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Access to justice in composite procedures for the implementation of EU law: the story so far

Mariolina Eliantonio

1. Introduction

It is by now almost commonplace to observe that the procedures taken for the implementation of EU law have departed from the traditional dichotomy between direct and indirect administration.¹ While not entirely a new phenomenon,² as of today, in virtually all EU policy fields, ranging from marketing authorisations to the management of EU funds to the area of Freedom, Security and Justice, banking supervision, or administrative cooperation in the field of taxation, there is increasing recourse to cooperative forms of decision-making processes, which have been labelled in doctrine as “composite procedures”. This term refers to administrative decision-making procedures which foresee the involvement of administrative authorities belonging to more than one legal system at various stages of the procedures and with different intensities.³

While lacking a general legislative framework in EU law,⁴ this phenomenon has been given various labels,⁵ and been studied from various perspectives, which have included some attempts at providing taxonomies.⁶ Furthermore, some authors have focused on the procedural

¹ On these notions, see J. ZILLER, “Introduction. Concepts d’administration directe, d’administration indirecte et de co-administration et fondements du droit administratif européen” in J.-B. AUBY and J. DUTHEIL DE LA ROCHÈRE (Eds.), *Traité de droit administratif européen*, 2022, Brussels, Bruylant, pp. 297-305.

² As early as the 1980s, Sabino Cassese had already pointed out that forms of cooperation were prevalent in the administrative governance of the European Union. See S. CASSESE, “Theoretical Sketch of Cooperative and Multidimensional Nature of Community Bureaucracy”, in J. JAMAR and W. WESSELS (Eds.) *Community bureaucracy at the crossroads: L’Administration Communautaire à l’Heure du Choix: actes du colloque organisé par le Collège d’Europe*, 1985, Bruges, De Temple p. 39.

³ The term was famously coined by H. Hofmann. See H.C.H. HOFMANN, “Composite decision-making procedures in EU administrative law”, in H.C.H. HOFMANN and A.H. TURK (Eds.), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, 2009, Cheltenham, Edward Elgar, p. 136.

⁴ S. ALONSO DE LEÓN, *Composite Administrative Procedures in the European Union* (PhD thesis, University Carlos III, Madrid), available at https://e-archivo.uc3m.es/bitstream/handle/10016/23445/Tesis_Sergio_Alonso_de_Leon_2016.pdf, p. 183, who also argues that “[P]rimary law [...] ignores composite procedures and assumes that indirect administration is the rule and direct implementation is the exception, as if nothing existed in-between”.

⁵ For example, the term *Verwaltungskooperation* (administrative cooperation) was used initially: see E. SCHMIDT-ABMANN, *Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*, 1996, Baden-Baden, Nomos. Other authors have spoken about *amministrazione mista* (mixed administration), such as G. DELLA CANANEA and C. FRANCHINI, *I principi dell’amministrazione europea*, 2017, Turin, Giappichelli; other authors refer instead to the term *Verwaltungsverbund* (administrative union): see W. WEIß, *Der Europäische Verwaltungsverbund. Grundfragen, Kennzeichen, Herausforderungen*, 2010, Berlin, Duncker & Humblot GmbH. Other literature speaks about “integrated administration,” such as H.C.H. HOFMANN and A.H. TURK (Eds.), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, *op. cit.*; or “composite administration”: see O. JANSEN and B. SCHÖNDORF-HAUBOLD (Eds.), *The European Composite Administration*, 2011, Cambridge, Intersentia. Finally, reference is made to *co-administration*, J. ZILLER, “Introduction. Concepts d’administration directe, d’administration indirecte et de co-administration et fondements du droit administratif européen”, *op. cit.*, p. 297.

⁶ See generally S. ALONSO DE LEÓN, *Composite Administrative Procedures in the European Union*, *op. cit.*; F. BRITO BASTOS, “Derivative Illegality in the European Composite Administrative Procedures”, *Common Market Law Review*, 2018, pp. 101-134; G. DELLA CANANEA, “The European Union’s Mixed Administrative Proceedings”, *Law and Contemporary Problems*, 2005, pp. 197-218; M. ELIANTONIO, “Judicial Review in an Integrated Administration: The Case of ‘Composite Procedures’”, *Review of European Administrative Law*, 2014, pp. 65-102.

rights during the composite decision-making processes,⁷ or the question of access to justice,⁸ while others have considered composite procedures in specific policy fields,⁹ or involving specific EU administrative players, such as EU actors,¹⁰ or specific types of cooperative mechanisms, such as inspections¹¹ or exchange of information procedures.¹²

The Court of Justice of the European Union (CJEU), in turn, has had the chance to rule on various issues linked to composite procedures, such as the right to be heard¹³ and the duty to give reasons.¹⁴ Yet, as has been pointed out, “composite procedures are not a legal category in the mind of the Union’s judges”.¹⁵ While this might not be entirely true, especially when we look at more recent case law,¹⁶ a full jurisprudential or legislative elaboration of the concept has still to appear.

Taking stock of, and departing from these earlier investigations, this contribution aims to revisit the phenomenon of composite procedures with two aims: first, to provide a renewed and up-to-date attempt to categorise these procedures, on the basis of a number of different criteria; second, discuss the question of access to justice in the framework of composite procedures, by considering the available case law of the CJEU, as well as the questions which this case law currently still leaves unanswered.

The contribution will show that, while the proliferation of composite procedures is a pervasive phenomenon in contemporary EU administrative governance, the current multi-level system of judicial protection is ill-suited to comprehensively controlling this form of decision-making

⁷ For a contribution focusing on the right to be heard, see CH. ECKES and J. MENDES, “The Right to be Heard in Composite Administrative Procedures: Lost in Between Protection?”, *European Law Review*, 2011, pp. 651-670.

⁸ See e.g., H.C.H. HOFMANN, “Decision-Making in EU Administrative Law – The Problem of Composite Procedures”, *Administrative Law Review*, 2009, pp. 199–221; M. ELIANTONIO, “Judicial Review in an Integrated Administration: The Case of ‘Composite Procedures’”, *op. cit.*, pp. 65-102; F. BRITO BASTOS, “Derivative Illegality in the European Composite Administrative Procedures”, *op. cit.*, pp. 101-134.

⁹ See e.g., F. BRITO BASTOS, “Composite Procedures in the SSM and SRM – An Analytical Overview”, in C. ZILIOI and K-PH. WOJCIK, *Judicial Review in the European Banking Union*, 2021, Cheltenham, Edward Elgar, pp. 97-113; L. WISSINK, *Effective legal protection in banking supervision: an analysis of legal protection in composite administrative procedures in the Single Supervisory Mechanism*, 2020, Groningen, Europa Law Publishing; M. ELIANTONIO and S. RÖTTGER-WIRTZ, “From Integration to Exclusion: EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals”, *European Journal of Risk Regulation*, 2019, pp. 393-411; R. LANCEIRO and M. ELIANTONIO, “The Genetically Modified Organisms’ Regime: A Playground for Multi-Level Administration and a Nightmare for Effective Judicial Protection?”, *German Law Journal*, 2021, pp. 371 – 390.

¹⁰ M. SCHOLTEN and A. BRENNINKMEIJER (Eds.), *Controlling EU Agencies: the Rule of Law in the Multi-Jurisdictional Legal Order*, 2020, Cheltenham, Edward Elgar; M. LUCHTMAN and M. SCHOLTEN (Eds.), *Law Enforcement by EU Authorities – Political and Judicial Accountability in a Shared Legal Order*, 2017, Cheltenham, Edward Elgar.

¹¹ M. DE BELLIS, “Multi-level Administration, Inspections and Fundamental Rights: Is Judicial Protection Full and Effective?” *German Law Journal*, 2021, pp. 416 – 440; and extensively M. DE BELLIS, *I poteri ispettivi dell’amministrazione europea*, 2021, Turin, Giappichelli.

¹² D. CURTIN and F. BRITO BASTOS, “Interoperable Information Sharing and the Five Novel Frontiers of EU Governance: A Special Issue”, *European Public Law*, 2020, pp. 59-70; D.-U. GALETTA, H.C.H. HOFMANN and J.-P. SCHNEIDER, “Information Exchange in the European Administrative Union: An Introduction”, *European Public Law*, 2014, pp. 65-69; M. ELIANTONIO, “Information Exchange in European Administrative Law: A Threat to Effective Judicial Protection?”, *Maastricht Journal of European and Comparative Law*, 2016, pp. 531–549.

¹³ Case T-346/94, *France Aviation v. Commission*, ECLI:EU:T:1995:187.

¹⁴ Case T-347/03, *Eugénio Branco Ld^a v Commission*, ECLI:EU:T:2005:265.

¹⁵ S. ALONSO DE LEÓN, *Composite Administrative Procedures in the European Union*, *op. cit.*, p. 11.

¹⁶ See the extensive discussion of the notion by AG Campos Sánchez-Bordona in *Silvio Berlusconi and Finanziaria d’investimento Fininvest SpA (Fininvest) v Banca d’Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, ECLI:EU:C:2018:502.

process. This lack of preparedness to cater for these procedures can be ascribed both to the hurdles concerning the reviewability of certain steps of the process, and to the ever deeper intertwining between different administrative levels of governance, rendering the attributability of an action to an administrative author increasingly challenging. In turn, the CJEU has not managed, so far, to provide a comprehensive guiding framework on access to justice in composite procedures, with important questions remaining unanswered and possible gaps of judicial control persisting. This, in turn, might endanger the right to an effective remedy, protected by Article 19 TEU and Article 47 of the EU Charter of Fundamental Rights.

2. Types of composite procedures: time to update the old taxonomies

2.1. A brief history of the taxonomy of composite procedures

Before embarking in any categorisation exercise, a *caveat* is required. Providing a thorough taxonomy of composite procedures is a daunting task. This is because the sheer number of composite procedures is in itself hard to determine, as they are constantly being created in EU legislation. Furthermore, as they are created to tackle specific regulatory problems that may be difficult to foresee before a concrete situation occurs, any taxonomy might need constant updating.¹⁷

The first attempt, to my knowledge, to provide a categorisation (or a “phenomenology” as the author calls it) of composite procedures is by Della Cananea, who, in a 2005 article, distinguishes between “bottom-up” and “top-down” procedures as well as a residual category of “hybrid” procedures which involve more than two steps and features from both “bottom-up” and “top-down” procedures.¹⁸ I tried to refine this categorisation in 2014, by adding nuances on the possible steps of the composite procedures (i.e., by considering procedures involving more than two steps) and on the possible types of preliminary measures which could be part of the decisional chain (such as the raising of objections, or the delivering of an opinion or the issuing of a binding measure).¹⁹ Alonso de León, having reviewed a number of criteria of categorisation (based on the direction of the procedure, the authority issuing the final decision, the number of participating authorities, or the possibility of participation of external stakeholders), settles on a categorisation based on the degree of intervention of the administration which does not issue the final decision.²⁰ Similarly, Brito Bastos proposes a categorisation based on the various degrees of “decisional interdependence” between the various participating institutions.²¹

Partly based on these earlier studies, in the next section several categorisations will be proposed, some with clearer legal implications than others for the purposes of access to justice. It is to these categorisations that the analysis now turns.

2.2. Horizontal and vertical composite procedures and their implications

When looking at the earlier studies mentioned above, what seems to have been overlooked is a *summa divisio* between so-called “horizontal” and “vertical” composite procedures, on the

¹⁷ Along those lines, S. ALONSO DE LEÓN, *Composite Administrative Procedures in the European Union*, *op. cit.*, p. 17.

¹⁸ G. DELLA CANANEA, “The European Union’s Mixed Administrative Proceedings”, *op. cit.*, pp. 197-218.

¹⁹ M. ELIANTONIO, “Judicial Review in an Integrated Administration: The Case of ‘Composite Procedures’”, *op. cit.*, pp. 65-102.

²⁰ S. ALONSO DE LEÓN, *Composite Administrative Procedures in the European Union*, *op. cit.*, p. 192 ff.

²¹ F. BRITO BASTOS, “Derivative Illegality in the European Composite Administrative Procedures”, *op. cit.*, p. 105 ff.

basis of the involvement (or lack thereof) of the EU administrative authorities. Examples of vertical composite procedures, entailing a cooperation between national and EU authorities exist in several policy fields, such as marketing authorisations for genetically modified organisms (GMOs),²² or the management of EU funds.²³ I shall return to vertical procedures in the next sections, by proposing sub-categorisations of these procedures.

Horizontal procedures exist, for example, in the field of administrative cooperation for taxation purposes, where the authority of a Member State can send an information request directed to the competent authority of another Member State, and the requested authority has to communicate the requested information to the requesting authority.²⁴ Beyond the exchange of information, horizontal procedures exist in other policy fields such as the environmental one and can take various forms: for example, if a Member State finds that a project is likely to have significant effects on the environment in another Member State, the latter must be given information on the project. If the Member State which receives the information indicates that it intends to participate in the environmental decision-making procedure, a consultation stage ensues, with the other Member State and its citizens having the possibility to participate in the decision-making procedures of the Member State conducting the environmental impact assessment of the project.²⁵ Similarly, the Water Framework Directive requires the creation of “river basins” as basic operational entities of water management, independent of administrative and political borders. A river basin extending over the territory of more than one Member State should be integrated into an international river basin district, involving the constant cooperation of administrative authorities of several Members States.²⁶

These horizontal composite procedures generate what has been labelled “transnational administrative acts”, namely administrative acts which take effect beyond the territory of the authority issuing it.²⁷ The mutual recognition schemes foreseen in various secondary EU measures, ranging from pharmaceuticals, to driving licences and professional qualifications, as well as stemming from the case law of the CJEU, also generate horizontal mechanisms of administrative cooperation.²⁸

As will appear clear in Section 3, this categorisation is relevant for the determination of the competent court for the purposes of access to justice, as the problems arising in the control of

²² Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L-106/1.

²³ Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No. 1296/2013 [2021] OJ L-231/21.

²⁴ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L-64/1.

²⁵ See Article 7 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) [2012] OJ L-26/1.

²⁶ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L-327/1.

²⁷ On this notion, see further E. CHEVALIER and O. DUBOS, “The Notion of ‘Transnationality’ in Administrative Law: Taxonomy and Judicial Review”, *German Law Journal*, 2021, pp. 325–343.

²⁸ See, on the notion of mutual recognition in European administrative law, the Special Issue of the *Review of European Administrative* and, in particular, the contributions by S. RÖTTGER-WIRTZ, “Mutual Recognition and the Ever-incomplete Internal Market for Pharmaceuticals”, *Review of European Administrative*, 2020, pp. 61-87; M. SCHRÖDER, “Mutual Recognition of Driving Licences in the EU – Current State of Integration and Perspectives”, *Review of European Administrative*, 2020, pp. 37-60. See also L. ARROYO JIMÉNEZ, “Effective Judicial Protection and Mutual Recognition in the European Administrative Space”, *German Law Journal*, 2021, pp. 344–370.

the preliminary acts of the decision-making process assume a different dimension when a horizontal relationship between various national authorities is at stake. This is both because the arguments based on the autonomy of the EU legal system are not applicable in a horizontal relationship (where instead equal sovereignty of two legal orders is the starting point),²⁹ and because of the lack of a system of “horizontal preliminary ruling” instead playing a role in vertical relationships.

Even this “basic” division between horizontal and vertical composite procedures is, however, not fully comprehensive of the universe of composite procedures. Indeed, there are at least two nuances in this respect. First, there are procedures which are horizontal, but can “verticalise” when certain situations occur. This is the case, for example, with pharmaceutical authorisations, for which if a marketing authorisation has already been obtained in one Member State, the authorisation holder may ask for the recognition of this marketing authorisation in other Member States, through a mutual recognition procedure. Where no potential serious risks to human health are identified, the authorities of the Member States where recognition of the authorisation is sought will issue a decision recognising the authorisation. If instead one or more of the Member States where recognition of the authorisation is sought do have concerns regarding potential serious risks to human health, and no agreement on this matter can be reached, the procedure is referred, first, to the so-called Coordination Group for Mutual Recognition and Decentralised Procedures, and subsequently (in the absence of an agreement) to the European Medical Agency.³⁰

Secondly, there are procedures which are “triangular”, in that they are initiated and concluded at the national level, but they also foresee the involvement of the EU authorities in the course of the procedure. This is the case, for example, after the reform of the Common Agricultural Policy (hereinafter: CAP), on the basis of which each Member State must, first, draft strategic plan to implement the CAP. These plans are subject to the Commission’s approval, and, following approval, the national authorities will take a number of measures to implement the plan.³¹ These triangular procedures do not pose *specific* problems of access to justice, beyond those which will be discussed below with respect to vertical procedures as there is only one national legal system involved (apart from the EU level).

A somewhat different scenario arises in procedures which can be regarded as “silently triangular”, as in the case of information exchange through databases managed by a European authority. This is the case for example with respect to the Schengen Information System (SIS), the most widely used and largest information-sharing system for security and border management in Europe. Competent national authorities, such as the police and border guards, are able to enter alerts on people and object in the database, which can be consulted by the competent authorities of all Member States, and which can form the basis of restrictive measures such as removal from the national territory. The involvement of the EU legal system is thus “silent” in that it is limited, through the EU Agency for large-scale IT systems (eu-

²⁹ See further on this point P. MAZZOTTI and M. ELIANTONIO, “Transnational Judicial Review in Horizontal Composite Procedures: *Berlioz, Donnellan*, and the Constitutional Law of the Union”, *European Papers*, 2020, pp. 41-70.

³⁰ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L-311/67.

³¹ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No. 1305/2013 and (EU) No. 1307/2013 [2021] OJ L-435/1.

LISA), to the operational management of the central IT system and the network on which the system operates. This has implications for the accountability of the EU administrative authorities, and hence for access to justice, since their participation in the decision-making process is unclear.³²

2.3. *Beyond the summa divisio: zooming in on vertical procedures*

Zooming in now on the forms of cooperation between national and EU authorities, perhaps the most “basic” type of categorisation is the one, mentioned earlier, based on the “direction” of the procedure. On this basis, two types of procedures – “bottom-up” and “top-down” – can be identified, depending on whether the procedure starts at national level, and is concluded at EU level or vice versa. An example of bottom-up procedure can be found in the context of the Protected Denomination of Origins and Geographical Indications, whereby the admissibility of an application is assessed by the national authorities, and the dossier is subsequently forwarded to the European authorities, with the Commission eventually taking a final decision.³³ The reverse, where a procedure starts at the level of the European Union and finishes with a national decision, happens, for example, when the EU administrative authorities conduct an inspection, following which a sanction is issued by the national competent authorities, as in the case of the Common Fisheries Policy.³⁴

This categorisation is certainly a relevant one for the purposes of access to justice, as the question of reviewability of the preparatory act in the procedure poses itself in very different terms depending on whether the procedure is bottom-up, and the preparatory act is, therefore, a national one or, vice versa, an EU one, in cases of a top-down procedure. Indeed, while in cases of preliminary EU acts, the mechanism of the preliminary question of validity under Article 267 TFEU is available to gain indirect access to the EU courts for the review of the EU act, there exists no comparable mechanism (in the form of a “reverse” preliminary ruling) when the procedure is bottom-up.³⁵ As shall be seen in Section 3, it is the CJEU case law which has tried to fill this gap of judicial protection.

Despite its merits, a categorisation based on the “direction” of the procedure is nevertheless possibly too simplistic.

This criterion does indeed not encompass the whole range of vertical composite procedures. There are many examples of composite procedures started at one administrative level of decision-making that end with a final decision at that same level with the significant

³² See further on this N. VAVOULA, “Information Sharing in the Dublin System: Remedies for Asylum Seekers In-Between Gaps in Judicial Protection and Interstate Trust”, *German Law Journal*, 2021, pp. 391–415; J.-P. SCHNEIDER, “Basic Structures of Information Management in the European Administrative Union”, *European Public Law*, 2014, pp. 89 – 106; M. TIDGHI and H.C.H. HOFMANN, “Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks”, *European Public Law*, 2014, pp. 147–163; F. WOLLENSCHLÄGER, “Informationssysteme als Herausforderung für den Rechtsschutz im Europäischen Verwaltungsverbund: Das EU-Schnellwarnsystem für Lebens- und Futtermittel (RASFF)”, *Die Verwaltung*, (2019), pp. 1–39.

³³ Regulation (EU) No. 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L 343/1.

³⁴ Articles 79 and 87 of Regulation Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No. 847/96, (EC) No. 2371/2002, (EC) No. 811/2004, (EC) No. 768/2005, (EC) No. 2115/2005, (EC) No. 2166/2005, (EC) No. 388/2006, (EC) No. 509/2007, (EC) No. 676/2007, (EC) No. 1098/2007, (EC) No. 1300/2008, (EC) No. 1342/2008 and repealing Regulations (EEC) No. 2847/93, (EC) No. 1627/94 and (EC) No. 1966/2006 [2009] OJ L-343/1.

³⁵ See on this, T. ELLERBROK, “Das umgekehrte Vorabentscheidungsverfahren als Schlussstein im europäischen Rechtsschutzverbund”, *Verwaltungsarchiv*, 2022, pp. 202-331.

contribution of another public administration, be it at EU or national level (or both). Examples of such procedures, which all foresee several steps meant to preserve a delicate balance of powers between the Commission and the Member States, can be found in the field of authorisations concerning pharmaceuticals, chemicals or GMOs.³⁶ This is why a more suitable criterion is that of the authority issuing the final decision (rather than the “direction” of the procedure): this authority will indeed determine the legal system where access to justice against the final measure will be available. In turn, all other national and EU acts (in all shapes and forms) will be preparatory vis-à-vis the final decision.

2.4. Beyond the summa divisio: categorisation of composite procedures based on the players

When looking at the varied universe of vertical and horizontal composite procedures, other types of categorisation can also be proposed, some with clearer relevance for the purposes of access to justice than others.

A first taxonomy can be based on the type of actors involved: for example, some vertical composite procedures involve only the Commission, as in the field of EU funds, while others, such as a marketing authorisations for GMOs or pharmaceuticals involve the presence of EU agencies, such as the European Food Safety Authority or the European Medicines Agency.³⁷ Most often EU agencies, when involved in vertical composite procedures, provide expert advice to the European Commission, but they also participate increasingly often in enforcement tasks, sometimes together with national authorities. This is the case notably in the field of financial regulation, where, for example, the European Securities and Markets Authority monitors certain financial institutions – such as credit-rating agencies – for compliance with EU law, can investigate alleged infringements and may even impose sanctions on these financial institutions.³⁸

Continuing with possible actors involved in vertical composite procedures, sometimes the comitology procedure is foreseen, while in other cases it is not. For example, the composite procedure for the authorisation of chemical substances culminates in a Commission Implementing Decision adopted through the examination comitology procedure.³⁹

While important for shedding further light on the EU administrative authorities involved in composite procedures, this categorisation is not relevant when it comes to the question of access to justice, as all EU authorities are subject, in principle, to the jurisdiction of the CJEU.

³⁶ See further on the rationale behind these setups, S. ALONSO DE LEÓN, *Composite Administrative Procedures in the European Union*, *op. cit.*, p. 221 ff.

³⁷ There are several reasons for the growing importance of Agencies in European administrative governance, in general, and with respect to composite procedures, in particular. See further on this point S. ALONSO DE LEÓN, *Composite Administrative Procedures in the European Union*, *op. cit.*, p. 202 ff and further references contained therein.

³⁸ Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L-201/1; Regulation (EU) No. 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No. 1060/2009 on credit rating agencies [2013] OJ L-146/1. Further on this, M. VAN RIJSBERGEN and J. FOSTER, “‘Rating’ ESMA’s accountability: ‘AAA’ status” in M. LUCHTMAN and M. SCHOLTEN (Eds.), *Law Enforcement by EU Authorities – Political and Judicial Accountability in a Shared Legal Order*, *op. cit.*, pp. 53-81.

³⁹ Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L-396/1.

Somewhat more problematic are the cases in which “hybrid” authorities are involved, such as the so-called “networks”. This is the case notably with the European Competition Network (ECN), which performs a number of tasks in the enforcement of EU competition law. Indeed, because of the multi-layered system of enforcement of EU competition, which is a task shared between the European Commission and the national competition authorities (NCAs), Regulation 1/2003 envisaged mechanisms of collaboration concerning information exchange in ongoing cases and case allocation between the European Commission and the NCAs, with the ECN acting as a framework for the operation of these mechanisms.⁴⁰ The informal nature of the Network and its workings may create hurdles for access to justice in the framework of composite procedures, as the Network itself, unlike the European agencies, lacks legal personality and its actions cannot be easily attributed to either the national or the European level of administration, in turn making the identification of the correct judicial forum more challenging.⁴¹

Beyond networks, other “hybrid” administrative bodies participating in composite procedures can also be found in other pieces of EU legislation: for example, in the field of the authorisation of pharmaceuticals, one step of the composite procedure foresees the presence of the above mentioned Coordination Group for Mutual Recognition and Decentralised Procedures, which is composed of one representative per Member State, as well as the Commission and the European Medicines Agency as observers. It is intended to provide a forum for deliberation to facilitate mutual recognition in the field of medicine authorisations and will try to reach a consensual agreement for disputes. This kind of body presents complexities when it comes to access to justice, as the authority in question is not one of the “bodies, offices or agencies of the Union” for the purposes of access to justice at the EU level under Article 263 TFEU, but it is also not conceivable that its acts could be reviewed by any national courts, as the body is certainly not a national administrative authority.⁴²

A further – and rather recent – set of actors entering the scene of composite procedures is that of third countries: indeed, as part of the increasing process of so-called “externalisation” of EU migration policy,⁴³ the EU is increasingly relying on a governance model based on the disbursement of funds from the EU to the Member States, which in turn conclude agreements with third countries: this the case of the European Union Emergency Trust Fund which has been created to address root causes of irregular migration and displaced persons in Africa and on the basis of which the EU grants funds to the Member States, which in turn award them to African authorities which have to present projects falling within the scope of the fund.⁴⁴ Again this set-up has implications for access to justice, because third countries are not bound to respect the EU Charter of Fundamental Rights and access to justice for beneficiaries of EU

⁴⁰ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L-1/1.

⁴¹ On this point, see further K. CSERES and A. OUTHUIJSE, “Parallel enforcement and accountability: the case of EU competition law” in M. LUCHTMAN and M. SCHOLTEN (Eds.), *Law Enforcement by EU Authorities – Political and Judicial Accountability in a Shared Legal Order*, *op. cit.*, pp. 82-114.

⁴² See further M. ELIANTONIO and S. RÖTTGER-WIRTZ, “From Integration to Exclusion: EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals”, *European Journal of Risk Regulation*, 2019, pp. 393-411.

⁴³ See on this concept, J. Santos Vara and L. Pascual Matellán, “The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries” in W. TH. DOUMA, C. ECKES, P. VAN ELSUWEGE, E. KASSOTI, A. OTT and R.A. WESSEL (Eds.), *The Evolving Nature of EU External Relations Law* (2021, Heidelberg, Springer), pp. 315-331.

⁴⁴ The constitutive agreement of the fund is available at: https://ec.europa.eu/trustfundforafrica/sites/default/files/original_constitutive_agreement_en_with_signatures.pdf

funding or other individuals affected indirectly by the EU action might be complicated by their location outside the EU legal system.

2.5. *Beyond the summa divisio: categorisation of composite procedures based on functions*

Another possibility to categorise and distinguish composite procedures is on the basis of their functions. While several composite procedures have a decision-making function, in that they grant (or recognise) marketing authorisations, they allocate funds, they withdraw a product from the market or they approve projects with environmental impacts, composite procedures are also used in the enforcement phase of administrative action. In fact, there is increasing recourse to composite procedures for enforcement purposes. It has been argued that the presence of EU administrative authorities, next to the national ones, is due to the need to promote a sometimes-problematic implementation of EU law, as well as the increased ability of tackle “transnational” problems through the possibility of issuing measures transcending national borders.⁴⁵ This might also be seen as the reason behind the establishment of horizontal composite enforcement procedures.

Composite procedures are used for the enforcement of various EU policy areas, ranging from fisheries, to banking supervision and aviation safety. Often (but not necessarily), enforcement tasks in these composite procedures are carried out at the EU level by the competent EU agency, such as European Securities and Markets Authority or European Fisheries Control Agency (EFCA).

Zooming in on composite procedures taken for enforcement purposes, we can further subdivide them on the basis of the steps of enforcement. There are indeed procedures where the “composite-ness” can be identified in the different levels of governance involved in the enforcement process. This is notably the case when one level of governance carries out an inspection, while another level issues a sanction which closes the enforcement process. An example involving EU agencies is the fisheries sector, where EFCA is, in certain situations, allowed to inspect vessels, but only the authorities of Member States are empowered to issue sanctions if irregularities have been identified during the inspection process.⁴⁶ Similarly, the *Office de Lutte Anti-Fraude* (OLAF), the Commission service entrusted with the task of carrying out administrative investigations to combat illegal activity adversely affecting the EU’s financial interests, does not have sanctioning powers, a competence which is exclusively reserved to the national competent authorities.⁴⁷

⁴⁵ M. SCHOLTEN, M. LUCHTMAN and E. SCHMIDT, “The proliferation of EU enforcement authorities: a new development in law enforcement in the EU” in M. LUCHTMAN and M. SCHOLTEN (Eds.), *Law Enforcement by EU Authorities – Political and Judicial Accountability in a Shared Legal Order*, *op. cit.*, p. 2.

⁴⁶ Articles 79 and 87 of Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No. 847/96, (EC) No. 2371/2002, (EC) No. 811/2004, (EC) No. 768/2005, (EC) No. 2115/2005, (EC) No. 2166/2005, (EC) No. 388/2006, (EC) No. 509/2007, (EC) No. 676/2007, (EC) No. 1098/2007, (EC) No. 1300/2008, (EC) No. 1342/2008 and repealing Regulations (EEC) No. 2847/93, (EC) No. 1627/94 and (EC) No. 1966/2006 [2009] OJ L-343/1. See further, F. CACCIATORE and M. ELIANTONIO, “Fishing in troubled waters? Shared enforcement of the Common Fisheries Policy and accountability gaps” in M. LUCHTMAN and M. SCHOLTEN (Eds.), *Law Enforcement by EU Authorities – Political and Judicial Accountability in a Shared Legal Order*, *op. cit.*, pp. 168-194.

⁴⁷ Articles 3 and 11 of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999 [2013] OJ L-248/1. See further M. LUCHTMAN and M. WASMEIER, “The political and judicial accountability of OLAF” in M. LUCHTMAN and M. SCHOLTEN (Eds.), *Law Enforcement by EU Authorities – Political and Judicial Accountability in a Shared Legal Order*, *op. cit.*, pp. 221–246.

In other composite procedures, the “composite-ness” is at a more micro-level, whereby authorities from different legal orders take part together in the same enforcement act. “Composite-ness” in these enforcement procedures can be vertical, when national and EU authorities cooperate in the inspection process, in various ways, such as through assistance, or joint inspection teams. Notable example of vertical cooperation in inspection procedures can be identified in the field of financial regulation, with the possibility of creation of so-called “joint supervisory teams”, composed of members of national central banks and the European Central Bank, with the task of inspecting certain important financial institutions.⁴⁸ Other vertical patterns of cooperation emerge, for example, with OLAF inspections, whereby national authorities can play an “assisting” role in OLAF’s inspection activities.⁴⁹

Close cooperation in inspection activities can also take a horizontal shape, as EU legislation foresees situations of national authorities needing to cooperate when carrying out inspections. This is the case with the implementation of EU fisheries policy, where the legislative framework foresees the creation of joint inspection teams with inspectors of at least two Member States carrying out inspection in a specific area (under the operational coordination of European Fisheries Control Agency).⁵⁰

Horizontal cooperation in the field of enforcement is not limited to inspection activities: for example, in the field of tax cooperation, EU secondary law established a framework for mutual assistance for the recovery of claims relating to taxes, duties and other related measures. On this basis, the authority of one Member State may request assistance to another Member State to recover claims arising in the applicant Member State: the requested authority, pursuant to this request, will take a number of possible administrative acts, such as notifying the debtor of all documents relating to the claims emanating from the applicant Member State, or carry out necessary administrative actions, such as proceed to the actual recovery of the debt, or take precautionary measures to guarantee the recovery of the claim.⁵¹

Importantly, when it comes to enforcement actions and in particular inspections, administrative action can breach several fundamental rights, such as the right to the inviolability of the domicile and the right to privacy, protected by Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention of Human Rights as well as the right of defence as component of the right to good administration protected by Article 41 of the Charter of Fundamental Rights.⁵² For the purposes of access to justice, the categorisation between decision-making and enforcement procedures might furthermore be of relevance, because enforcement actions might take the shape of factual acts, which, when carried out in a

⁴⁸ Articles 3 and 4 of Regulation (EU) No. 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L-141/1.

⁴⁹ Article 3(3) of Regulation No. 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999 [2013] OJ L-248/1.

⁵⁰ Articles 5 and 7(d) Regulation (EU) 2019/473 of the European Parliament and of the Council of 19 March 2019 on the European Fisheries Control Agency (codification) [2019] OJ L-83/18.

⁵¹ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L-84/1.

⁵² M. DE BELLIS, “Multi-level Administration, Inspections and Fundamental Rights: Is Judicial Protection Full and Effective?” *op. cit.*, pp. 416 – 440.

composite fashion, could pose challenges in identifying the authority responsible for an act and consequently the judicial forum in charge of reviewing it.

2.6. *Beyond the summa divisio: categorisation of composite procedures based on the type of action*

A categorisation which, as we shall see below, has clear relevance for the question of access to justice in composite procedures is one based on the types of measures which intervene in the course of the decision-making process and before a final measure is adopted.

Indeed, there are composite procedures in which preliminary measures are binding. However, this notion of bindingness can have different aspects. In the procedures for the award of EU funds, the preparatory act is a binding EU measure of legislative nature.⁵³ In other cases, instead, the bindingness of the preparatory measure is not evident from the nature of the act, but rather from the fact that it gives an “inevitable” course to the decision-making process. This course can relate to the authority taking the final decision. For example, after receiving the notification that an application for the placing on the market of a GMO has been submitted to the authorities of another Member State, the authorities which receive this notification may raise objections concerning possible risks to human health and the environment linked to the GMO in question. If these objections are maintained and no consensus can be found as to the risks possibly generated by the GMO, the decision-making procedure is no longer concluded by a national decision, but by a decision of the Commission.⁵⁴ The raising of an objection, therefore, is binding in the sense that it is capable of determining the authority taking the final measure in the decision-making process. The bindingness of a preliminary measure can also relate to the outcome of the decision-making process. In the old – and by now no longer in force – EU secondary law governing the European Agricultural Guidance and Guarantee Fund, applicants wishing to receive aid had to submit an application to the national competent authorities which produced an opinion for the Commission, which was binding on the latter authority.⁵⁵ The preliminary measure, in this case, is capable of determining the content of the final decision.

In several other procedures, both of a horizontal or vertical nature, the preparatory acts are not binding and may consist in the preparation of draft measures, the results of consultations procedures, or the raising of an objection. For example, in the field of financial supervision, the assessment of the acquisition of a qualifying holding in a credit institution is subject to a composite procedure foreseen by EU law which is initiated at the national level through a non-binding measure and concluded at the EU level. In particular, the relevant national authorities are responsible for assessing the acquisition and drafting a decision for the European Central Bank (ECB), with the final decision-making power lying with the ECB.⁵⁶ In the field of visas, a Member State may require the authorities of other Member States to state whether they have

⁵³ See e.g., Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No. 1296/2013 [2021] OJ L-231/21.

⁵⁴ Article 18 of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L-106/1.

⁵⁵ Article 20 of Council Regulation (EEC) No. 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed [1977] OJ L-51/1.

⁵⁶ Article 15(2) of Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L-287/63.

grounds for objecting to the issuing of a visa. If objections are raised, the visa may be refused, but the authority issuing the final measure still retains discretion in this regard.⁵⁷

Plans, as a form of administrative action, can also be steps of composite procedures. This happens in the agricultural field, with Member States being required under EU law to draft strategic plans to implement the Common Agricultural Policy,⁵⁸ but also in the field of climate change, where Member States draft so-called “Integrated National Energy and Climate Plans” which are subject to the approval of the Commission.⁵⁹

As mentioned above, the degree of bindingness of the preparatory acts in the decision-making process was considered decisive by Alonso de León to determine whether a decision-making process qualifies as a composite procedure in the first place.⁶⁰ While the present contribution adopts a larger definition of composite procedure, the importance of this criterion for the purposes of access to justice should be particularly highlighted. Indeed, as will be explained in more depth in Section 3, the only – by now – relatively settled case law when it comes to access to justice in bottom-up vertical composite procedures is based on the degree of autonomy which the EU administration, as final decision-maker, has vis-à-vis the preparatory measures issued at the national level. This degree of autonomy, according to the CJEU, determines whether a separate or integrated system of judicial review will apply, namely whether the CJEU will review the entirety of the decision-making process, including its national components, or whether it will be subject to the jurisdiction of the competent national courts.

However, a categorisation based on the measures intervening in composite procedure has to consider not only what would qualify traditionally as an “act” (be it binding or not), but also other forms of administrative action which nevertheless can be part of composite procedures. They can be, for example, acts of information, which, as has been appropriately argued, “sit uneasily within [the] legal/factual dichotomy”.⁶¹ Composite procedures in which the preparatory measures consist of information exchanges are to be found in the tax field, but also in the field of migration and asylum, and in internal markets.⁶²

These exchanges can take place purely horizontally, with or without a request, as happens in the tax field,⁶³ or through the presence of an EU authority. The role of the EU administration,

⁵⁷ Article 22 of Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L-243/1.

⁵⁸ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No. 1305/2013 and (EU) no. 1307/2013 [2021] OJ L-435/1.

⁵⁹ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No. 525/2013 of the European Parliament and of the Council [2018] OJ L-328/1.

⁶⁰ S. ALONSO DE LEÓN, *Composite Administrative Procedures in the European Union*, *op. cit.*, p. 192 ff.

⁶¹ S. DEMKOVA, *Automated Decision-Making and Effective Remedies: The New Dynamics in the Protection of EU Fundamental Rights in the Area of Freedom, Security and Justice*, 2023, Cheltenham, Edward Elgar (forthcoming).

⁶² See in general J.-P. SCHNEIDER, “Basic Structures of Information Management in the European Administrative Union”, *European Public Law*, 2014, pp. 89-106.

⁶³ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L-64/1.

in turn, can present itself in different ways. Firstly, it can materialise in the facilitation of the sharing of information between authorities of different legal systems. This is the case of the Rapid Exchange of Information System (RAPEX) system. The latter is an alert system for unsafe consumer products, set by General Product Safety Directive.⁶⁴ In this system, Member States share information concerning dangerous products with the Commission. After validation by the Commission, the information is made available to the competent authorities throughout the EU, which can take measures to prevent the circulation of the product, such as a ban on sales or withdrawal from the market. Secondly, the EU presence can relate to the creation and management of a database, such as the Schengen Information System (which is managed by an EU agency). The procedures involving a database differ from more traditional forms of information sharing, because in these procedures “a traditional characteristic of cooperation, that is, the communication between the parties involved, no longer exists and it has been replaced by a unilaterally initiated flow of information”.⁶⁵

The presence of an EU authority in the process, through sharing information or maintaining a database, is important for the purposes of access to justice, because it renders the procedure – to different degrees – “triangular”. These procedures pose peculiar problems of access to justice, as will be discussed in Section 3.

Furthermore, as briefly mentioned in Section 2.5., factual action can also be part of a decisional sequence qualifying as composite procedure. This is the case notably in the inspection procedures discussed above. Actions through which, for example, the European Securities and Market Authority, as a part of a composite procedure, enters an institution’s business premises or seals its books qualify as factual actions.⁶⁶ However, factual action in composite procedures can also be of relevance beyond enforcement procedures. For example, the acts through which third-country nationals are interviewed in the so-called “hot spots”, are carried out by the European Union Agency for Asylum in cooperation with the national authorities and are also acts of factual nature.⁶⁷

As will be further elaborated in Section 3, while case law has tackled the question of access to justice in composite procedures where the preparatory measures are “acts” (of a binding or non-binding nature), the applicability of this case law to situations in which the contribution of the participating authority is much more “volatile” (and consists in the sharing of a piece of information or a factual action) is yet to be settled.

2.7. Interim conclusions: the mosaic of composite procedures and its challenges

As the examples presented above have shown, the variegated universe of composite procedures makes any attempt at a comprehensive categorisation extremely challenging. One thing is nevertheless certain and remains a constant in the landscape: composite procedures, as the regulatory manifestation of the increasingly intense cooperation between national and European authorities for the implementation of EU law, are present in virtually all EU policy fields. While this form of procedural cooperation is by now a prevalent mechanism in EU

⁶⁴ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2002] OJ L-11/4.

⁶⁵ F. WETTNER, “The General Law of Procedure of EC Mutual Administrative Assistance” in O. JANSEN and B. SCHÖNDORF-HAUBOLD (Eds.), *The European Composite Administration*, 2011, Intersentia, Antwerp, p. 315.

⁶⁶ Article 63(2) of Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L-201/1.

⁶⁷ It should be noted that these actions do not have a legal basis in the applicable legislative framework. See further on this point, L. TSOURDI, “Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office”, *European Papers*, 2016, pp. 997-1031.

administrative governance, composite procedures lack both an “official” definition and a clear conceptualisation. Their existence, or their usefulness for the purposes of involving Member States in the execution of EU law, is not disputed. However, the current judicial framework seems ill-suited to cater for their comprehensive judicial control.

This is because composite procedures challenge and show the weakness of the traditional approach to the judicial review of administrative action, which is based on the principle of territoriality. On this basis, the jurisdiction of courts is limited to the review of the administrative action stemming from the authorities belonging to the domestic legal system. This approach would make both “transnational” judicial review (i.e., of a national court on a decision adopted by a foreign authority) and “trans-level” judicial review (i.e., of a national court on an EU measure, or vice versa of the CJEU on a measure adopted by a national authority) impossible.

The procedural integration at the level of decision-making sits uncomfortably with this strict separation of judicial control of administrative action and may create difficulties in access to justice. These are likely to arise for two main reasons. First, because the several preliminary steps leading to a final decision within a composite procedure might not constitute a reviewable act in the legal system to which this step, act or action, belongs (in light of their preparatory nature), and, at the same time, might not be subject to judicial control in the court of the legal system adopting the final decision because of the limitations generated by the principle of territoriality. Second, because the actions of the several national and EU authorities participating in a composite procedure might be so intertwined that it could be difficult to trace the contribution of each authority in the process, and consequently, the attributability of a conduct to a specific level of administrative governance.

Despite the presence of composite procedures since the inception of the process of European integration, the case law of the Court of Justice, tackling the problems highlighted in the paragraphs above, is relatively sparse and certainly does not provide a comprehensive framework for the judicial control of composite procedures. As Hofmann has argued, this piecemeal approach of the CJEU is only natural, if we consider that “in the EU, administrative powers, competences and procedures are largely regulated on a policy-specific approach”.⁶⁸ As the next section will show, the Court of Justice has been asked on a number of occasions to determine the extent of its own jurisdiction as well of that of the national courts in composite procedures. However, many questions are still left unanswered and possible gaps in judicial protection might persist.

3. Access to justice in composite procedures in the case law of the CJEU: more questions than answers?

3.1. Vertical composite procedures concluded with a national measure: not all that glitters is gold

As discussed above, vertical composite procedures can be “top-down” or “bottom-up”, depending on the “direction” of the decision-making process. More than the direction, however, what matters for the identification of the competent court in a composite procedure is the authority taking the final decision, and the authorities taking the necessary preliminary steps. The cases in which the EU authorities take preliminary procedural steps towards a final

⁶⁸ H.C.H. HOFMANN, “Multi-Jurisdictional Composite Procedures. The Backbone to the EU’s Single Regulatory Space”, *Law Working Paper Series*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399042, p. 3.

measure adopted at the national level are the least “controversial” amongst the scenarios involving composite procedures, because of the existence of the preliminary reference of validity under Article 267 TFEU. This provision allows national courts to send a question concerning the validity of an EU measure to the CJEU, which, according to its *Foto-Frost* ruling,⁶⁹ is the sole judicial authority, in case of doubt on the validity of acts stemming from an EU authority, able to control it. Furthermore, according to the *Grimaldi* ruling, preliminary questions of validity are admitted with respect to all measures of EU law, including non-binding acts.⁷⁰ Hence, for any preliminary action of an EU authority, including enforcement acts, the preliminary question of validity seems to be available.⁷¹

This set-up solves several – but not all – possible gaps in judicial protection in composite procedures. When the procedure is not only top-down, but also involves only two steps (a preliminary measure stemming from the EU level, and a final measure adopted at the national level), access to justice is fully ensured. However, matters become much more intricate in cases where there is more than one step in the procedure involving the national level: if the preliminary national measure belongs to the same legal system as that of the final measure, access to justice is ensured through a single judicial procedure, whereby the court will be able to review both the preparatory and the final measure, both belonging to the same legal system. However, this is not the case where the preliminary national measure is “foreign” vis-à-vis the court of the legal system where the final measure was adopted. This is the case when those procedures which have been labelled above as “triangular” are at stake as well as with procedures involving several possible steps in the decision-making. In those cases, the national court, faced with a national measure based on both the actions of the EU level and, before that, the actions of an authority of another legal system, will only be able to rely on the preliminary question of validity with respect to the EU input. The case law on horizontal composite procedures which will be discussed in Section 3.3. might be applied with respect to the foreign preparatory measure. However, the applicability of this case law has never been confirmed by the CJEU.

Furthermore, the employability of the preliminary question of validity presupposes the capacity of the national court to “discern” the EU contribution to the national measure: this might not always be evident in cases of composite enforcement procedures where national and EU authorities take part in a single inspection process, or where factual actions are at stake (such as in case of collaboration within the “hot spots” discussed above). In those cases, it is not clear how a national court should act: should it – in doubt – send a preliminary question of validity, even though the contribution of the EU administrative authority might not be discernible e.g., in an inspection report (incurring a risk of the preliminary question being declared inadmissible), or should it accept the indiscernibility of EU and national action and review the measure, possibly in breach of its *Foto-Frost* obligation?

Finally, the preliminary question of validity finds a textual limit in the wording of EU primary law: it can only concern acts and actions of EU “institutions, bodies, offices or agencies of the Union”. It will therefore not be easily actionable against the activities of hybrid bodies which do not qualify as relevant EU authorities under Article 263 TFEU.

⁶⁹ Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.

⁷⁰ Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles*, ECLI:EU:C:1989:646.

⁷¹ For the same conclusion, see M. DE BELLIS, “Multi-level Administration, Inspections and Fundamental Rights: Is Judicial Protection Full and Effective?” *op. cit.*, p. 436.

3.2. Vertical composite procedures concluded with an EU measure: from *Borelli* to *Berlusconi* (and beyond?)

When a composite procedure ends with a national measure, the first visible hurdle is the lack of a “reverse” preliminary ruling, whereby the CJEU could ask a national court to review the validity of an act of a national authority.⁷²

This situation and the possible gaps of judicial protection it entailed came to the attention of the Court in the *Borelli* ruling, in which the Court held, first that it was not entitled to review acts of national authorities, but also, second, that national courts had to admit claims against national preparatory measures, regardless of the limitation posed to that review by the applicable national procedural rules. As has been argued, the Court could not have reached a different conclusion as it was torn between, on the one hand, the need to ensure effective judicial protection, and on the other, that of not invading the jurisdiction of national courts.⁷³ After *Borelli*, the same approach was repeated in a number of cases relating to the field of Protected Denomination of Origins and Geographical Indications under the applicable EU legislation. In these cases, the Court confirmed, on the basis of *Borelli*, that national preparatory measures should be reviewed by national courts, but only when such a measure “constitutes a necessary step in the procedure for the adoption of a [EU] measure, [and in regard to which] the [EU] institutions have only a limited or non-existent discretion”.⁷⁴

Quid iuris of situations instead in which the EU authority retains a margin of discretion in respect of the final measure to be issued vis-à-vis the preparatory measure of the national authorities? The system of judicial protection afforded in such cases has been established in the *Berlusconi* ruling, in which the Court ruled that, in cases of composite procedures where the final decision-making power lies with the EU authorities, the CJEU has jurisdiction to review the entirety of the decision-making chain, including its national component.⁷⁵ Advocating a form of “integrated” judicial review, the CJEU has, at the same time, stripped national courts of their jurisdiction to review certain national preparatory measures which are part of composite procedures.

The combined reading of *Borelli* and *Berlusconi* entails that the determining criterion to vest national courts with the jurisdiction (and the duty) to review national preparatory measures is that of the margin of discretion afforded to the final EU decision-maker. It has been argued in the literature that the result of this combined reading seems logical in light of the differences in the set-ups of the composite procedures at stake: in *Borelli* a number of constitutional arguments speak against the possibility of derivative illegality (i.e., the capacity of national measures to contaminate final EU measures), which in turn limits the possibility to “centralise” judicial control in the hands of the CJEU over the entirety of the process. Indeed, as has been argued, if national preparatory measures were able to contaminate final EU measures, the autonomy of EU law would be threatened, and if the CJEU were able to review these measures,

⁷² For a thorough discussion on how the introduction of such a mechanism would solve the gaps of judicial protection in such situations, see T. ELLERBROK, “Das umgekehrte Vorabentscheidungsverfahren als Schlussstein im europäischen Rechtsschutzverbund”, *op. cit.*, pp. 202-331.

⁷³ S. ALONSO DE LEÓN, *Composite Administrative Procedures in the European Union*, *op. cit.*, p. 336; F. BRITO BASTOS, “The *Borelli* Doctrine revisited: three issues of coherence in a landmark ruling for EU administrative justice”, 2015, *Review of European administrative law*, pp. 269-298.

⁷⁴ Case C-269/99, *Carl Kühne GmbH & Co. KG and Others v. Jütro Konservenfabrik GmbH & Co. KG*, ECLI:EU:C:2001:659. See more recently also Case C-343/07, *Bavaria NV and Bavaria Italia Srl v. Bayerischer Brauerbund eV*, ECLI:EU:C:2009:415.

⁷⁵ Case C-219/17, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, ECLI:EU:C:2018:1023.

the prohibition on the EU courts to adjudicate on national measures would be by-passed.⁷⁶ In *Berlusconi*, instead, because of the discretion enjoyed by the EU authorities to diverge from the national preparatory measure, the national error is implicitly ascribable to the EU level. As a consequence, a centralised system of judicial control seems justified, as in this case the EU authorities bear responsibility for endorsing an invalid national preparatory measure (even though they had the power, and possibly the duty, to control its lawfulness).⁷⁷

However, it has also been considered that the determining criterion established by the CJEU, based on the margin of discretion afforded to the final EU decision-maker is not without practical complications. In *Berlusconi*, the CJEU uses the notion of “discretion” to refer to the margin of manoeuvre of the EU authorities to decide on the *content* of a decision (as opposed to a situation in which this content is pre-determined by the content of the national preparatory measure). However, discretion can also relate, for example, to *whether* to exercise a power, or to *which form* a decision can take. Furthermore, discretion can relate to policy choices, but also the assessment of facts. The case law of the CJEU is very fluid on the notion of “discretion”, as Hofmann shows.⁷⁸ This unrealistic “binary” view of discretion, apart from clashing with the reality of composite procedures, is also liable to generate further preliminary references and legal uncertainty: who is to assess whether the legal framework is such to grant “exclusive jurisdiction” to the CJEU or conversely whether a national court must be seized of the review of a preliminary measure? *Quid iuris* of time limits if the CJEU eventually decides that the preliminary measure needs to be reviewed by the national courts?

Also when considered separately, both the *Borelli* and the *Berlusconi* ruling leave a number of questions unanswered. In particular, the solution adopted in *Borelli* remains unclear still from a practical point of view and has only been partially clarified by the *Jeanningros* ruling.⁷⁹ Indeed, while the obligation for national courts to review national preparatory measures binding on the EU authority taking the final decision was clear after *Borelli*, the question remained open as to what would happen if a final decision is taken by the Union administration before the national court has had the opportunity to review the binding national preparatory act upon which it is based. In *Jeanningros*, the Court clarified that, on the one hand, any pending proceedings against the national preparatory act should continue and, on the other, a national ruling holding that act invalid should lead the EU authority to revoke a decision taken on that basis (upon assumption that the time limits under Article 263 would be long expired). While this confirms, for potential applicants, that the national route must remain open even when the EU authority took a final decision, it still does not clarify what would be the remedies at their disposal if the Commission would refuse to or simply not revoke its final measure after the national proceedings are concluded. Is an action for failure to act under Article 265 TFEU then open for applicants? In the lack of formalised communication channels between national courts

⁷⁶ Further on these points, F. BRITO BASTOS, “Derivative Illegality in the European Composite Administrative Procedures”, *op. cit.*, pp. 110-113.

⁷⁷ P. DERMINE and M. ELIANTONIO, “Case Note: CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17, Silvio Berlusconi and Finanziaria d’investimento Fininvest SpA (Fininvest) v Banca d’Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)”, *Review of European Administrative Law*, 2019, pp. 237-253.

⁷⁸ H.C.H. HOFMANN, “Multi-Jurisdictional Composite Procedures. The Backbone to the EU’s Single Regulatory Space”, *op. cit.*, p. 12.

⁷⁹ Case C-785/18, *GAEC Jeanningros v Institut national de l’origine et de la qualité (INAO) and Others*, ECLI:EU:C:2020:46.

and the Commission, what if the Commission is simply unaware of the fact that the relevant national proceedings are concluded?⁸⁰

Zooming in specifically on the *Berlusconi* scenario, the review of the national measure admitted by the CJEU seems to be limited to errors of EU law, to the exclusion, therefore, of flaws in the national preparatory act based on domestic procedural law.⁸¹ A different solution would be difficult to imagine, as it would entail the CJEU applying national law and because it would make the determination of the validity of an EU measure indirectly dependent on varying national procedural arrangements. However, the exclusion from the scope of judicial control of these national preparatory measures of errors stemming from national law inevitably creates what has been referred to as “administrative crack in the EU’s rule of law”.⁸²

Furthermore, it is hard to imagine how the combined reading of *Borelli* and *Berlusconi* can be easily applied in composite procedures which entail more than two steps. This difficulty is exemplified in the *Association Greenpeace France* ruling, which concerned the authorisation scheme in the field of GMOs.⁸³ In this case, the applicant complained that the actions of the national authority where the procedure had started were irregular, and therefore rendered the final Commission decision irregular. The Court could thus still implicitly rely on the *Borelli* ruling and find that national courts are competent for the review of that preliminary national measure.⁸⁴ However, it is not clear which would be the competent court to review the input of *another* national authority in the process (e.g., in the form of an objection to the assessment made by the first authority).

Finally, as in the scenario of those composite procedures concluded with a national measure, the applicability of *Borelli* or *Berlusconi*, determining which court is competent for a national preparatory measure, will entail an additional layer of complexity when it is difficult to discern which national authority is responsible for a specific action in the decision-making process. Indeed, both solutions presuppose the possibility of identifying the national and EU action in the procedure. However, as shown above, this might not always be possible when the actions of the national and EU authorities are so intertwined as to not be distinguishable from one another. Should this speak in favour of a “centralised” system of review in the hands of the CJEU? The case law has not tackled this question yet.

3.3. Horizontal procedures: between *Berlioz* and *R.N.N.S.* and *K.A.*

When composite procedures involve horizontal relationships between national authorities, there are two starting points for a discussion on access to justice. First, there is no such thing as a “horizontal” composite procedure. Second, the arguments in favour or against separated or integrated judicial review (linked to the autonomy of EU law) do not apply to horizontal

⁸⁰ See on these points, F. BRITO BASTOS, “Judicial Annulment of National Preparatory Acts and the Effects on Final Union Administrative Decisions: Comments on the Judgment of 29 January 2020, Case C-785/18 Jeanningros, EU:C:2020:46”, *Review of European Administrative Law*, 2021, pp. 115 ff.

⁸¹ P. DERMINE and M. ELIANTONIO, “Case Note: CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17, Silvio Berlusconi and Finanziaria d’investimento Fininvest SpA (Fininvest) v Banca d’Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)”, *op. cit.*, pp. 249-250.

⁸² F. BRITO BASTOS, “An Administrative Crack in the EU’s Rule of Law: Composite Decision-making and Nonjusticiable National Law”, *European Constitutional Law Review*, 2020, pp. 63-90.

⁸³ Case C-6/99, *Association Greenpeace France and Others v Ministère de l’Agriculture et de la Pêche and Others*, ECLI:EU:C:1999:587.

⁸⁴ On the point of the coherence between *Borelli* and *Greenpeace*, F. BRITO BASTOS, “The *Borelli* Doctrine revisited: three issues of coherence in a landmark ruling for EU administrative justice”, 2015, *Review of European administrative law*, pp. 277 ff.

situations, where instead the starting point is that of the equal sovereignty of two legal systems.⁸⁵ This implies, on the one hand, that a legal system can freely decide on the applicability of a foreign act on its territory and, on the other, that an act can only be reviewed against the law of the system from which it originates.⁸⁶ The proliferation of horizontal composite procedures, both in the form of mechanisms of mutual assistance and sharing of information, but also of mutual recognition schemes, however, challenges and shows the weaknesses of this territorially bound approach to judicial review. In the European context, furthermore, the principle of mutual trust, famously enunciated by the CJEU in Opinion 1/13, would seem to speak against the possibility of national courts reviewing decisions stemming from other legal systems.⁸⁷

In *Berlioz*, the Court of Justice was seized of a question concerning the possibility for a national court to review a foreign preparatory measure adopted in the framework of the system of the exchange of information for tax purposes, and held that national courts can review such measures in the name of the imperative to ensure the right to an effective remedy under Article 47 of the Charter.⁸⁸ However, this form of transnational judicial review is limited in scope to EU law-related errors in the actions of the foreign authority. While this solution seems, as in case of the procedures at stake in *Berlusconi*, the only feasible one to preserve the sovereignty of the national legal orders, it does leave a significant gap of judicial review if a foreign preparatory measure has been adopted in violation of provisions of national law.

Furthermore, *Berlioz* does not address the question of the “destiny” of the foreign measure. Again, from the perspective of preserving equal sovereignty of the national legal systems, it would have to be concluded that national courts do not have jurisdiction to decide on the *validity* of the foreign measures on which they adjudicate, but only on their transnational *applicability*. The consequence of transnational judicial review would be then the disapplication *inter partes* of a foreign act, or the limitation of its effects, without *erga omnes* effect.

Another related problem is linked to the duplication of rulings (with possibly contradictory results): while transnational judicial review is indeed a possibility on the basis of *Berlioz*, national courts remain competent to review their own national preparatory measures. Such a solution may, at first sight, look like providing for several avenues of judicial review for applicants; however, it also bears a significant risk of potential contradictions between the assessments of various national courts.⁸⁹

⁸⁵ For observations concerning how the equal sovereignty of the Member States in horizontal composite procedures seem to be unduly strained in the case law of the CJEU, see F. BRITO BASTOS, “Berlioz, B AND L: Some doubts on how to balance effective judicial protection and territoriality”, available at <https://realaw.blog/2022/04/01/berlioz-b-and-l-some-doubts-on-how-to-balance-effective-judicial-protection-and-territoriality-by-filipe-brito-bastos/>

⁸⁶ L. ARROYO JIMÉNEZ, “Effective Judicial Protection and Mutual Recognition in the European Administrative Space”, *op. cit.*, pp. 355-356.

⁸⁷ According to the CJEU, this principle “requires [...] each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law”. Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 191.

⁸⁸ Case C-682/95, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373.

⁸⁹ E. CHEVALIER and O. DUBOS, “The Notion of ‘Transnationality’ in Administrative Law: Taxonomy and Judicial Review”, *op. cit.*, p. 343.

Only one year after *Berlioz*, in *Donnellan* the CJEU extended the possibility of transnational judicial review to enforcement procedures of a horizontal nature in the field of the cross-border collection of taxes, by holding the national courts are able to review the enforcement acts belonging to a different legal system, not only against substantive EU law provisions but also against – vague – procedural standards.⁹⁰

As a consequence, it seems by now well established that, when horizontal composite procedures in the field of taxation are at stake, “transnational” judicial review is allowed. The ensuing question is whether and to what extent the *Berlioz* and *Donnellan* rulings can be generalised and extended to other areas of horizontal composite procedures. Given the reasoning of the Court (which is largely based on the need to ensure protection of the right to an effective remedy under Article 47 of the Charter), there are some arguments pleading in favour of the generalisability of the outcomes of *Berlioz* and *Donnellan*.⁹¹ However, several arguments, based on national sovereignty and domestic constitutional arrangements would speak against this generalisability.⁹²

Furthermore, the *Berlioz* and *Donnellan* line of case law seems difficult to reconcile with a more recent ruling, again one in which a horizontal composite procedure was at stake. In the *R.N.N.S. and K.A.* case, the final decision was one in which a Schengen visa had been refused by one Member State, on the basis of an objection raised by another Member State.⁹³ The Court held that, while a national court is competent to review the legality of the decision to refuse a visa, the same court is not competent to review the substantive legality of the decision of objection, which ought to be challenged before the court of the Member State where the objection was raised. While the determining criterion as to where applicants should seek access to justice against national preparatory measures in horizontal composite procedures was not clarified by the Court, it seems that one distinguishing element between the procedures at stake in *Berlioz* and in *R.N.N.S. and K.A.* respectively is, once more, the margin of discretion.

From this perspective, the mechanism of “transnational” judicial review would seem justified when the final measure is the product of an administrative activity which leaves little margin for discretion to the authorities in question (e.g., how to respond to a request for information or take into account the requested tax information), while it would be excluded when highly discretionary activity is at stake, such as the raising of objections against the issuance of a visa or the decision on the issuance of the visa.⁹⁴ It can therefore be observed that the presence of a margin of discretion produces in horizontal procedures opposite results when compared with the *Borelli* and *Berlusconi* line of case law, in that the lack of discretion generates the possibility for an applicant to avail themselves of one single avenue of judicial protection in horizontal proceedings, while it requires two separate judicial proceedings in vertical procedures concluded by an EU measure. This apparent contradiction, however, would seem to be rather logical when considering that, while in vertical composite procedures specific

⁹⁰ Case C-34/17, *Eamonn Donnellan v. The Revenue Commissioners*, ECLI:EU:C:2018:282.

⁹¹ See further P. MAZZOTTI and M. ELIANTONIO, “Transnational Judicial Review in Horizontal Composite Procedures: *Berlioz*, *Donnellan*, and the Constitutional Law of the Union”, pp. 51 ff.

⁹² F. BRITO BASTOS, “*Berlioz*, *B AND L*: Some doubts on how to balance effective judicial protection and territoriality”, *op. cit.*

⁹³ Joined Cases C-225/19 and C-226/19, *R.N.N.S. and K.A. v. Minister van Buitenlandse Zaken*, ECLI:EU:C:2020:951.

⁹⁴ The court itself recognised that Member States “have a broad discretion, in examining a visa application, as regards the conditions for applying the grounds of refusal laid down by the Visa Code and the evaluation of the relevant facts”. Joined Cases C-225/19 and C-226/19, *R.N.N.S. and K.A. v. Minister van Buitenlandse Zaken*, ECLI:EU:C:2020:951, para. 49.

problems of autonomy of EU law are at stake and a hierarchical relationship can be sketched between the competent national and EU authorities, the point of departure in horizontal proceedings is that of equal sovereignty between national legal systems.

However, with limited instructions emerging from the applicable case law, the same problems sketched above with respect to the difficulties for applicants to distinguish whether they find themselves in a *Borelli* or *Berlusconi* situation, appear relevant in composite procedures as well. Also, will national time limits apply once the court of the legal system which adopted the final decision declare themselves not competent to review the foreign preparatory measure, generating the need for a second procedure in a different legal system? Furthermore, can a “horizontal *Jeanningros*” be conceivable whereby, if the preparatory measure is challenged separately from the final one, there is a duty for the authority adopting the final measure to revoke its final decision? And finally, which court is competent when horizontal cooperation is so intertwined (such as in the case of an inspection) that it is not possible to discern which actions belong to which legal system? All these fundamental questions for access to justice need to be clarified in future case law.

3.4. Composite procedures and information sharing: the challenges of “triangularity”

A final reflection should be dedicated to the emerging case law concerning a special type of composite procedure which is based on information sharing, namely those involving an EU actor. The SIS and the RAPEX, which have been mentioned above, are notable examples of such mechanisms. Indeed, both the case law emerging from vertical and horizontal procedures does not seem to clearly “fit” these situations in which the procedure is started and concluded at the national level, but it also foresees the presence of an EU authority as a part of the decision-making process. The rationales lying behind *Borelli* and *Berlusconi* seem therefore of limited applicability in these cases, as the final decision-making process does not lie with the EU level, while the *Berlioz* line of case law finds a hurdle in the fact that the EU’s – intermediate – contribution seems to prevent the possibility of a full “transnational” review of the composite procedure.

The case law in this framework is rather limited and leaves many questions unanswered. Two cases, *Malagutti*⁹⁵ and *Bowland*,⁹⁶ dismissing an action for damages against the EU for sharing allegedly incorrect information (on the basis of which national measures had been adopted) seem to indicate that, according to the CJEU, the EU action within these systems is limited to “passing on” the information, which remains within the full responsibility of the Member State which shared the information in the first place. The “triangularity” in these procedures seems therefore, according to this case law, merely formal.

If these procedures are then to be considered horizontal *in substance*, should national preparatory measures in these cases be reviewed “transnationally” as in *Berlioz* or through two separate procedures as in *R.N.N.S. and K.A.*? A recent opinion by AG Ćapeta seems to indicate that preparatory measures in which the information is shared (in this case, within the RAPEX system) must at least be open to judicial control in the legal system where the measure was taken.⁹⁷ However, in this case, there had not yet been any national measure taken after the alert was shared by the Commission to the Member States. If a subsequent national measure (e.g., determining that a product be banned from the market) is taken, should an applicant initiate

⁹⁵ Case T-177/02, *Malagutti-Vezinhet v. Commission*, ECLI:EU:T:2004:72.

⁹⁶ Case T-212/06, *Bowland Dairy Products v Commission*, ECLI:EU:T:2009:419.

⁹⁷ Opinion in Case C-626/21, *Funke Sp. z o.o.*, ECLI:EU:C:2022:954.

two separate proceedings? All questions concerning horizontal proceedings thus remain equally relevant for these situations.

4. Conclusions

Already since *Les Verts* ruling, the CJEU has held that the EU is “based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”.⁹⁸

The picture sketched above with respect to access to justice in composite procedures shows that this right is currently not fully ensured. In composite procedures, several authorities belonging to multiple legal systems intervene in the decision-making process. This complex web of vertical and horizontal interactions, intervening at different moments of the procedures, taking a variety of – more or less formalised – forms, sits uncomfortably with the traditional approach to the judicial review of administrative action, which is based on the principle of territoriality and on the separation of jurisdictions between national and EU courts. As a consequence, there may well be situations in which private parties might be denied the right to challenge acts emanating from composite procedures.

The Court of Justice has tried to tackle these problems by clarifying the *locus* of the justiciability of preparatory measures within composite procedures which end with an EU measure. However, several questions surrounding the *Borelli* and *Berlusconi* case law remain open. The same can be argued with respect to horizontal procedures after the *Berlioz* ruling. With respect to several other situations generated by composite procedures, there is currently no conclusive answer as to how access to justice ought to be ensured, and by which court. The proliferation of “hybrid” bodies, of close vertical and horizontal cooperation in factual action, and of increasingly “volatile” information is only likely to exacerbate these problems.

While several gaps of access to justice within composite procedures seem to persist, and the CJEU has failed to clarify a number of essential aspects of judicial review in this respect, there are also structural shortcomings which ought to be mentioned. In the lack of a “reverse” or “horizontal” preliminary question, which admittedly is not for the CJEU to create, the Court was unable to tackle the fundamental shortcomings of access to justice in composite procedures. It is therefore to be hoped that a fundamental reconsideration of how to ensure access to justice in an increasingly “integrated” administration will soon be placed on the agenda of the EU legislator.

⁹⁸ Case 294/83, *Parti écologiste “Les Verts” v European Parliament*, ECLI:EU:C:1986:166 para. 23.