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ARTICLES

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

IS THERE AN ACCOUNTABILITY GAP IN EU EXTERNAL RELATIONS? SOME INITIAL CONCLUSIONS

What conclusions is it possible to draw from this research into the operation of EU administrative law in EU external action? It is clear, in the first place, both that this is a worthwhile object of study and that in this set of *Articles* we have only started to map some of the most important features of EU external action from an administrative law perspective: certainly more is needed to explore these features in more detail, and to draw out some more normative conclusions. Still, this research collaboration between scholars of EU administrative and external relations law has been able to build on promising earlier work and to begin to map some of the features of an administrative law of EU external relations.

It might have been thought that administrative law has little place in the conduct of foreign policy, and it is certainly true that constitutional law has dominated both scholarly discussion and litigation in this field, unsurprisingly given the emphasis in the EU Treaties on the central constitutional issues: power conferral, institutional balance, procedural rules and fundamental principles and objectives. But when we look at the ways in which external policies are implemented and given effect we find an extensive use of legal instruments, of legally-prescribed procedures (including financial procedures), which administrative law and the decisions of the CJEU have played an important role in developing and controlling. External policy is conducted through administrative or executive action – the preparatory and rule-making instruments discussed by Vianello for example – which create legal effects although they may not be formally legally binding, and in the formation and execution of these acts administrative law principles such as the duty of care apply. In many of the external policy fields considered here, from the neighbourhood policy (ENP) to anti-dumping and from development cooperation to restrictive measures, we see a tendency towards proceduralisation, constraining the ways in which policy discretion is exercised while avoiding interference with substantive policy choices. This proceduralisation may take legislative form (as in the case of anti-dumping and environmental protection) but may also derive from non-legislative in-

struments (as in the common foreign and security policy or migration) and institutional practice (as in the case of the enlargement and neighbourhood policies) – and of course combinations of these. We also see the influence in the external sphere – enlargement, environmental and climate change policies for example – of “new governance” techniques developed internally, and the administrative law challenges that these pose also challenge external action. This emphasis on procedure should not blind us to the symbiotic relationship between procedure and substance: procedural design will have a crucial impact on outcomes.

Conditionality has become a central feature of some external policies, notably enlargement and the neighbourhood policy, but also in the context of development cooperation where additional trade benefits are tied to implementation of international environmental and good governance standards and where financial assistance may be withdrawn in case of serious breach of the “essential elements” clause in the Cotonou Convention, which references key international human rights instruments. In the latter cases conditionality has been introduced into legislation or is explicit in the EU’s international agreement;¹ in the former it is still very much a matter of “soft law” instruments such as Progress Reports and Action Plans.² In both cases institutional practice of conditionality has led to the adoption of regular procedures, but even where these make provision for participation by third country actors or representation of the external interests involved the ultimate decision-making power lies with the EU institutions. Procedural rules now established in legislation such as anti-dumping or restrictive measures targeting individuals frequently originated in judgments of the Court of Justice applying general principles such as the right to be heard and the right to an effective remedy.³ Where procedures form part of administrative practice they may be enforced by the Ombudsman, an institution which appears to be playing an increasing role in scrutinizing the administration of external relations policies. External action is in fact a rich field in the application of administrative law.

This conclusion leads to the second question at the heart of our inquiry: to what extent and in what ways is the operation of administrative law within external action distinctive? As we indicate in the Introduction to this collection, the types of administrative

¹ Regulation (EU) 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences; Partnership Agreement 2000/483/EC between the African, Caribbean and Pacific Group of States of one part, and the EU, of the other part. See P. LEINO, *Administering EU Development Policy: Between Global Commitments and Vague Accountability Structure*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 617 *et seq.*

² See I. VIANELLO, *Acknowledging the Impact of Administrative Power in the EU External Action*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 597 *et seq.*

³ See further E. KORKEA-AHO, S. SANKARI, *External Participants v. Interests: Principles of EU Administrative Law in Anti-Dumping Investigations*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. ??? *et seq.*, and by L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures: Does the Adversarial Principle Survive the Necessities of Secrecy?*, *Ibid.*, p. 649 *et seq.*

act identified by administrative law scholars appear to be fully represented in external policy fields. Preparatory acts, investigations and fact-finding are common, as are non-legally binding (“soft law”) instruments, nor is there any lack of legally binding acts, including single-case decisions. The Common Foreign and Security Policy (CFSP) is unusual in excluding the possibility of legislative acts,⁴ but CFSP decisions are legally binding and may give rise to implementing measures.⁵ With the exception of the CFSP, delegated and implementing acts, derived from legislation under Arts 290 and 291 TFEU, are widely used in each of the external policy fields we examined.

Notwithstanding, three types of executive act may be considered specific to external action and possess particular characteristics from the point of view of administrative law. The first is the decision to (sign or) conclude an international agreement, adopted under Art. 218 TFEU, including the possibility of a decision on provisional application. Such a decision may cover all external policy fields, including the CFSP and also including the external dimension of other policies such as environmental protection and migration. The decision is adopted by the Council under a variety of procedures, normally (except in the case of an exclusively CFSP agreement) involving the European Parliament. Although legally binding and as such subject in principle to challenge under Art. 263 TFEU, these decisions are not legislative acts but form part of the executive’s international relations function.⁶ Legal challenge by a privileged applicant, such as a Member State, the Commission or the European Parliament is not very unusual,⁷ but is it possible for an individual (or organisation) to bring such a challenge? The attempt was made for the first time in *Front Polisario* and rather surprisingly the General Court accepted the standing of the Front Polisario to bring the action.⁸ In doing so it made two determinations, the first relating to the nature of the act (the Council decision) and the second relating to the standing conditions laid down by Art. 263, para. 4, TFEU. The nature of the Council decision was relevant since non-privileged applicants may bring an action against “a regulatory act which is of direct concern to them and does not entail

⁴ Arts 24, para. 1, and 31, para. 1, TEU.

⁵ Art. 31, para. 2, TEU. Unusually (see Art. 291, para. 2, TFEU) these are adopted by the Council.

⁶ See e.g. Court of Justice, judgment of 3 July 2014, case C-350/12 P, *Council v. Sophie In’t Veld*, paras 76 and 105-107, where the issue was discussed in the context of transparency and access to documents.

⁷ See e.g. Court of Justice: judgment of 10 March 1998, case C-122/95, *Germany v. Council*; judgment of 11 June 2014, case C-377/12, *Commission v. Council* [GC]; judgment of 14 June 2016, case C-263/14, *European Parliament v. Council* [GC]. Note that the annulment of the concluding decision does not affect the validity of the agreement itself (in international law) but the agreement will no longer be binding on the institutions and Member States as a matter of EU law (cf. Art. 216, para. 2, TFEU). Depending on the defect, the decision may then be re-adopted and the Court may decide to preserve the legal effects of the wrongly-based decision until this has been done: see e.g. Court of Justice, judgment of 22 October 2013, case C-137/12, *Commission v. Council* [GC].

⁸ General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*.

implementing measures"; in other cases individual as well as direct concern must be demonstrated. According to the General Court (the point was not discussed directly by the Court of Justice on appeal), the decision was a legislative and not a regulatory act on the grounds that it was adopted according to a special legislative procedure as defined in Art. 289, para. 2, TFEU.⁹ This reasoning may be disputed; although it is true that the procedure laid down in Art. 218, para. 6, TFEU for the conclusion of an international agreement will – except in the case of the CFSP – meet the definition in Art. 289, para. 2, TFEU (a decision adopted by the Council with the participation of the Parliament), it does not necessarily follow that this is in fact a “special legislative procedure” within the meaning of Art. 289 TFEU. The Treaties habitually state explicitly when an act is to be adopted under a special legislative procedure and references to this procedure assume that it is explicitly required.¹⁰ Art. 218, para. 6, TFEU on the other hand does not define the procedure in this way. Indeed, were it to do so a substantial problem would arise in that decisions concluding CFSP agreements, also adopted under Art. 218, para. 6, TFEU, would have to be categorised differently given the prohibition on adopting legislative acts within the CFSP.

In our view, the decision concluding an international agreement should not be regarded as a legislative act but rather as an executive act, albeit in many (but not all) cases adopted with Parliamentary participation. They have certainly been treated as such in the context of the access to documents rules, where the distinction affects the Court’s approach to transparency.¹¹ Having categorised the Council decision, the General Court further held that the Front Polisario, albeit not possessing legal personality, was a “legal person” for the purposes of Art. 263, para. 4, TFEU and was directly and individually concerned in the Council decision, although in determining direct concern it employed some unorthodox reasoning.¹² This ruling is potentially important for our study since it opens the door to validity challenge of such acts by non-governmental and perhaps also civil society organisations, including those based outside the EU. The Court of Justice, on appeal, did not refer to this question directly, but based its annulment of the General Court’s judgment on its finding that the agreement in question did not apply to the territory of the Western Sahara and that therefore the applicant had no interest in bringing the action. By implication, therefore, the Court of Justice did not re-

⁹ *Ibid.*, paras 68-72.

¹⁰ See e.g. Art. 48, para. 7, TEU and Art. 333, para. 2, TFEU.

¹¹ See footnote 6.

¹² In *Front Polisario v. Council of the European Union*, cit., the General Court, although referring at para. 105 to the standard test for direct concern, then goes on to set out and apply the test for the *direct effect* of international agreements (at para. 107). For a critique see further M. CREMONA, *A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon*, in *Swedish Institute for European Policy Studies*, Working Paper no 2, 2017, pp. 53-55.

ject the possibility in principle of an individual application for review.¹³ Caution is needed, however: the position of the *Front Polisario* is very specific and although such an action might be possible in principle it would not be easy for a non-governmental organization to demonstrate direct and individual concern.

The second type of act which is specific to EU external action is a decision of a different kind: a decision adopted within an international forum (such as the conference of the parties to an international convention), which may have direct or indirect legal effects within the EU legal order. As Mendes' *Article* demonstrates, both the internal EU procedures for the adoption of the EU's position in such fora, which are based on Art. 218, para. 9, TFEU in cases where the international decision will have legal effects, and the legal status of such international decisions in EU law, pose a number of difficult questions.¹⁴ This is a form of delegated rule-making – characterised by Mendes as the “external administrative layer” of EU law-making – which may affect individual interests. Yet the simplified decision-making processes of Art. 218, para. 9, TFEU do not leave much scope for participation-centred procedures. Where the international rule-making is not formally binding the procedures and legal status are even less clear. As Mendes shows, these processes of external rule-making may take place within bilateral as well as multilateral contexts. Recent experiences with the negotiation of international agreements with a strong regulatory dimension (Transatlantic Trade and Investment Partnership and Comprehensive Economic and Trade Agreement) have demonstrated – partly following Ombudsman activity – that some space for transparency enabling a broader public debate does exist, and might in fact be vital for the survival of the agreements.

The third type of act specific to EU external action consists not in internal or external decision-making but in operational action. We find examples in CFSP military and civilian missions and in migration policy, typically taking place in third country territory. Despite the exclusion of the Court of Justice from jurisdiction over operational CFSP action, the *Article* by Cremona illustrates that such missions may in fact involve a variety of administrative decision-making on issues such as procurement and human resources which may still fall within the Court's jurisdiction. Nonetheless, the fact that such missions operate outside the territory of the EU; the operation of Status of Forces and Status of Mission agreements concluded with host States and containing liability limitation clauses;¹⁵ the complexity of command structures; and the questions over the applicability of the Charter of Fundamental Rights of the European Union explored by Rijpma all

¹³ Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC].

¹⁴ See e.g. Court of Justice, judgment of 7 October 2014, case C-399/12, *Germany v. Council* [GC].

¹⁵ A. SARI, *The European Union Status of Forces Agreement (EU SOFA)*, in *Journal of Conflict & Security Law*, 2008, p. 353 *et seq.*

impact on the determination of responsibility and accountability for the conduct of external missions and external operational action more generally.¹⁶

These three types of act are all examples of executive (not legislative or judicial) power and as the different *Articles* in this *Special Section* demonstrate, may entail administrative action.¹⁷ They also demonstrate characteristic features of executive and administrative action in the external sphere more generally. As we have seen in the context of several policy fields, including the CFSP and migration, external action is characterised by a multiplicity of actors. On the EU side we find examples of mixed administration involving Member States as well as the EU, and the case of the “deal” or arrangement with Turkey shows that it is not always easy for even the actors themselves to be clear as to whether an act is adopted by the EU or by its Member States. The European External Action Service has a degree of autonomy but is neither an institution in the formal sense nor an agency: its seconded national staff and its non-hierarchical relation to the Council and Commission can make it difficult to determine lines of accountability and responsibility or even to identify the proper respondent. The involvement of third countries and third country actors gives rise to a separate set of issues, and indeed we might define as a characteristic of administrative law in external relations the fact that it involves not only the familiar relationship between public authority (such as the EU institutions) and the individual but also the relationship between the EU institutions and (third) states. In some cases the legal answers may be relatively clear in a particular case but not necessarily uniform across policy fields: the extent to which administrative rights apply to non-EU nationals, for example (as discussed by Leppävirta, Hadjiyianni, Rijpma, Leino and Korkea-aho and Sankari) or jurisdictional questions where action takes place outside the territory of EU Member States (as discussed by Rijpma). Other issues are much less easy to determine, both legally and normatively: to what extent should the EU be required to consider as “relevant facts” the situation in a third country or the consequences of an EU action on third country nationals? To what extent is the EU required to take into account the interests of third country nationals affected by its action; what is the scope of its duty of care in such cases? In addition, it may not always be easy to identify the addressee of a (formal or informal) decision or those whose interests are affected: as Vianello points out, reports and other acts seemingly addressed to an EU actor such as the Council may in fact be intended to influence the conduct of a third country. In a number of external policy fields procedural rights are effectively established through individual notifications (such as opening tender procedures under development policy, or notifications of interest in anti-dumping cases)

¹⁶ S.Ø. JOHANSEN, *Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?*, in *International and Comparative Law Quarterly*, 2017, p. 181 *et seq.*

¹⁷ See *supra*, M. CREMONA, P. LEINO, *Introduction: The New Frontiers of EU Administrative Law and the Scope of Our Inquiry*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 467 *et seq.*, for a discussion of what is meant here by executive and administrative action.

rather than secondary legislation, which may leave unclear who bears such rights, their precise scope and what obligations they create for the institutions.

Our second main conclusion, based on this mapping of the types of administrative action in external policy fields, is that while the pattern of administrative action is shared with EU action more generally, some distinctive types of action can be identified and external action tends to demonstrate some distinctive qualities resulting in part from the multiplicity of actors and fora (including external) involved.

The third central question addressed by this *Special Section* relates to the scope of executive discretion. We started with a hypothesis, based in part on statements from the Court of Justice, that the very broad discretion granted by the Treaties in the field of external relations challenged conceptions of accountability – political, legal and financial. We sought to test that hypothesis and to explore the ways in which administrative law may constrain that discretion. While the picture varies across different policy fields certain patterns emerge. It is clear that the institutions do indeed possess a great deal of policy discretion and that the Court is unwilling to engage in shaping substantive policy priorities.¹⁸ In some policy fields, including anti-dumping and development cooperation, even legislative goal-setting is very open-ended and leaves a great deal of scope for institutional (in practice, Commission) priority-setting and specific policy choices. The same is true of the softer forms of goal-setting through Commission strategy papers and Council Conclusions found in the enlargement and neighbourhood policies. It is less true in the CFSP; although the Treaties give very little guidance as to CFSP objectives (those found in the Treaties being not only general to all external action but also lacking in specificity and prioritisation),¹⁹ Council decisions imposing restrictive measures and launching civilian and military missions will typically contain a great deal of detail as to objectives and implementation.²⁰

The role of delegated and implementing acts adopted under Arts 290 and 291 TFEU are also relevant here. Where legislation establishes a broad policy frame it may not be easy to identify the “essential elements” of an act which should not under Art. 290 TFEU be subject to delegated power.²¹ It is also clear that in many policy fields (including enlargement and neighbourhood, development cooperation, anti-dumping) decisions which may appear on their face either highly technical or simply the result of drawing

¹⁸ M. CREMONA, *Structural Principles in EU External Relations Law*, Oxford: Hart Publishing, forthcoming 2018.

¹⁹ Arts 3, para. 5, and 21, TEU. This is not to say that they are unimportant; the Court has for example used these general objectives to guide its interpretation of the scope of external powers (see e.g. Court of Justice: judgment of 19 July 2012, case C-130/10, *European Parliament v. Council* [GC]; opinion 2/15 of 16 May 2017); however they have not (so far) been used to circumscribe policy discretion.

²⁰ See e.g. Court of Justice, judgment of 28 March 2017, case C-72/15, *PJSC Rosneft Oil Company* [GC], paras 86-90, holding that the level of detail in the Council's CFSP decision did not encroach on the powers of the High Representative and Commission under Art. 215 TFEU.

²¹ Art. 290, para. 1, TFEU.

conclusions from a technocratic assessment exercise not only contain substantial policy choices but also represent major consequences for individuals and third countries. Thus to some extent the policy direction and executive power granted to the Commission – for example in the case of development cooperation – may be concealed and correspondingly difficult to contest.

However this policy discretion is not without constraints. The constraints imposed by financial procedures and audit are important in some policy fields, including development cooperation where they represent an attempt to assess the matching of objectives to implementation (Leino). Most striking has been the proceduralisation already referred to as governing many types of external action, whether established by legislative act or developed through practice and non-binding instruments. And the Court's reticence towards substantive policy choice does not extend to procedure; it has proved willing both to enforce procedural rules laid down in legislation and to require compliance with procedural principles such as the duty of care. The framing of these procedural principles is important; the emphasis is on ensuring that the institutions have possession of the "relevant facts" to exercise their discretion and to make a decision in the Union interest rather than on ensuring (for example) the individual right to be heard. For example in anti-dumping, *Korkea-aho* and *Sankari* show that participation functions more as a vehicle for establishing relevant facts than as a vehicle for accountability.

Constraints may also be external in origin, the result of commitments in international agreements such as the WTO's Anti-Dumping Agreement, or the Aarhus Convention on access to environmental information, resulting from customary international law or international decision-making. Externally-derived norms may determine the operationalisation of general objectives, for example by establishing specific commitments in relation to climate change or development. In *Front Polisario* the Court of Justice ensured that its interpretation of the scope of the EU-Morocco Association Agreement was in compliance with the right of self-determination, "a legally enforceable right *erga omnes* and one of the essential principles of international law".²² It refused to accept that the administrative practice of the Commission in implementing the agreement could serve to alter that interpretation, and indeed the Court's interpretation will require a change to that practice.²³ External migration policy also provides the EU with a substantive challenge in living up to its Treaty commitments to international law in general and international human rights law in particular.²⁴

These examples, and the cases discussed by Mendes on the legal effects of international decisions, demonstrate the importance of judicial review as a central form of ac-

²² *Council v. Front Polisario* [GC], cit., para. 88.

²³ *Ibid.*, paras 123-124. An example of such practice would be the *de facto* application of tariff preferences under the EU-Morocco Agreement to products originating in the Western Sahara: *ibid.*, para. 118.

²⁴ Art. 3, para. 5, TEU and Art. 78, para. 1, TFEU.

countability. Most of the *Articles* discuss this dimension. Administrative law has been the means of limiting the scope of the exception to the Court's jurisdiction over the CFSP (Cremona); judicial review has tested the ability of third country nationals to rely on administrative law (Hadjiyianni, Rijpma and Korkea-aho and Sankari), the operation of international norms as constraints on executive discretion (Mendes), and the balance between security and procedural and fundamental rights (Leppävirta). Alongside the courts, however, we are seeing the growing importance of other fora of financial and administrative accountability, including the Court of Auditors (Leino) and the Ombudsman (Leino, Vianello and Cremona). The importance of these additional forms of accountability in external relations and the degree to which they may impose a higher degree of scrutiny suggests the need for more detailed study.

As a final point, the policy-specific contributions to this collection invite us to think about the connection between procedures and outcomes in the light of the purposes of administrative law. On the one hand we may say that administrative procedures and rules are designed to ensure good administration in the sense of ensuring that outcomes match stated objectives and are achieved efficiently; the tendency towards result-based monitoring reflects this. On the other hand, administrative law is concerned with the exercise of executive power as it affects individuals, and as we have seen procedures play an important part in these structures of control and accountability. This dichotomy between effectiveness and individual rights is, however, more apparent than real and in reality the two are closely connected: procedures that take account of the interests and rights of individuals are more likely to frame objectives in ways which reflect agreed needs and to produce effective outcomes. This is not to suggest that it is possible to search for (still less to find) an administrative or procedural solution which will optimize every interest and objective. The different dimensions of accountability themselves may pull in different directions and may not always be reconcilable.²⁵

We are brought back to the fundamental question at the heart of this *Special Section*: to what extent should EU administrative law when operating in the context of external action allow space for the interests of the EU's third country partners and their citizens? As we have seen, mechanisms do exist in many cases for participation in administrative procedures and decision-making, but is the function of this participation primarily to vindicate external individual interests or to ensure outcomes which best reflect Union interests? The mandate given by the EU Treaties to the Union is to "uphold and promote" its values as well as its interests in its external relations, and the general objectives as expressed in Arts 3, para. 5, and 21 TEU suggest that wider global and third country interests should be a motivating force in Union external action. But the balancing of interests at the micro as well as the macro level is inevitably and rightly a

²⁵ M. BOVENS, *Analysing and Assessing Accountability: A Conceptual Framework*, in *European Law Journal*, 2007, p. 466.

matter for political determination. In the absence of that political debate there is only so much that administrative law can do.

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