

Herwig C.H. Hofmann, 'The Court of Justice of the European Union and the European Administrative Space', in: Michael W. Bauer, Jarle Trondal (eds.) *The European Administrative System*, Palgrave (Basingstoke and New York, 2014)

Abstract:

This chapter outlines the role of the judiciary in shaping the European administrative system, the major developmental stages of judicial review of administrative action and the evolution of concepts under which judicial accountability has been exercised. In this context, it looks at the consequences for judicial accountability by the increasing integration of administrative procedures in the EU. This chapter argues that such procedural forms of cooperation have been established with a primary concern for efficiency of de-central administrative action but less with regard to possibilities of exercising judicial review ensuring compliance with written provisions and General Principles of EU law and rights of individuals.

This chapter looks at effects of the exercise of judicial review on the development of the European administrative space in the EU and, more specifically, at the conditions of implementation of EU policies by administrative action in the EU. Such judicial review takes place by the Court of Justice of the European Union (CJEU)¹ and of the Member States. The chapter outlines some long-term trends and effects of holding administrative action to account by means of judicial review and Courts' possibilities of influencing the development of public law in the EU.² It thereby looks not only at the 'big picture' of the major phases of transformations of the system of implementing EU law by means of administrative activities. It also asks what the effects of these transformations have been on the possibilities of exercising judicial review and which future developments might be necessary to remedy some of the remaining or newly emerging problematic aspects of the system. With regard to the past developments, this chapter therefore uses a descriptive approach historically contextualising the observed features. With regard to the discussion of possible consequences, it compares the existing and observed *status quo* with some requirements arising from general principles of EU as developed in no small part by the case law of the CJEU itself.

This chapter is therefore not concerned with the CJEU's own administration as institution of the EU. The CJEU's own administration essentially exists in the form of the Registrars' offices in charge of administering the incoming cases, the communications with the parties involved including the receipt, notification and retention of all procedural documents as well as the translation service. This administrative activity of the Court is thus strictly ensuring the exercise of the judiciary function, which in turn has been a powerful tool for shaping the conditions of the exercise of powers in the European administrative system. The latter function of the Courts is the focus of this chapter.

Two major transformations of administration in the EU and the role of the courts

The European Union is a legal system which, during the past 60 years of its evolution, has developed and transformed itself many times. One of the ways in which the European Union polity has evolved in recent years is in the nature and breadth of the tasks it performs as well as the range of actors who perform them. Despite this, the various Treaty amendments of the past decades have left the forms of judicial review largely unchanged. Only the Treaty of Lisbon introduced some limited amendment for the action for annulment in Article 263 TFEU. Irrespective of the relative stability of the structure and organisation of judicial review in the EU, the conditions for exercising judicial review have profoundly changed. Not only has there been an increase in forms of administrative action on the EU level, also the ‘Europeanisation’ of Member State political and legal systems has intensified. This in consequence, has led to a larger amount of policy areas affected, the creation of a greater diversity of actors and forms of procedural interaction between them. At the same time, the last 60 years have also been marked by a profound change in the understanding of the necessary coherence of a legal system in that the role of fundamental rights and principles as guiding concepts for all policy areas has risen. On the EU level this is reflected also by an increasing amount of sources of such rights, principles and values which need to be balanced. These changes were, in part, the results of case-law of the CJEU often developed in cooperation with national courts; In part, they can be attributed to changes in the nature of the legal system of the EU to which courts are struggling to find answers.

Regarding the former, the CJEU has itself over time established criteria for legality of action of administrations as well as for interpretation of written EU law by the development of General Principles of EU law. Such General Principles include procedural rights such as *inter alia* the right to an effective judicial remedy or the right to good or sound administration, as well as specific substantive rights such as the right to property, to academic freedom and others. They also include

criteria for the exercise of judicial review such as the principle of proportionality. Within the legal system, all rights are also regarded as General Principles of EU law.³ They serve multiple purposes such as providing a guide to the interpretation of Union law, including Treaty provisions, and constituting grounds of review of any kind of Union acts created by the institutions, bodies, offices and agencies of the Union. In that, depending on their nature, General Principles of law can either be used as criteria for reviewing the legality of acts or directly to ensure the protection of individuals' rights in the face of administrative action from various levels.

General Principles of law – whether comprehensively addressed in Treaty provisions or predominantly arising from the case law of the CJEU – are also the key of the common constitutional law of the Union in that they contribute to the purpose to enhance the coherent interpretation and application of Union law also regarding its implementation by Member States. In fact the General Principles of law are concepts which have to be complied with throughout the European administrative system not only in the case of implementation of EU law in the strict, limited sense of transposition of EU legal acts,⁴ but also when Member States derogate from it,⁵ that is, in all cases which 'fall within the scope of Community law',⁶ and when Member States use their legal systems to enforce obligations arising under EU law.⁷ In that, General Principles of EU law as developed by the CJEU have had a considerable influence on Member State and even private party action whenever the scope of EU law, for example by application of fundamental freedoms of the TFEU, is touched.

Given case-by-case nature of judicial review, not surprisingly, the set of General Principles of law recognised today was not developed not develop as a comprehensive and consistent set of principles in one go. In fact, the development is ongoing. Instead, the full canon of General Principles of EU law, as we know them today, when seen from a historic point of view of legal integration, started to be recognised in the first cases in matters judging the European Coal and Steel Community. The largely procedural rights recognised in this phase include the protection of

legitimate expectations, the prohibition of retroactivity and the notion of proportionality as a criteria for review.⁸ An enlarged set of principles was then recognised in the wake of the first enlargement of the Community in the form of defence rights of individuals against Commission action. A further wave of developments started in the 1990ies and the subsequent ‘Nordic’ enlargement with an increased awareness of the need for transparency, access to documents and other rights of individuals’ vis-à-vis the administrative system. Finally, since the turn of the century, a stronger fundamental rights bias and with it a strengthening of notions of proportionality have occurred which cumulated in the creation and incorporation of the Charter of Fundamental Rights into primary law of the EU. Generally, and with hindsight, they can all be classified as deriving from the rule of law.

The recognition of General Principles of EU law by the CJEU, however, took place against the background of profound changes in EU law and policies. The past decades have been marked by an increase in policy areas subject to Europeanisation and a continuous development of forms of implementation. In the wake of these developments, the legal and political system has become more complex and more directly relevant to citizens’ lives. Also, the dynamic development of European integration has in reality changed the effects of judicial accountability on the European administrative system profoundly. This change also took place over time and goes hand-in-hand with the transformation of the notion of the state in the process of integration.

In simplified terms, the system of administration in Europe began its development on the basis of a system within ‘closed’ states with national administrations as state-specific structures reflecting different identities, historic traditions of organisation (Hofmann: 2008, 662-676). It has developed to what is today an ever more integrated system of EU and national administration cooperating with the goal of implementing EU law. The path from relative independence to a high level of integration can be described in the following terms: With the development by the CJEU of the ‘constitutional’ principles of direct effect and supremacy of EU law, the notion of implementation

of EU law became an obligation of each administration and Court – not only of the national legislature transposing international law into national law. This changed the approach to the administrative system in that it required the Member State legal systems to ‘open’ themselves to implementing EU policies formulated through EU law. This to a certain degree began to erode the importance of the distinction the ‘inner sphere’ of a state - organised by national law - and its ‘outer sphere’ -organised by public international law. A second phase of development of towards a European administrative system became more disruptive for the traditional borders between national administrations of individual Member States as well as those between national and EU’s administrations. The requirements of a true single market as a legal space without internal frontiers were spelt out by the CJEU to require an increasing response of administrative cooperation and mutual recognition of the administrative and legislative decisions of other member states (Weiler: 1991).⁹ In terms of the administrative system this led to an opening of the administrative systems of the member States to allow ‘foreign’ administrative decisions’ effect within the own jurisdictional territory. A third phase quickly followed. It was designed as a reaction of the legislature to the demands of the judiciary on mutual recognition within the single market. Since in many policy areas, mutual recognition and assistance did not prove sufficient to create a single legal space and single market, the response in terms of administrative organisation and structures was twofold: First, through intensified procedural cooperation by the executive branch of powers from the Member States and the EU, as well as, second, the creation of organisational forums for cooperation in comitology committees, European agencies and many networks of actors created formally or informally through obligations of procedural cooperation. Under the growing debate about subsidiarity, there was also little appetite to build large-scale administrative capacities for implementation of EU law on the EU level. In view of the then relatively small administrative capacities of the EU in relation to its duties (Kassim 2003: 151), the solution was to link the decentral administrations in network structures. This third phase of development can be described as the move to an ‘integrated administration’ (Hofmann/Türk: 2007). The integration of

administrations took place in a policy-by-policy development by means of procedural cooperation of varying intensity.

As a consequence of these developments, in many policy areas the development of the integration of EU and national administrative proceedings has led to ‘composite proceedings’. These are administrative procedures which – although finally terminated by a decision on either the European, or the national level – are undertaken with input from various jurisdictions (Cassese 2004: 21-36; Cananea: 2004, 197-218; Chiti: 2004, 37-60; Sydow: 2001, 517-542; Schmidt-Aßmann: 1996, 270-301). This development, importantly, has led in an increasing number of policy areas to a growing gap between, on one hand, the jurisdiction taking a decision and, on the other hand, the jurisdiction investigating the conditions and facts leading to such decision. Examples for such multi-jurisdictional decision making procedures are for example the areas in which alert systems exist on the basis of which executive bodies from one Member State act implementing the warning of another. These exist for example in areas of regulation of the single market in the area of food safety or medicines. Alert systems also exist in the field of visa and immigration matters for example in the context of the Schengen Information System (SIS). Composite procedures also exist in the field of planning – be it in the field of environmental law, emissions trading, transport and energy and many other fields. Under these conditions, the identification of responsibility for parts of a final act amongst actors of several jurisdictions is emerging as a challenge. This also has implications for conditions of judicial review and its effectiveness when legal provisions from multiple jurisdictions have been applied to create one single administrative outcome (Hofmann: 2009, 136-167; Hofmann/Tidghi: 2014). Where administration from various jurisdictions contribute to a final act adopted either by an EU institution or body or by a Member State, input into a final decision may result from various jurisdictions each applying their national law (Nehl: 2011, 648).

The state of judicial accountability of administrative action

Today's EU-specific possibilities of holding administrations judicially to account have, in a nutshell, developed, on one hand, with the expansion of the role of General Principles of EU law which in principle should allow for a review of compliance of administrations implementing EU policies across levels. However, on the other hand, with the increasingly integrated administration often engaged in composite procedures, the exercise of judicial review has become significantly more difficult in reality. The reason is that the system of judicial review of administrative action in the EU is established in a traditional two-level approach. The separation of the levels is much more distinct than the sophistication of procedural integration seen on the level of administration cooperation. The decisive factor is not that courts are organised either as national courts or as courts of the CJEU. This organisational separation is also a feature of administrative actors being organised either on the EU level as institutions of the EU or EU agencies. The difference is that Courts, unlike administrations, are procedurally much less integrated. This obscures possibilities of allocating responsibility and finding adequate remedies for judicial review in procedures of composite nature.

Judicial supervision of action of the integrated executives in the EU is undertaken generally by Member State courts. The CJEU with its General Court and Court of Justice are generally called upon directly only for actions for annulment of acts of EU institutions (Article 263 TFEU), bodies and agencies or in a claim for damages for their alleged wrongdoing (Article 340 TFEU). The CJEU as the highest court of the legal system enjoys the monopoly of interpretation of EU law and has the sole right to annul acts of the EU institutions.

Member State courts can require the Court of Justice to give a preliminary reference on questions of interpretation of EU law or validity of acts of the institutions (Article 267 TFEU). The success of this process lies in the cooperation of courts from different levels (Maduro: 2003, 512). The

procedure of preliminary reference assured that the relations between the courts were non-hierarchical in so far as Member State law could not demand the exhaustion of national remedies prior to such a request. The result is a system in which the national judge has also become in effect a Union judge, and where the supremacy of European law does not imply the inferiority of national courts. It should be noted in this connection, however, that one characteristic of the preliminary reference procedure is that the CJEU makes findings only regarding the Union law aspects of cases. The final decision of the case rests with the national judge. Problems with this form of cooperation, in view of the highly integrated EU executives, arise from the fact that the cooperation structures provided through Article 267 TFEU operate in only one direction. They allow only for 'vertical' cooperation initiated by national courts. Other dimensions characteristic of a genuine network, such as vertical cooperation initiated by the CJEU or horizontal cooperation between Member State courts, are not provided for. The latter might be especially useful in the context of judicial review of the increasing amount of measures created in composite procedures in the areas of implementation of policies and executive rulemaking.

Direct access to the CJEU, on the other hand, is limited to cases of actions for annulment of acts of Union institutions, bodies, offices and agencies (Article 263 TFEU). In review of these cases, however the CJEU has no possibility of reviewing the input into a decision by national authorities, even when the latter act under EU law. In cases, where Member State actors are implementing Union law, national courts are in charge of reviewing the legality of a national decision. National courts can ask the CJEU for an authoritative interpretation of EU law or request to review the legality of an EU act in view of higher Union law including General Principles of EU law through the preliminary reference procedure under Article 267 TFEU. But they have no such tool to request the legality of input into their decision coming from other Member States.

Review of decisions taken by these means by the Court of the jurisdiction which adopted the final measure might not be able to do justice to the requirements of effective judicial review of the

preparatory acts from other jurisdictions. There is, thus, in these areas a potential mismatch between procedural integration of de-centrally organised administrations, on one hand, and a clear separation of judicial competencies, on the other. Where such gaps may arise between dispersed decision-making powers and judicial review, such gaps would be detrimental to the application of the right to an effective judicial remedy.¹⁰ The right to an effective remedy is a General Principle of EU law which has also explicitly been recognised in Article 47 CFR. It requires that ‘everyone whose rights and freedoms are guaranteed by the Law of the Union’, be given the possibility to obtain a ‘remedy to set aside national measures which are in conflict therewith’ (van Gerven: 2000, 509).¹¹

In interpretation of this principle, given that the EU is a legal system with multiple levels, the CJEU has held that in the absence of judicial remedies on the Union level, it is for the Member States to establish a sufficiently complete ‘system of legal remedies and procedures which ensure respect for the right to effective judicial protection’ of Union law.¹² Accordingly, case law by the CJEU held that Member States were obliged to ensure that their courts provide ‘direct and immediate protection’ of rights arising from the Union legal order.¹³ This over time evolved towards the General Principle requiring that rights arising from EU law, be ‘effectively protected in each case’.¹⁴ Where therefore, it comes to Member State action, rights under European law necessarily imply the existence of a corresponding remedy. The ‘form and extent’ of such remedy as well as the procedural rules to make it operational are, however, in principle within national competence (Galetta: 2010), except for matters where the Treaties have explicitly granted jurisdiction to the EU-level. Thus, national Courts are required to ‘guarantee real and effective judicial protection’.¹⁵ Anything which ‘might prevent, even temporarily, Community rules from having full force and effect’ is therefore incompatible with Union law.¹⁶ In view of these obligations, national Courts often face the difficulty that the fact that the substance of administrative cooperation in composite procedures is in particular the joint gathering and subsequent sharing of information. Reliance on *ex post* review of a final act risks becoming increasingly insufficient to ensure effective legal

protection. This makes judicial accountability all the more difficult as no forms of horizontal preliminary references exist for the judges of one Member State to request an authoritative interpretation of the law of another legal system. This problem is only theoretically addressed by the requirement under the case law of the CJEU that Member States and their courts are under the obligation to create additional remedies to those already existent under national procedural rules, if such were necessary to ensure the relation between right and remedy under EU law. Examples are *UPA*,¹⁷ regarding the protection of individuals against regulations which for their effect do not require any further implementing measures; *Borelli*,¹⁸ regarding the protection of individuals in composite procedures with input from Union and Member State administrations into a final administrative decision; as well as *Factortame*,¹⁹ regarding the establishment of a system of interim relief to effectively protect a right under EU law. These requirements have so far only regarded rights of standing. Factually, the national courts, given the complexity of composite information-driven cooperation between administrations, will often not be capable of addressing the substance of a case.

For accountability within the system as a whole this has important consequences. Integrated executives function through the notion of strong procedural cooperation within various forms of networks. There is thus an almost inevitable disparity between the organisational forms available for institutional action in administrative implementation and the mechanisms of judicial accountability external to the administration itself. Traditionally organised multi-level supervisory structures face difficulties, then, in penetrating the details of differently organized executive instrumentalities. They are challenged by locating responsibility for, procedural and substantive errors made and inadequate functional performance within the context of administrative networks, and by finding adequate remedies and correctives for this. They also display special difficulty in coping with the fact that the core of executive cooperation within composite procedures is the joint gathering and subsequent sharing of information.

Where to go from here?

The arguments of this chapter are based on a *multi-dimensional* understanding of EU administrative law. The obligation to ensure proper implementation of EU law and policies as a function is shared by EU and Member State administrations. These administrations, although organisationally fragmented in that they are either EU bodies or bodies of the Member States, in most policy areas, must cooperate through integrated procedures. As a consequence, especially in policy areas in which information networks have been created, it is becoming increasingly impossible to allocate responsibility for policy decisions to one level or another. Decision-making, one could say, is in many cases ‘national, transnational, and supranational, all at the same time’ (Bignami: 2004, 1-20).

In absence of strong and effective procedures for judicial cooperation to exercise effective supervision of integrated administrations, it would appear that there is a need for a comprehensive, critical, and systematic reconsideration of the structures developing in the context of the implementation of EU law. In other words, it needs to be recognised that significant transformations of the legal and political environment for implementation of EU law have substantially affected the possibilities of exercising judicial control. The key problem appears to be that many administrative procedures have become ‘composite’, drawing on input from different levels and actors. Under these conditions, holding administrative bodies to account for their action is hampered by the fact responsibility for the various steps of an administrative procedure lies with bodies in different jurisdictions each applying their specific law with which courts from other jurisdictions not only lack familiarity but also competence to judge upon. This fact in turn has implications for transparency, and for allocating responsibility for safeguarding the procedural and substantial rights of individuals affected.

The question therefore arises what the judiciary, the legislatures on the European and national levels have can do in response to these challenges (Hofmann/Rowe/Türk: 2011, 4-19). I would submit, that if the outline of the problems to exercising judicial accountability in the EU presented in this chapter is correct, it would allow for two potential avenues towards developing solutions.

The first would be to develop forms of judicial cooperation between national judges (horizontal relation) and with the CJEU (as a two-way vertical relation as opposed to the current set-up of Article 267 TFEU allowing for only one-way preliminary references). Part of the problem to date is that the system of judicial review remains oriented towards a model of a two-level system following a logic of separation of powers between the EU and the national levels. Consequently, national courts may not review acts of the EU institutions,²⁰ and similarly, the CJEU may not review national acts.²¹ It might be now time to consider expanding the possible references by courts allowing courts of Member States to obtain a preliminary ruling from courts of other Member States to review the input of other Member State administrations into a procedure, the final act of which was taken by a national administration. Expanding the judicial network would then allow for a more effective supervision of administrative cooperation in multiple-step procedures and might therefore also increase the legal certainty in the system. One approach to more comprehensive systems of reference could be to develop the preliminary reference procedure to allow for the CJEU to also refer questions to national courts as to the application of national law in composite procedures.

A second line of thought would be to develop approaches to reduce the diversity of legal systems applicable in single legal procedures or, if that should not prove to be possible, reduce the negative side effects of a reduced possibility of judicial oversight. One approach to developing such a solution would be the adoption of a general Law of Administrative Procedure for the EU. The Treaty of Lisbon has developed a legal basis in Article 298 TFEU for such an act covering implementing activities by institutions, bodies, offices and agencies of the EU. This legal basis can be used in

combination with other provisions of the Treaty such as Article 114 TFEU, having the same legislative procedure and would allow for the extension of such provisions also to Member State activities when implementing EU law designed for the internal market. The scope of application of such legislation would then be capable of covering all relevant levels and could lead to a significant reduction of the laws applicable to procedures. That might carry the additional advantages of enhancing the protection of individual rights of both natural and legal persons dealing directly with the EU administrations as well as those dealing with national administrations when implementing EU law since these rights would be set out in one piece of legislation, with sector-specific law providing for more far-reaching protection if required. Guiding interpretation of such law by the CJEU could immediately be used by the courts throughout the EU and lead to joint standards of good administration in the implementation of EU law. Next to these benefits, a general law on EU administrative procedures could further have as side effect the possibility of simplifying policy-specific legislation in that the basic rules of procedure can be applied by reference to the general administrative procedures act. (Mir 2011; Ziller 2011a; Ziller 2011b). The positive effects to the legal system might also include a certain degree of consolidation of General Principles of law applicable to administrative procedures in implementing EU law by making them more visible and more readily applicable by administrations implementing EU law.

Notes:

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¹ Previous to the entry into force of the Treaty of Lisbon, the CJEU was known as the European Court of Justice (ECJ). The CJEU has two main sub-units, one being the Court of Justice (CJ) and the other the General Court (GC, pre-Lisbon called the Court of First Instance – CFI).

² This takes place in the context of Article 19(1) TEU which states that the CJEU ‘shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’

³ Article 6(3) TEU.

⁴ See Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609.

⁵ Case C-260/89 *ERT v DEP* [1991] ECR I-2925.

⁶ Case C-260/89 *ERT v DEP* [1991] ECR I-2925, para. 42. See also Case C-263/97 *First City Trading* [1998] ECR I-5537.

⁷ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-nyr.

⁸ E.g. Joines Cases 7/56 and 3-7/57 *Algera and Others v Common Assembly* [1957/58] ECR English Special Edition 39.

⁹ This ‘horizontal’ opening of member states’ legal systems is most closely associated with the case of *Cassis de Dijon*, which required member states to mutually accept and enforce each-others regulatory decisions even in cases where the EU in the concrete context had not passed any harmonised legislation which would have required implementation by member states administrations. See: Case 120/78 *Rene Central AG (Cassis de Dijon)* [1979] ECR 649, paras 8, 14.

¹⁰ The Court of Justice has repeatedly found this right to be a fundamental right of individuals resulting from the common constitutional traditions of the Member States and recognised Articles 6 and 13 of the ECHR. The fundamental rights arising from this are thus also protected as General Principles of EU law under Article 6(3) TEU. See e.g.: Case 222/84 *Johnston* [1986] ECR 1651, paras 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, para 14; Case C-424/99 *Commission v Austria* [2001] ECR I-9285, para 45; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para 39; Case C-467/01 *Eribrand* [2003] ECR I-6471, para 61; Case C-432/05 *Unibet* [2007] ECR I-2271, para 37; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, para 335; Case 12/08 *Mono Car Styling* [2009] ECR I-6653, para 47; Joined Cases C-317/08 to C-320/08 *Alasimi* [2010] ECR I-2213, para 61.

¹¹ Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 18-21.

¹² Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paras 40, 41; Case C97/91 *Oleificio Borelli* [1992] ECR I-6313, para 15.

¹³ Case 13/68 *Salgoil* [1968] ECR 453 at page 463.

¹⁴ Case 179/84 *Bozzetti* [1985] ECR 2301, para 17; Case 222/84 *Johnston* [1986] ECR 1651, para 18. Understood in that sense, Article 47 CFR requires a broad interpretation of Article 51(1) CFR. However, the right to an effective judicial remedy is also, next to its recognition under Article 47 CFR recognised as General Principle of EU law (Article 6(3) TEU), the application of which to Member States is limited by the case law and is not subject to Article 51 CFR.

¹⁵ Case 14/83 *Van Colson* [1984] ECR 1891, para 23.

¹⁶ Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 19, 20.

¹⁷ Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

¹⁸ Case C97/91 *Oleificio Borelli* [1992] ECR I-6313.

¹⁹ Case C-213/89 *Factortame* [1990] ECR I-2433.

²⁰ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4225, para. 20.

²¹ Case C-97/91 *Oleificio Borelli v Commission* [1992] ECR I-6313, paras 9-13; Case C-269/99, *Carl Krühne & Co. KG and Others v. Jürto Konservenfabrik GmbH & Co. KG.* [2001] ECR I-9517 para. 58; Case T-18/07 R *Hans Kronberger v. European Parliament* [2008] ECR II-77, paras 39-40; Case C-64/05P *Sweden v. Commission* [2007] ECR I-11389, para. 93; Case C-393/07 *Italy and Donnici v. European Parliament* [2009] ECR I-3679, para. 44; Case T-76/02 *Mara Messina v. Commission*, [2003] nyr, para. 7; Joined Cases C-512/07 P(R) *Occhetto and European Parliament v Donnici* and C-15/08 P(R) *Parliament v Donnici* [2009] ECR I-1; Case C-317/04 *Parliament v Council*, [2006] ECR I-4721, para. 164; Case T-22/97 *Kesko v Commission* [1999] ECR II-3775, paras 82-84.