary to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.[80] This case not only shows the willingness of the current Ombudsman to address alleged instances of maladministration in the way the Commission develops and implements its external action, but also the reliance by third countries' citizens on the Ombudsman office. Third countries' citizens are no longer

[77] Article 2(2) of the Ombudsman's Statute, adopted by the Parliament on 9 March 1994, *OJ* L 113/15, 04.05.1994, and amended by its decisions of 14 March 2002, *OJ* L 92/13, 09.04.2002 and 18 June 2008 *OJ* L 189/25, 17.07.2008. See also A. Tsadiras, 'Navigating through the Clashing Rocks: The Admissibility Conditions and the Grounds for Inquiry into Complaints by the European Ombudsman' 26 *Year Book of European Law* 2007.

[78] P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), 753-754.

[79] 'The European Ombudsman has thus far agreed to take up complaints filed by companies, associations, federations, foundations, unions, funds, charities, NGOs, interest and initiative groups, city councils, municipalities, regional ombudsmen, and national courts.' P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), at 743.

[80] Decision on 2 September 2016 of the European Ombudsman on complaint OI/7/2015/ANA against the European Commission, external relations, breach of Article 23 ECGAB; see also complaints 1150/97/OI/JMA; OI/4/99/OV; OI/2/2003/GG; OI/ 4/2003/ADB; OI/2/2004/GG; OI/3/2005/OV; OI/7/2006/JF.

content to be passive subjects. They have begun to understand that they have a role to play in the external administrative processes, and that public administration involves striking a balance among conflicting interests and competing principles. In light of the increasing relevance acquired by the administrative activities externally, the Member States might want to consider the option of modifying article 228(1) TFEU to allow non-EU citizens and legal persons with registered office outside the Union's territory to lodge their complaints to the office.

While the remedies of the Ombudsman are 'softer', they are certainly not ineffective.[81] The office's ability to report instances of maladministration to the European Parliament may place considerable pressure on targeted institutions and bodies.[82] Unlike a court, the European Ombudsman can monitor the implementation of recommendations, and can report to the European Parliament cases of compliance resistance. In other words, Ombudsman decisions ought not to be the end of the story; the European Parliament ought to adopt resolutions urging the Commission and the EEAS to follow the Ombudsman's recommendations, especially in cases of compliance resistance. The EU Parliament already tries to influence the Commission and EEAS' power in developing and implementing the Union's wider neighbourhood policies by adopting resolutions. Some are of these are policy-embracing, some are country-specific, while others are topic-related e.g. on the human rights monitoring procedures externally or on the interaction with civil society.[83] For the future, the challenge will be to have the Ombudsman's decisions inform the European Parliament's resolutions.

Despite resolutions, the European Parliament has also other occasions in which it could promote the respect of a more principled approach in the way the Commission and

[81] Two in-depth surveys of compliance conducted in 2012 showed a compliance rate of around 82%. The European Ombudsman, *Annual Report 2012* (Luxembourg: Office for Official Publications of the EU 2012), at 7.

[82] The Annual Reports of the Ombudsman following-up investigations introduced a practice of highlighting 'star cases' where the institutional response has been particularly satisfactory. C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing 2014), at 80.

[83] Some examples of EU Parliament resolutions are: European Parliament Resolution on the European Neighbourhood Policy, (P6_TA (2006) 0028); European Parliament resolution of 15 November 2007 on Strengthening the European Neighbourhood Policy (2007/2088(INI)); European Parliament Report on the Review of the European Neighbourhood and Partnership Instrument (2008/2236(INI)); European Parliament resolution of 22 November 2012 on Enlargement: policies, criteria and the EU's strategic interests (2012/2025(INI)); European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter (2012/2145(INI)); European Parliament resolution of 4 February 2016 on the 2015 report on Serbia (2015/2892(RSP)); European Parliament resolution of 10 March 2016 on the 2015 report on Montenegro (2015/2894(RSP)).

the EEAS develop and implement the SAP and the ENP. A few examples will be hereby presented. Progress reports are presented every year as a package (Enlargement or ENP package) by the Commissioner responsible for the European neighbourhood policy and enlargement negotiations to the Foreign Affairs parliamentary committee (AFET). Normally, at the centre of the discussion are the state of play of the policies and the content of the progress reports.[84] Moreover, the European Parliament also exercises some form of supervision in respect of the Commission's powers in strategizing and programming financial assistance. Both the IPA II and ENI regulations contain a declaration by the Commission to conduct a strategic dialogue with the European Parliament during the programming of financial assistance.[85] According to the declaration, the Commission is to present to the European Parliament the relevant available document programming financial assistance. In this respect, the Commission is asked to take into account the position expressed by the Parliament on the matter.[86] Furthermore, neither the IPA II regulation nor the ENI regulation contain a specific article allowing for the suspension of financial assistance in case one of the beneficiary countries fails to observe the basic principles set forth in the regulations, notably the principles of democracy, rule of law and the respect for human rights. The reason behind this choice is the firm conviction on the side of the Parliament that the Commission's and Council's decision to suspend or not to suspend financial aid needs to be taken under its supervision; the Parliament has to be entitled to fully exercise its prerogatives if a

[84] See as an example the ENP the agenda of the AFET Parliamentary Committee of 31 March and 1 April 2014, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+COMPARL+AFET-OJ-20140331-1+01+DOC+XML+V0//EN> (Consulted on 07.08.2016); and for the SAP the agenda of the AFET Parliamentary Committee of 9 and 10 November 2015 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+COMPARL+AFET-OJ-20151109-1+05+DOC+XML+V0//EN> (Consulted on 07.08.2016).

[85] Declaration by the European Commission on the strategic dialogue with the European Parliament, 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), *OJ* [2014] L77/13, 15.03.2014; Declaration by the European Commission on the strategic dialogue with the European Parliament, Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[86] 'The strategic dialogue is to be carried out also in preparing the mid-term review and before any substantial revision of the programming documents during the period of validity of the regulations. The Commission can be invited by the European Parliament to explain where the Parliament's observations have been taken into consideration in the programming documents and any other follow-up given to the strategic dialogue.' Declaration by the European Commission on the strategic dialogue with the European Parliament, 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), *OJ* [2014] L77/13, 15.03.2014.

suspension decision is to be taken.[87] The article was present in the regulations preceding IPA II and ENI and did not foresee the participation of the Parliament in the suspension decision.[88] Therefore, both IPA II and ENI regulations, instead of having an article on the suspension of financial assistance, which would have excluded the Parliament supervision, contain a statement by the European Parliament on the importance of being consulted in case suspension of assistance granted under the financial instruments is envisaged.[89] Finally, assistance under the IPA II and ENI regulation is to be provided in accordance with the relevant European Parliament's resolutions.[90]

Over time the European Ombudsman has the potential to promote the development of reviewable norms, especially, if clear, recurring patterns and a normative consensus emerge. In other words, the Ombudsman ought to engage in the operationalisation of administrative law principles that are crucial for upholding the rule of law in the Union's new forms of foreign governance. Its dynamic interaction among the various stakeholders has the potential to reconnect the paths and enforce the efforts made by the various actors

[87] 'The European Parliament considers that any suspension of assistance under these instruments would modify the overall financial scheme agreed under the ordinary legislative procedure. As a co-legislator and cobranch of the budgetary authority, the European Parliament is therefore entitled to fully exercise its prerogatives in that regard, if such a decision is to be taken.' Statement by the European Parliament on the suspension of assistance granted under the financial instruments, 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), *OJ* [2014] L77/13, 15.03.2014. The wording of the provision in the ENI Regulation is identical.

[88] E.g. Article 21 of the IPA Regulation (predecessor of the IPA II Regulation: '1. Respect for the principles of democracy, the rule of law and for human rights and minority rights and fundamental freedoms is an essential element for the application of this Regulation and the granting of assistance under it. […] 2. Where a beneficiary country fails to respect these principles or the commitments contained in the relevant Partnership with the EU, or where progress toward fulfilment of the accession criteria is insufficient, the Council, acting by qualified majority on a proposal from the Commission, may take appropriate steps with regard to any assistance granted under this Regulation. The European Parliament shall be fully and immediately informed of any decisions taken in this context.' Council Regulation (EC) No. 1085/2006 of 17 July 2006 establishing an Instrument of Pre-accession Assistance (IPA), *OJ* [2006] L 210/82, 31.07.2006.

[89] Statement by the European Parliament on the suspension of assistance granted under the financial instruments, 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), *OJ* [2014] L77/13, 15.03.2014; Statement by the European Parliament on the suspension of assistance granted under the financial instruments. Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

[90] '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. The Commission shall ensure coherence between the assistance and the enlargement policy framework.' Article 4(1), 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), *OJ* [2014] L77/13, 15.03.2014; see also article 3(1), ENI Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (ENI), *OJ* [2014] L77/30, 15.03.2014.

in promoting rule of law values such as participation, reasoned decision-making and care. Suggesting a stronger synergy between the European Ombudsman and the Parliament in the field of external administrative action is in line with the Parliament's willingness and commitment to the respect on the rule of law when the Union acts externally.[91]

3.2 Enforcement through compliance building: opening the door for new solutions

Building compliance with the administrative rule of law externally through non-coercive means of enforcement is particularly relevant for the administrative principles which structure the relation between the Union administration and third states. The neighbouring states, as explained in chapter IV section 5.2.3, find themselves in a subordinate position in respect of the Union. Some of them are dependent on the Union for macro financial assistance (e.g. Ukraine and Tunisia); others, find themselves abandoned in the middle of the internal market, with few options other than trading with the Union (e.g. Bosnia and Herzegovina, Montenegro, Macedonia, etc.); while others, having decided to turn their back to Russia, are left with the choice of cherishing their relations with the EU (e.g. Moldova). Therefore, it is highly unlikely that a third state will bring an action to Court challenging the legality of a Council decision in light of the Commission's failure to hear them before the final decision was taken. Moreover, it cannot be assumed that EU Treaties confer standing rights to third states.[92] The relation between the Union and third states is usually understood as one between two separate entities that interact in the world of diplomacy, and international relations. Therefore, neighbouring countries are likely to seek diplomatic solutions to disputes with the Union rather than challenging a Union's act in Court, an act which would risk undermining its relation with the EU. Nevertheless, such reluctance should not excuse the Union from identifying mechanisms aimed at enforcing the duty to hear third states.[93] From a rule of law perspective, it is fundamental that at least protected rights like the right to be heard is capable of overcoming the formal conception of the relation between the Union and the neighbouring states. As mentioned at beginning of the chapter, a system based on the rule of law ought to guarantee mechanisms of enforcement for the principles it protects.

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[91] Chapter I, section 4.3.
[92] The *locus standi* for third states before Union Courts is expressed in the agreements conclude by the Union with third states; e.g. article 20, Agreement between the European Community and the Swiss Confederation on Air Transport, *OJ* [2002] L 114/3, 30.04.2002.
[93] Chapter IV, section 5.2.

The enforcement of principles governing the relationships between EU subjects exploits the compliance mechanisms worked out over sixty years of legal integration. The same cannot be said of the enforcement of principles governing relationships between EU and non-EU subjects.[94] For the time being, the relationship between EU and non-EU countries uses the enforcement strategies envisaged by international agreements concluded by the Union with third states; however, such regulatory frameworks only consider the type of relationship established by the agreements themselves.[95] As shown by this thesis, the relationship between the Union and its neighbours is far more encompassing: it is in fact a new form of foreign governance. Therefore, the enforcement mechanisms regulating the relations between the Union and third states ought to reflect this more complex reality. The relevant EU political institutions have taken a rather defensive approach and proved disinclined to develop mechanisms aimed at enforcing the Commission's and EEAS's duty to hear the third state when developing and implementing the SAP and the ENP.[96] A possible justification for such a lack might be linked to the desire to protect the Commission's and EEAS's manoeuvring space in exercising their external relations tasks.[97]

The context in which the duty to hear the other side operates requires rethinking the means of enforcement. The method of enforcement ought to reflect the context in which the relation between the administrative power and the addresses of the power develop. In this respect, building compliance through non-coercive mechanisms which use as a starting point self-imposed rules might help to accommodating the needs and allay the fears of both parties. The Commission and the EEAS would feel less threatened, and third states might feel more comfortable in claiming that the administration did not respect its own rule of behavior rather than a superior form law, which might have detrimental effects for the overarching relation between the Union and the third state.

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[94] E. Chiti, 'Enforcement of and Compliance with Structural Principles', in M. Cremona (eds.) *Structural Principles in EU External Relations Law* (London: Hart Publishing forthcoming).

[95] See articles 129, 130, and 133 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, *OJ* [2010] L 108/3, 29.04.2010.

[96] Chapter IV, section 5.2.3.

[97] Case T-292/09 *Mugraby* v. *Council and Commission*, EU:T:2011:418, para. 60; Case T-2/04 *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, EU:T:2006:97, para. 50.

Building compliance requires a relational understanding by each actor of their own role and position so as to avoid self-interested behaviours.[98]

As already discussed throughout the thesis, the administrative activities implementing the SAP and the ENP (i.e. progress reports, action plans, impact assessments, etc.) are adopted in accordance with administrative self-imposed guidelines.[99] Türk, Hoffman and Rowe define these internal norms as forms of 'internal administrative rule-making'; while Mashaw defines them as norms composing the 'internal administrative law'.[100] Despite the difference in terminology, these measures are an important tool for the administration to guide its own administrative procedures. Self-imposed guidelines regulate whether interested parties can participate in the drafting of an act; or they might determine the procedures aimed at guaranteeing the respect of internal policy principles e.g. the principle of joint ownership.[101] Proceduralising the processes regulating the relations between the Commission and the third states through self-imposed rules could be a first best option in building compliance with the duty, on the side of the administration, to hear the third state. If this might be the best viable option, self-imposed rules ought to start recognising the actual role played by third countries in the process. So far, the implementing arrangements elaborated by the Commission and EEAS's self-imposed guidelines governing the relationships between EU and third states recognise the third country as a source of information rather than as an entity whose subjective right ought to be protected.[102] In other words, the current self-imposed guidelines need to be further developed to be in compliance with the duty to hear the other side. In this respect, the internal domain could represent a starting point.

The administrative phase of the infringement procedure constitutes an interesting example. There are many similarities between the role of the Commission in the first phase of the infringement procedures and the monitoring role that the Commission and the EEAS have in the SAP and ENP. First, the administrative phase of the infringement procedure is characterized by a definite mix of political and administrative

[98] E. Chiti, 'Enforcement of and Compliance with Structural Principles', in M. Cremona (eds.) *Structural Principles in EU External Relations Law* (London: Hart Publishing forthcoming).
[99] Chapter II, section 4 and Chapter IV, sections 2.2, 3.2, 4.2, 5.1.2, 5.2.2.
[100] H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2012), Chapter 16; J.L. Mashaw, *Bureaucratic Justice* (New Haven and London: Yale University Press 1983).
[101] Chapter IV, section 2.2.
[102] Chapter IV, section 5.2.

considerations.[103] Second, the Commission enjoys a wide margin of discretion.[104] Third, the administrative phase of the proceedings represents an essential guarantee for the protection of Member States' interests that may not be ignored.[105] Likewise, a proceduralisation of the processes regulating the relation between the Commission and the third states could work as an essential guarantee for the protection of third states' interests. The administrative phase of the infringement procedure is normally preceded by informal contacts with the Member State concerned. The informal contacts are aimed at delimiting the subject matter of the dispute and at giving the Member State the information it needs to prepare its defence.[106] During the informal phase the Member State is granted an opportunity to respond, 'which is an essential guarantee required by the Treaty'.[107] However, if a settlement remains elusive, the administrative proceedings will culminate in a reasoned opinion. The purpose of the reasoned opinion is twofold: it provides the Member state with the opportunity either to comply with its obligations under Union law, or to put forward an effective defence to the complaints made by the Commission.[108] The reasoned opinion may not raise objections on which the Member State has not been invited to comment.[109] Structuring the processes regulating the relations between the Commission and the neighbouring states in a similar way would allow the third state to intervene in the process at specific moments, and provide time limits and rules as to the adoption of the administrative acts, particularly if they lead to the suspension of benefits or to the adoption of sanctions. The proceduralisation of the obligation on the side of the Commission to hear third states in processes liable to

[103] The infringement procedure has been described by Harlow and Rawlings has 'a front-loaded procedure, which starts with a negotiatory, diplomatic phase; continues through a formal, bureaucratic phase, culminating only if unsuccessful in a Court ruling.' C. Harlow and R. Rawlings, 'Accountability and law enforcement: the centralized EU infringement procedure', 31 *European Law Review* 2006, at 455.
[104] 'An action against a Member State for failure to fulfil its obligations, the bringing of which is a matter for the Commission in its entire discretion, is objective in nature'. Case 416/85 *Commission* v. *United Kingdom*, EU:C:1988:321, para. 9. In this respect see also L. Prete and B. Smulders, 'The Coming of Age of Infringement Proceedings', 47 *Common Market Law Review* 2010, at 14.
[105] '[T]he proper conduct of that procedure [the administrative phase of the infringement procedure] constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member States concerned, but also so as to endure that any contentious procedure will have a clearly defined dispute as its subject matter.' Case C-1/00 *Commission* v. *France*, EU:C:2001:687, para. 53.
[106] Case 51/83 *Commission* v. *Italy*, EU:C:1984:261.
[107] Case 274/83, *Commission* v. *Italy* EU:C:1985:148, para. 20.
[108] A. Dashwood and R.C.A. White, 'Enforcement Actions under Articles 169 and 170 EEC', 14 *European Law Review* 1989, 398-399.
[109] Case 74/82 *Commission* v. *Ireland*, EU:C:1984:34, at 339-340.

culminate in negative measures ought to include some considerations as to the ability of third states to access documents and files.[110]

Building compliance with the administrative rule of law by making use of self-imposed guidelines requires identifying ways that stimulate the Commission and the EEAS to respect them. In fact, proceduralisation does not exclude the possibility of actors acting according to their own preferences. One administrative principle which could support compliance building is transparency. Disclosing internal guidelines and making them available to third states and the wider public could put substantial pressure on the administration to follow them throughout the process. The European Parliament could more transparently monitor the Commission's behavior. Furthermore, third states could complain of lack of compliance with the procedures within the Councils established by the agreements (e.g. the Stabilisation and Association Council, the Association Council, etc.). Finally, proceduralisation has also the effect of protecting the Commission from possible criticism. If the Commission can prove that it followed the proper steps, third states have no grounds to complain about the Commission's behavior. Identifying responsibilities and duties not only has the effect of constraining the Commission's and the EEAS's discretion; it also has the potential to protect these same two institutions from criticism. Ultimately, proceduralisation may work as a machine for a gradual development of obedience.[111] It can work as enforcement mechanism in guaranteeing the respect of a principled approach in the way the Union develops and implements its action towards third states. Moreover, it can stimulate the third state to respect, in turn, a principled approach in its relations with the Union; for example, when providing to the Union information concerning the level of implementation of the reform process. Internal implementing arrangements are only a starting point; more defined procedures which indicate with clarity the roles of all the actors involved ought to be welcomed.

[110] Article 41 of the Charter of Fundamental Rights is applicable to individuals and not to third states; however, it makes the link between the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; [and] the right of every person to have access to his or her file.

[111] This point is developed by E. Chiti, 'The Governance of Compliance', in M. Cremona (eds.) *Compliance and Enforcement of EU Law* (Oxford: Oxford University Press, 2012), 31, 36-42.

Conclusion

As already stressed in different parts of the thesis, administrative activities developing and implementing the SAP and the ENP may be treated as authoritative by third states and individuals. They may influence their attitude and their behaviour, generating legal effects. Therefore, in a system based on the rule of law, the impact that administrative activities exercise on the public power and on individuals ought to be reviewed. The obligation to respect the rule of law when the Union develops and implements its action externally demands that mechanisms of enforcement ought to be put in place. Enforcement mechanisms are not neutral and ought to be considered within the context in which they are required to function.

The Court ought to enforce a principled approach to external administrative activities, particularly, if they lead to final decisions that directly impact the legal situation of third parties, or if they impinge on legally protected rights. However, the capacity of the judiciary to enforce the respect of the administrative rule of law externally seems to be constrained by a number of factors. Despite the politically sensitive nature of the topic, significant obstacles stand on the way of effective judicial review. The rule of law as understood by the Court and as applied to the external domain is not satisfactory in protecting the subjects affected by Union action. The Court ought to be more open to the idea that underlying constitutional values like the rule of law may require different things in different setting. The only relevant attempt thus far was made by the General Court in the *Front Polisario* case, in which it hardened the obligation of the side of the Union to carry out a human rights impact assessment before concluding an agreement with a third state. Nevertheless, the *Front Polisario* case is currently under appeal. If on the one hand it will be difficult for the Court to argue against the obligation on the side of the Union to examine with due care the potential impacts of its action on human rights in third countries, on the other the Court might challenge the General Court's understanding of direct and individual concern.

For the time being, the European Ombudsman can work as an effective alternative in upholding the administrative rule of law in all the situations in which the Court cannot act, is not willing to act, or is not called upon to act. The Ombudsman's cooperative and change-driven solutions – rather than adversarial remedies – have the potential to work with, rather than against, the experience of external governance in articulating benchmarks for review, and in contemplating the adequacy of specific procedures. The

Ombudsman's intimate relation with the EU Parliament has the effect of hardening the impact of the office's decisions in case of resistance, and can further the development of benchmarks for review thanks to the adoption of resolutions urging the Commission and the EEAS to follow the Ombudsman recommendations. Next to the Ombudsman, compliance building mechanisms seem to be well suited to support the enforcement of administrative principles aimed at regulating the relation between the administration and the third states. Revised self-imposed guidelines that clarify the procedures the administration is to follow when adopting progress reports, action plans, impact assessment, etc., may stimulate the internalisation of compliance through informal pressure by the European Parliament and the third state, without the need for coercion. This conclusion suggests that coercion, quasi-judicial enforcement strategies and compliance-building mechanisms are not necessarily alternative systems, as is often argued in the literature on compliance in the context of international and supranational legal regimes.[112] On the contrary, in the context of the Union external administrative action, the three can work in synergy with the aim of developing and enforcing a principled approach which recognises the complexity and the impact that the administrative activities have on public power and on individuals both internally within the Union, and externally in third states.[113]

[112] K. Raustiala and D.G. Victor stated that '[t]he two school of thought [coercive strategy and problem solving approach] reflect different visions of how the international system works, the possibilities for governance with international law, and the policy tools that are available and should be used to handle implementation problems.' K. Raustiala and D.G. Victor, 'Conclusions', in D.G. Victor, K. Raustiala and E.B. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Evidence* (Cambridge: MIT Press 1998), at 681. In this respect see also K. Raustiala and A. Slaughter, 'International Law and Compliance', in W. Carlsneas, T. Risse, and B. Simmons (eds.), *Handbook of International Relations* (London: Sage 2002), at 543.

[113] J. Tallberg and E. Chiti have also challenged the conception of enforcement and management as competing strategies for achieving compliance. J. Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', 56 *International Organisations* 2002; E. Chiti, 'Enforcement of and Compliance with Structural Principles', in M. Cremona (eds.) *Structural Principles in EU External Relations Law* (London: Hart Publishing forthcoming).

Epilogue: Structuring upcoming and future encounters

…giving effect to the administrative rule of law externally

The thesis has charted both the development and the exercise of administrative power in EU external relations, using as case studies the Stabilisation and Association Process and the European Neighbourhood Policy. The use of administrative power externally is part of a significant transformation in the dominant approach which has so far structured the Union relations with third countries and their citizens. This transformative process has slowly developed a new legal reality and, consequently, also a new set of normative concerns over the future of this approach. Cases are currently litigated in front of the Court of Justice of the European Union and of the European Ombudsman which question the use of administrative power externally.[1] If for a moment, we go back to the three-step waltz beating the tempo for the development of administrative law, we realise the importance that these cases potentially have in making the third step: fitting the new reality within the existing understandings of the administrative rule of law.[2] Completing the third step of waltz is essential in a system based on the rule of law and committed to its respect in its actions towards the outer world. To view the obligation – spelled out by the Treaty of Lisbon – to respect the rule of law when acting externally merely as the continuation of previous practices without much normative content is to disregard the potential normative repercussions it introduces. The same Court, in two recent judgements, used article 3(5) TEU and the provisions of article 21 TEU to stress the obligation on the side of the Union to respect the rule of law when acting externally.[3] The debate as to what this obligation concretely implies ought to be started also by EU and administrative law scholars.

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[1] Case T-512/12 *Front Polisario* v. *Council of the European Union,* EU:T:2015:953 (currently under appeal); Case C-660/13 *Council* v. *Commission*, EU:C:2016:616 (decided on the 28 July 2016); Decision on 26 February 2016 of the European Ombudsman on complaint 1409/2014/JN against the European Commission, external relations, breach of Article 4 ECGAB, Duty of care; Decision on 2 September 2016 of the European Ombudsman on complaint OI/7/2015/ANA against the European Commission, external relations, breach of Article 23 ECGAB.

[2] 'First, something happens in the world. Second, public policymakers identify that happening as a problem, or an opportunity, and initiate new forms of governmental action to take advantage of or to remedy the new situation. Third, these new forms of action generate anxieties about the direction and control of public power. Means are thus sought to make the new initiative fit within existing understandings of what it means to be accountable to law.' J.L. Mashaw, 'Recovering American Administrative Law: Federalist Foundations, 1787-1801', 115 *Yale Journal* 2006, at 1337.

[3] Case C-263/14 *European Parliament* v. *Council of the European Union*, EU:C:2016:435, para. 47; Case C-455/14 *H* v. *Council, Commission and EUPM*, EU:C:2016:569, para. 40.

This thesis proposes a path for a new line of inquiries, and makes the case for a new legal approach to be followed. The analytical framework suggested is about identifying which administrative law principles giving effect to the administrative rule of law internally have the potential of giving effect, in comparable situations, to the rule of law externally. The comparison is based on the features, functions, addresses and impact of the administrative power. In other words, the methodology demands starting from commonalities of fact-patterns between the internal and external domain, to subsequently move into the features and specificities of the external policies. The application of the administrative law principles externally ought to take a comprehensive approach which considers all the attempts so far made to drive the exercise of administrative power in external action. Such a comprehensive approach is essential to providing a full picture of the context in which administrative law principles have to be operationalised.

This epilogue aims at applying *in concreto* the legal framework, so far developed by this thesis, to a specific case which was recently decided before the European Ombudsman.[4] This endeavour tries to portray how forums of encounter such as the Ombudsman have the potential to structure the meeting between EU external action and the administrative law rule of law. The dispute deals with a refusal by the Commission to grant access to documents to a Serbian civil society association, represented by a third country citizen. The complainant (the Serbian Association People's Parliament represented by Mr. Borivoje Djordjevic) alleges that, contrary to Regulation 1049/2001, the Commission failed to disclose its comments on the draft of the Serbian Free Legal Aid Act.[5] On 12 May 2015, the Ombudsman informed the Commission that she had opened an own initiative inquiry following Mr. Djordjevic complaint. The adoption of the Serbian Free Legal Aid Act is a pre-condition to opening chapter 23 (Judiciary and Fundamental Rights) of the accession negotiations between the European Union and Serbia. The Ombudsman on 2 September 2016 published her decision on the case.[6]

[4] Decision on 2 September 2016 of the European Ombudsman on complaint OI/7/2015/ANA against the European Commission, external relations, breach of Article 23 ECGAB.
[5] Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* [2001] L145/43, 31.05.2001.
[6] This Epilogue was written before the decision of the European Ombudsman was published. However, since the decision was released just before the submission of the thesis it has been incorporated in the text.

❖ The quest for rules and principles in pre-accession negotiations

The absence of Union *acquis* as to how the draft Serbian Free Legal Aid Act should look allows the Commission to make recommendations based on its own judgment. The right to free legal aid is enshrined in article 47 of the CFR; however, the implementation of this right varies in accordance with the Member States' legal culture. Fundamental differences in the philosophy, organisation and management of the Member States' legal aid systems are reflected in their free legal aid acts.[7] The absence of clear rules as to how the Serbian Free Legal Aid should look in order to comply with the Union's standards hinders the ability of civil society to act as watchdogs during the adoption of the law and 'limits the discourse between Serbian civil society and the EU.'[8] This is true both for national and international civil society organisations. The Commission's comments on the draft Free Legal Aid Act are not without consequences. Internally, they are preparatory acts informing the opening of chapter 23 of the accession negotiation with Serbia. Externally, the comments have a clear preparatory (and possibly rule-making function) for the third state. The same Commission expressly recognised both functions of the comments in its statement of opinion on the case. First, it makes a link between disclosure of its comments and the decision-making process in the context of the accession negotiations with Serbia. Second, the Commission bases its arguments against disclosure on the 'real and reasonably foreseeable' impact that publication of the comments on the draft Serbian Free Legal Aid Act could have on the country e.g. strikes.[9] If the comments were deprived of impact externally, there would be no fear of social unrest.

❖ Time to face the genuine lacunas in the Union legal system

According to article 2(1) of Regulation 1049/2001 only citizens and natural or legal persons residing or having their registered office in a Member State have a right to access to documents. The right to access to documents for citizens and natural or legal persons residing or having their registered office in a Member State is also reiterated in article 42

[7] European Justice, Legal Aid, available at: <https://e-justice.europa.eu/home.do?plang=en&action=home> (Consulted on 07.08.2016). As it will be discussed later, the progress reports are also silent as to which standards ought to be adopted by Serbia.
[8] Decision on 2 September 2016 of the European Ombudsman on complaint OI/7/2015/ANA against the European Commission, external relations, breach of Article 23 ECGAB, point 19.
[9] Comments of the Commission on a request for information from the European Ombudsman - Own-initiative inquiry OI/7/2015/ANA, available at: <http://www.parlament.org.rs/res/comments-european-commission-ombudsman-own-initiative-inquiry.pdf> (Consulted on 07.08.2016).

CFR and 15(3) TFEU.[10] The right to access to documents has been often associated with openness and democracy.[11] The preamble of Regulation 1049/2001 clearly states:

> 'Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy […].'[12]

By tightening the right to access to documents with democracy and citizenship, the regulation seems to distance the right from natural and legal persons not residing or not having their registered office in a Member State. In fact, article 2(2) of Regulation 1049/2001 makes clear that EU institutions are not under an obligation to grant access to documents to natural and legal persons not residing or not having its registered office in a Member State. They *may* grant access to documents subject to the same principles, conditions and limits put forward by the regulation.[13] Therefore, the right can be extended at the discretion of the institutions, bodies, offices and agencies.[14] The approach taken by Regulation 1049/2001 discharges the role of natural and legal persons not residing or not having their registered office in a Member State within the Union's decision-making process. As underlined by Ziller, the restriction of the personal scope of application of the right to access to documents is difficult to justify, given that non-citizens, non-residents and persons not registered in a Member States also may have an objective interest in accessing Union's documents.[15] The lacuna identified in Regulation 1049/2001 is accompanied by a general lack of internal rules governing the adoption, and the

[10] Article 42 CFR: 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.' Article 13(3) TFEU: 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.'

[11] Case T-84/03 *Maurizio Turco* v. *Council*, EU:T:2004:339, para. 53; Case T-403/05 *MyTravel Group plc* v. *Commission*, EU:T:2008:316, para. 49.

[12] Point 1, Preamble Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* [2001] L145/43, 31.05.2001.

[13] Article 2(2): 'The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.' Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* [2001] L145/43, 31.05.2001.

[14] D. Curtin and J. Mendes, 'Article 42 – Right of Access to Documents', in S. Peers, T. Hervey, J. Kenner, A. Ward, *The EU Charter of Fundamental Rights A Commentary*, (Oxford: Hart Publishing 2014), 1099, at 1107.

[15] Ziller J., 'Article II-102 Droit d'Accès aux Documents' in A. Levade, F. Picod and L. Burgorgue-Larsen (eds.), *Traité établissant une Costitution pour l Europe. Commentaire article par article. Partie II: La Charte des droits fondamentaux de l'Union* (Bruxelles: Bruylant 2005), 653, at 647.

conditions for disclosure, of Commissions' comments on the laws of candidate countries for EU membership.

❖ The application of administrative law principles in external action

A contextual and comprehensive approach, which takes into account the *finalité* of the Enlargement Policy and all the sources which have so far tried to operationalise the respect of the rule of law externally, highlights how access to documents for citizens and legal persons from candidates and potential candidate states for membership is fundamental to help ensuring their sincere participation in the process of accession to the EU. Openness facilitates participation: it ensures access to information, a fundamental mean to take part in the process of governance to which individuals are subject.[16] Within the enlargement framework, stakeholders attach a great deal of importance to Commission documents regulating the relations between the Union and their states, and the Commission attaches much significance to the role of civil society as a source of information.[17] Over the years the Commission and the EEAS have developed a framework of guidelines stressing the importance of consultation with civil society and indicating their role in the decision making process.[18]

As already discussed in this thesis, recognising the importance and the functions that consultation procedures play should not be without consequence. The recognition ought to demand that EU institutions sponsor and facilitate participation in public affairs.[19] Therefore, even if Regulation 1049/2001 does not grant a right to natural and legal persons not residing or not having their registered office in a Member State, the importance that participation has acquired externally needs to be taken seriously. In

[16] Decision on 6 January 2015 of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission, external relations, breach of other rights and duties resulting from the Charter of Fundamental Rights and not covered by this list, point 38.
[17] The same Commission, in its comments to the own-initiative inquiry, acknowledges the value and the role of civil society in the accession process. Comments of the Commission on a request for information from the European Ombudsman - Own-initiative inquiry OI/7/2015/ANA, available at: <http://www.parlament.org.rs/res/comments-european-commission-ombudsman-own-initiative-inquiry.pdf> (Consulted on 07.08.2016).
[18] Chapter IV, sections 2.2 and 5.1.
[19] The Ombudsman seems to embrace the same approach. In her own-initiative inquiry on transparency and TTIP negotiations, she stresses that in order to ensure sincere consultations, the Union's institutions, bodies, offices and agencies, 'must conduct their work as openly as possible.' Decision on 6 January 2015 of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission, external relations, breach of other rights and duties resulting from the Charter of Fundamental Rights and not covered by this list, point 9.

other words, access to documents ought to be guaranteed to non-EU citizens, not so much for a link to democratic values, but for their recognised role in the decision-making process. In the case at stake the Commission's comments did not even identify which would be the potential interest of increased openness in enabling the Serbian civil society organisation to participate more closely in the decision-making process.

Maintaining the trust of any international partner of the EU is certainly a public interest of the Union. As sustained by the Ombudsman in her own-initiative inquiry on TTIP negotiations, such a public interest offers reasonable and well-grounded explanations for the non-disclosure of documents based on the need to protect the legitimate interests of the international partner. However, the protection of the international partner cannot have an 'unfettered veto over the disclosure of any document in the possession of the EU institutions.'[20] The same Court affirmed that, where the institution concerned refuses to grant access to a document because it would undermine one of the interests protected by article 4(1)(a) of Regulation 1049/2001, that institution is obliged, also when enjoying a wide margin of discretion:

> 'to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.'[21]

Furthermore, as stressed by this thesis, EU institutions ought not to use as an excuse for non-disclosure simply the risk of undermining the international relations with a third state. In this context, nothing prevents the Union's institutions from consulting the third country to understand its position on the issue. The Serbian Ministry of Justice published

[20] Decision on 6 January 2015 of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission, requests for information and access to documents (Transparency), breach of other rights and duties resulting from the Charter of Fundamental Rights and not covered by this list, point 20.

[21] 'It must be noted in that regard that while it is true that, as regards the scope of the judicial review of the legality of a decision of an institution refusing public access to a document on the basis of one of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001, that institution must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. […] However, where the institution concerned refuses access to a document the disclosure of which would undermine one of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, that institution remains obliged, as noted in paragraph 52 of the present judgment, to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.' Case C-350/12 *P Council of the European Union* v. *Sophie in 't Veld*, EU:C:2014:2039, paras 63-64.

all the draft versions of the Free Legal Aid Act, as modified according to the Commission's comments, on its own website.[22] This shows the willingness of the Serbian Ministry to be transparent as to the process of accession.

❖ Waltzing in search for innovative solutions

The Ombudsman in deciding this case, and similar ones to come, ought to work as catalyst in stimulating the discussion as to how administrative law can face the challenges posed by the Union's external action. The Ombudsman can embark on this new challenge by forcing the Commission into specific types of action (e.g. disclosing the document); or she can more timidly push forward the agenda through recommendations that would encourage the EU institutions and scholars to start thinking about new solutions. The Ombudsman in the case at stake opted for the second option. In her brief assessments, she agrees with the Commission's decision not to disclose the document; but at the same time offers some suggestions for increasing openness. First, she encourages the administration to make the document available at a later date – for example after the entrance into force of the Serbian Legal Aid Act or the provisional closure of Chapter 23 of the accession negotiations. Even if this choice is not ideal for the Serbian civil society, the states lagging behind in the enlargement process could benefit from greater openness. For example, Bosnia and Herzegovina's civil society could have access to the Commission's recommendations on the Serbian Legal Aid Act when such act will be discussed in their own country. Second, the Ombudsman in her assessment indicates that some of the information contained in the requested document will be incorporated in the Serbia progress report, 'which should adequately inform the public of the general recommendations directed at the Serbia authorities.'[23] Therefore, the next progress report on Serbia accession to the EU should be more informative as to the Commission's recommendations on the adoption of the Serbian Free Legal Aid Act, particularly when compared to past ones. In this respect, it is enough to highlight that the latest Commission progress report on Serbia – in reference to the Free Legal Aid Act – simply stated that

[22] Decision on 2 September 2016 of the European Ombudsman on complaint OI/7/2015/ANA against the European Commission, external relations, breach of Article 23 ECGAB, point 16.
[23] Decision on 2 September 2016 of the European Ombudsman on complaint OI/7/2015/ANA against the European Commission, external relations, breach of Article 23 ECGAB, point 26.

'[t]he 2011 Criminal Procedure Code […] remains to be completed, in particular when it comes to free legal aid'.[24]

If on the one hand one could disagree with the Ombudsman's decision of not making a finding of maladministration; it is also true that with her suggestions the Ombudsman paved the way to the discussion on the importance of guaranteeing openness in the pre-accession negotiations. Should guidelines be imposed as to what progress reports ought to include? Should there be a time limit for non-disclosure of Commission's comments on the laws of candidates and potential candidate states for membership? More generally, should article 2(1) of Regulation 1049/2001 also cover natural or legal persons residing or having their registered office outside the Union? The absence of an adequate system of rules which would guarantee the respect of the administrative rule of law externally demands EU institutions and scholars to find the right instruments to govern this reality. From the early years of its conceptions, the Union realised the importance of not remaining in isolation and of interacting with its external partners. The relations between the Union and its external partners have intensified immensely over the years. The changes brought forward by the process of intensification should not be perceived as a threat, but as venues for new original solutions. In exploring this new legal reality, the EU institutions and legal scholars ought to be forward-thinkers: they ought to move beyond the conventional legal categories that have helped us so far to comprehend EU external relations, into the full complexity and impact of the Union administrative action outside its borders. The construction of an administrative law systems that would embrace the developments in EU external action finds support – as argued by this thesis – in what is already offered by the Union's legal order.

[24] Commission Staff Working Document Serbia 2015 accompanying the EU Enlargement Strategy of 10 November 2015, SWD(2015) 211 final, at 57.

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