Beyond Executive Federalism

The Judicial Crafting of the Law of Composite Administrative Decision-Making

Filipe Brito Bastos

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

Florence, 13 June 2018

European University Institute
Department of Law

Beyond Executive Federalism

The Judicial Crafting of the Law of Composite Administrative Decision-Making

Filipe Brito Bastos

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

Examining Board

Professor Deirdre Curtin, European University Institute (Supervisor)
Professor Miguel Poiares Maduro, European University Institute
Professor Paul Craig, St. John's College, Oxford
Professor Herwig Hofmann, University of Luxembourg

Researcher declaration to accompany the submission of written work
Department of Law – LL.M. and Ph.D. Programmes

I Filipe Brito Bastos certify that I am the author of the work Beyond Executive Federalism: The Judicial Crafting of the Law of Composite Administrative Decision-Making I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

I warrant that I have obtained all the permissions required for using any material from other copyrighted publications.

I certify that this work complies with the Code of Ethics in Academic Research issued by the European University Institute (IUE 332/2/10 (CA 297).

The copyright of this work rests with its author. Quotation from this thesis is permitted, provided that full acknowledgement is made. This work may not be reproduced without my prior written consent. This authorisation does not, to the best of my knowledge, infringe the rights of any third party.

I declare that this work consists of 120.746 words.

Statement of inclusion of previous work:

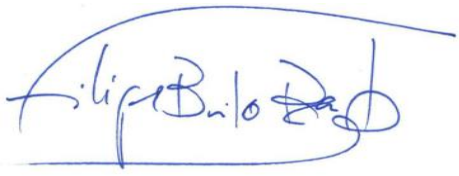
I confirm that chapter 7 draws upon an earlier article I published ('Derivative Illegality in European Composite Administrative Procedures', in: Common Market Law Review, 55, (2018), 101-134).
I confirm that parts of Chapters 6 and 7 draw upon another earlier article I published ('The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice', in: Review of European Administrative Law, 8:2, (2015), 269-298).

Statement of language correction:

This thesis has been corrected for linguistic and stylistic errors.

I certify that I have checked and approved all language corrections, and that these have not affected the content of this work.

Signature and date:



07.02.2018

THESIS SUMMARY

The thesis examines how EU courts have addressed the rule of law challenges of composite procedures. Composite procedures are pervasive administrative processes which involve joint decision-making by national and EU authorities. Such procedures fit poorly into the EU's traditional model of administrative law, EU executive federalism, which is designed for an administrative system where decisional power is exercised separately by the two levels of administration. This mismatch would make it difficult to observe several key requirements of the rule of law in EU administrative law – such as the right to be heard, the right to a reasoned decision, judicial protection, and the control of legality.

The thesis argues that EU courts have crafted a series of unprecedented implicit principles that specifically aim at ensuring the observance of rule of law requirements in composite decision-making. In doing so, EU case law has departed from the old doctrine of EU executive federalism. This was however not an easy transition. Indeed, since the EU's foundational period, EU executive federalism was considered to be a constitutional doctrine, i.e., to immediately flow from the Treaties. Given the almost complete lack of references to administrative issues in the Treaties, this reading was entirely question-begging. Its espousal in the case law is explained in the dissertation as the likely result of a shared federalist conception of the European Union and of the administrative order created under its aegis.

The thesis further argues that, just as the doctrine of EU executive federalism, the judge-made law of composite procedures relies on a series of assumptions on the relations between national and EU administration. The principles of composite decision-making do not treat national and EU authorities as two strictly separate spheres of power. Rather, they handle the two levels as a single, integrated administration, where national authorities are treated as an extension of the Commission – as the EU administration's ancillary bureaucracy.

ACKNOWLEDGEMENTS

A doctoral dissertation is always in equal parts a book and the visible, tangible face of a period in its author's life. Beneath every word there lies a particular moment and stage of that period. Many paragraphs, sections, and footnotes have a story of their own. Mine are invisibly and inaudibly punctuated by the tolling of the bells from the monastery in San Domenico di Fiesole; moments of victory and doubt; mornings in Florentine cafés; afternoons on the beautiful EUI campus; late-night editing on Austrian trains; and sea-side scribbling in the Azores.

Above all else, the text of this dissertation, as such, does not reveal the most important aspect of the process that allowed it to be completed. Its driving force was the continual support that I received on so many levels over the years. I find it difficult to find the words to thank all those who have accompanied me throughout my doctoral studies in a way that does justice to how grateful I am.

Some doctoral candidates have the luck to find a supervisor who respects their autonomy yet pushes them out of their comfort zone. Others will have the luck to find in their advisor a devoted mentor and friend. Others will have the luck to have a doctoral supervisor who provides constant encouragement, valuable advice, and constructive criticism. I had the immense luck to have a supervisor who offered me all this and much, much more. It has been a unique privilege to be supervised by Professor Deirdre Curtin. I am immeasurably thankful for her supervision, for all that I have learned from her, and for the several years in which I was proud to work as her research assistant.

I would like to thank Professor Paul Craig, Professor Herwig Hofmann, and Professor Miguel Poiares Maduro for having graciously agreed to be part of my examining board, and for the constructive and engaging comments I received from them on the manuscript. It is a great honour to defend my thesis before such a distinguished jury, and one for which I am very grateful.

In the years that have led to its completion, the dissertation has benefitted tremendously from the discussions I enjoyed with many great scholars. I owe them all a great debt of gratitude. I would like to thank Professors Giacinto della Cananea, Mariolina Eliantonio, Luís Fábrica, Carol Harlow, Jan Komárek, Luca de Lucia, Giorgio Monti, Morten Rasmussen, Lilian Tsourdi, and Jacques Ziller for their valuable critique and feedback. There are five scholars who followed the progress of my research particularly closely, and whom I would like to thank individually. I would first like to thank Joana

Mendes for her friendship and constant encouragement, as well as for some of the most stimulating discussions I have ever had on EU administrative law. In the critical early stages of my research, I benefitted from the attentive and supportive supervision of Professor Claire Kilpatrick, and from inestimably fruitful dialogues with Professor Loïc Azoulai. Still at the EUI, I found in Professor Bruno de Witte a keen interlocutor to whom I often turned for invaluable and experienced advice. His comments helped me in developing key parts of my argument, and in situating my research topic in EU law as a whole. In Lisbon, I am deeply indebted, both academically and personally, to Dr. André Salgado de Matos, who first introduced me to administrative law. He also dared me to dream of a world rid of conceptualism in public law.

In the Spring of 2017 I had the privilege of working as a *stagiaire* at the Court of Justice, in the cabinet of Judge Cruz Vilaça. I am grateful to Judge Cruz Vilaça for the generosity with which he hosted me, and for offering me a precious glimpse into the ECJ's judicial practice.

The last steps towards finalising my PhD were taken at the Amsterdam Centre for European Law and Governance. I would like to use this opportunity to thank Professor Christina Eckes for warmly welcoming me to ACELG and for her encouragement as the dissertation approached its final form.

I am also very grateful to the many colleagues and friends at the EUI and beyond, who have accompanied me these years and given me their feedback, personal support, and quite often both. I would like to thank Birgit, Marta, Cátia, Alessandro, Maria Barata, Nik, Martijn, Janneke, Fabrizio, John-Erik, Verena, Michał, João Labareda, Andrea, Miguel Rodrigues, Frederico, Agnieszka Smoleńska, Marijn, João Brogueira de Sousa, Agnieszka Sztajdel, Hubert, Maria Vicente, Benedita, and Lucía. Among them, I also include Ciarán, who did a magnificent job as the dissertation's language corrector. He helped me revise many issues of style, grammar, and clarity that I would not have otherwise detected.

Marcin Barański, James Dennison, Koen Docter, Przemek Pałka, and Christophe Schellekens have been the best companions one could have hoped for in this (nearly) 5-year journey. The invaluable friendship of each of them has been essential to my time in Florence, each in different ways. Both my thesis and my experience at the EUI would have been greatly impoverished if our paths had not crossed.

In developing my doctoral project, I had countless exchanges with colleagues, practitioners, and academics at all stages of their careers. Nevertheless, it is not only

customary, but right to emphasise that any errors or flaws in the dissertation are the author's own.

Besides research itself, there are the practical and logistical aspects in a researcher's life. The research carried out for this dissertation was made possible by the funding provided by the *Fundação para a Ciência e Tecnologia*. In the spirit of this dissertation's field, I would also like to sincerely thank the EUI administration. They strive to make our lives easier so that we may focus on our research. I found a culture of true public service at many levels of the EUI administration – from Veerle Deckmyn and Fatma Sayed, in Academic Service, to Nicky Hargreaves in the Language Centre; from Filipa de Sousa, in the Welcome Unit, to Cécile Brière, at the Housing Office; from the Law Department's administrative assistants, to the EUI's exceptional library staff.

Lastly, but certainly not least, I would like to thank my family. My father Rui and my brother Miguel were present and supportive every step of the way. I am immensely grateful to them. I am grateful, too, to my cousin Guilherme, not least for joining me in discovering the Tuscan countryside.

I reserve the final words of my acknowledgements to the person who made my time in Florence the happiest years of my life. Mariana was, in these years, an inexhaustible source of strength and light. She lifted me up in times of uncertainty, and enthusiastically celebrated every little triumph with me, regardless how small. Maybe above all, she was incredibly patient and compassionate, and never ceased to inspire me with her optimism. Without her, I doubt I would have ever completed the thesis in good time. If, as I began by saying, this dissertation is imperceptibly punctuated by a collection of beautiful memories of my time as a PhD, then Mariana imperceptibly drew the lines on which it was written. This is why the dissertation is dedicated to her.

TABLE OF CONTENTS

Table of Contents 1

INTRODUCTION

1. The parts and the whole: the rise of a law of composite administrative decision-making 6

2. Lost for words: EU administrative law as concretized EU constitutional law and the limits of national doctrinal vocabulary 10

3. Approach and existing literature 13

4. Intended contribution and scope 17

5. Structure of the argument 20

PART I

TERTIUM DATUR: FROM STRICT EU EXECUTIVE FEDERALISM TO THE RISE OF COMPOSITE DECISION-MAKING PROCEDURES

Chapter 1: Theoretical and methodological framework 29

1. Introduction 29

2. What is a doctrinal approach, and what is its point? 31

3. The structure of legal doctrines and the factual assumptions of administrative law doctrines 36

4. Two doctrines and two methods: the path ahead 40

5. Composite procedures of reference and generalizability 42

6. Conclusion: formulaic, formalistic, and discretely transformative 45

Chapter 2: The judicial crafting of EU executive federalism 47

1. Introduction 47

2. The doctrinal structure of EU executive federalism 49

2.1. Surface elements of EU executive federalism: concepts and principles 49

2.2. Sub-surface elements of EU executive federalism: deep justification and background assumptions 53

3. Defeated in Paris, Silent in Rome: the Treaties and Europe's federal administrative system 55

4. Revived in Brussels: the federalist Eurolawyers in the Community administration 58

5. Constitutionalised in Luxembourg: EU executive federalism and the discrete administrative dimension of the European constitutionalisation process 67

5.1. The separation principle, the *DM* formula, and constitutional status 68

5.2. Loyal cooperation, national autonomy, and the Union's default administration ... 72

5.3. The judicial crafting of the second-order administration 75

6. Conclusion: Enshrined in Lisbon? Or an appearance of consensus? 78

Chapter 3: Composite administration, composite procedures, and the rule of law 83

1. Introduction: where does the problem actually lie? 83

2. Composite administration and composite procedures 84

3. Composite bodies, composite information-sharing, and a misplaced concern 91

4. Composite procedures: origins, rationale, and structure 96

4.1. The heavy-lifters: the role of national authorities in composite decision-making 101

4.2. Managers, arbiters and custodians of uniformity: EU authorities in composite decision-making 103

5. Composite procedures, executive federalism and the rule of law 107

5.1. Rule of law requirements of EU administrative law 109

5.2. Locating the mismatch 113

6. Conclusion: the erosion of a constitutional doctrine 116

PART II

TOWARDS A PRINCIPLE OF UNITARY PROCEDURAL PROTECTION

Chapter 4: The Principle of Unitary Protection and the Right to be Heard in Composite Procedures 120

1. Hearing through the national screen 120

2. The rocky road to unitary procedural protection 122

2.1. A doctrinal transition 123

2.2. An almost universal transition 126

3. An excess of doctrinal zeal: the inter-administrative approach 128

4. A doctrinal U-turn: the unitary protection principle 133

4.1. The rule of primary contact 136

4.2. Direct links and mediated hearings: the right to be heard during EU procedural stages 140

4.3. The rule of confirmation 149

4.4. The rule of delegability 153

5. State aid: the last stronghold of an outdated approach 158

6. Conclusion: hearings, the ancillary administration and the demise of the separation principle 163

Chapter 5: The Principle of Unitary Protection and the Right to a Reasoned Decision in Composite Decision-Making 167

1. 'Part and Parcel': national reasons, EU decisions 167

2. The duty to give reasons: rationales and place in EU constitutional law 169

3. Restate or refer: reasons-giving in composite procedures 173

3.1. The rule of replicability 175

3.2. "We agree": composite statements of reasons and the rule of referral 178

4. Replicability, referral, and the administrative touch of Midas 184

5. Conclusion: reasons-giving beyond executive federalism 187

PART III

JUDICIAL CONTROL OF COMPOSITE DECISION-MAKING

Chapter 6: Judicial protection against composite decision-making 191

1. Introduction 191

2. Divided courts and the integrated administration 193

3. Three alternatives 195

4. Bottom-up composite procedures: partial innovation 198

4.1. The jurisdictional *Borelli* principle: national decisional dominance and the substantive test 200

4.2. Beyond *Borelli*: judicial review in composite procedures where EU decision-making predominates 212

5. Top-down composite procedures: *locus standi* and the illusion of a 'second-order' administration 216

5.1. Structural funds: inter-administrative and unitary readings 218

5.2. The Regione Siciliana saga 221

5.3. 'Second-order administration' and the denial of direct concern: another case of misuse of EU executive federalism 226

6. Conclusion 229

Chapter 7: The principle of imputation: national illegalities, EU responsibility 232

1. Introduction: contamination effects in composite decision-making 232

2. The discrete erosion of a constitutional doctrine: the imputation principle and executive federalism 234

3. Derivative illegality in composite procedures: a four-dimensional constitutional dilemma 235

4. Reconstructing the Court's case law on derivative illegality in composite administrative procedures 240

5. The *Borelli* doctrine: no EU discretion, no imputation 241

6. Restricted derivative illegality: the principle of imputation 245

6.1. Condition 1: imputability 247

6.2. Condition 2: breach of EU rules 253

6.3. Condition 3: evaluation of procedural irregularities in the light of EU standards of review. 257

7. A rule of law blindspot? 259

8. Conclusion: making the EU administration accountable for the misdoings of its ancillary national bureaucracies 260

CONCLUSION

Beyond Executive Federalism 264

Table of Cases 275

Literature 287

Archival Sources 312

"…the whole is something beside the parts."

Aristotle, *Metaphysics*, Book VIII, Part 6

INTRODUCTION

1. The parts and the whole: the rise of a law of composite administrative decision-making

In all that concerns the distribution of administrative power between the European Union and its Member States, the history of Europe's administrative integration has largely converged around a simple dilemma. The dilemma is how to ensure that the Union's policies are implemented effectively and evenly, without over-empowering its institutions vis-à-vis the Member States.

Over the course of sixty years, two fundamental solutions to this problem have emerged. The first solution was the development of a model of administrative implementation based on a strict division of tasks, whereby the EU legislated policies and the Member States' authorities administered them. The EU's own administration, notably the Commission, was confined to a supervisory, coordinating or arbitral role in respect of national administrations, and only exceptionally exercised decisional powers itself. Though bound to cooperate and provide mutual assistance, the two levels of administration enjoyed strictly separate powers.

Yet, as the European Union expanded both geographically and in competence, it became clear that such a model could not fully guarantee the uniformity and effectiveness of EU policies. Nor could it ensure, in a setting in which borders eroded and different jurisdictions met, that disagreements between national authorities could be overcome where they could cripple the functioning of the internal market. To respond to these challenges, cooperation between the administrations intensified. Though varying in shape and degree of formality, different cooperation mechanisms were developed, and gave rise to what many describe as European 'composite',[1] 'shared',[2] 'integrated',[3] 'common',[4]

[1] Eberhard Schmidt-Aßmann, 'Introduction: European Composite Administration and the Role of European Administrative Law', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 1-22.
[2] Paul Craig, *EU Administrative Law*, 2nd ed., (Oxford, 2012), 27 ff.
[3] Herwig Hofmann/Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences', in: *European Law Journal*, 13:2 (2007), 253-271.
[4] Bettina Schöndorf-Haubold, 'Common European Administration: the European Structural Funds', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 25-54.

'intertwined',[5] or 'multilevel' administration.[6] Some of those mechanisms follow the old logic of strictly divided powers. One does not.

The alternative solution went beyond simply promoting cooperation between national and EU authorities in the exercise of their respective powers. It linked national and EU administration in *composite*, i.e. joint, decision-making processes. Such composite procedures have become a unique and pervasive form of Europe's interconnected administration.

The focus of this dissertation, however, is not to map how the reality of Europe's administration has shifted between these two solutions. It is not a thesis about the empirics of European administration. It is a thesis about EU administrative law – about the rules and principles of EU law governing the implementation of EU law and policies by the bureaucracies of the Member States and of the Union itself.[7] It is about whether the fundamental change brought about by the introduction of composite procedures has been met with corresponding fundamental changes in EU administrative law.

The dissertation examines whether the case law of EU courts recognized the transition between the two solutions sketched out above. It argues that it has. The dissertation argues that EU courts have developed a set of implicit legal principles, which specifically aim to govern composite decision-making.

These legal principles are as unprecedented and unique as the procedures themselves. Indeed, by joining authorities from different jurisdictions, and subject to different laws, composite procedures raise legal and constitutional problems that are unknown to administrative procedures that unfold entirely within a single legal order.[8]

The development of a law of composite decision-making was not a simple affair. It was crafted via a case law that is scattered along different policy fields, opaque in its line of reasoning, and not always consistent. Above all, the judicial development of the principles of composite decision-making defied the postulates of EU executive federalism.

EU executive federalism corresponds to the first solution to the opening dilemma. Administrative implementation generally falls to *indirect administration* – the authorities of the

---

[5] Paola Chirulli, 'Amministrazioni nazionali ed esecuzione del diritto europeo', in: Luca de Lucia/Barbara Marchetti (Eds.), *L'amministrazione europea e le sue regole*, (Il Mulino, 2015), 145-170, 167 (describing European administration as "intrecciata") and Jacques Ziller, 'Multilevel Governance and Executive Federalism: Comparing Germany and the European Union', in: Patrick Birkinshaw/Mike Varney (Eds.), *The European Union Legal Order after Lisbon*, (Wolters Kluwer, 2010), 257-275, 257.

[6] See Jarle Trondal/Michael Bauer, 'Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system', in: *European Political Science Review*, 9:1, (2017), 73-94.

[7] Cfr. Rob Widdershoven, 'European Administrative Law', in: René Seerden (Ed.), *Administrative Law of the European Union, its Member States and the United States*, (Intersentia, 2012), 245-319, 245.

[8] Bernardo Giorgio Mattarella, 'Procedimenti e Atti Amministrativi', in: Mario Chiti (Ed.), *Diritto Amministrativo Europeo*, (Giuffrè, 2013), 327-377, 337.

Member States – and only in exceptional cases to *direct administration* – to the EU's own authorities. Administrative measures are separately adopted either by direct or indirect administration, in the exercise of their own, strictly independent, decisional powers.

Many will doubt that this account of Europe's administrative order is still of any relevance. After all, the pervasiveness of composite procedures shows that the decisional powers of national and EU administration can no longer be viewed as strictly separate. Moreover, through composite procedures, EU authorities are involved in decision-making processes so frequently that one could dispute that direct administration even represents an exception.

The problem is that EU executive federalism is not a mere descriptive account of the features of Europe's administrative order. It is a legal *doctrine*. As with any legal doctrine, it relies on a set of assumptions – on a conception – of the extra-legal reality it intends to govern. The principles of EU executive federalism were crafted by the Court of Justice based on the assumption that Europe's administrative order factually reflected a strict division of power. Those principles were designed to preserve the strict divide between national and EU administrative power, and between national and EU judicial control.

What is more, EU executive federalism is not simply a legal doctrine. It is a *constitutional* doctrine. It was held by EU courts to be enshrined in the Treaty, and to represent an immediate expression of the general principles on the relations between the Union and its Member States. The doctrine of EU executive federalism was constructed in tandem with the broader process of constitutionalisation of the Treaties. Indeed, it must be understood as an extension of that process in the realm of administrative law. It resulted from the same movement whereby jurists in various EU institutions fashioned Europe's constitution based on a federalist reading of the Treaties. With the support of former Treaty drafters in the Commission and in the Court, EU executive federalism emerged as a constitutional doctrine. This constitutional doctrine was to govern a federal administrative order in the making.

Nevertheless, the fact is that composite procedures, based on decisional interdependence between national and EU administration, do not match the kind of European administration that EU executive federalism traditionally assumed to exist. If this mismatch is ignored, serious damage is done to key requirements of the rule of law, such as procedural rights and judicial control. This would be a worrying result, not least because

the rule of law is the lodestar of administrative law[9] – in nation-states as well as in the European Union.

If, however, the risks posed to the rule of law are detected by EU courts, one would expect judicial creativity in response. EU courts might conceivably craft principles that specifically aim to maintain the rule of law in composite decision-making. This would in turn lead to a different, but connected issue. If EU executive federalism was built as a constitutional doctrine based on a federal conception of Europe's administration, then one must wonder about the conception that is reflected in the principles crafted for composite procedures.

This dissertation aims to address these doubts. It intends to answer the following research question:

have the EU courts crafted principles that specifically aim at ensuring the rule of law in composite decision-making and, if so, what is the conception of European administration upon which those principles are based?

'Administration' is understood in an organizational sense, rather than as an activity. In an organizational sense, the administration can be defined as the aggregate of authorities and services that implement law and policies in order to pursue public interests.[10] While the use of the term 'administration' may strike some as "old-fashioned",[11] and associated excessively with the hierarchical bureaucracies of the unitary nation-state,[12] it is uncontroversial that contemporary administrative action largely transcends the boundaries of the state's jurisdiction.[13] Composite procedures, which join decision-making at the national and EU level, are but one example. The fact that EU courts develop specific principles for composite decision-making shows that the law itself is changing, and attempts to accommodate inter-jurisdictional administration.

Nevertheless, the accommodation of composite procedures into EU law was not an easy task. Originally seen as constitutionally entrenched, EU executive federalism proved difficult to abandon. EU courts initially subjected composite decision-making to the old

---

[9] See the rigorous historical account of Friedrich von Hayek, *The Constitution of Liberty*, (University of Chicago Press, 1978), Chapters 13 and 14. Otto Mayer, the most influential of the founding fathers of German administrative law, strikingly described the state under the rule of law (*Rechtsstaat*) as "the state of well-ordered administrative law" (Otto Mayer, *Deutsches Verwaltungsrecht*, I, 3rd ed., (Duncker & Humblot, 1924), 58.

[10] Cfr. Hartmut Maurer, *Allgemeines Verwaltungsrecht*, 18th ed., (C. H. Beck, 2011), 1; Mário Aroso de Almeida, *Teoria Geral do Direito Administrativo*, 3rd ed., (Almedina, 2015), 17; and Marcelo Rebelo de Sousa/André Salgado de Matos, *Direito Administrativo Geral*, I, 3rd ed., (D. Quixote, 2008) 49.

[11] Anne Meuwese/Ymre Schuurmans/Wim Voermans, 'Towards a European Administrative Procedure Act', in: *European Administrative Law: Top-Down and Bottom-up*, (Europa Law Publishing, 2009), 3-35, 6.

[12] Christian Joerges, 'The Law's Problems with the Governance of the European Market', in: Christian Joerges/Renaud Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, (Oxford, 2002) 3-31, 5.

[13] See for instance Sabino Cassese, 'New Paths for Administrative Law', in: International Journal of Constitutional Law, 10:3, (2012), 603-613, 605 ff.

principles that were intended to preserve the strict separation of powers between EU and national authorities. In some policy areas, they still do.

This should not be entirely unsurprising. The blurring of the dividing lines between national and EU power is never uncontroversial. Even in Germany, the country whose constitutional model of administration inspired EU executive federalism, similar forms of joint decision-making by the federal *and Land* administrations are deemed to violate constitutional norms on the separation of their powers.

EU constitutional law, generally speaking, coexists poorly with the miscegenation of what is national and what is European. One Advocate General suggested that measures which are part national, part European – 'legal hermaphrodites' as he puts it – are unacceptable from the point of view of legal certainty.[14] Perhaps less provocatively, composite procedures might rather be described as legal hybrids – as "legal phenomena that our inherited conceptual framework is unable to capture and imprison in a determinate conceptual box".[15] Indeed, composite decision-making cannot be described as a form of direct or indirect administration. Rather than harming legal certainty, the CJEU's implicit principles of composite decision-making generate it. They aim to assign clear responsibility within the European administrative order for the observance of procedural rights, judicial accountability, and the overall legality of the decision-making process.

The conception of administration that underpins the principles of composite decision-making is neither federalist, nor dualistic, as EU executive federalism would intend. It is an *integrated* conception of European administration, where national authorities are conceived of as an extension – as the *ancillary bureaucracy*– of the EU's own administration. According to that conception, composite decision-making is more than direct and indirect administration joined together. It is not conceived of as a mere linkage of national or EU-level decision-making – but rather, as a whole that is more than the sum of its parts.

2. Lost for words: EU administrative law as concretized EU constitutional law and the limits of national doctrinal vocabulary

This investigation adopts as its starting point the perspective that administrative law must be considered in its constitutional context. All constitutional orders aim to frame and

[14] Opinion of AG Alber in Case C-336/00, *Huber*, EU:C:2002:175, paras. 60-61.
[15] Kaarlo Tuori, 'Transnational Law: on Legal Hybrids and Perspectivism', in: Miguel Poiares Maduro/Kaarlo Tuori/Suvi Sankari (Eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, (Cambridge, 2014), 11-57, 14.

govern public power. One therefore can and should expect constitutional law to decisively inform the ways in which legislators and courts structure the limits of administrative power. The key notion underlying this approach has traditionally been encapsulated in the common assertion that administrative law is concretised constitutional law.[16] As a judge of the Court rightfully points out, that observation, though linked in its genesis to national administrative law, is perfectly valid in EU administrative law.[17] Indeed, EU primary law – the Treaties and the Charter – can be seen as a constitution "in a substantive, functional sense", since it "contains the classical functions of a constitution in terms of the horizontal division of powers between the European institutions, the vertical division of powers between the Community and the Member States, and the protection of fundamental rights".[18]

The discovery of what concretized EU constitutional law might mean is made easier by the fact that the CJEU has always simultaneously performed the function of a constitutional and an administrative court.[19] As Azoulai writes, "doffing, as it were, the red garb of the constitutional judge", a CJEU judge "puts on the grey one of the administrative judge".[20] The judicial development of general principles has always been of vital relevance for EU administrative law.[21] The case law strove to establish general legal standards that give effect to key EU constitutional requirements, such as the rule of law and the division of power between the Union and the States. This was of incalculable importance in a legal landscape where there are hardly any general provisions on administration,[22] and where rules of procedure and procedural rights are scattered across sectoral legislation.[23]

---

[16] Fritz Werner, '»Verwaltungsrecht als konkretisiertes Verfassungsrecht«', in: *Recht und Gericht unserer Zeit*, (Carl Heymanns, 1971), 212-226.

[17] Thomas von Danwitz, *Europäisches Verwaltungsrecht*, (Springer, 2008), 141.

[18] Koen Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law', in: Miguel Poiares Maduro/Loïc Azoulai (Eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Hart, 2010), 295-315, 298. For a similar functional view of the Treaties as a constitution, see Kaarlo Tuori, *European Constitutionalism*, (Cambridge, 2015), 28 ff.

[19] Andreas Donner, 'National Law and the Case Law of the Court of Justice of the European Communities', in: *Common Market Law Review*, 1, (1963), 8-16, 11 held that "the court could perhaps best be characterizing by defining it (…) as the administrative and sometimes constitutional court of the Communities".

[20] Loïc Azoulai, 'The Court of Justice and the Administrative Governance', in: *European Law Journal*, 7:4, (2001), 425-441, 428.

[21] See Case T-186/98, *Inpesca*, EU:T:2001:42, which refers at para. 54 to the "general principles of administrative law" that are "defined in the case-law of the Court of Justice and the Court of First Instance".

[22] Martin Shapiro, 'The Institutionalization of European Administrative Space', in: Alec Stone Sweet/Wayne Sandholtz/Neil Fligstein (Eds.), *The Institutionalization of Europe*, (Oxford, 2001), 94-125, 95; and Herwig Hofmann, 'Composite decision making procedures in EU administrative law', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: towards an integrated administration*, (Elgar, 2009), 136-167, 149.

[23] George Berman, 'A Restatement of European Administrative Law: Problems and Prospects', in: Susan Rose-Ackermann/Peter Lindseth (Eds.), *Comparative Administrative Law*, (Elgar, 2010), 595-605, 595.

The judicial creativity of EU courts may have been encouraged by the historical experience of the Member States. Indeed, as in EU law, the driving force for the birth and maturity of many national administrative laws was judge-made law.[24] Many of the principles of EU administrative law were explicitly drawn from national legal traditions, and adjusted to the EU context.[25] EU courts embraced the vocabulary of national administrative doctrine, and the use of a shared language made their reasoning more accessible to lawyers, scholars, and national judges.

Of course, what concretized constitutional law will look like will depend on the idiosyncrasies of each constitutional order. Crucially, it will also depend on the political and legal culture of the institutional actors that concretize constitutional law. This should be a banal observation, but it in fact entails one important, if simple, implication for the study of EU administrative law. Since the EU's constitution governs a polity which is unlike a nation-state, one cannot expect its administrative law to reflect the same values, or compromises between values, that one would find in national administrative law.[26] EU administrative law is not a failed version of national administrative law. As the European constitutional and political experiment unfolded, and as unprecedented forms of administration emerged, the limits of the traditional vocabulary of national administrative law were reached. Words failed the Court of Justice.

---

[24] As Jürgen Schwarze writes ('Judicial Review of European Administrative Procedure', in: *Law and Contemporary Problems*, 68, (2004-2005), 85-105, 88), "judge-made law at the Community level is typical of administrative law, which at its origin was shaped primarily by judges – in particular, the French Conseil d'Etat". A similar comparison is made by Claudio Franchini, 'I principi applicabili ai procedimenti amministrativi europei', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2003), 1037-1059, 1057.

[25] Sabino Cassese, 'La signoria comunitaria del diritto amministrativo', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2002), 291-301, 292; Edoardo Chiti, 'The relationship between National Administrative Law and European Administrative Law in Administrative Procedures', in: Jacques Ziller (Ed.), *What's New in European Administrative Law/Quoi de Neuf en Droit Administratif Européen*, EUI Working Paper Law 2005/10, (2005) 7-10, 8; Carol Harlow, 'Three Phases in the Evolution of EU Administrative Law', in: Paul Craig/Gráinne de Búrca (Eds.), *The Evolution of EU Law*, (Oxford, 2011), 439-464, 444. In some of the foundational EC rulings on principles of administrative law, the Court of Justice engaged in an exercise of comparative law to determine what the key features of certain concepts were across the Member States. The ruling in Joined Cases 7/56, 3/57 to 7/57, *Algera*, EU:C:1957:7 is a case in point. The judgment illustrates the use of this approach in the Court's defence of the power of the administration to review the legality of its own decisions as a general principle. Case 17-74, *Transocean Marine Paint*, EU:C:1974:91 is one example of how the same approach was followed in the domain of the right to be heard.

[26] One prominent early ECJ judge admitted that the reliance on national law experiences often posed a challenge in the ECJ's practice. In interpreting EU law, the ECJ's judges were often "conditioned by some national preconception that should not apply in community law" (Andreas Donner, *The Role of the Lawyer in the European Communities*, (Northwestern University Press, 1968)). Similarly, AG Tesauro wrote that any "national approach towards the community law, even in the terminological realm" should be abandoned and replaced by a more accurate "community approach to law" (Giuseppe Tesauro, *Diritto Comunitario*, 5th ed., (CEDAM, 2008), XIV).

The 1990s are a period sometimes associated with the mitigation of the inventiveness (some would say activism) of the CJEU's case law.[27] While this is perhaps true of EU constitutional law, the claim does not hold in the domains of remedies and administrative law.[28] Crucially, it does not hold for the case law on composite procedures, a form of administration that lacked any parallel in national administrative traditions. EU courts began to use particular patterns of argument in dealing with cases involving composite procedures. They developed principles on composite decision-making that, for want of similar phenomena, remained implicit and nameless. Nevertheless, and for all the conceptual austerity of the case law, it was not just that EU administrative law changed. EU constitutional law itself was reinterpreted – and the understanding of the administrative order that exists under it, reappraised.

3. Approach and existing literature

The aim of this dissertation is to offer a bottom-up reconstruction of the case law on rule of law issues in composite decision-making. It examines the argumentative patterns in the case law and reconstitutes the implicit principles that EU courts have crafted specifically for composite procedures. It proposes a vocabulary to refer to those implicit principles. The dissertation therefore follows a doctrinal approach to the administrative law of European composite procedures.

A systematic doctrinal study of EU administrative law did not exist until the late 1980s. Administrative law was historically understood as an expression of statehood. Many scholars were sceptical whether it could even exist beyond or above the nation-state.[29] Some renowned academics had the prescience to acknowledge that it would be unsustainable in the long run for the study of the same 'administrative events of the European Communities' to be fractured along national traditions of administrative law.[30] In the view taken here, the need for a *European* doctrinal approach is even greater where, as in

---

[27] Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice', in: Maurice Adams/Henri de Waele/Johan Meeusen/Gert Straetmans (Eds.), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice*, (Hart, 2013), 13-60, 16 ff.

[28] See Michael Dougan, 'Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts', in: Paul Craig/Gráinne de Búrca (Eds.), *The Evolution of EU Law*, (Oxford, 2011), 407-438; and Michal Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States', in: Hans-Wolfgang Micklitz/Bruno de Witte, *The European Court of Justice and the Autonomy of the Member States*, (Intersentia, 2011), 305-324, 311 ff.

[29] Giacinto della Cananea/Claudio Franchini, *I principi dell'amministrazione europea*, (Giappichelli, 2013), 18 ff.

[30] Otto Bachof, 'Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung', in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 30, (de Gruyter, 1972), 194-364, 236.

composite decision-making, the forms of European administration and the constitutional issues they raise are unknown to national laws.

Yet, some have argued that the notion of composite procedures is of mere "cognitive value", of limited importance due to the absence of a general legal regime. Indeed, Giacinto della Cananea has argued that composite decision-making "does not have its own legal framework, distinct from that of the entire universe of European administration".[31] Similarly, Britz has argued that composite administration it not a legal, but a merely descriptive concept.[32]

Other authors simply deny composite administration to be more than the interaction between the EU's own administration (direct administration) and national (or indirect) administration. Ziller argues that composite administration – which he terms 'coadministration' – is "not exactly a third category (…) which would have chronologically appeared after direct and indirect administration", but "rather the coordination of the two types".[33] In this sense, von Danwitz points out that, despite the cooperation between the two levels that characterises composite administration, any decision can be traced back to an administrative procedure concluded by either an EU or national authority.[34]

One also finds literature representing the opposite view. Indeed, many have argued that the traditional dualistic divide between direct and indirect administration has been "abandoned" and "hardly does justice" to how intertwined national and EU administration have become.[35] This has led some authors, such as Schöndorf-Haubold, to claim that

---

[31] Giacinto della Cananea, 'The European Union's Mixed Administrative Proceedings', in: *Law and Contemporary Problems*, 68, (2004-2005), 197-217, 215.

[32] Gabriele Britz, 'Vom Europäischen Verwaltungsverbund zum Regulierungsverbund? Europäische Verwaltungsentwicklung am Beispiel der Netzzugangsregulierung bei Telekommunikation, Energie und Bahn', in: *Europarecht*, (2006), 46-77, 47.

[33] Jacques Ziller, 'Introduction: les concepts d'administration directe, d'administration indirecte et de co-administration et les fondements du droit administrative européen', in: Jean-Bernard Auby/Jacqueline Dutheil de la Rochère (Eds.), *Droit Administratif Européen*, (Bruylant, 2007), 235-244. A similar view is taken by Diana-Urania Galetta, 'Coamministrazione, reti di amministrazioni, *Verwaltungsverbund*: modelli organizzativi nuovi o alternative semantiche alla nozione di «cooperazione amministrativa» dell'art 10 TCE, per definire il fenomeno dell'amministrazione intrecciata?', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2009), 1689-1868, 1694-1695.

[34] Thomas von Danwitz, (fn 17), 612-613.

[35] See Herwig Hofmann/Alexander Türk, (fn 3), 253-254; Herwig Hofmann, 'Composite decision making procedures in EU administrative law', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: towards an integrated administration*, (Elgar, 2009), 136-167, 137; Jens Hofmann, 'Legal Protection and Liability in the European Composite Administration', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 441-466, 441-442; Edoardo Chiti, 'The Governance of Compliance', in: Marise Cremona (Ed.), *Compliance and the Enforcement of EU Law*, (Oxford, 2012), 31-56, 36; and Mariolina Eliantonio, 'Judicial Review in an Integrated Administration: the Case of 'Composite Procedures', in: *Review of European Administrative Law*, 7:2, (2014), 65-102, 66, and 255-256. It is noteworthy that the dualistic description of European administration was already criticized as early as the 1960s – even by judges of the ECJ itself. See Andreas Donner, (fn 26), 14.

composite represents is a new kind of administration that has superseded the old division between direct and indirect administration.[36]

In the view supported in this thesis, the debate on whether composite administration is actually at odds with the old division between direct and indirect administration may benefit from more nuance. Given their diversity, it is fruitless to pursue the demonstration that *all* or *none* of the forms of composite administration contradict the conceptual dichotomy of direct and indirect administration. Moreover, unless it intends to be confined to a mere classificatory or taxonomical exercise, the debate must also refocus on the concrete legal problems and implications that result from that mismatch. It must consider *what* exactly renders any given form of composite administration incompatible with the strict division of power of EU executive federalism, and *why* such an incompatibility would even constitute a legal problem.

The problem of composite procedures is not that they fit poorly into the traditional descriptive classification of direct and indirect administration. The problem is that, in composite procedures, unlike what occurs in many forms of composite administration, such as agency boards or inter-jurisdictional exchanges of information, decisional power is not only exercised by national or EU bodies, but by both. This difference is what makes composite decision-making a constitutional problem.

Indeed, EU executive federalism was historically perceived by EU courts as a constitutional doctrine. Its principles are intended to govern and ensure the rule of law in an administration based on strictly separated national and EU powers. They are unfit for purpose if applied to composite decision-making, where power is shared between the two levels.

The focus of this dissertation is in how EU case law has addressed this problem, and what it says about the CJEU's shifting conception of European administration. If EU courts have developed specific legal principles for composite decision-making – and, it is argued, they have – then this would corroborate at least in part the findings of existing legal scholarship. It would show that the administrations involved in composite procedures indeed enjoy the status of a 'tertium genus', alongside purely direct and indirect administration', which some literature has claimed to have identified in composite administration as a whole.

---

[36] Bettina Schöndorf-Haubold*, Die Strukturfonds der Europäischen Gemeinschaft*, (C. H. Beck, 2005), 38 ff. It is nonetheless surprising that Schöndorf-Haubold's otherwise thorough analysis gives relatively little relevance to issues of judicial control and procedural rights. Determining whether there are any particularities in how EU courts address such issues in composite administration would have been of pivotal importance in the author's argument that it forms a legal tertium genus in respect of direct and indirect administration.

The dissertation does not claim to 'discover' or to 'invent' principles. It rather hopes to bring clarity to the argumentative patterns of EU courts in the domain of composite decision-making. The vocabulary proposed by the dissertation will certainly not be unimpeachable, but it hopes to offer a contribution for legal scholarship to debate the developments in the case law in a more self-conscious and explicit manner. It is also hoped that the reconstruction of the implicit principles and rules crafted in the case law will also be useful for practitioners dealing with composite procedures, in whatever policy area they may be found.

It is, however, not the case that the literature has been entirely oblivious to the specificities of the case law concerning composite procedures, or to constitutional principles on administrative procedure deployed therein. Much has been written on litigation in composite decision-making. Alongside the rich body of doctrinal and empirical scholarship on European administration, this dissertation relies heavily on roughly three decades of literature approaching that litigation, be it from the perspective of particular policy fields,[37] from the perspective of particular procedural rights,[38] or from the perspective of composite procedures more broadly.[39] What is missing, however, is an account of the overall case law that exposes the argumentative patterns that are unique to composite procedures, and which unify the litigation on this subject in the form of implicit principles.

Few authors have attempted to offer a holistic account of the case law on composite procedures. Nehl's signature monograph on EU constitutional principles of administrative procedure is what comes closest.[40] With analytic rigor, the study provides a panoramic view of how such principles are applied in cases relating to composite decision-making. Though it offers the most comprehensive account of the case law to the date, Nehl's invaluable contribution overlooked the discrete but fundamental shifts that composite decision-making brought about in EU administrative law. The monograph's emphasis is on the EU's general principles of administrative procedure. The CJEU's case law on composite decision-making is analysed as yet another instance when such general

---

[37] E.g., Barbara Marchetti, 'Fondi Strutturali e tutela giurisdizionale: Variazione degli schemi regolatori e conseguenze sull'architettura giudiziaria dell'UE', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2012), 1105-1128, 1120-1121 and Andrea Mastromatteo, 'A Lost Opportunity for European Regulation of Genetically Modified Organisms', in: *European Law Review*, 25:4, (2000), 425-432.

[38] Christina Eckes/Joana Mendes, 'The right to be heard in composite administrative procedures: lost in between protection?', in: *European Law Review*, 36:5, (2011) 651-670.

[39] See Giacinto della Cananea (fn 31) and Herwig Hofmann (fn 35).

[40] Hanns Peter Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung „mehrstufiger" Verwaltungsverfahren*, (Duncker & Humblot, 2002).

principles apply, rather than the backdrop to how they serve as the justification for the development of *specific* principles on composite procedures. The subtitle of Nehl's work is telling. It is "a study of Community law principles of procedure, *with particular focus on* multilevel administrative procedures" (*unter besonderer Berücksichtigung mehrstufiger Verwaltungsverfahren*). Above all, Nehl's thesis omitted of the equation the extent to which the case law on composite procedures constitutes a shift away from the CJEU's previous understanding of the relations between national and EU administration. It did not delve into the case law's departure from traditional EU executive federalism, or into the fundamental implications of the rulings on composite decision-making for EU administrative law as a whole. However, these are doubts that should certainly be addressed.

4. Intended contribution and scope

The thesis hopes to make three contributions to the existing literature.

As was shown, a common view holds that composite procedures differ from traditional EU executive federalism, in that they do not reflect a dualistic division of national and Union administrative power. What has not been examined, however, is whether that difference is also recognized by EU courts. The first contribution of the dissertation is to demonstrate that it is. It argues that EU case law crafted a series of implicit principles that specifically apply to composite procedures. In doing so, the case law reflects a doctrinal transition from the paradigm of EU executive federalism to a new doctrinal framework, termed as the 'law' or 'principles' of composite decision-making.

The literature is often critical of the case law on composite procedures. That case law is frequently riddled by apparent contradictions and seemingly inexplicable hesitations in addressing rule of law issues in composite decision-making. The second contribution of the thesis is that it offers an explanation as to why the case law was so conflicted, particularly before the 1990s. The dissertation argues that the rigidity of the approach of EU courts is most likely due to the perceived constitutional status of the doctrine of EU executive federalism. That constitutional status must be understood in the light of the political and constitutional context from which EU executive federalism emerged. As it turns out, the doctrine of EU executive federalism is crafted from the same cloth as the broader processes of constitutionalisation of the Treaties.

The study of the case law on composite procedures has tended to focus on a limited number of cases, such as *Borelli* or *France-Aviation*. The third contribution that the

dissertation aims to offer is that it examines a large body of case law, and exposes how some argumentative patterns appear across cases and policy fields. It contends that the case law can, despite some inconsistencies, be unified around a few implicit principles. However, the dissertation argues that this is not just a doctrinal shift on a superficial level of norms. It is a fundamental and systemic shift in the very way in which EU courts conceive of European administration, of the relations between national and EU power, and of the position of individuals, under the EU's constitution.

The ambit of the dissertation is nevertheless circumscribed. The selection of subject-matters that are not include is certainly not immune to criticism.

The dissertation's account of a law of composite procedures may be found lacking in horizontal composite procedures. Horizontal composite procedures are administrative procedures that only involve national authorities of different states, and that do not foresee a procedural stage at EU level. Such procedures are omitted as a matter of conscious choice. Besides the fact that they have produced relatively little litigation, horizontal composite procedures do not raise problems of division of power between the Union and the Member States, which is the focus of EU executive federalism. Moreover, it results from a simple observation of available legislation that horizontal composite procedures are rare, and currently on the brink of extinction. Due to the EU's successive enlargements, the potential also grew for disagreements between an ever-growing number of national authorities. Horizontal composite procedures therefore began to incorporate stages at the EU level where the Commission and European agencies act as arbiters between national authorities, and rule on matters on which they disagree. This evolution has covered many authorisation procedures in the internal market,[41] from pharmaceuticals to the cross-border transportation of waste.[42]

---

[41] The evolution of the governance of pharmaceutical products illustrates well how the cooperative links between different national authorities and the Commission have intensified.
In the aftermath of the thalidomide crisis in the early 1960s, the Council adopted Directive 65/65/EEC. Articles 3 to 10 introduced an authorisation scheme by which national authorities applied common safety criteria, but separately gave their consent to the marketing of medicines. The procedure was predominantly defined by national administrative law, took place before one national authority, and resulted in an authorisation which produced effects only in the deciding Member-State.
In a second period, under Council Directive 75/319/EEC, cooperation between national authorities was enhanced. According to articles 9 to 11, once market actors received an authorisation from a national authority, they could request the forwarding of the authorisation's dossier to the authorities of other Member States where they wished to introduce the pharmaceutical. The forwarding of that dossier was "deemed to be equivalent to submitting an application for marketing authorisation (…) to the said authorities". National authorities remained mutually independent in the exercise of their own decision-making competences. Therefore, "the Member States retained complete sovereignty" (Leigh Hancher, 'The European pharmaceutical market: problems of partial harmonisation', in: *European Law Review*, 15, (1990), 9-33, 13).
In a third period, the scenario changed radically. Currently, under Directive 2001/83/EC, market actors who wish to place a pharmaceutical on the market in several Member-States must only present their application to

The dissertation omits any discussion on the *Textilwerke Deggendorf* (TWD) case law.[43] Under the TWD case law, the Court of Justice may refuse preliminary questions on the legality of EU acts, if a person who could have 'undoubtedly' challenged those acts directly within the time-limits of Article 263 TFEU instead challenges their national implementing measures.[44] Some authors consider TWD to be a key judgment on the judicial review of composite decision-making.[45] Indeed, the ruling may usefully be applied in composite procedures where the EU level adopts preparatory acts which leave no room for discretion to the national authorities deciding in a subsequent stage.[46] However, TWD is not a line of case law which *specifically* concerns composite procedures. It is often applied to situations where there are two closely linked, but autonomous, administrative decision-making procedures at EU and national level.[47]

Moreover, the very choice of judicial decisions as the primary object of study is debatable. The dissertation does not consider many problems of composite decision-making which, though relevant, have yet to be touched upon by EU courts. In particular, the analysis will not cover the regime for the administrative self-review, or withdrawal, of decisions taken pursuant to composite procedures. There is a range of issues which, as of yet, have not been brought before EU courts. The choice to examine those issues that *have*

---

the competent national authority of one of them. The latter will then act as a rapporteur and submit the report on the product to the authorities of the other Member-States in which it is to be marketed. If those authorities oppose to the authorisation, the Commission will take over the procedure and adopt the final decision. If they do not, the rapporteur authority gives its consent in writing to the marketing of the pharmaceutical. In either case, the final decision will result from a single procedure, and bear effects in all of the Member-States concerned. In contrast to the other two periods, the current regime is based on interdependent decision-making, i.e., the final decision requires the joint exercise of decisional power by authorities from different jurisdictions.

[42] The only instance apparently left of purely inter-state administrative procedures relates to the transportation of dual use items. The relevant legislation, Council Regulation (EC) No 428/2009 of 5 May 2009, defines dual-use items as, "items, including software and technology, which can be used for both civil and military purposes" (Article 2(1)). The export of dual-use goods is subject to an authorisation procedure. If that good is or will be located in a Member State different from that which receives the application, its authorities may veto the granting of the authorisation (see Article 11(1) of Council Regulation (EC) No 428/2009).

[43] Case C-188/92, *TWD Textilwerke Deggendorf*, EU:C:1994:90.

[44] See for instance Case C-72/15, *Rosneft*, EU:C:2017:236, para. 128. See also Cases C-441/05, *Roquette Frères*, EU:C:2007:150, paras. 40-47; C-494/09, *Bolton*, EU:C:2011:87; and C-158/14, *A and Others*, EU:C:2017:202, para. 67 and the case law cited therein.

[45] Sabino Cassese, 'European Administrative Proceedings', in: *Law and Contemporary Problems*, 68, (2004-2005), 21-36, 34 and Bernardo Giorgio Mattarella (fn 8), 338. Specific literature on the TWD ruling is difficult to come across. See however Mark Hoskins, 'Case C-188/92, TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland, Judgment of 9 March 1994, [I994] ECR 1-833', in: *Common Market Law Review*, 31, (1994), 1399-1408.

[46] Jens Hofmann, 'Legal Protection and Liability in the European Composite Administration', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 441-466, 456-457.

[47] A case in point in this regard is provided by the litigation concerning antidumping measures. Such measures, usually the definition of a duty, are established by a decision-making process at EU level, but then implemented through individual administrative decisions by national customs authorities that aim to collect that duty. See Case C-239/99, *Nachi Europe*, EU:C:2001:101, paras. 36-40.

been addressed is motivated by an interest in analysing whether the CJEU, the historical engineer of EU administrative law, has also developed a body of law that is specific to composite procedures.

Furthermore, as in any dissertation, there has to be a choice between those academic debates in which one is a participant, and those in which one is an observer. At some points of this study, there is a conscious decision not to engage in a detailed argument with various competing views or theories on themes that are only indirectly or marginally relevant to answering the research question. Since the focus is on the particularities of the case law on composite procedures, the analysis of issues that *do not* specifically relate to the interstices between national and EU authorities will only play a secondary role. Only limited attention will be paid to national procedural autonomy, or to the non-procedural aspects of the policy fields where composite decision-making can be found.

Lastly, in explaining the key legal problem of the thesis – the unsuitability of the doctrine of EU executive federalism to ensure the rule of law in composite procedures, and the rigidity of that doctrine as a result of its perceived constitutional rank – Part I deliberately seeks to provide the least question-begging version of the concepts involved. The dissertation discusses how composite procedures raise challenges relating to e.g. the rule of law, procedural rights, and effective judicial protection, but it does not – it *cannot* – offer a self-standing and comprehensive theory on any of the three. It will therefore dwell upon the scope of such concepts and principles to the extent that such is necessary to explain the nature of the problem posed by composite decision-making, and the solutions given to it by EU courts. In explaining that problem, the argument in the dissertation will progress from the most broadly accepted and well-established version of the terms that are used. The purpose is that the premises supporting the conclusion are themselves as consensual as possible. This is a standard practice of legal argumentation, and one that is backed by many theories of legal rhetoric.[48]

5. Structure of the argument

Part I lays the conceptual, theoretical, and methodological foundations of the argument. It sets the stage for the key issues addressed in the case law that is analysed in the remainder of the thesis. It will also offer a reconstruction of the political and judicial

[48] For many, see Neil MacCormick, *Rhetoric and the Rule of Law: a Theory of Legal Reasoning*, (Oxford, 2005), 17 ff.

development of the doctrine of EU executive federalism. In order to determine whether the case law on composite decision-making differs from conventional EU executive federalism, the argument must first set out what precisely that doctrine means.

The dissertation will begin by setting out the argument's methodological and theoretical framework. Chapter 1 explains what is intended by a legal doctrinal approach, and what its added value is. It further explains why the method of 'subjects of reference' that is advocated by contemporary administrative law dogmatics may serve as an appropriate tool to select the relevant case law in the doctrinal reconstruction of the law of composite decision-making. Legal doctrines combine legal norms and concepts to govern a given aspect of social reality. Drawing on the legal theoretical works of Aarnio and Tuori, it will be argued that legal doctrines are also always informed by certain background assumptions, i.e. conceptions, on the nature of their object. Such background assumptions are an integral component of legal doctrines. They play a particularly relevant role whenever legal sources are indeterminate, and their meaning therefore depends on a broader interpretive consensus among the participants in legal processes. If interpretive consensus is to be reached in respect of a vague source, there must be common ground concerning *what exactly* the source is intended to govern to begin with.

The importance of background assumptions in legal doctrines will become apparent in Chapter 2. The chapter maps the as-yet uncharted process by which EU executive federalism emerged as the basic EU constitutional doctrine on the relations between national and EU administration. The Treaty of Rome was almost entirely silent on administrative matters. Nevertheless, many Treaty drafters shared a federalist conception of European integration, and of the nature of the political and constitutional order it brought about. The fact that many of the drafters then occupied key positions in the EU institutions as ECJ judges, legal advisors, and even Commission Presidents, made it possible to sustain the view that the Treaties had implicitly enshrined a federal administrative order. That order was based on the assumption that national and EU administrations enjoyed strictly separate and mutually independent powers. Accordingly, as early as the 1960s, the Court began to develop principles that specifically aim to preserve that separation. Unless explicitly and exceptionally accorded the power to decide in respect of individuals, the Commission was to be confined to the role of a second-order administration, in the sense of having national bureaucracies as its sole interlocutors. Drawing on the process of constitutionalisation that swept its case law, the Court crafted

the doctrine of EU executive federalism, declaring it to result immediately from the Treaties.

Just as the Court shaped the constitutional status of European administration, European administration itself was changing. National administrations came to turn ever more to the Commission for guidance; and the Commission itself came to rely ever more on the information and assistance provided by national authorities. In varying degrees of formality and intensity, reciprocal cooperation between different administrations gave rise to the European composite administration. Chapter 3 considers this process, and provides a conceptual framework to clearly distinguish between different forms of composite administration. Crucially, not all manifestations of composite administration can be said to constitute composite *procedures*. Furthermore, and contrary to a common view, it is argued that not all forms of composite administration are incompatible with traditional EU executive federalism. Composite procedures, however, are. Whereas EU executive federalism presupposes – and preserves – a strict separation of decisional power, composite procedures aim at the exercise of *interdependent* – i.e. *shared* – decisional power. The Chapter further argues that this mismatch may result in the failure of key rule of law requirements in the realm of composite decision-making. The principle of the rule of law requires that the administration observes rights of the defence, and that it is subject to judicial control. Either of the two requirements risks being violated if composite procedures are read in light of the doctrine of EU executive federalism.

The structure of parts II and III follows the typical steps in the life of an administrative procedure in a chronological fashion. Chapters 4 and 5 respectively analyse the case law on a procedural right that is exercised in the course of an administrative procedure – the right to be heard – and on another that is to be observed upon the procedure's conclusion, the right to a reasoned decision. Chapter 6 considers judicial challenge to the final decision of a composite procedure, and Chapter 7 the grounds for its annulment. This sequencing of topics appears appropriate in light of the fact that it begins with the requirements of procedural protection with which the administration must comply before moving to how those requirements are enforced. Moreover, as will be shown, the solutions in the case law treated during the earlier chapters are indispensable to understand certain rulings examined in later chapters.

Part II examines how EU courts have addressed the mismatch explained above in the domain of the rights of the defence. It argues that, in composite decision-making, EU courts have developed an implicit principle which, will be termed as the principle of unitary

protection. Its rationale is that the distribution of decisional power between national and EU administration should not hamper the exercise of the rights of the defence, which are an important corollary of the EU's commitment to the rule of law. Based on this line of thought, the case law develops a series of rules that require national and EU authorities to coordinate in the observance of the rights of the defence.

Chapter 4 considers the case law on the right to be heard (*audi alteram partem*) in composite procedures. That case law can be divided into two periods. The first period covered most of the 1980s, and largely coincided in time with the judicial consolidation of EU executive federalism as a constitutional doctrine. The legislation establishing composite procedures was interpreted in light of that doctrine. Accordingly, it treated composite decision-making as a coordination of two distinct administrative procedures, aimed at the exercise of strictly separate national and EU decisional powers. EU authorities were understood to be a second-order administration – to decide only in respect of, and only bound by legal relations to, national authorities. For their part, individuals were seen as the subjects only of national authorities. Composite procedures were conceived of as a matter between national and EU authorities. This 'inter-administrative' reading of composite procedures resulted in the denial of any legal relation between the EU administration and individuals, however affected by the former's decisions.

Since the early 1990s, with the *Technische Universität München* case, the 'inter-administrative' reading gave way to an entirely different approach to the right to be heard. It recognizes that, even if the legislation only provides for legal relations between national authorities and the EU administration, the latter is still bound by 'direct links' with the individuals affected by its decisions. With the sole exception of the composite procedures in state aid, the case law is now unified around the unitary protection principle. It subjects both levels of administration to practically identical standards of procedural protection, and requires them to coordinate in offering affected parties an opportunity to be heard. The logic of unitary protection was used to justify three distinct rules, which are sometimes misunderstood as contradictions in the case law. The first – termed as the 'rule of primary contact' – requires national authorities to give a hearing, whenever the composite procedure begins at national level, and those authorities enjoy a power of appraisal. The two other rules concern the duty of the EU's own administration to observe the right to be heard. More specifically, the two rules concern *how* EU authorities may do so. The case law shows that, in order to observe its duty of *audi alteram partem*, the EU administration *may*, but *is not required to*, offer a hearing itself. Instead, it may choose to rely on the assistance of

national authorities. If national authorities already heard affected parties on the preparatory measures they will forward to the EU administration, and if the EU authority intends to adopt the final decision by following those measures, it may simply *confirm* the hearings carried out at national level. This will be termed as the 'rule of confirmation'. The third implicit rule in the case law will be termed as the 'rule of delegability'. It allows the EU administration to fulfil its obligation to hear affected parties by requesting national authorities to offer a hearing on its behalf. Both the rule of confirmation and the rule of delegability mean, in a nutshell, that hearings provided by national authorities will count as if they had been offered by the EU administration itself.

Chapter 5 considers a similar development in the domain of the right to a reasoned decision. The case law is far less complex in that domain than in that of the right to be heard. This is largely because the Charter, Article 298 TFEU, and the CJEU's case law have long made crystal-clear that all binding legal acts enacted by any EU body or institution must be accompanied by a statement of reasons. What is distinctive about the case law on the reasons-giving requirement in composite procedures is, once again, *how* the EU administration may fulfil that obligation. The same logic of unitary procedural protection allows it to rely on the assistance of national authorities to do so. If persuaded by the reasons contained in national preparatory measures, the EU administration may simply reproduce those reasons in its statement of reasons. This notion will be referred to as the rule of replicability, the fourth rule drawn from the logic of unitary protection. Perhaps more interestingly, the case law also enables the EU administration to fulfil its duty to give reasons by stating its agreement with the position expressed in the national preparatory acts previously forwarded to it. This is the fifth and last implicit rule that the dissertation identifies as an implication of the principle of unitary protection. It will be termed as the rule of referral. The rule enables the adoption of statements of reasons which are themselves composite, in that they consist of a reference made by the EU administration to documents drafted by a national authority.

Part III of the dissertation analyses the case law on the judicial control of composite decision-making. Judicial scrutiny of public power is a key requirement of the principle of the rule of law, and indeed the most present aspect of that principle in the Court's case law. It entails both a subjective function, of judicial protection of individuals, and an objective function, of the restoring legality whenever the administration violates its own legal requirements.

Chapter 6 focuses on the judicial protection of individuals affected by decisions taken pursuant to composite procedures. It examines two issues in particular that concern access to courts.

The first issue concerns the identification of the measures which may form the object of a self-standing judicial review. With regard to EU measures, the case law has not needed to go beyond the conventional tests that are generally applied beyond the realm of composite decision-making. EU acts are subject to judicial review, whenever they intend to produce binding legal effects. When they do not – which will be the case of many preparatory measures – they can only be challenged upon the conclusion of the procedure. In what concerns national procedural stages, EU courts have been more innovative. The *Borelli* line of case law develops a series of conditions that specifically apply to national authorities involved in composite procedures. Unlike what occurs in instances of purely national decision-making, the CJEU requires national courts to accept challenges against some national preparatory measures. Namely, they must admit actions for annulment against national preparatory acts that, according to the legislation governing the relevant composite procedure, leave no discretion to the EU administration. In tandem, EU courts are barred from accepting review of those national preparatory measures, even if indirectly and as a part of an action for annulment against the final decision at EU level. The demand that national courts review national preparatory measures as if they would review any final administrative act, and the prohibition for EU courts to review those measures, jointly form what will be termed as the *jurisdictional Borelli principle*.

The second issue examined in Chapter 6 relates to the *locus standi* of individuals before EU courts, in composite procedures formally concluded by a national authority, but where the decision is in substance taken at the level of the EU administration. One example of such composite procedures is found in the procedure for financial corrections in the management of structural funds. It is argued that the case law on structural funds illustrates how EU executive federalism has not been universally abandoned, and how the persistence of EU courts in following it in composite procedures is detrimental to the effective judicial protection of individuals. In the domain of the withdrawal of financial assistance, EU courts resort to the tenets of EU executive federalism. Based on a formalistic interpretation of the legislation, they still adopt an 'inter-administrative' reading of composite decision-making. EU courts treat the two levels of administration as strictly separate, and the Commission as a second-order administration which is generally not intended to relate – or be judicially answerable – to individuals. Consequently, beneficiaries

of EU funds are considered not bound by any 'direct link' – i.e., not *directly concerned* – by the Commission's decisions to withdraw financial assistance, which is regarded as a matter falling between national and EU administration.

Chapter 7 considers one issue of judicial review that is fairly unproblematic in contexts of decision-making at the national or the EU level alone, but which causes significant constitutional complexity in composite procedures. The Chapter examines the issue of derivative illegality – whether the illegality of preparatory acts may contaminate the final decision of an administrative procedure. More specifically, it considers the extent to which a final decision taken at EU level may be invalid because it is based on illegal national preparatory acts. It is argued that the case law on the matter is informed by two implicit principles. The first concerns composite procedures where the EU administration enjoys no margin of discretion to diverge from the position taken by national authorities. The *Borelli* line of case law shows that EU courts categorically deny that, in such procedures, the final decision at EU level may be vitiated by derivative illegality. This notion will be referred to as the *substantive Borelli principle*. Things are radically different when the EU administration *does* enjoy the discretion to decide contrarily to what is proposed in a national preparatory act. In such composite procedures, and under certain conditions, the case law holds the EU administration responsible for the illegalities committed by national authorities. EU courts therefore admit the EU administration's decisions to be annulled on the grounds that they are based on illegal national preparatory acts. This will be referred to as the principle of imputation.

The conclusion of the dissertation summarizes its findings. It argues that the case law on the unitary protection principle and judicial control reflect how the CJEU has to a large extent abandoned EU executive federalism, once seen as a constitutionally established doctrine. The CJEU developed implicit legal principles that specifically apply to composite decision-making. In so doing, it also abandoned the federal and dualistic conception of administration espoused by the founding fathers of EU law. The judge-made principles of composite decision-making do not reflect a conception of European administration where national and EU administrative power are strictly divided, or where the EU administration is generally limited to a second-order role. Rather, the case law of composite procedures reflects a conception of European administration as an integrated administration, where national and EU authorities are joined into a single, unified bureaucratic apparatus. Perhaps more controversially, the principles of composite decision-making tend to treat national

authorities as if they were an extension of the EU's own administration. Indeed, the case law treats the Member State's authorities as the EU administration's ancillary bureaucracy.

PART I

TERTIUM DATUR: FROM STRICT EU EXECUTIVE FEDERALISM TO THE RISE OF COMPOSITE DECISION-MAKING PROCEDURES

CHAPTER 1

THEORETICAL AND METHODOLOGICAL FRAMEWORK

1. Introduction

The present Chapter sets out the dissertation's theoretical and methodological foundations. The project answers what is, ultimately, a doctrinal research question. Accordingly, it requires a prior clarification of what is intended by legal doctrine, its purpose, and how it may be developed in EU administrative law. Such clarifications are appropriate in determining whether there is a law of composite procedures, whether it differs from conventional EU executive federalism, and whether the two are based on differing conceptions of Europe's administration.

Doctrinal approaches have been at the heart of administrative law since its birth as a discipline.[1] The main activity of scholars of administrative law has long been that of discovering and perfecting general legal principles and conceptual tools that could be applied across the more specific legal fields requiring administrative implementation (usually designated as the branches of special administrative law).

The almost complete absence of general codified rules should not discourage doctrinal development of EU administrative law.[2] The codification of administrative law and procedure is a fairly recent phenomenon.[3] For most of the history of administrative law, jurists worked with "unwritten principles" and with legal concepts constructed by judges and academics from the fragmentary materials available in special administrative law.[4] This is even echoed in the history of EU administrative law. Almost a century after police law served as the nursery for Otto Mayer's theories of general administrative law, Jürgen Schwarze's landmark treatise demonstrated how the Court' sectoral case law on

---

[1] See Michael Stolleis, 'Die Entstehung des Allgemeinen Teils des Verwaltungsrechts (1850–1900)', in: *Juridica International*, 21, (2014), 21-28.

[2] Timid examples of such provisions can be found, to some extent, in the general rules on comitology, access to documents, and Article 41 of the Charter of Fundamental Rights.

[3] With the exception of Austria, which adopted its General Administrative Procedure Code in 1925, most instances of movement of codification of administrative procedural law in Western Europe occurred after the 1950s. This was the case of countries such as Spain (1958 and 1992), Germany (1976), Finland (1985), Sweden (1986), Italy (1990), Portugal (1991), the Netherlands (1996) and Greece (1999).

[4] Cf. Hermann Pünder, 'Administrative procedure - mere facilitator of material law versus cooperative realization of common welfare', in: Hermann Pünder/Christian Waldhoff (Eds.), *Debates in German Public Law*, (Hart, 2014), 239-260.

competition and agriculture had incorporated unwritten general principles of administrative law.[5]

And yet, in EU administrative law as in EU law more broadly, it would seem nowadays that doctrinal research must justify its very recognition as a worthwhile enterprise. If it were not beginning to be seen as the poor relation of transnational legal scholarship, there would perhaps not be a need for this dissertation to start by recapitulating why it represents an irreplaceable form of the study of law. The Chapter therefore begins by explaining what legal doctrine is, and what purpose it fulfils in the study of EU administrative law. In doing so, the Chapter takes on two of the potentially valid, but not irredeemable, points of critique that are commonly offered against legal doctrine: criticisms of artificiality and lack of sensibility for extra-legal factors.

The first point of critique relates to the supposed abstraction and rigidity of legal doctrine. The Chapter will suggest that it can be circumvented by adopting an inductive and problem-oriented method proposed by contemporary dogmatics of administrative law and some legal theorists. That method, of 'subjects of reference', will not only serve as a useful methodical framework for the doctrinal reconstruction of the law of composite procedures, but will provide a criterion for the selection of the relevant case law.

The second point of critique – termed here as 'contextual blindness' – must from the outset be dismissed, at least in part, for the simple reason that legal doctrine is *not* concerned with the study of anything but the reformulation of positive law sources. The empirical study of the practices of law, the research on its economic efficiency, or its perpetuation of class inequalities, are the domain of other valid intellectual projects – but not of doctrinal legal scholarship. It will however be acknowledged that there is room for a doctrinal interest in extra-legal factors to the extent that they influence interpretive consensus, and that the structure of legal doctrines must account for them.

Put simply, legal doctrines rely on certain *background assumptions* or *conceptions* of the extra-legal realities they aim to govern. The preconceptions with which interpreters approach legal sources influence the way in which they are construed. As it turns out, the beliefs held by the first interpreters of EU law on the nature and structure of public administration in Europe were of decisive influence in how the Commission and the Court developed the doctrine of EU executive federalism. Whether the CJEU crafted a law of composite procedures, and whether it is based on a different conception of administration,

[5] Jürgen Schwarze, *Europäisches Verwaltungsrecht*, I, 1st ed., (Nomos, 1992), especially 27 ff.

are the questions to which the remainder of the dissertation will attempt to provide an answer.

2. What is a doctrinal approach, and what is its point?

Doctrinal legal studies are a practice-oriented form of scholarship. It is through doctrinal work that fragmentary and often inconsistent legal materials are turned into a commonly accessible, functional reservoir of arguments for legal practice.[6] Doctrinal approaches focus on the crafting and development of legal doctrines. Depending on the context, 'legal doctrine' may designate both a theory in law, and the type of legal research that develops theories of that kind.

Legal doctrines, in turn, can be defined as proposals for the reformulation of sources of positive law into clusters of concepts and principles that aim to regulate a given social reality.[7] Such concepts and principles form the basic building blocks of the language of legal argument. It is in that language that actors from all branches of the legal profession put forward their claims about how the law is to be interpreted and applied. In this sense, doctrinal studies, often unfairly mistaken for a merely transcriptive project,[8] do not passively observe, but rather create and revitalise the grammar of legal debate.

In everyday legal practice, legal doctrines tend to function through the tacit knowledge of legal actors; and their content is usually only debated in an explicit and self-conscious manner when lawyers are confronted with hard cases.[9] One of the most important tasks of legal scholarship is to make legal sources intelligible and comprehensible by synthesising them in legal concepts, and to make explicit the hitherto implicit principles used by legislators and judges.[10] Indeed, in legal orders where judge-made law occupies a prominent place in the system of legal sources – as is the case of the EU – it is particularly important for legal scholarship to reconstruct the legal doctrines that often remain implicit and scattered along the fragmentary case law.[11] The judge's task "is not to put forward theories but to dispense justice".[12] Accordingly, as Posner writes, it falls to law academics, who have more time and specialized knowledge, to "clean up" after judges by teasing out

---

[6] Cfr. Armin von Bogdandy, 'Founding Principles of EU Law: a Theoretical and Doctrinal Sketch', in: *European Law Journal*, 16:2 (2010), 95-111, 100.
[7] Cfr. Aulis Aarnio, *Essays on the Doctrinal Study of Law*, (Springer, 2011), 177-178.
[8] Cfr. Neil MacCormick, 'Reconstruction after Deconstruction: a Response to CLS', in: *Oxford Journal of Legal Studies*, 10:4, (1990), 539-558, 556.
[9] Kaarlo Tuori, *Ratio and Voluntas*, (Ashgate, 2011), 173.
[10] See Aleksander Peczenik, 'A Theory of Legal Doctrine', in: *Ratio Juris*, 14:1, (2001), 75-105, especially 78 ff.
[11] I am indebted to Professor Cruz Vilaça, Judge at the European Court of Justice, for his extremely useful insights on this matter.
[12] Joined Opinion of AG Lagrange in Case 8-55, *Fédération Charbonnière de Belgique*, EU:C:1956:6.

generalizable doctrines from their rulings. Sometimes, judges also engage in this systematizing work, and attempt "a preliminary tidying up of an area of law by restating a rule or standard in a way that clarifies, unifies, and perhaps modestly improves the rule implicit in a line of cases".[13] However, more often than not, it is the judicature who relies on scholarly doctrinal work, particularly so when legal materials are obscure or insufficient.[14]

This dissertation's conscious choice of a doctrinal approach comes perhaps at the turn of an adverse tide in EU legal studies. As American legal academia becomes the paradigm of 'cutting-edge' legal research,[15] there has been a tendency in recent years for the doctrinal study of EU law to be neglected, largely to the benefit of interdisciplinary or policy-oriented perspectives.[16]

Frustration with doctrinal studies in EU law is understandable. They historically suffered from a series of vices, with three principal culprits – excessive reverence toward the EU legal establishment, integrationist bias, and conceptualism. In a well-known critique, EU legal doctrine was accused of mistaking "professional commentary" for "legal truth", and the Court's case law for "the inevitable working out of the correct implications of the constitutional text".[17] When not exclusively devoted to the uncritical exegesis of the case law, EU legal studies were dominated by integrationistic stances;[18] systematically downplayed or applauded the Court's boldest case law,[19] and rarely disclosed ideological or political assumptions on the merits of more integration.[20] Lastly, doctrinal studies of EU law have long been beset by a legacy of conceptualism – the legal academic practice of erecting general legal concepts describing a given reality and deducing purportedly immediate, inherent legal consequences from them. In EU law, this is familiar from the longstanding academic debates that seek to draw legal implications from the 'nature' or 'essence' of the EU and its legal order, and their closer conceptual resemblance to a state or an international organisation. Such debates are decried as fallacious and sterile by members

---

13 Richard Posner, *How Judges Think*, (Harvard, 2008), 211.
14 Richard Posner, (fn 13), 211-212. Posner notes, however, that dialectic exchanges between judges and legal academics in American academia have become rarer.
15 Anthony Arnull, 'The Americanization of EU Law Scholarship', in: *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, (Oxford, 2008), 415-432, 424 ff.
16 See Anthony Arnull, (fn 15), and Hans-Wolfgang Micklitz/Rob van Gestel, 'Why Methods Matter in European Legal Scholarship', in: *European Law Journal*, (2014), 20:3, 292-316.
17 Martin Shapiro, 'Comparative law and comparative politics', in: *Southern California Law Review*, 53, (1979-1980), 537-542, 538.
18 Cf. Francis Snyder, *New Directions in European Community Law*, (Weidenfeld and Nicolson, 1990), 1 and 10.
19 Joseph Weiler, 'The Court of Justice on Trial' (book review of Hjalte Rasmussen, *On Law and Policy in the European Court of Justice*), in: *Common Market Law Review*, 24, (1987), 555-589, 555-556. See also Hjalte Rasmussen, *On Law and Policy in the European Court of Justice*, (Nijhoff, 1986).
20 Hans-Wolfgang Micklitz/Rob van Gestel, (fn 16), 305, 313-314.

of the Court today,[21] just as they were in the 1960s,[22] when judge Donner called it the 'ex ungue leonem' argument.[23]

In addition to these endemic historical flaws, the doctrinal analysis of EU law tends to be dismissed in transnational academic circles for the same two basic reasons as doctrinal analysis more broadly. On the one hand, doctrinal practices are accused of *artificiality* – of being rigid, formalistic, and closed-minded,[24] or of displaying an "obsession" with taxonomy, abstraction and systematic coherence.[25] On the other hand, they are disparaged for their apparent *contextual blindness* – for a lack of interest in observing 'real life' legal practices or incorporating extra-legal perspectives.

For both reasons, a growing number of legal academics have turned to the empirical methods of political and social sciences to study phenomena that legal doctrine fails to capture. This is also true of administrative law. EU administrative law experienced a stark 'governance turn', which emphasizes the study of the real practices of institutional arrangements beyond formal rules.[26] Similarly, under the banner of the "new science of administrative law" movement, scholars of national administrative law have encouraged exchanges with disciplines such as political science, in search of insights on how to make administrative law an effective tool for to steer administrative action and social behaviour.[27] This is in no way a new phenomenon. The methodological contest between 'juristics' and 'interdisciplinarians' marked administrative law when it was still a new discipline. In those days, the stakes were high – its credibility depended upon garnering respect from other legal disciplines. In the 19th century, and in civil law countries, that meant following the

---

[21] Niilo Jääskinen, 'Back to the Begriffshimmel? A plea for an Analytical Perspective in European Law', in: Sacha Prechal/Bert van Roermund (Eds.), *The Coherence of EU law: The Search for Unity in Divergent Concepts*, (Oxford, 2008), 451-462.

[22] Andreas Donner, *The Role of the Lawyer in the European Communities*, (Edinburgh, 1968), 7.

[23] In a loose translation: "if it has claws, it must be a lion".

[24] Douglas W. Vick, 'Interdisciplinarity and the Discipline of Law', in: *Journal of Law and Society*, (2004), 163-193, 181.

[25] Stefan Vogenauer, 'An Empire of Light?: II: Learning and Lawmaking in Germany Today' in: O*xford Journal of Legal Studies*, 26:4, (2006), 627–663, 657.

[26] For but two examples, see Deirdre Curtin/Renaud Dehousse, 'European Union agencies: tipping the balance?', in: Jarle Trondal/Madalina Busuioc/Martijn Groenleer (Eds.), *The agency phenomenon in the European Union: emergence, institutionalisation and everyday decision-making,* (Manchester, 2012), 193-206; and Edoardo Chiti, 'The Governance of Compliance', in: Marise Cremona (Ed.), *Compliance and the Enforcement of EU Law*, (Oxford, 2012), 31-56, particularly at 32 and 47.

[27] Andreas Voßkuhle, 'Neue Verwaltungsrechtswissenschaft', in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, I, 2nd ed., (C. H. Beck, 2012), 1-64, 24 and 58 ff, and Eberhard Schmidt-Aßmann, 'Cuestiones fundamentales sobre la reforma de la Teoría General del Derecho Administrativo. Necesidad de la innovación y presupuestos metodológicos', in: Javier Barnes (Ed.), *Innovación y Reforma en el Derecho Administrativo*, (Global Law Press, 2006), 15-132, 37 ff.

'juristic method' of private lawyers and cultivating strict independence from extra-legal disciplines.[28]

However, despite all criticism, legal doctrine remains necessary – in EU law, in national administrative law, and in EU administrative law. Reducing the complexity of legal sources and identifying their simpler building blocks is a key function of legal scholarship in many countries – and legal practice relies on that function being fulfilled. Comparative analysis has suggested that legal scholarship becomes less, not more, influential, if it completely loses sight of what is useful for practicing jurists or commits excessively to the standards of other disciplines.[29] This is not to say that interdisciplinarity should not be encouraged in law – but rather that one should acknowledge that different approaches answer different research questions. Accordingly, and as a response to the unwarranted wholesale rejection of either doctrinal analysis or interdisciplinarity, many EU legal scholars,[30] as scholars of national administrative law, [31] have pleaded for the recognition of the value of methodological pluralism. That value is most evident where interdisciplinary and doctrinal approaches enrich each other reciprocally and question each other's assumptions and aims.

No legal scholar can reasonably ignore the fact that doctrinal legal studies still represent the methodical bedrock of the training undertaken by jurists throughout the continent. In order to make claims that are plausible in the eyes of others, judges and legal practitioners must still frame their arguments by selecting the doctrines that are appropriate to their cases. This is also true of EU judicial practice, and particularly so when cases are difficult, or previous rulings unhelpful. While Opinions of the Court's Advocate Generals are often teeming with references to legal literature,[32] there is a convention not to quote

---

[28] Michael Stolleis, (fn 1), at 27. Stolleis quotes Fleiner, who in 1905 claimed that the use of the juristic method that had led private legal dogmatics to flourish had also helped German administrative law to overcome its status of a "hybrid discipline" that "amalgamated" politics, economics and history. Similar developments were taking place in Italy at around the same time, and for roughly the same reasons. It was Orlando, often seen as the founding father of Italian administrative law, who first introduced the "juristic method". He found that the legal scholars of his time were far too engaged with philosophy, sociology, history, and politics, and not sufficiently committed to the study of the law. For that reason, he championed a strictly legal method that focused on distilling general principles and institutions from specific legal provisions (see Giulio Cianferotti, *Il Pensiero di V. E. Orlando e la Giuspubblicistica Italiana fra Ottocento e Novecento*, (Giuffrè, 1980), 99 ff and Sabino Cassese, *Cultura e Politica del Diritto Amministrativo*, (Il Mulino, 1972), 21-25).

[29] Nils Jansen, 'Making Doctrine for European Law', in: Rob van Gestel/Hans-Wolfgang Micklitz/Edward Rubin (Eds.), *Rethinking Legal Scholarship: a Transatlantic Dialogue*, (Cambridge, 2017), 224-261, 242.

[30] See for instance Anthony Arnull, (fn 15), 430 ff.

[31] Martin Eifert, 'Conceptualizing Administrative Law – Legal Protection versus Regulatory Approach', in: Hermann Pünder/Christian Waldhoff (Eds.), *Debates in German Public Law*, (Hart, 2014), 203-218, 215-217.

[32] It is nevertheless important to point out that the degree to which Advocates General cite legal writings in their practice varies. See Bruno de Witte, 'European Union Law: A Unified Academic Discipline?', in: Antoine Vauchez/Bruno de Witte (Eds.), *Lawyering Europe: European Law as a Transnational Social Field*, (Hart, 2013), 101-116, 114.

literature in the CJEU's judgments. This does not mean that the Court's judges (and their cabinets) do not consult legal doctrine – it simply means that the references hardly make it past the stage of the *rapport préalable*. The incorporation of terms like 'effectiveness', 'equivalence' and 'procedural autonomy' is just one example of how the vocabulary crafted by legal doctrine has become common currency in EU case law.[33] In the first steps it took towards the construction of EU administrative law, the Court often relied on doctrinal writings of national law.[34]

In short, it cannot be doubted that the development of legal doctrine matters in EU law. This is by extension also true of EU administrative law. The question is *how* legal doctrine can be sensibly developed without the excesses of artificiality and contextual blindness explained above. The doctrinal approach followed in this dissertation is designed so as to evade both risks.

The risk of artificiality may be addressed as follows. The development of legal doctrine does not require a commitment to the discovery of – or even the belief in – the legal order's systematic coherence. Nor does it require the conceptualist reconstruction of legal sources as if they contained cascades of logically deductible solutions. It may well content itself with reformulating the patterns of legal argument which, in a given legal order, make certain solutions to a problem *arguable*, or acceptable as *plausible*, to participants in legal processes.[35] This approach is particularly appropriate in legal orders such as that of the EU, where case law occupies a central place amongst legal sources. Indeed, much of EU law is built on the CJEU's accumulated answers to concrete legal problems. In most cases, that answer is *literally* given to a specific, pre-given question submitted by a national judge. Accordingly, the doctrinal reconstruction of the Court's case law in the following chapters focuses on detecting and critically analysing patterns in the CJEU's line of argument, without shying away from any inconsistency they may present. This approach will be followed both in the study of the CJEU's case law on EU executive federalism, and

---

[33] Michal Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States', in: Hans-Wolfgang Micklitz/Bruno de Witte, *The European Court of Justice and the Autonomy of the Member States*, (Intersentia, 2011), 305-324, 321. The concept of national procedural (or 'institutional') autonomy seem to have been coined by Joël Rideau, 'Le rôle des États membres dans l'application du droit communautaire', in: *Annuaire Français de Droit International*, 18, (1972), 864-903.

[34] Cfr. Aldo Sandulli, 'Il Ruolo della Scienza Giuridica nella Costruzione del Diritto Amministrativo Europeo', in: Luca de Lucia/Barbara Marchetti (Eds.), *L'Amministrazione Europea e le sue Regole*, (Il Mulino, 2015), 273-294. A paradigmatic example of use of national doctrine on administrative law can be seen in the founding ruling on the right to be heard in EU law, Case 17-74, *Transocean Marine Paint*, EU:C:1974:91. AG Warner resorted to classics of administrative law scholarship in a number of Member States, including Forsthoff for German, and Waline for French administrative law.

[35] Theodor Viehweg, *Topik und Jurisprudenz*, 5th ed. (C. H. Beck, 1974), esp. 97 ff; Neil MacCormick, *Rhetoric and the Rule of Law*, (Oxford, 2005), 12 ff; and André Salgado de Matos, *A Fiscalização Administrativa da Constitucionalidade*, (Almedina, 2004), 61 ff.

in the reconstruction of its implicit principles on composite decision-making. The criteria for the selection of the relevant case law and for the identification of generalizable patterns will be further explained under section 5 below.

The objection of contextual blindness raised against legal doctrine also needs to be addressed – but only to the extent that extra-legal context matters in the reformulation of legal sources. Whether a proposal for reformulation, or a legal argument more generally, is plausible to legal actors is *not* a question that can be answered in purely legal-technical terms. The answer is, instead, dependent upon the context of prevailing argumentative practices and beliefs held by interpreters participating in legal debate. In administrative law, often described as concretized constitutional law,[36] those practices and beliefs often concern the nature and structure of public power under the relevant polity's constitution. Far from representing mere sociological or ideological facts, the context of practices and beliefs forms an integral part of legal doctrines. Conceptualising EU administrative law as concretized EU constitutional law requires that context to be taken seriously. For these reasons, the dissertation will delve into a structural component of legal doctrines that has tended to be neglected by legal scholars.[37] It will attempt an *integral* doctrinal reconstruction of EU executive federalism and of the law of composite decision-making, so as to uncover the conception of administration based on which they were crafted by EU case law. This, in turn, requires a prior step of defining the standard structural elements of legal doctrines.

3. The structure of legal doctrines and the factual assumptions of administrative law doctrines

Legal doctrines, sometimes referred to as 'theories in law', are reformulations of sources of positive law that are carried out by legal scholars and, up to a point, by judges. Occasionally, legal doctrines *become* sources of positive law. This occurs when a given reformulation of legal sources becomes so well-established that they are codified by lawmakers. A good example of this is how the general theory of administrative acts, originally crafted by German scholars and judges, was sanctioned into law when the Administrative Procedure Act was adopted in 1976.[38]

---

[36] The origin of this notion is attributed to Fritz Werner, then president of the German Federal Administrative Court. See Fritz Werner, '»Verwaltungsrecht als konkretisiertes Verfassungsrecht«', in: *Recht und Gericht unserer Zeit*, (Carl Heymanns, 1971), 212-226, 215-218.

[37] Kaarlo Tuori, (fn 9), 197-198.

[38] See Armin von Bogdandy/Peter Huber, 'Evolution and *Gestalt* of the German State', in: Armin von Bogdandy/Peter Huber/Sabino Cassese (Eds.), *The Administrative State*, (Oxford, 2017), 196-236, 214.

Legal doctrines are necessarily composed of a number of constitutive, 'surface' and 'sub-surface', elements.[39] Legal doctrines are, first and foremost, combinations of networked legal concepts, principles, and rules. Legal concepts refer to the legal-institutional facts of the field. Put simply, they tend to encapsulate generic descriptions of factual realities (e.g., 'deceased', 'pharmaceutical'), evaluative criteria (e.g., 'good faith', 'proportionate'), or normative concepts (e.g., 'duty', 'competence').[40] They may also relate to social realities and facts which are themselves constituted by the law – such as 'tenant', 'theft', or 'procedure'.

Legal doctrines are also composed of norms regulating those facts. They may be rules – norms operating in an either-or fashion – or principles.[41] In a widely accepted understanding, legal principles are norms "commanding that something be realized to the highest degree that is actually and legally possible".[42]

It would however be mistaken to believe that doctrines *only* consist of the concepts referring to a given extra-legal reality, and of the norms governing it. In addition to these two, more visible 'surface' elements, legal doctrines consist of two other, 'sub-surface' components.

First, doctrines are construed by reference to a 'deep justification' for the set of principles and concepts that compose them. If the legal norms forming a given doctrine serve as a justification for a course of action, 'deep justification' represents the ultimate rationale for those justifications to exist to begin with – it is the "justification of justification itself".[43] Thus, to give just one example, one commonly invoked 'deep justification' for separation of powers theory is the avoidance of unlimited power in the hands of a few, so as to prevent its abuse.

Second, legal doctrines rely on implicit background assumptions on the nature of the phenomena they address – on *conceptions* of extra-legal reality.[44] Theories of unfair dismissal in labour law, for example, aim to protect workers vis-à-vis their employers. They are based on a presupposition that workers usually are, as a matter of fact, in a position of vulnerability. The well-known *nullum crimen sine lege* principle presupposes both that criminal

---

[39] Tuori's conceptualization of the structure of theories in law is closely followed in this section. Cfr. Kaarlo Tuori, (fn 9), 197-200.
[40] Cfr. Dietmar von der Pfordten, 'About Concepts in Law', in: Jaap Hage/Dietmar von der Pfordten (Eds.), *Concepts in Law,* (Springer, 2009), 17-33, 18-19.
[41] Kaarlo Tuori only refers to principles, but there is no discernible reason why the fundamental aspects of a doctrine cannot include rules, i.e. norms that apply in an either-or fashion.
[42] Robert Alexy, 'On the Structure of Legal Principles', in: *Ratio Juris*, 13:3, (2000), 294-304, 295 and David Duarte, *A Norma de Legalidade Procedimental Administrativa*, (Almedina, 2006), 133-135.
[43] Aulis Aarnio, (fn 7), 135. For the most influential study of the concept of deep justification, see Aleksander Peczenik, *On Law and Reason*, (Springer, 2008), 5-9 and 129-130.
[44] Kaarlo Tuori, (fn 9), 197-200.

laws are actually able to guide the behaviour of individuals, and that there will always be a risk that the latter are arbitrarily prosecuted. Indeed, legal doctrines can only make sense if they rely on certain factual commitments. This is true both of those legal doctrines that are explicitly enshrined in legal sources, and of those which can only be drawn from legal sources through careful interpretive reconstruction. In the latter case, the factual commitments made by interpreters of those sources are especially important. Interpreters never approach legal sources in a social void – they will approach legal texts with certain initial expectations about their meaning and what would in general be the correct application of the norms contained in those texts. These processes are also dependent on preexisting conceptions of the nature of the object of those norms.[45] Especially when legal sources are vague or open-ended, their interpretation is inevitably conditioned by the interpreters' pre-understandings, including their conception of the object of legal doctrines. Particularly in such cases, the plausibility of a legal doctrine – and therefore, its chances of success – will depend on the extent to which other participants in legal processes share the interpreter's conception of the doctrine's object.

What will set the analysis carried out in this dissertation apart from many other doctrinal approaches is that it considers that conceptions of extra-legal reality, or 'background assumptions' are an integral part of legal doctrines. This standpoint, which allows us to consider how legal doctrines are shaped by their context, has two crucial analytical advantages.

First, it provides a fresh perspective on how the shared beliefs of EU judges influence the case law. Those beliefs tend to be appraised from a theoretical point of view, focussing on the 'judicial activism' the ECJ and how it affects its legitimacy. Incorporating 'background assumptions' into doctrinal analysis makes it also possible to study integrationist beliefs and conceptions on Europe as part of the context in which the Court reconstructs sources in hard cases. As a prominent and long-serving ECJ judge once put it, the judges had a "certaine idée de l'Europe of their own", which was more decisive than any "legal technicalities" in difficult interpretive questions.[46]

The second advantage is as follows. The more underdetermined or vague legal texts are, the more legal doctrines are the creatures of interpreters. This, in turn means that shared consensus on the doctrine's object is all the more important for the doctrine itself to be recognized as a plausible reformulation of the relevant legal sources. This entails that,

---

[45] Cfr. Kaarlo Tuori, *Critical Legal Positivism*, (Ashgate, 2002) 300-302. See also Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis*, (Athenaeum, 1970), 136 ff.
[46] Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', in: *European Law Review*, 8, (1983), 155-177, 157.

to an extent, an interpreter's or a court's proposal for the reformulation of legal sources can be attacked by other interpreters on *factual grounds*. The entire sustainability of a doctrine collapses once a rival proposal successfully disproves the accuracy of its factual presuppositions as a misapprehension of the doctrine's object. Thus, for example, certain theories which propose to apply the rules on the interpretation of private law contracts to administrative decisions have been attacked by rival theories for mistaking public authority for something factually comparable to private autonomy.[47]

What was said of the relevance of 'background assumptions' or 'conceptions' of social reality also applies to doctrines in administrative law. More often than not, they are premised on a certain conception of the administration and of its place under the polity's constitution. This is aptly captured by Harlow and Rawlings when they write that "behind every theory of administrative law there lies a theory of the state".[48]

The integral reconstruction of administrative law doctrines must take into account that, if it is 'concretized constitutional law', administrative law is always concretized by *someone*. Only rarely do constitutions include "constitutionally fixed" demands on the core of values, instruments, or institutions that administrative law must adopt.[49] Generally speaking, the process of 'concretization' is one of constitutional interpretation. Every time a legislator enacts administrative law, she imprints onto her creation her own conception of what the position of administrative power should be, or could plausibly be, under the fundamental principles of the legal order.[50] Legislative initiative, it should be noted, will often come from a governmental cabinet, the European Commission or some other equivalent –the highest summit of the administration itself.

Something similar occurs in judicial process. Courts both enforce and, through their case law, *make* administrative law. This is true both in common law and, despite common misconceptions, in many continental jurisdictions.[51] In their role as crafters of administrative law, courts embed into the legislation their own vision of what a concretised constitution should look like, often by reference to constitutional principles in the context

---

[47] Cfr. Marcelo Rebelo de Sousa/André Salgado de Matos, *Direito Administrativo Geral*, III, 2nd ed., (D. Quixote, 2009), 146-147.

[48] Carol Harlow/Richard Rawlings, *Law and Administration*, 3rd ed., (Cambridge, 2009), 1.

[49] Eberhard Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee: Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung*, 2nd ed., (Springer, 2006), 11 and Dirk Ehlers, 'Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat', in: Hans-Uwe Erichsen/Dirk Ehlers (Eds.), *Allgemeines Verwaltungsrecht*, 14th ed., (De Gruyter, 2010), 1-252, 236.

[50] All state organs, citizens and judges are potentially the constitution's interpreters – not only jurists, and in particular not only constitutional judges (see Peter Häberle, 'Die offene Gesellschaft der Verfassungsinterpreten', in: *Juristenzeitung*, 30:10, (1975), 297-305, 297-300 and 302).

[51] Cfr. Jan Komárek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent', in: *American Journal of Comparative Law*, 61, (2013), 149-172, 167 ff.

of harmonious interpretation. In real life, a process of this kind does not happen without judges relying more or less consciously on a certain conception of administration itself.

The scholarly endeavour to uncover such conceptions in legal doctrines bears some resemblance to certain forms of the cultural study of law (CSL).[52] The purpose of cultural analysis is to interpret and expose the system of beliefs embedded in a given society's practices, to gain "access to the conceptual world in which our subjects live so that we can, in some extended sense of the term, converse with them".[53] Accordingly, the cultural study of law investigates the ways in which we imagine and conceive our world, and how representations and narratives present in the social imaginary and the law relate in a mutually constitutive manner.[54] Of administrative law in particular, it can be said that it offers us a valuable glimpse into the beliefs held by its many makers about the character of administrative power under the constitution. The study of those beliefs will not however be taken here as an end in itself – as is the main purpose of CSL – but as instrumental to the integral reconstruction of the CJEU's administrative law doctrines.[55]

4. Two doctrines and two methods: the path ahead

Different sets of methods will be used for the different steps of the argument made in the dissertation. Since its overarching claim concerns the shift between two doctrines – EU executive federalism and the law of composite procedures – the dissertation will need to reconstruct both.

That reconstruction will cover the two doctrines' surface and sub-surface components. Put differently, the analysis will identify the key constitutive concepts, principles, 'deep justification' and conception of administration that is present both in the case law on EU executive federalism and on composite decision-making.

Given that the case law has developed few concepts on composite procedures, and that the deep justification for both doctrines is fairly simple,[56] the emphasis of the analysis

---

[52] For just two illustrative pieces, see Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship*, (University of Chicago Press, 1999) and Menachem Mautner, 'Three Approaches to Law and Culture', in: *Cornell Law Review*, 96, (2010-2011), 839-867.

[53] Clifford Geertz, *Local Knowledge: further essays on interpretive anthropology*, (Basic Books, 1983), 24.

[54] Ulrich Haltern, *Europa und das Politische*, (Siebeck, 2005), 16 ff. See also Susan Silbey, 'Making Place for Cultural Analyses of Law', in: *Law & Social Inquiry*, (1992), 39-48, 42.

[55] Some would consider the methodological framework used in this dissertation as a form of 'basic' interdisciplinarity in law. See Matthias Siems, 'The Taxonomy of Interdisciplinary Legal Research: finding the Way out of the Desert', in: *Journal of Commonwealth Law and Legal Education*, 7:1, (2009), 5-17, 6-8.

[56] The deep justification of EU executive federalism is the objective of maintaining the rule of law and the division of power between the Union and the Member States in the domain of public administration (see Chapter 2, section 2.2.). The deep justification of the principles of composite decision-making is to maintain

will fall on the principles and conception of administration that underlie EU executive federalism and the law of composite decision-making. Once those principles and that conception are defined, it will be possible to compare both doctrines.

The argument will begin by considering the emergence of EU executive federalism as a constitutional doctrine. The conception of administration on which it is based – a *federal* conception – can be identified in a simple manner. Chapter 2 will resort to historical methods and examine a variety of historical sources which reveal the commonly shared assumptions of many legal and political actors on the nature of Europe's administrative system.[57] The analysis will comprise both secondary and primary sources. The secondary sources are articles and monographs written by historians researching the early years of the EU, its law, and its administration. The primary sources examined will include memoirs of Commissioners, high-ranking administrators, and members of the Treaties' *groupe de rédaction*, published interviews, and *travaux préparatoires*, as well as legal writings of judges and administrators, in their capacity as scholars. Particular emphasis will be given to the writings of Walter Hallstein, a prominent legal scholar and first Commission President. As it turns out, once put together, these sources reveal a shared conception of European administration that is reflected in how the Court first concretized the emerging EU constitution by developing the principles of EU executive federalism.

Chapter 3 will bring some conceptual clarity to what composite procedures are and how they distinguish themselves from other forms of administration in the EU. It will further explain why the application of the doctrine of EU executive federalism to instances of composite decision-making risks compromising the rule of law's values.

Chapters 4, 5, 6, and 7 examine the CJEU's response to that risk, and whether it materialised in specific principles on composite decision-making. The extent to which the case law's solutions on composite procedures differ from conventional EU executive federalism will be considered at the conclusion of each individual chapter. As is often the case with legal doctrines, the conception of European administration that underlies the law of composite procedures must be reconstructed from the presuppositions and implications of its constitutive principles.[58] However, this first requires establishing what the constitutive principles of the law of composite decision-making are.

---

the rule of law in composite procedures, where power is shared between the two levels of administration (see Chapter 3, section 6).

[57] I am indebted to my historian colleague, Christophe Schellekens, for his valuable advice on chronology and use of historical sources.

[58] Cfr. Kaarlo Tuori, (fn 9), 197-198.

Reassembling those principles from the rather fragmentary case law requires a set of criteria for a careful selection of the cases. The following section explains the methodical tools that will be used in this regard.

5. Composite procedures of reference and generalizability

The case law on composite procedures is characterised by striking conceptual austerity. EU courts rarely provide clear conceptual tools to capture the implicit doctrines adhered to in their rulings. The legislative instruments governing composite procedures are often riddled with gaps, vague, and susceptible to several alternative readings. Yet, the CJEU unconvincingly presents its rulings as resulting immediately from a strict application of the relevant sectoral legislation. It uses an argumentative style that privileges ostensibly formalistic and textually bound reasoning, often without articulating the reasons why it prefers one reading to others.[59]

Yet, for all its purported textualism, what makes the case law on composite procedures interesting is not what *is* in the legislative text, but rather what *is not*. It is the ensemble of the argumentative patterns that *specifically* result from the CJEU's line of reasoning, and not from the legislation, which would allow us to conclude for the existence of a judge-made law of composite decision-making. In doing so, the core concern of the analysis will be to identify solutions which have been adopted by EU courts in cases pertaining to a given composite procedure *are*, or *can be* generalizable in the sense of being applicable across policy fields.

As the key methodical tool in this process, the thesis will use an adaptation of the notion of "subject of reference" that has been developed in recent years in German administrative legal studies.[60] Traditional dogmatics of general administrative law functioned in a deductive fashion. Scholars worked out a potential general theory and held it to be confirmed and verified by applying it to a field of special administrative law. Historically, however, this approach led to only limited and perhaps arbitrarily selected branches of special administrative law being considered as representative for administrative

[59] To this extent, the CJEU's case law on composite decision-making echoes older habits from its more constitutional jurisprudence. See Miguel Poiares Maduro, *We the Court*, (Hart, 1999), 20 and Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (Cambridge, 2012), 75.

[60] 'Subject of reference' is the translation proposed for *Referenzgebieten*. See Matthias Ruffert, 'The Transformation of Administrative Law as a Transnational Methodological Project', in: Mathias Ruffert (Ed.), *The Transformation of Administrative Law in Europe = La mutation du droit administratif en Europe*, (Sellier, 2007), 3-52, 12. Other possible translations could eventually be 'ambit' or 'domain' of reference.

law as a whole.[61] It also led to the pervasiveness of conceptualism in administrative law doctrine, as well as to its ossification. New realities of special administrative law were often forced to fit into the self-confirmed and sometimes dated conceptual categories of general administrative law.[62]

The method of taking "subjects of reference" as focal points is a contemporary methodological strategy that intends to deal with these excesses. The starting points for the reconstruction of administrative law doctrines cease to be general theories, and become the evolving "representative sectors of the current panorama of public administration"[63] – the "subjects of reference".

The methodical process is thus not deductive, but inductive. It starts with the legal issues, concepts and principles that at first sight appear to be specific to the selected sectors of administrative law, and tests their generalizability to other sectors. In doing so, the method aims at finding the real overarching up-to-date issues of administrative law by examining the developments of administrative law in different policy sectors.[64]

Until now, the method of subjects of reference has sought to "decipher the key features of a sector" and "inquire if the pieces that integrate it may be generalised".[65] Given its particular object, this study will propose a subtle, but important adaptation. Instead of looking at entire policy fields as subjects of reference, it will focus on "composite procedures of reference" found in such fields.

In reconstructing a general law of composite decision-making, the focus cannot be on particular policy fields. The selection of case law is therefore not based on 'case studies', in the sense of choosing the analysis of one policy field in its entirety. Some policy fields, such as pharmaceuticals, foresee composite procedures, purely national decision-making and decision-making at EU level only, depending on the particular issue on which the administration must decide. Moreover, not all legal problems addressed in cases involving composite procedures emerge from their multi-layered structure. Sometimes, the case law deals with legal problems that happen to have occurred in a context of composite decision-making, but for the resolution of which the procedure's structure is immaterial.

---

[61] Christoph Möllers, 'Methoden', in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, I, (C. H. Beck, 2012), 123-178, 171-172.
[62] Christoph Möllers, *ibidem* and Andreas Voßkuhle, 'Die Reform des Verwaltungsrechts als Projekt der Wissenschaft', in: *Die Verwaltung*, 32, (1999) 545-554, 551.
[63] Eberhard Schmidt-Aßmann, (fn 27) 75-76; and also, Eberhard Schmidt-Aßmann, 'El Método de la Ciencia del Derecho Administrativo', in: Javier Barnes (Ed.), *Innovación y Reforma en el Derecho Administrativo*, (Global Law Press, 2006), 133-175, 153-154.
[64] Andreas Voßkuhle, (fn 27), 39 ff.
[65] Eberhard Schmidt-Aßmann, (fn 27) 76.

The focus should rather be on whether the case law can be unified around principles the scope of which concerns only procedures with a composite structure and which are, or can be, applied in a way that criss-crosses policy fields. To this end, the dissertation only analyses case law *specifically* addressing the issues resulting from the multilevel structure of composite decision-making.

The selection of case law covers rulings addressing such issues, with solutions that have been, or that can be, generalised across different policy areas to composite procedures of a similar structure. The presence of implicit principles governing composite procedures across sectoral areas is more evident where a ruling on a given policy field is generalised, in the sense of being extended to new cases. Applying the solution of a judgment in a later decision is, "at its core", "asserting that there is an overarching category or organizing theory covering both".[66]

However, it is also possible that a solution is generalizable even though it is only found in the case law concerning one composite procedures in a given policy area. This is so when it is based on an argumentative pattern that is built *entirely* on the procedure's composite decisional structure, and for which substantive aspects of the policy area at stake are immaterial. The doctrinal reconstruction carried out in this dissertation may perhaps be most useful in such cases, where EU courts themselves do not seem to be aware that they have developed a principle that they could easily use in different policy areas. As will be shown, this is what can be observed in the CJEU's case law on the right to a reasoned decision.

Analysis will focus mainly on the case law concerning a number of composite procedures which have given rise to especially abundant litigation on one or several of the four topics explored in parts II and III (the right to be heard, the right to a reasoned decision, judicial protection, and derivative legality). These are the procedures for the granting and withdrawal of structural funds, registration of protected designations of origin and geographic indications, and the remission and repayment of custom duties. The litigation emerging from certain composite procedures has been relevant from the point of view of just a few of the topics examined in Chapters 4 to 7. This is the case of composite procedures in state aid – practically relevant only from the perspective of the issues explored in Chapter 4 – and for the access to documents in possession of EU bodies but which originate from the Member States (Chapter 7). The selection of these procedures not only covers a significant part of the Court's vast case law on composite procedures, but

[66] Marc Jacob, *Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business*, (Cambridge, 2014), 80.

also enables a fruitful dialogue with the rich literature that has been written on them from sectoral perspectives.

6. Conclusion: formulaic, formalistic, and discretely transformative

Given that the object of this study is CJEU case law, two final caveats are appropriate.

First, it must be recalled that, even though EU courts routinely rely on their own case law, EU law lacks a formal rule of *stare decisis*.[67] *Obiter dicta* and *rationes decidendi* potentially have the same normative value in subsequent rulings.[68] This is especially important to bear in mind in EU administrative law, as a considerable portion of the Court's seminal references to the fundamental structural traits of EU administration are found in *obiter dicta*.

Second, the case law of EU courts relies on the constant use of formulas – on the verbatim reproduction of passages of previous rulings.[69] Komárek has described this as a *legislative* model of reasoning with previous decisions. The model implicitly presumes that all of what the Court says is equally authoritative, and in practice ascribes equal worth to legislative provisions and excerpts of past judgments.[70] The development of EU administrative law, including the law of composite procedures, has been no different.

While ostensibly relying on a formalistic, 'blackletter' approach to the legislation, the case law offers solutions that often do not result from the applicable provisions, and that often ascribe less argumentative force to them than to past rulings. The use of formulae from previous decision pervades the case law on composite decision-making. It is especially visible in the case law on procedural rights, and in the repetitive use of passages from the *Borelli* line of case law.

The judicial crafting of principles on composite decision-making transformed EU administrative law. It disrupted the long reign of the doctrine of EU executive federalism. EU courts came to conceive of executive federalism as a constitutionally determined model of administrative law, and to express this view in the repeated use of the *Deutsche Milchkontor* formula.

The following Chapter examines how EU executive federalism emerged as a constitutional doctrine to begin with. As it transpires, its development can be explained as

---

[67] Takis Tridimas, 'Precedent and the Court of Justice: a Jurisprudence of Doubt?', in: Julie Dickson/Pavlos Eleftheriadis (Eds.), *Philosophical Foundations of European Union Law*, (Oxford, 2012), 307-330, 313.
[68] Anthony Arnull, *The European Union and its Court of Justice*, 2nd ed., (Oxford, 2006), 631
[69] Cfr. Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU*, (Hart, 2012), 245 ff.
[70] Jan Komárek, (fn 51), 161-166.

an 'administrative chapter' of the European constitutionalisation process. In its early days, the EU's own administration was largely inhabited by jurists who had been present during the drafting of the Treaties, and who believed themselves to be the custodians of a federation in the making. To this day, echoes of this view still persist in the Commission's esprit de corps.[71] What the case law strongly suggests, especially if read in conjunction with the writings of EU judges, is that the early federalist conceptions of Europe and its administration found their way into the Court.

[71] Antonis Ellinas/Ezra Suleiman, *The European Commission and Bureaucratic Autonomy: Europe's custodians*, (Cambridge, 2012), 29-35. The authors' empirical analysis shows that a certain 'European idea' is central in the self-perception of Commission officials. The Commission is believed to be the custodian of European interests, and a bureaucracy which, interestingly, also represents 'future Europeans'.

CHAPTER 2

THE JUDICIAL CRAFTING OF EU EXECUTIVE FEDERALISM

1. Introduction

Various meanings are associated with the expression 'European executive federalism'. Habermas uses the term critically, to denote how the European Union's political process is dominated by members of national executives – by the Council of the European Union.[1] In legal circles, however, executive federalism tends to be associated with the rule that the implementation of EU law is generally carried out by national administrations, and only exceptionally by EU authorities.[2]

The case law and history of EU administrative law show this notion to be but a part, albeit an important one, of executive federalism. EU executive federalism is a legal doctrine. It combines a variety of concepts and principles. Those principles aim to define the status enjoyed by national and EU administrations, to govern the relations between the two, and to secure their judicial accountability.

Executive federalism and its principles have exerted a profound influence in the case law of EU courts. While never used to actually strike down legislation, they are routinely relied upon in the interpretation of unclear provisions, to make sense of the relations between national and EU administrations.

The problems addressed in the case law on composite procedures begin in EU executive federalism. More precisely, in the fact that EU executive federalism was historically understood by EU courts as a constitutionally pre-established model, i.e., to result directly from the Treaties. However, and especially if read rigidly, the use of EU executive federalism in composite decision-making leads to results that are incompatible with the rule of law.

The mismatch between composite procedures and executive federalism will be explained in the next chapter. For now, the present chapter will focus on the root causes of that mismatch – the content and rigidity of EU executive federalism. It will map the structure of EU executive federalism and the process by which it emerged in EU case law not just as a legal, but as a *constitutional* doctrine.

---

[1] Jürgen Habermas, *Zur Verfassung Europas: ein Essay*, (Suhrkamp, 2011).

[2] See for instance Stefan Kadelbach, 'European Administrative Law and the Law of a Europeanized Administration', in: Christian Joerges/Renaud Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, (Oxford, 2002), 167-206.

EU executive federalism is a remnant of the political processes and tensions that characterised the EU's foundational period. During that period, the meaning of European integration was 'up for grabs', and contested by federalist and statist visions.[3] As the broader process of constitutionalisation of the Treaties unfolded,[4] the Court crafted EU executive federalism as the model of administrative law that best suited the supposed nature of the nascent polity.

Its key principles were reconstructed from the Treaties based on a federal conception of European integration. That conception was shared by many jurists who were involved in the making of the Treaties and then went on to occupy key positions in the Commission and the Court of Justice. By contrast, while never endorsing a federalist reading of the Treaties, the Member States could always embrace the practical implications of executive federalism: the promise of keeping the EU's administration small, and its intrusion into national bureaucracies minimal.

The argument will proceed as follows. Section 2 will begin by setting out the constitutive elements of the doctrine of EU executive federalism. It will do so by reference to the general structure of legal doctrines as examined in Chapter 1, and consider EU executive federalism both in its 'surface' and 'sub-surface' elements. Section 2 will also explain why the supposed constitutional rank of executive federalism must be ascribed to the federalist conceptions of the Treaties' first interpreters. Section 3 sketches out the broader political context in which the doctrine came to light. The reluctance of the Member States to overempower the new European institutions led to a silence in the Treaties about the role of administration, and it fell to the Union's first administrators make sense of this regulatory void. Section 4 offers a brief account of how many of those administrators, often guided by federalist ideals, conceived of the EU and its administration. The section will zoom into the influential political and constitutional thought of Walter Hallstein, one of the most influential Eurofederalist 'statesmen'. Section 5 turns to the case law of EU courts. Though never referring to it by name, the case law

[3] For an overview of three of those visions, see Neil Walker, *The Philosophy of European Union Law*, University of Edinburgh Research Paper Series, 2014/29, 6 ff. The author highlights three different strands of aspirations for European integration in its founding years – a neo-federalist, a statist, and a supranational one. Even in more recent decades, those visions still influence competing discourses on Europe to a considerable extent. See Justine Lacroix/Kalypso Nicolaïdis, 'European Stories: An Introduction', in: Justine Lacroix/Kalypso Nicolaïdis (Eds.), *European Stories: Intellectual Debates on Europe in National Contexts*, (Oxford, 2010), 1-29, 12 ff.

[4] For an overview of the European constitutionalisation process, see the classic works of Federico Mancini, 'The Making of a Constitution for Europe', in: *Common Market Law Review*, 26:4, (1989), 595-614, Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism', in: *American Journal of Comparative Law*, 38: 2, (1990), 205-263, 208 ff and Joseph Weiler, 'The Transformation of Europe', in: *Yale Law Journal*, 100:1, (1991), 2403-2483, 2413 ff. For a more recent and equally illuminating perspective, see Kaarlo Tuori, *European Constitutionalism*, (Cambridge, 2015), 45 ff.

describes EU executive federalism as a model immediately resulting from the Treaties. Just as Hallstein's thought can be seen as representative of the federalist conceptions present in the EU's administration, the *Deutsche Milchkontor* case law is reflective of the Court's likely espousal of that conception. The section will attempt to shed some light on how the case law construes three of EU executive federalism's most important tenets. First, the strict division of administrative power. Second, the role of national authorities as the EU's normal administrators. Third, the status of the Commission as essentially a 'second-order' administration. Section 5 will suggest that the development of these tenets in the case law echoes the federal conception of the EU and its administration explored in section 4. Section 6 summarizes the argument's key points. It concludes by pointing out the problem that is addressed in the case law analysed in the remainder of the thesis. The view of executive federalism as a constitutional doctrine, and the background assumptions on which it is based, make it difficult to accommodate composite procedures in a manner that guarantees the rule of law.

2. The doctrinal structure of EU executive federalism

As Chapter 1 sought to illustrate, the structure of legal doctrines generally includes both surface elements – legal concepts and principles – and sub-surface elements, such as a deeper justification and a set of background assumptions on the doctrine's object. In this regard, the structure of EU executive federalism is no different.

2.1. Surface elements of EU executive federalism: concepts and principles

As it results from the case law, EU executive federalism can be broken down into a number of concepts and principles. Those concepts and principles, like EU executive federalism itself, are usually not referred to by name by EU courts. Much of the terminology used in this Chapter was developed by practitioners and legal scholars.

In order to refer to the structure of Europe's administration, EU executive federalism distinguishes between the concepts of *indirect administration* and *direct administration*.[5] Indirect administration is composed of the Member State's administrative authorities at local, regional and state level, whenever they implement EU law and policies. Direct Administration, by contrast, is the EU's own administration – the Commission, EU agencies, and more rarely the EU Council. This conceptual dichotomy was crafted by EU

[5] Herwig Hofmann/Gerard Rowe/Alexander Türk, *Administrative Law and Policy of the European Union*, (Oxford, 2011), 13.

legal doctrine, and seems to have been first made by Pescatore.[6] However, only occasionally do the terms 'direct' and 'indirect' administration appear in the CJEU's practice,[7] usually in the Opinions of Advocates General.[8]

EU executive federalism is composed of a combination of EU constitutional principles. One of these, the separation principle, is exclusive to administrative law and concerns the status that national and EU authorities respectively enjoy in the European administrative order. The two other principles, are 'shared' with other branches of government in the EU, but were mostly developed in the case law relating to administration, and EU executive federalism. The second principle – termed here as 'double exclusivity' – concerns the allocation of responsibility for the judicial control of the different levels of administration. The third, loyal cooperation, provides the general normative standard that is intended to guide the relations between EU and national administrations.

The most important constitutional principle of EU executive federalism – the *separation principle* –[9] refers to what the case law calls the "principle of strict separation of powers of the Community institutions and the authorities of the Member-States".[10] When the separation principle first appeared in the case law, in the *Humblet* ruling, its content appeared to be vague. However, that content appears to be inferable from a number of contemporary and later rulings where the divide between national and EU administrative power was refined. According to the separation principle, as it emerges from those judicial developments, EU and national authorities enjoy separate spheres of authority that are mutually independent and should be preserved as such.

The separation of levels of administrative authority is supplemented by a similarly strict divide in applicable laws. While national administrative laws are becoming more Europeanised due to EU case law and sectoral legislation,[11] there has never been a generic

---

[6] See Pierre Pescatore, 'Das Zusammenwirken der Gemeinschaftsrechtsordnung mit den nationalen Rechtsordnungen', in: *Europarecht*, (1970), 307-323, 309-312.

[7] A "principle of indirect administration" was recently invoked by the Council in Case C-147/13 *Kingdom of Spain v Council*, EU:C:2015:299, para. 77.

[8] See the Opinion of AG Léger in Case C-5/94, *Hedley Lomas*, EU:C:1995:193, para. 93 and of AG Trstenjak in Case C-19/05, *Commission v Kingdom of Denmark*, EU:C:2007:418, para. 61.

[9] On the separation principle in EU administrative law, see Eberhard Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee: Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung*, 2nd ed., (Springer, 2006), 381, Eberhard Schmidt-Aßmann, 'Cuestiones fundamentales sobre la reforma de la Teoría General del Derecho Administrativo. Necesidad de la innovación y presupuestos metodológicos', in: Javier Barnes (Ed.), *Innovación y Reforma en el Derecho Administrativo*, (Global Law Press, 2006), 15-132, 108, and Jürgen Schwarze, *European Administrative Law*, (Sweet & Maxwell, 2006), CLXX ff.

[10] Case 6/60, *Humblet*, EU:C:1960:48.

[11] See Stefan Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss*, (Siebeck, 1999); Jean-Bernard Auby, 'About Europeanization of Domestic Judicial Review', in: *Review of European Administrative Law*, 7:2,

EU competence to make administrative law for the Member States. Only national legislators may create the general legal framework for domestic administrative authorities, which continue to follow their own procedures to the extent that no adaptations from EU law are needed. Conversely, the EU's own administration is exclusively subject to EU law.[12]

As a further consequence of this logic of separation, one occasionally finds reference to a principle of separation of legal relations. According to this notion, the EU administration is bound by legal relations *either* to private parties *or* to national authorities, depending on who the addressees of its measures are. Given that most of the EU administration's measures are addressed to, or implemented by national authorities, this will tend to result in a duplication of legal relations. There will be a legal relation between the Commission and the national authorities, on the one hand, and between those national authorities and individuals affected by their decisions, on the other.[13] This reflects the fact that, in general, EU courts tend to adopt a formalistic view of the legal relations emerging from administrative procedures as strictly bilateral.[14] Whenever the EU administration decides in respect of national authorities, they are often treated as its (sole) 'administrés'. [15]

The second principle of EU executive federalism is an extension of the first. It concerns judicial control. In *Humblet*, the same judgment which for the first time referred to the principle of strict separation between Member State and EU *authorities*, the Court also proclaimed a principle of 'strict separation' between national and EU *judiciaries*.[16] Following the terminology some have suggested, and in order to avoid confusion between the two principles, the latter will be referred to as a principle of "double exclusivity" of national and EU judicial control.[17] Double exclusivity encapsulates the idea that only national courts may review the action of national administrations, and only EU courts may review the action of EU authorities. This notion often appears labelled as "clear separation of functions" in preliminary rulings,[18] or "strict separation of judiciaries" in liability cases.[19]

(2014), 19-34; and Friedrich Schoch, 'Zur Europäisierung des Verwaltungsrechts', in: *Juridica International*, 21, (2014), 102-117.

[12] Cfr. Case 1/58, *Stork*, EU:C:1959:4, para. 4.

[13] Case T-60/03, *Regione Siciliana II*, EU:T:2005:360, para. 33 Also Case T-341/02, *Regione Siciliana I*, EU:T:2004:228, para. 38.

[14] Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach*, (Oxford, 2011), 189-190.

[15] Cfr. Mario Chiti, 'La tutela giurisdizionale', in: Mario Chiti (Ed.), *Diritto Amministrativo Europeo*, (Giuffrè, 2013), 380-551, 411.

[16] See Case 6/60, *Humblet*, EU:C:1960:48, at 572.

[17] Barbara Marchetti, 'Il Sistema Integrato di Tutela', in: Luca de Lucia/Barbara Marchetti (Eds.), *L'amministrazione europea e le sue regole*, (Il Mulino, 2015), 197-228, 198.

[18] See for instance Cases C-119/05, *Lucchini*, EU:C:2007:434, para. 43; C-220/05, *Auroux*, EU:C:2007:31, para. 25; C-341/05, *Laval*, EU:C:2007:809, para. 45; C-11/07, *Eckelkamp*, EU:C:2008:489, para. 27; C-373/08, *Hoesch Metals and Alloy*, EU:C:2010:68, para. 59; Joined cases C-165/09 to C-167/09, *Stichting Natuur en Milieu*, EU:C:2011:348, para. 47; C-618/10, *Banco Español de Crédito*, EU:C:2012:349, para. 76; C-62/14, *Gauweiler* EU:C:2015:400, para. 15; and Joined Cases C-283/14 and C-284/14, *CM Eurologistik*, EU:C:2016:57, para. 44.

Even though it applies beyond the domain of administration, the principle of double exclusivity is an integral part of EU executive federalism.[20] Indeed, double exclusivity largely developed in the interstices of the divide between national and EU administration. It is considered in the case law and by individual members of the Court to be a reflection of that divide.[21]

While it enjoyed a more explicit textual basis in the Treaties than the separation principle, double exclusivity only became sharply defined through the case law. The Treaties give EU courts the competence to review the action of EU bodies, but were never explicit about this competence being *exclusive*. It took judgments such as *Foto-Frost* to clarify that *only* the EU judicature has the power to quash EU measures,[22] and judgments such as *Les Verts* and *Sogelma* to make evident that this power extends to *any* EU body.[23] However, for all the *praeter* and even *contra legem* judicial interpretations of the system of remedies in the Treaties,[24] EU courts still rigorously deny jurisdiction over acts of national authorities.[25]

The third principle refers to the relations between national and EU authorities. Both are bound by the principle of loyal cooperation. The principle generally serves as a normative standard from which more specific duties are derived in concrete cases.[26] Though not specific to EU administrative law,[27] or indeed to EU executive federalism, loyal cooperation has been particularly relevant in those domains. It has required of national amongst themselves,[28] and of EU and national authorities,[29] that all assist each other and exchange information in the exercise of their respective competences.

---

[19] See Case C-275/00, *First NV*, EU:C:2002:711, para. 33. Important precedents for this judgment can be found in Joined cases 12, 18 and 21/77, *Debayser*, EU:C:1978:42, para. 25.

[20] Cfr. Mariolina Eliantonio, 'Judicial Review in an Integrated Administration: the Case of 'Composite Procedures', in: *Review of European Administrative Law*, 7:2, (2014), 65-102, 96.

[21] See Cases T-93/95, *Laga*, EU:T:1998:22, para. 33 ff and T-94/95, *Landuyt*, EU:T:1998:23, paras. 33 ff. See also Thomas von Danwitz, *Europäisches Verwaltungsrecht*, (Springer, 2008), 612.

[22] Case 314/85, *Foto-Frost*, EU:C:1987:452. See also Case 101/78, *Granaria*, EU:C:1979:38, para. 4.

[23] Cases 294/83, *Parti écologiste "Les Verts"*, EU:C:1986:166 and T-411/06, *Sogelma*, EU:T:2008:419. The two cases considered the reviewability of measures of EU bodies that at the time were not foreseen in Article 263. The first case concerned the European Parliament, whereas *Sogelma* concerned European Agencies.

[24] *Foto-Frost* is often considered as an example of a *contra legem* interpretation of the Treaty. The ruling requires national courts to refer to the Court of Justice whenever they are inclined to consider an act of EU law invalid, even though the wording of Article 267 TFEU suggests this to be a mere choice at their disposal. See for example Vlad Constantinesco, 'The ECJ as a Law-Maker: *Praeter aut Contra Legem?*', in: *Liber Amicorum in Honour of Lord Slynn of Hadley*, I, (Kluwer Law International, 2000), 73-79, 77.

[25] See for example Cases 46/81, *Benvenuto*, EU:C:1981:64 and 142/83, *Nevas*, EU:C:1983:267.

[26] Case 78-70, *Deutsche Grammophon*, EU:C:1971:59, para. 5. For an overview of the different applications of loyal cooperation in the case law of the Court, see John Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty', in: *Common Market Law Review*, 27, (1990), 645-681.

[27] Cfr. Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, para. 12.

[28] Case C-251/89, *Athanasopoulos*, EU:C:1991:242, para. 57.

[29] Deirdre Curtin/Ige Dekker, 'The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity', in: Paul Beaumont/Carole Lyons/Neil Walker (Eds.), *Convergence and Divergence in European Public Law*, (Hart, 2002), 59-78, 70.

Given that the EU administration has no formal tools with which to enforce national authorities' compliance with EU law, the cooperation between the two levels is expected to *spontaneously* arise.[30] The EU administration is supposed to cooperate by offering interpretive guidance, or by serving as a hub of information-sharing and coordination between authorities of different states. However, the lion's share of loyal cooperation falls to national authorities. Historically, the case law built their status as the EU's *indirect administration* based on the principle of loyal cooperation, and on the variety of specific duties that have been drawn from it.[31] Such duties range from the simple non-obstruction to the implementation of EU policies,[32] to the duty to set aside provisions of national law that conflict with EU legal rules.[33]

The principle of loyal cooperation is also the constitutional justification for the simplest but most important duty, and simultaneously the notion most commonly associated with EU executive federalism. Under the principle of loyal cooperation, the implementation of EU law is generally a matter for the Member States, except where the relevant EU legislation provides otherwise.[34] Accordingly, national authorities must actively implement EU law as a matter of their own responsibility.

2.2. Sub-surface elements of EU executive federalism: deep justification and background assumptions

Besides concepts and principles, EU executive federalism also shares with any other legal doctrine the fact that it also entails sub-surface components. The ultimate rationale –

---

[30] Cfr. Diana-Urania Galetta, 'Coamministrazione, reti di amministrazioni, *Verwaltungsverbund*: modelli organizzativi nuovi o alternative semantiche alla nozione di "cooperazione amministrativa" dell'art. 10 TCE, per definire il fenomeno dell'amministrazione intrecciata?', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2009), 1689-1698, 1692 and 1695-1696.

[31] John Temple Lang, 'The Duties of National Authorities under Community Constitutional Law', in: *European Law Review*, 23, (1998), 109-131, especially 113 ff.

[32] Case 66/86, *Saeed*, EU:C:1989:140. See also the Opinion of AG Dutheillet de Lamothe in Case 39-70, *Norddeutsches Vieh- und Fleischkontor*, EU:C:1971:16 for an enumeration of more concrete duties that had been hitherto from loyal cooperation.

[33] Case 103/88, *Costanzo*, EU:C:1989:256 and joined Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes*, EU:C:2009:316. For a broader examination of the problem of the duty administrative to disapply conflicting national law, see Maartje Verhoeven, *The Costanzo obligation: the obligations of national administrative authorities in the case of incompatibility between national law and European law*, (Intersentia, 2011).

[34] Thomas von Danwitz, (fn 21), 307. See also Stefan Kadelbach, 'European Administrative Law and the Law of a Europeanized Administration', in: Christian Joerges/Renaud Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, (Oxford, 2002), 167-206. Jacques Ziller, 'Multilevel Governance and Executive Federalism: Comparing Germany and the European Union', in: Patrick Birkinshaw/Mike Varney (Eds.), *The European Union Legal Order after Lisbon*, (Wolters Kluwer, 2010), 257-275, 270; and Merijn Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty', in: *Common Market Law Review*, 53, (2016), 1501-1544, 1505.

or 'deep justification' –[35] of EU executive federalism is twofold. On the one hand, it preserves, in administrative matters, the Treaties' balance of power between the Union and the Member States. On the other, EU executive federalism ensures that the rule of law is upheld in the EU's administrative system. It does so by strictly dividing, and thereby *limiting*, administrative power; by clearly delimiting responsibility for judicial control; and by requiring national authorities to remain subject to the procedures and remedies generally foreseen in national law.

However, the decisive factor in the development of EU executive federalism concerns the background assumptions upon which it is based. It is in the light of those assumptions that one understands the kind of balance of power that EU executive federalism envisages to maintain, and why it came to be seen as constitutionally ordained. Indeed, as will be shown below, EU courts have historically considered EU executive federalism to derive immediately from the Treaties. Since the Treaties did not contain explicit provision on administrative matters until 2009, that reading begs the question as to why a model of executive federalism could even be perceived as a constitutional dictate.

The Treaties have long contained provisions that could have served as the basis for an entirely different interpretation. Several of these could have provided the foundations for a far more centralised administrative system, though one revolving around the Council rather than the Commission.[36] Moreover, the first indent of Article 155 EEC made the Commission responsible for "ensur[ing] that the provisions of [the] Treaty and the measures taken by the institutions pursuant thereto are applied". Ambivalent as it was, this provision could have perhaps been interpreted as authorising the Commission to establish European agencies, or to directly implement EU law within the Member States.[37]

In short, the model of EU executive federalism was not an evident reading. The reason why it came to be seen as constitutionally prescribed relates to the 'background assumptions' with which many early actors in the Commission and in the Court approached the Treaties.[38] The kind of assumptions in question is somehow already betrayed by the very term 'indirect administration', which suggests the EU acts *through* national bureaucracies. EU executive federalism was the interpretive by-product of a shared federal conception of the European Union and of the administrative order created under

---

[35] Cfr. Chapter 1, section 3.
[36] Cfr. Robert Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union', in: *Common Market Law Review*, 47, (2010), 1385-1427, 1425.
[37] In this sense, Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges*, (Cambridge, 2015), 391. However, as Robert Schütze (fn 36), argues (at 1394), the qualification 'in the manner provided for in this Treaty' would have made such an interpretation less plausible.
[38] See Chapter 1, section 3.

its auspices. It was in the light of that conception that the Treaties were interpreted, and that the basic principles of EU executive federalism were crafted.

The background assumptions of a legal doctrine are usually to be reconstituted from the implications and presuppositions of its surface elements. However, in what follows, the argument will inverse the order of the analysis, since the broader political context which shaped EU executive federalism chronologically precedes its construction by EU courts.

The ensuing sections will contextualise the historical overwhelming vagueness of the Treaties on the constitutional status of administration in the EU, and map some less well-known administrative dimensions of the political and constitutional thought of early Eurofederalists. That thought was largely informed by a conception of the EU which, for want of a better label, can be described as a federal conception influenced by neofunctionalist thought. As will be shown in section 5, there are striking similarities between that conception and ways in which the case law on the principles of EU executive federalism concretely frames their content and reach.

3. Defeated in Paris, Silent in Rome: the Treaties and Europe's federal administrative system

The foundations of what would become the European Union were laid by the Treaty of Rome. The Treaty was born in the aftermath of the failure of the European Political Community and the European Defence Community Treaties, and informed by the causes of their defeat. Besides concerns over German rearmament, one of the key reasons for the rejection of the EDC and EPC in the French *Assemblée Nationale* was that the EPC would have established a European Executive Council with far-reaching powers.[39] That European Executive Council would have coordinated and supervised a multitude of European 'specialized' administrative agencies established "in the European public interest".[40] Moreover, it would have even enjoyed the option of taking over already existing national administrative services in order to pursue the Community's aims.[41] The Community's legislature enjoyed a large degree of discretion in shaping the federal

[39] Richard Griffiths/Alan Milward, *The Beyen Plan and the European Political Community*, EUI Working Paper 85/199, (1985).

[40] Article 88 (1) of the EPC Treaty provided: "Within the framework of the mission and general aims laid down in Article 2, the Community may set up, or sponsor the creation of, administrative bodies, institutions, public services or services in the European public interest, or self-governing and financially independent organizations, centralized or decentralized; it may also exercise supervision over them". Article 43 EPC was explicit in recognizing such supervision to the European Executive.

[41] See Article 88 (3) EPC.

administration.[42] As the EPC's drafters agreed, "the question of federal execution should be ruled by the Community itself".[43]

The Treaty of Rome, by contrast, seemed to abandon any ambitions for a dominant European Executive. Indeed, the EEC Treaty was practically silent on administrative matters, and the few provisions it did entail were aimed at containing the EU's own administration. One member of the Treaty's *groupe de rédaction* reported that the position of the Executive had been "the most sensitive question" haunting the drafting of the Treaty.[44] The Member States wanted to avoid an overly powerful European administration. The EEC Treaty therefore restricted the Commission's decisional powers to a limited set of policy areas.[45] Unlike the EPC Treaty, the Treaty of Rome did not contain any provisions allowing the Community to establish its own administrative bodies, or to create its own administrative laws. Moreover, fragmentation of executive power between the ECSC, the EEC, and EURATOM prophesied an "*impossible administration* [and] *improbable government*".[46]

After the failure in 1954 of the EDC and EPC Treaties, the Member States proved far less generous in endowing the Commission of the EEC with administrative powers than they had been with its predecessor, the High Authority of the ECSC.[47] Wary of their sovereignty, the governments of the Member States, and in particular that of France,[48] distrusted the Commission. Their reluctance to empower the Commission becomes apparent not only from the provisions of the EEC Treaty themselves, but also from the political dynamics of the first years of its functioning.[49] Such reluctance pervaded nearly all aspects of the Commission's work, from the most politically salient to the most mundane. Though the scope of the EEC's legislative competences was far wider than that of the

---

[42] See Article 88 (4) EPC.

[43] HAUE Document AH-154, *Session 2 - Onzième séance, le 6 décembre*, 1952AA/CC/SCP (2) PV 11, at 5.

[44] Pierre Pescatore, 'Les Travaux du «groupe juridique» dans la négociation des traités de Rome', in*: Studia Diplomatica*, 34, (1981), 159-178, 169.

[45] Edoardo Chiti, 'La Costruzione del Sistema Amministrativo Europeo', in: Mario Chiti (Ed.), *Diritto Amministrativo Europeo*, (Giuffrè, 2013), 45-88, 48-50 and Sabino Cassese, 'La signoria comunitaria del diritto amministrativo', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2002), 291-301, 292-293.

[46] Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*, LSE Law, Society and Economy Working Papers 19/2013, 11.

[47] Katja Seidel, *The Process of Politics in Europe: the Rise of European Elites and Supranational Institutions*, (Tauris, 2010), 68.

[48] French President Charles de Gaulle was open in his scepticism, and sometimes outright disdain, of the early political ambitions of the Commission. He perceived them as a threat to France's independence and influence in Europe's post-war order. Other than accusing the Commission of having become an "aeropagus of stateless bureaucrats", De Gaulle is known to have claimed that "there is and can be no Europe other than a Europe of the States – except of course for myths, fictions and pageants". See Michael Burgess, *Federalism and the European Union: the Building of Europe 1950-2000*, (Routledge, 2000), 81 and Wilfried Loth, 'Walter Hallstein, a committed European', in: Michel Dumoulin (Ed.), *The European Commission 1958-1972: History and Memories*, (Office for Official Publications of the European Communities, 2007), 79-90, 85.

[49] See Wilfried Loth/Marie-Thérèse Bitsch, 'The Hallstein Commission 1958–67', in: Michel Dumoulin (Ed.), *The European Commission 1958-1972: History and Memories*, (Office for Official Publications of the European Communities, 2007), 51-78.

ECSC, the Commission's administrative powers were far more limited than those of the High Authority.[50] Competition policy was practically the only instance where the EEC Treaty explicitly did grant such powers to the Commission. Whatever other administrative decision-making powers the Commission would have, the Treaty made them dependent upon case-by-case conferral by the Member States in the Council.[51] Moreover, where the Commission was conferred implementing powers at all, the Member States placed their exercise under the close supervision of committees composed of national representatives and experts.[52] The unwillingness of the Member States to empower the Commission even extended to the pettiest of its routine bureaucratic tasks. They sought to limit its influence by binding it to administrative procedures, which were rigid, cumbersome, and sometimes downright impractical.[53]

The fact that the Treaty was either silent or restrictive of the Commission's administrative activity had at least one clear implication. Administrative implementation of EEC law was, as a rule, a matter for the Member States. The EEC was to operate with few exceptions under the normal rules of international law, whereby states are entirely and exclusively responsible for how they fulfil their international commitments. This reading could be corroborated by the fact that, with the exception of one provision, to which we will return shortly, the Treaty was as silent on administrative implementation by the Member States as it was in respect of the Commission's administrative tasks. *Ex silentio*, it was for the Member States to decide internally which bodies would implement EEC law, according to which procedures, and subject to what remedies.

---

[50] See Loïc Azoulai, 'Pour un Droit de l'Exécution de l'Union Européenne', in: Jacqueline Dutheil de la Rochère (Ed.), *L'Exécution du Droit de l'Union, entre mécanismes communautaires et droits nationaux*, (Bruylant, 2009), 1-26.

[51] The Commission's powers of implementation of EC legislation had to be conferred by the Council, as provided for in Article 155, 4th indent, EEC. The provision, as Craig argues, was a "decidedly shaky basis for the assertion of authority or autonomy" that the Commission required (Paul Craig, *EU Administrative Law*, 2nd ed., (Oxford, 2012), 112).

[52] On the Member-States' reluctance to confer unsupervised executive powers to the Commission, which resulted in the comitology system, see Carl Fredrik Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System*, (Oxford, 2005), 46 ff.

[53] A case in point is found in the procedures enshrined in the EEC's first antidumping regulation. The regulation was the result of a period marked by "reluctance on the part of some Member States to concede any strengthening of the Commission's role in the Community". As a consequence of that reluctance, there were "certain features in the original legislation which can only be described as being somewhat bizarre" (Johannes Friedrich Beseler/Neville Williams, *Anti-Dumping and Anti-Subsidy Law: The European Communities*, (Sweet & Maxwell, 1986), 174). According to Article 6 of Regulation 459/1968, all initial complaints for dumping or subsidies necessarily had to go through Member States' authorities. The latter checked if all the particulars were present. It was for the Commission to adopt all relevant measures, and the role played by the Member States was entirely formal. However, if the Commission received itself a complaint directly, it was obliged to forward it back to the states without being allowed to perform any checks on the complaint's formal sufficiency.

This model of predominantly national administration was chosen by the Member States for the same reasons why they were loath to allow a large supranational administration to grow. They wanted to preserve sovereignty over national bureaucracies, and to retain full control of the integration process 'downstream', at the implementation stage, in spite of having lost the upper hand 'upstream', at the legislative stage.[54] The words of Andreas Donner, the Dutch judge who presided over the European Court of Justice from 1958 to 1964, are noteworthy in this regard. Donner explained that the responsibilities and powers funded by the Member States to the Community "are far too essential to national well-being and prosperity to make a downright abandonment of them possible, and in a certain way member states have taken back with their left hand what they gave with the right one". Subtly alluding to a provision that had been buried with the EPC Treaty – and subtly criticizing the Commission's federalist ambitions – Donner also explains that the alternative of co-opting national authorities into the EEC's own administration was off the table: "a swift take-over of national public servants by the community would have been too exhausting even for people like Professor Hallstein and his colleagues and would certainly have seemed in bad taste to member governments".[55]

Nevertheless, and regardless of whether or not the take-over of national authorities was his preferred option, Professor Hallstein had different views on the meaning of the model of decentralised implementation implied by the Treaty. In fact, that model actually went hand in glove with the political vision that Commission President Hallstein was advancing in Brussels.

4. Revived in Brussels: the federalist Eurolawyers in the Community administration

Only courts – and in EU law only the CJEU – can give binding interpretations of constitutional texts. Nevertheless, those texts are often also the raw matter for the construction of legal arguments that different actors use to advance their own political goals. In the early days of integration, the Commission played a particularly active part in this regard. As Walter Hallstein himself put it, the Commission's "daily work consists in filling with life the letters of the Treaty of Rome".[56]

---

[54] See Sabino Cassese/Giacinto della Cananea, 'The Commission of the European Economic Community: the administrative ramification of its political development', in: *Jahrbuch für europäische Verwaltungsgeschichte*, 4, (1992), 75-94, 79-80.
[55] Andreas Donner, *The Role of the Lawyer in the European Communities*, (Edinburgh, 1968), 12-13.
[56] Walter Hallstein, *Die echten Probleme der europäischen Integration*, (Kieler Vorträge, 1965), 6.

Hallstein's legacy as Commission President was enduring,[57] and the reading of the Treaties that his Commission supported in administrative matters was of seminal importance for the institution's future development. In the process of 'filling with life the letters of the Treaty', Hallstein made administration the field where he first put his political vision for the Community into practice.[58] This was the case not just in how Hallstein organised the Commission's bureaucratic structure and practices, but also, crucially, in how he and his Commission interpreted the relations between national and European administration under the Treaty.

In the first decades of European integration, the influence and mobility of jurists across different institutions and social groups was a powerful if discrete engine of the Union's political development. These Eurolawyers, as Vauchez has aptly named them, were often involved in the drafting of Treaties, later proceeding to occupy key positions in national governments or in the legal services of the Commission and the Council. Some became ECJ judges or Commissioners. They often moved between positions, and were in frequent contact with each other. They helped to serve as 'brokers' of European integration by crafting the legal doctrines that the nascent European polity needed in order to enjoy a robust political and institutional infrastructure.[59] They often approached the Treaties from a more or less explicit integrationist or federal standpoint.

Walter Hallstein, legal academic, drafter of the Treaties and Commission president, was one such Eurolawyer. And like many Eurolawyers, he did not take the view that the founding Treaties' silence on administration should be interpreted as a sign that the implementation of European policies by the Member States would follow the standard scheme of international law. In the Commission, in the Council, and in the Court, many 'Eurolawyers' had no doubts that the Communities' founding Treaties had set in motion an unstoppable march towards Europe's political unification in the form of a federal polity. The Communities' institutions were, in their view, destined to become the institutions of a federal Europe. This may explain why, perhaps paradoxically, many 'Eurolawyers' believed that, in their silence, the Treaties had founded an administrative order of a federal kind.

Hallstein's vision of European federalism has often been misunderstood. It is in the light of Hallstein's political and constitutional thought, which was moreover quite

---

[57] Michelle Cini, *The European Commission: leadership, organisation, and culture in the EU administration*, (Manchester, 2000), 37.
[58] Daniela Preda, 'Hallstein e l'amministrazione pubblica europea (1958-1967)', in: *Storia Amministrazione Costituzione: Annale dell'Instituto per la Scienza dell'Amministrazione Pubblica*, 8, (2000), 79-104, 86.
[59] Antoine Vauchez, *Brokering Europe: Euro-lawyers and the Making of a Transnational Polity*, (Cambridge, 2015), 24 ff.

influential across European institutions, that his espousal of the doctrine of EU executive federalism must be read. In order to understand the role that the *legal* doctrine of EU executive federalism played in Hallstein's vision for Europe, one must consider three aspects of his federalist *political* doctrine. First, the position that should be assigned to the Member States in a European federal Union. Second, the mission of the EU institutions in European integration. And thirdly, the constitutional status that those institutions enjoyed.

First of all, from Hallstein's own writings, and from the research carried out by historians on his speeches and memoirs, it becomes evident that Hallstein's federalist conception of European integration was not in any way based on a desire to supplant the European nation-state. Instead, Europe's new political order was to grow symbiotically around the Member States' existing institutions. He wrote that the Communities had "never been conceived to make the states disappear, but as a form of Union between them".[60] Hallstein further considered Europe's nations as "the pillars on which integration rests" and held that "to desire the unity of Europe is not to wish to create a cold streamlined machine (…) but to keep alive the fruitful diversity of Europe, which is a constant source of mutual emulation".[61] The political unification of Europe into a federation was intended to protect Europe's nations, not erase them; to respect statehood, not to dismantle it.

For all the political miscalculations it prompted,[62] Hallstein held the belief that Europe's political unification was both preordained by the Treaties, and the expressed will of the Member States.[63] He was an avid reader of neofunctionalist theory, and made it an integral part of his political project. Hallstein believed that European political unification would come about through "some kind of federalism by instalments".[64] Integration in one policy sector would set in motion a chain reaction whereby other sectors would be integrated; incrementally, the *quantitative* expansion of common European policies would

---

[60] Walter Hallstein, 'L'Évolution des Communautés Européennes', in: *Annuaire Européen*, 6, (1959), 1-28, 6-7. In the original, " les Communautés n'ont jamais été conçues comme devant faire disparaître les États, mais comme une forme d'union entre eux".

[61] See the speeches reproduced and the analysis in Matthias Schönwald, 'Hallstein and the »Empty Chair« Crisis 1965/66', in: Wilfried Loth (Ed.), *Crises and Compromises: the European Project 1963-1969*, (Nomos, 2001), 157-171, 159.

[62] See Jonathan White, 'The Neofunctionalists and the Hallstein EEC Commission', in: *Journal of European Integration History*, 9:1, (2003), 111-131. White argues that Hallstein's near-deterministic views on progress towards a federal political union were partly responsible for the empty chair crisis of 1966. His confidence in the certainty of the Community's path to federation, whatever setbacks it would find along the way, may have led him to misjudge the longer-term implications of upsetting Gaullist France.

[63] Walter Hallstein wrote that the Treaty's preamble, which still proclaims "an ever closer union between the peoples of Europe", was to be taken as an explicit recognition by the Member States that the ultimate objective of European integration was the construction of a federation (Walter Hallstein, *Die Europäische Gemeinschaft*, (ECON, 1979), 36 and 364).

[64] Jonathan White, (fn 62), 114 and 120.

inevitably lead to the *qualitative* political transformation of the Communities into a federal union. The mission of Europe's new institutions was to oversee this process, by managing dissension between the Member States and serving as the custodians of their compromise.[65] Influenced by the writings of German constitutional lawyers, in particular Triepel, Hallstein believed in the virtues of federalism as a framework to compose opposing interests, to accommodate the diversity of the federation's constituent states, and to ensure their autonomy in pursuing the Community's common objectives.[66]

Nevertheless, in order to effectively promote and supervise the integration process, and to mediate in conflicts between the Member States, Europe's institutions needed to be more than persuasive. They required a solid institutional and constitutional status that could secure their independence from encroachments from the Member States,[67] as well as the effectiveness of their power. In this regard, Hallstein shared a view that was common amongst German public lawyers involved in the EU institutions.[68] He held that the sovereign character of the Member States' power had been transferred along with the powers conferred to the Communities' institutions.[69] The Community, Hallstein claimed, was based on the federal solution of detaching sovereign rights from the constituent states

---

[65] See Hallstein's speech at the World Fair in Seattle in 1962, available at http://www.cvce.eu/en/obj/statement_by_walter_hallstein_on_the_eec_seattle_1962-en-4f85477a-cf46-4a3e-9d18-933cc564745b.html

[66] See Jonathan White (fn 62), 159-160. Though a comparison between the two discourses on European integration would go well beyond the scope of this Chapter, it is interesting to note how, in a way, Hallstein's federalism resembles contemporary discourses of European demoicracy. See Kalypso Nicolaïdis, 'The Idea of European Demoicracy', in: Julie Dickson/Pavlos Eleftheriadis (Eds.), *The Philosophical Foundations of European Union Law*, (Oxford, 2012), 247-274.

[67] Though in many federations the discussion on encroachment has historically concerned the expansion of the power of central government at the expense of the constituent states, debates on the design of federal institutions are also shaped by a concern to protect them from undue influence of individual states. See for instance Alexander Hamilton, The Same Subject Continued: The Insufficiency of the Present Confederation to Preserve the Union', in: *The Independent Journal* (Federalist Papers, No 17) (available at https://www.congress.gov/resources/display/content/The+Federalist+Papers): "It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State governments if they administer their affairs with uprightness and prudence, will generally possess over the people".

[68] For a contemporary critique of this theory and its implications in the domain of conflicts between national and Community law, See Hans Peter Ipsen, 'The Relationship between the Law of the European Communities and National Law', in: *Common Market Law Review*, 3, (1966), 379-402. Ipsen, when criticizing the reading of the Treaties made by Ophüls, Wohlfahrt and more generally the "German jurists" working in the "Executives of the various Communities", notes (at 386) that it is "obvious" that their view on the relations between EU and national law is "inspired by a particular conception of the legal nature of the Communities, whose structure it considers as analogous with that of a federal state".

[69] See for instance Hans von der Groeben, *The European Community: the formative years: the struggle to establish the Common Market and the Political Union (1958-66)*, (Office for Official Publications of the European Communities, 1987), 26: the Communities were made with the intention "that in the course of implementation of the Treaties, a new sovereign authority should arise alongside the once solely sovereign national States (…) albeit in the limited areas laid down in the Treaty".

and recasting them to be exercised by common authorities.[70] In the view held by Hallstein and others, the Treaties had instituted an order constituted by two independent spheres of power: the sphere of the Member States, sovereign in their origin, and of the Community's institutions, sovereign within the scope of their competences.[71] The Community was structured to create an "immediately binding order" at European level, while allowing the Member States to continue as such – a dualistic structure which, in Hallstein's view, corresponded to "the essence of the federation".[72]

These three elements in Hallstein's constitutional and political thought were shared by many 'Eurolawyers'. All three were present not just in how Hallstein organised his administration – openly shaping it to become Europe's future federal government –[73] but in how the doctrine of EU executive federalism was reconstructed from the Treaties.

Emile Noël, the influential secretary-general of the Commission for over 30 years, provides us illuminating insights in this regard. Noël reported that even though the Treaties made no explicit mention of it, the drafters of the Treaty of Rome agreed that it followed, in essence, the German model of executive federalism.[74] Two of those drafters – von der Groeben and Hallstein himself – became members of the Commission. Ophüls, at the time Hallstein's "right hand man",[75] became Germany's ambassador to the Community, after having been Head of the German Delegation to the Intergovernmental Committee established by the Messina Conference that preceded the Rome Treaties. Wohlfahrt, member of the *groupe de rédaction* of the EEC Treaty, became director of the Council's legal service. Pescatore, also a member of that group, became member of the Commission's legal service and later a long-serving ECJ judge. All of them agreed that the Treaties had

---

[70] Walter Hallstein, (fn 63), 41 and Walter Hallstein, 'Zu den Grundlagen und Verfassungsprinzipien der Europäischen Gemeinschaften', in: *FS Ophüls*, (Müller, 1965), 1-18, 15.

[71] This was also the view of Treaty drafter Carl Friedrich Ophüls. Ophüls referred to the Council as the "federal organ" of the Communities and noted the "double character of the Community itself, which is simultaneously a union of member states and an independent European organization, exercising itself the sovereign rights which were conferred to it by the member States" (Carl Friedrich Ophüls, 'La Relance Européenne", in: *Annuaire Européen*, 4, (1958), 3-19, 11).

[72] Walter Hallstein, (fn 63), 365.

[73] See Katja Seidel (fn 47), 69 and Emile Noël, 'Comment fonctionnent les Institutions de la Communauté Économique Européenne', in: *Revue du Marché Commun*, 5:4, (1963), 14-21, 16.

[74] Emile Noël, 'Témoignage: l'administration de la Communauté européenne dans le rétrospective d'un ancien haut fonctionnaire', in: *Jahrbuch für europäische Verwaltungsgeschichte*, 4, (1992), 145-158, 156. Some contemporary public lawyers were sceptical of this approach. Ipsen in particular cautioned against reading the relationship between national administrations and the Community under the Community Treaties as if the latter were the German Basic Law (Hans Peter Ipsen, 'Deutsche Verwaltung und europäische Wirtschaftsintegration', in: *Die Öffentliche Verwaltung*, (1968), 441-445, 442). For an overview of executive federalism in German law, see Janbernd Oebbecke, 'Verwaltungszuständigkeit', in: Josef Isensee/Paul Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VI, (Müller, 2008), 743-810. For a more detailed examination of the subtler differences between German and EU executive federalism, see Jacques Ziller, (fn 34), 257 ff.

[75] Anne Boerger/Morten Rasmussen, 'Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993', in: *European Constitutional Law Review*, 10:2, (2014), 199-225, 203.

implicitly adopted executive federalism as the Community's model of administration. Advocating a federal reading became easier because, despite being generally silent in administrative matters, the Treaties contained one provision that seemed to support the view that the Member States' administrations would play the same role as the administrations of the German *Länder*.

Notwithstanding the failure of the EPC Treaty and the disappearance of its provisions on the European central federal administration, the same provisions relating to the national implementation of European laws had survived. In enshrining the principle of loyal cooperation, Article 5 EEC practically replicated Article 105 of the European Political Community Treaty, by binding the Member States to "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community".[76] The subsistence of the provision made it possible to revive the agreement arising from discussion among EPC drafters according to which "the administration of the Community [would], in principle, be an administration delegated to the national administrations".[77] Ophüls wrote that the EEC Treaty recovered the plan from the EPC ad-hoc Assembly, which, "as has long been the case in German federal law, in essence leaves [the execution of Community law] to the administration of the Member States".[78] In his influential commentary to the EEC Treaty, Wohlfahrt claimed that the provision meant that the Community followed the German model and thereby made national authorities "state bodies and as executive bodies of the Community".[79] Similarly, Pescatore described the Member States as the executive arm of the Community.[80] Lastly, Hallstein himself held the view that the Treaties followed the German model – adding that the adoption of that model expressed the desire to preserve national statehood and had the advantage of bringing to citizens the still 'foreign' reality of the European order "in the well-known

---

[76] Compare with Article 105 EPC: "The Member States pledge themselves to take all measures necessary to implement the laws, regulations, decisions and recommendations of the Community and to assist the Community in the accomplishment of its mission." Like Article 5 EEC (and Article 4 (3) TEU today), the second paragraph of Article 105 EPC also bound the Member States "to refrain from any measure incompatible with the provisions of the present Statute".

[77] HAEU Document AH-153, AA/CC (2) PV 10, para. 28. As some drafters of the Rome Treaty acknowledged, the EPC Treaty was one of the main sources of inspiration for the EEC's design. See Pierre Pescatore, (fn 44), 165.

[78] Carl-Friedrich Ophüls, 'Zur ideengeschichtlichen Herkunft der Gemeinschaftsverfassung', in: *Festschrift Walter Hallstein*, (Klostermann, 1966), 387-413, 404.

[79] Ernst Wohlfahrt, in: Ernst Wohlfahrt/Ulrich Everling/Hans Joachim Glaesner/Rudolf Sprung (Eds.), *Die Europäische Wirtschaftsgemeinschaft, Kommentar zum Vertrag*, (Vahlen, 1960), 12 and 517.

[80] Pierre Pescatore, *The Law of Integration: emergence of a new phenomenon in international relations, based on the experience of the European Communities*, (Sijthoff, 1974), 45-46.

fabric of the national order".[81] In other words, national implementation of Community law was seen as a solution in which the Member States could retain their old prerogatives over administration, and that allowed the diverse 'fabrics' of national legal orders to remain undisturbed.

Yet it is not just the perceived role of national administrations that fits neatly with the federalist vision advocated by actors like Hallstein. The role attached to the Commission and the position it occupies vis-à-vis national authorities also resonate with the other elements of the broader federal conception of the Community described before. The Commission was to become "a great administration",[82] but one devoted to the fulfilment of only a number of specific tasks. It would serve "as a motor, to stimulate and initiate Community action", as "a watchdog, one of the guardians of the treaty, keeping governments and others up to the mark", and as "an honest broker, helping to bring about agreement among the Member States".[83] Hallstein, as Monnet before him, envisioned a Community administration which, as a rule, was not to take decisions in regard to individuals on an everyday basis, but rather fulfil planning, supervisory and monitoring functions.[84] He held the view that it is "not the power of decision that essentially characterizes the role of the Commission in the institutional system of the treaty".[85] In harmony with the strong preference for decentralised administration of executive federalism, the Community administration was of an exceptional character. Ophüls, one of the drafters of the Rome Treaties, held that they had created in the Commission an administration which, unlike the ECSC's High Authority, was designed to interact with other administrations at national level and only in rare cases with private parties.[86] As an "administration of administrations', and not of citizens, the Commission could well be described as a *second-order* administration.[87]

One cannot understate the importance of inter-administrative cooperation for federalists and neofunctionalists such as Hallstein and Monnet. Both believed that continuous contacts between the Community administration and national civil servants was of a crucial 'pedagogical' role. Monnet called it 'psychological integration'. Only in the

[81] Walter Hallstein, (fn 63), 61-62 and 376-377.
[82] Emile Noël, (fn 74), 152.
[83] Matthias Schönwald, (fn 61), 161.
[84] Sabino Cassese/Giacinto della Cananea, (fn 54), 79-80 and 89.
[85] Walter Hallstein, 'Déclaration du 12 octobre 1960, devant l'Assemblée parlementaire européenne en réponse à la question orale avec débat posée par MM. Birkelbach, Poher et Pleven'.
[86] Carl-Friedrich Ophüls (fn 78), 405.
[87] The notion of the 'second-order' or 'second-grade' character of EU administration draws on an expression found in Sabino Cassese, 'Divided Powers: European administration and national bureaucracies', in Sabino Cassese (Ed.), *The European Administration/L'Administration Européenne*, (International Institute of Administrative Sciences/European Institute of Public Administration, 1987), 5-21, 10.

incremental fashion advocated by neofunctionalism, through cooperation between officials, could national administrations be 'acculturated' into their new European role, persuaded to see above parochial interests, and learn to understand the needs of European integration.[88] As Bignami aptly puts it, for Monnet, "European integration was to be achieved through administration".[89]

If the Community administration was to become an administration "qui fait faire",[90] it needed to enjoy a strong position vis-à-vis national officials. Hallstein's Commission was keenly aware of the need to secure institutional independence from the Member States and their administration, without which it could not claim authority in its own right when persuading national bodies to cooperate with the Community.[91] It also needed that independence to "prevent individual Member States' rights or interests being endangered by the formation of coalitions".[92] Arguing that the Commission participated in the independent power of Community institutions – thus suggesting that, like the remaining institutions, the Commission exercised transferred 'sovereign rights' – was an important step in defending its institutional independence as a matter of constitutional character.

This section sought to demonstrate the close link between the broader political and constitutional thought of early Eurofederalists, in particular Hallstein, and the Commission's espousal of the doctrine of EU executive federalism. As the core tenets of EU executive federalism formed, they echoed some of the key elements in Hallstein's federal conception of European integration.

The desire to preserve and accommodate the autonomy and diversity of the Member States is expressed in the strong preference for decentralised administration. The reverse side of that preference is that the EU administration was to be accorded the power to decide in respect of individuals only on an exceptional basis.

The general role of the EU institutions in managing disagreement between states, and in upholding their commitment to European integration, is reflected in the conception of the Commission as a second-order administration.[93] The Commission's mission as the

---

[88] See also Walter Hallstein, (fn 56), 10-11.

[89] Francesca Bignami, 'Three Generations of Participation Rights before the European Commission', in: *Law and Contemporary Problems*, 68, (2004-2005), 61-83, 61. Evocatively, some have conceptualised the functionalist vision as one of a "Europe of Offices". See Luuk van Middelaar, *The Passage to Europe: how a Continent became a Union*, (Yale, 2013), 2-3.

[90] See Jean Monnet, *Mémoires*, (Fayard, 1976) 436.

[91] Emile Noël, (fn 74), 152 and 156, Daniela Preda, (fn 58), 86-87 and Roger Morgan, 'Jean Monnet and the ECSC Administration: Challenges, Functions and the Inheritance of Ideas', in: *Jahrbuch für Verwaltungsgeschichte*, 4, (1992), 1-9, 6.

[92] Hans von der Groeben, (fn 69), 31.

[93] That the Commission acknowledged from an early stage the need to become a skilful arbitral institution shows that it was keenly aware that its "role as a guardian of the European interest would depend on its

guardian of the Treaties and of the neofunctionalistic piecemeal advancement of integration is indissolubly linked to its role of supervisor, coordinator, arbitrator, and educator of national bureaucracies.

Lastly, the Commission's constitutional status benefited from the federal reading of the Treaties according to which the Member States had endowed the Community with sovereign rights. Its independent authority vis-à-vis the Member States was held to be constitutionally anchored, and to coexist with the authority of national authorities in a dualistic setting of overlapping spheres of power.

In short, the three elements of the conception of Europe's administration in the early days of the integration process – a federal scheme of separate levels of authority, the favouring of implementation at the national level, and the status of the Commission as an essentially second-order administration – was shaped by a federalist and functionalist conception of the European polity itself. What the Chapter will attempt to demonstrate in the following section is that these elements were also present in the judicial development of different aspects of the doctrine of EU executive federalism.

However, it must be stated from the onset that it is close to impossible to find unequivocal causal links between individual aspects of the case law and the federal conception endorsed by the Commission and its early presidents.[94] Due to the secrecy of the ECJ's deliberations, one cannot hope to find 'smoking gun' evidence. What can be said with certainty is that the Court's case law is likely to have been influenced by the same conceptions of Europe. This is suggested by the shared background of many early 'Eurolawyers' and by the fact that some of them became members of the Court. Moreover, historical research has shown that in this same period, the federal conception of the European Community, and academic commentary exalting the constitutional character of the Treaties,[95] exerted a profound influence in the judicial interpretation of the Treaties, often via the Commission's legal service.[96] It is almost certain that, as they searched for the constitutional status of European administration, ECJ judges were informed by a federal conception of the EU.

---

expertise and its credibility as an impartial mediator between political views, conflicting national interests, and interest group pressures" (Anchrit Wille, *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive*, (Oxford, 2013), 38).

[94] Hallstein was not the only federalist at the head of the Commission. Even after him, "Mansholt and Rey were openly pursuing federalist objectives" (Hans von der Groeben, (fn 69), 31. Furthermore, the fact that Emile Noël briefed every new Commissioner and president on the administrative aspects of the institution's functioning also strongly suggests that the legacy of Hallstein's vision of executive federalism was passed down through the decades.

[95] Anne Boerger/Morten Rasmussen, (fn 75), 201 ff.

[96] See Antoine Vauchez, (fn 46), 29 ff and Morten Rasmussen, 'Revolutionizing European law: A history of the *Van Gend en Loos* judgment', in: *International Journal of Constitutional Law*, 12, (2014), 136-163.

5. Constitutionalised in Luxembourg: EU executive federalism and the discrete administrative dimension of the European constitutionalisation process

This section considers how the Court of Justice crafted the doctrine of EU executive federalism in tandem with the constitutionalisation of the European Treaties. The way in which it did so strongly suggests that, in interpreting the Treaties' silence on administration, the Court was influenced by a conception of the EU that mirrors the federalist reading of the Treaties set out in the previous section. Several aspects of the Court's case law indeed resonate with the three elements of Hallstein's political and constitutional thought highlighted above.

The three ensuing subsections will point out the similarities between the federal ideas of early 'Eurolawyers' and three different aspects of the Court's development of the doctrine of EU executive federalism. As will be shown, the Court's landmark ruling in *Deutsche Milchkontor* (hereinafter: *DM*), came to function in the case law as a repository of the core tenets of that doctrine.

The first subsection examines the Court's reconstruction of the separation principle. After exploring the constitutional foundations of that principle, the subsection provides an initial insight into the historical significance of the *Deutsche Milchkontor* ruling both in regard to the separation principle and EU executive federalism more broadly. It ends by drawing out the assumptions that underlie the separation principle with regard to the nature of the divide between national and EU public power. Once those assumptions are clarified, it will also become clear why the principle of 'double exclusivity' could develop, even though the Treaty provisions on judicial competence did not set out such an obviously strict divide.

The second subsection begins by drawing out other important implications of the *Deutsche Milchkontor* case law. The ruling couples the emphasis on the loyalty of national administrations towards the EU with a logic respect for the Member States' autonomy in administrative matters. The analysis will conclude by comparing the rationale of this aspect of the case law with the role that the early Eurofederalists assigned to national bureaucracies.

The third subsection will delve a step deeper into the same *Deutsche Milchkontor* line of case law. It will examine how the CJEU's jurisprudence approaches the conception of the EU bureaucracy as a 'second order' administration that pervaded the early federalists' political and constitutional thought.

5.1. The separation principle, the *DM* formula, and constitutional status

The Court's early establishment of the principle of the autonomy of the European legal order was one of the most important moments of the EU constitutionalisation process.[97] A sort of declaration of independence from national law,[98] the principle of autonomy allowed the Court of Justice to assert the immunity of the exercise of EU power from national legal constraints. Indeed, early in the integration process, the Court clarified that the "law of any Member State (…) and Community law constitute two separate and distinct legal orders".[99] However, the Court in Luxembourg also emphasized that the Union is an entity "composed of States, each of which *retains its own legal system*".[100] This notion of overlapping and independent legal orders is present in the most salient rulings of the European Union's "foundational period". In the *Van Gend en Loos* and *Costa/ENEL* rulings,[101] the Court proclaimed that the Community constituted "a new legal order" and enjoyed "its own legal system". By creating that new and autonomous legal order, the Court added, the Member States had also consented to "the establishment of institutions endowed with sovereign rights".[102] The new common European institutions enjoyed "real powers stemming from a limitation of sovereignty", or deriving from a "transfer or powers", by which the states had "limited their sovereign rights".[103]

This account of the independence of the EU legal order, and of the ostensibly sovereign character of the power of EU institutions is strikingly similar to the view endorsed by Hallstein and other early federalists. One of them, Pierre Pescatore, an ECJ judge at the time when executive federalism emerged, offered an account of European supranationality that practically replicated Hallstein's views. Supranationality consisted in "real and autonomous power placed at the service of objectives common to the Member States".[104]

Since its founding period, the independence of the EU legal order has been closely linked to the independence of EU powers.[105] Nevertheless, it is worth pointing out that

---

[97] See for instance René Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism', in: *European Constitutional Law Review*, 5: 3, (2009), 421-446, 423-424 and Kaarlo Tuori, (fn 4), 53 ff.
[98] Whether the Court of Justice ever actually severed EU law's ties to international law is still debated. See for instance Bruno de Witte, 'The European Union as an International Legal Experiment', in: Gráinne de Búrca/Joseph Weiler (Eds.), *The Worlds of European Constitutionalism*, (Cambridge, 2011), 19-56.
[99] Case 13-61, *Bosch*, EU:C:1962:11, at 49.
[100] Case 33-67, *Kurrer*, EU:C:1968:16, at 135.
[101] See Case 6/64, *Costa v Enel*, EU:C:1964:66. See also Cases 26/62, *Van Gend en Loos*, EU:C:1963:1 and 14/68, *Walt Wilhelm*, EU:C:1969:4.
[102] *Van Gend en Loos* (fn 101).
[103] *Costa/ENEL* (fn 101).
[104] Pierre Pescatore, (fn 80), 50-51.
[105] See René Barents, *The Autonomy of Community Law*, (Kluwer Law International, 2004), 226 and Joël Molinier, 'La notion de «pouvoir public commun» et la nature des communautés Européennes', in: *Mélanges*

even before the Court of Justice delivered the two landmark rulings in *Van Gend en Loos* and *Costa/ENEL*, the same notion of separate and overlapping powers had been expressed in the separation principle in the relations between national and Community *administrations*.

Indeed, the *Humblet* judgment is occasionally mentioned as a precursor to the two seminal rulings of 1963 and 1964.[106] In that judgment, the Court declared that Community law entailed a "principle of strict separation of powers of the Community institutions and the authorities of the Member-States".[107] Though usually only appearing implicitly in the case law, this separation principle has often been used to preserve the mutual independence of the spheres of power held by European and national authorities. This is seen in at least two aspects of the Court's historical case law.

First, already in the 1950s, this same logic of separation had led the Court to the conclusion that EU bodies could not be held responsible or judicially accountable for the erroneous exercise of national administrative competences, as such presupposed the ability to control their action.[108]

Second, the separation of spheres of authority also came to mean in the case law of EU courts that the Commission is generally barred from issuing binding instructions to national authorities.[109]

However, the clearest usage of the separation principle, and its treatment as a constitutive element of EU executive federalism, would only begin after 1983. In that year, the Court of Justice delivered *Deutsche Milchkontor*, a ruling that is perhaps the most perfect expression of its espousal of EU executive federalism as a constitutional doctrine. Drawing on the consistent case-law it had built up in the previous decades, the Court declared that

> "According to the general principles on which the institutional system of the Community is based and which govern the relations between the Community and the Member States, it is for the Member States, by virtue of

---

Guy Isaac: 50 ans de droit communautaire, I, (Presses de l'Université des sciences sociales de Toulouse, 2004), 191-210. Some rulings of the Court of Justice refer to this link in quite explicit terms. See Opinion 1/00, EU:C:2002:231, para. 12: "preservation of the autonomy of the Community legal order requires (…) that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered".

[106] René Barents, (fn 97), 423.

[107] Case 6/60, *Humblet*, EU:C:1960:48.

[108] Case 23/59, *FERAM*, EU:C:1959:33 and Joined Cases 46 and 47/59, *Meroni*, EU:C:1962:44, 421-422.

[109] Case 133/79, *Sucrimex*, EU:C:1980:104, para. 16. In this respect, the ruling draws on the Opinion of AG Reischl, who defended that, as a consequence of the mutual autonomy of national and EU administrative power, a Commission measure explaining the applicable law upon request from domestic administrative bodies. Such a measure, he writes, "*cannot have any real binding character because in Community law the national intervention agencies are competent to apply the relevant rules upon their own responsibility*" (at 1316). See also Cases 45/81 *Moksel*, EU:C:1982:110, para. 21 and 217/81, *Interagra*, EU:C:1982:222, para. 8.

Article 5 of the Treaty [now, article 4 (3) TEU], to ensure that Community regulations (…) are implemented within their territory"[110].

DM was a seminal case in the broader historical process of the judicial construction of EU administrative law, and of the latter's relations to the emerging EU constitution. In that regard, the ruling is of fundamental relevance on at least four accounts.

Firstly, the key paragraph of the ruling became almost synonymous with the separation principle itself. This is striking, since the logic of strict separation between administrations is not the most evidently present notion in the *DM* formula. Nevertheless, the *DM* formula came to be deployed recurrently as a textual basis both for old and new uses of the separation principle. The *DM* formula was invoked to maintain that, being fully autonomous in the implementation of EU law, national authorities are exclusively responsible for the legality of their own decisional processes.[111] In other words, the separation principle was again used to ensure that neither level of administration could be held accountable for the misconducts of the other. The *Deutsche Milchkontor* ruling's formula was also cited to reiterate that the Commission generally cannot send binding instructions to national authorities, and is instead limited to sending simple 'opinions'.[112] Lastly, the *DM* formula was used to draw new rules from the separation principle. Invoking that formula as an expression of the "division of powers" between the Member States and the EU,[113] EU courts have maintained that the Commission cannot suspend national measures.

Secondly, the *Deutsche Milchkontor* judgment initiated a seam of constant case law where the division of administrative power envisaged by EU executive federalism is portrayed as *resulting immediately from the Treaty*.[114] Put differently, the *DM* line of case law recognizes the doctrine of EU executive federalism to be of a constitutional rank. It is considered to be dictated by the very "principles which govern the relations between the

---

[110] Joined Cases 205 to 215/82, *Deutsche Milchkontor*, EU:C:1983:233, para. 17.

[111] Case T-54/96, *Oleifici Italiani*, EU:T:1998:204, paras. 54 and 57. Conversely, national authorities bear "the sole and entire responsibility" for their decisions, even where they act by following information shared by EU authorities (see Case T-193/04, *Tillack*, EU:T:2006:292, para. 70).

[112] *Oleifici Italiani* (fn 111) para. 51.

[113] Joined Cases T-492/93 and T-492/93 R, *Nutral*, EU:T:1993:85, paras. 26 and 30. It is interesting to note that, upon appeal, the provisions of the legislation at stake in the case, an agricultural regulation, had been explained by the Commission as having drawn "their inspiration from a strict requirement for the separation of the Commission's powers from those of the Member States". See Case C-476/93 P, *Nutral*, EU:C:1995:401, para. 6.

[114] It must be pointed out that in later rulings, the Court sometimes used simplified versions of the *DM* formula, which often emphasizing certain of its aspects in a slightly different wording. There is a certain variation between the reference to "general principles" or just "principles" "which govern relations between the Community and the Member States", and between the expression "institutional system" and "institutional structure".

Community [read: EU] and the Member States", and by "the institutional structure" of the EU, that the EU and the national authorities must be treated as strictly separate levels of administrative power; and that national administrations are responsible for implementation until the EU legislature decides otherwise.[115] It is striking how the Court immediately derived this division of powers from the Treaty, whereas the Advocate General had pleaded for a more modest argument that emphasized the concrete "distribution of powers" between the States and the Union in the relevant legislation.[116] However, it was not entirely new for the Court to associate the design of public administration under the Treaties with the EU's institutional structure. A decade before the *Deutsche Milchkontor* ruling, the Court had already described certain administrative mechanisms, also mirroring a logic of separation of competences and reciprocal cooperation between administrations, as being in harmony with the structure of the EU itself.[117]

Thirdly, the *DM* formula leaves no doubt as to what, in the light of the Treaties, should be the normal distribution of the burden of implementing EU law and policies. As long as the EU level is not exceptionally allocated implementing powers, implementation falls to national authorities. Under the principle of loyal cooperation, they are vested with the role of the EU's default administration. Some of the ways in which this aspect of the *Deutsche Milchkontor* formula was used in the case law not only relate to the legal construction of the role of national administrations under EU constitutional law, but also to that of the Commission. As the Chapter will attempt to show in the following subsections, some of the uses found for the *DM* formula in EU case law reflect the same conception of the Commission as a 'second-order' administration that the early 'Eurolawyers' supported.

The fourth point to be made about the place of *DM* in the development of EU executive federalism goes to the heart of the Chapter's argument. In the relatively scarce academic commentary on the *DM* ruling, one finds the analysis of Ulrich Everling – none other than its judge-rapporteur. Everling's account of *DM* offers a valuable glimpse into how EU judges conceive of the relations between national and EU administration. That account constitutes perhaps the strongest evidence that a federalist conception of the EU

---

[115] See Cases 262/87, *Kingdom of the Netherlands v Commission*, EU:C:1989:50; C-290/91, *Peter*, EU:C:1993:220, para. 8; C-285/93, *Dominikanerinnen-Kloster Altenhohenau*, EU:C:1995:398, para. 26; C-292/97, *Karlsson*, EU:C:2000:202, para. 27; T-166/98, *Cantina sociale di Dolianova*, EU:T:2004:337, para. 66; C-495/00, *Visentin*, EU:C:2004:180, para. 39-40; T-341/02 *Regione Siciliana I* (fn 13), para. 59; and C-402/13, *Cypra*, EU:C:2014:2333, para. 23.

[116] See the Opinion of AG Verloren van Themaat in Joined Cases 205 to 215/82, *Deutsche Milchkontor*, EU:C:1983:163

[117] Case 76-70, *Wünsche*, EU:C:1971:51, para. 10. The case concerned the administrative implementation EEC's first common organisation of the markets in cereals.

did influence the judicial shaping of EU executive federalism; and that the ideas of the early federalist 'Eurolawyers' were passed down in the Court long after the days of the Hallstein Commission.

In his robes of legal academic, Judge Everling claimed that the *Deutsche Milchkontor* judgment (which he had drafted) demonstrated the "federal structure" of the EU. The division of administrative power between the EU and the Member States was just one example of that structure.[118] He further argued that the EU's decentralised model of administrative implementation had "certainly oriented itself under the influence of the German federal experience".[119] In other words, in Everling's view, the institutional system established by the Treaty of Rome was federal in structure, and the Union's administrative system was to be understood in that light. In this context, it cannot be trivial to note that, as a junior law professor, Everling co-authored one of the most influential commentaries on the EEC Treaty with Wohlfahrt, one of its drafters. When Everling drafted *DM*, the case law finally gave clear expression to the conception of the EU and its administration held by the early federalist lawyers.

5.2. Loyal cooperation, national autonomy, and the Union's default administration

The *DM* formula also illustrates the notion that is most commonly associated with EU executive federalism – the preference for decentralised administrative implementation. This notion becomes clear in how the Court invokes the Treaty's principles to reconstruct the rule according to which, in the absence of any legal provision stating otherwise, "it is for the Member States (…) to ensure that Community regulations (…) are implemented within their territory".[120]

In a way, the *Deutsche Milchkontor* ruling confirmed in this respect the Court's older case law, where it had suggested that, when they implement Community law, national authorities act "on behalf of the Community".[121] What was more innovative was that the Court explicitly referred to the principle of loyal cooperation as the constitutional

[118] As late as 2009, Everling restated that the rule of decentralised implementation by national authorities "illustrates the federal elements of the [EU's] division of functions particularly clearly" (Ulrich Everling, 'Die Europäische Union als föderaler Zusammenschluss von Staaten und Bürgern' in: Armin von Bogdandy/Jürgen Bast, *Europäisches Verfassungsrecht: theoretische und dogmatische Grundzüge*, (Springer, 2009), 961-1007, 991).
[119] Ulrich Everling, 'Zur föderalen Struktur der Europäischen Gemeinschaft', in: *FS Karl Doehring*, (Springer, 1989), 179-198, 183 and 186-187.
[120] See also Joined Cases 89 and 91/86, *L'Etoile Commerciale*, EU:C:1987:337, para. 11.
[121] Case 96/71, *Haegeman*, EU:C:1972:88, para. 5.

justification for the general obligation for national authorities to implement EU law. The principle was enshrined in Article 5 EEC (today, Article 4 (3) TEU), which had been revived from the defeated European Political Community Treaty. Article 5 EEC was often seen by EU judges as 'provision of a federal character'.[122] In that light, it is unsurprising that the principle of loyal cooperation came to form – together with the separation principle and 'double exclusivity' – one of the cornerstones of EU executive federalism.[123]

However, in *Deutsche Milchkontor*, the Court did more than restate the principles governing the separation of administrative power, and national authorities' duty to serve as the EU's normal administrators. It complemented those principles by also restating its established jurisprudence on the application of EU law by national authorities. The Court ruled that

> "In so far as Community law, including its general principles, does not include common rules to this effect, the national authorities when implementing Community regulations act in accordance with the procedural and substantive rules of their own national law".[124]

This passage can be read as the culmination of the longer process of development of the notion of national institutional and procedural autonomy. The underlying logic of that notion is that the Member States are best placed to know which, under their own legal system, and in their own national context, are the most appropriate legal mechanisms for the administrative implementation of EU policies.[125] Even prior to the *DM* ruling, the Court had appeared to be committed to an attitude of laissez-faire in regard to national administrative laws.[126] Previous case law had stressed that insofar as the EU legislature has not established the forms guiding the implementation and enforcement of EU law, national authorities should follow the procedural rules available in the national legal order.[127] Similarly, the selection of the individual authorities entrusted with the powers to implement

---

[122] In the words of former ECJ judge Ole Due, 'Article 5 du traité CEE. Une disposition de caractère fédéral?', in: Frank Emmert (Ed.), *Collected Courses of the Academy of European Law*, 2:1, (Nijhoff, 1991), 15-35, 23, it is because of loyal cooperation that "*the Member States constitute, in a way, bodies of the Community*". It is worth pointing out how similar Due's account is to Wohlfahrt's.

[123] Robert Schütze, (fn 36), 1405-1406.

[124] *Deutsche Milchkontor*, (fn 110), para. 17.

[125] Cfr. Joined Cases 146, 192 and 193/81, *BayWa*, EU:C:1982:146, para. 20.

[126] Jean-Victor Louis, 'Compétences des Etats dans la mise en œuvre du règlement', in: *Cahiers de Droit Européen*, (1971), 627-640, 628-629.

[127] Cases 39-70, *Norddeutsches Vieh- und Fleischkontor*, EU:C:1971:16, para. 4, 77-71, *Gervais-Danone*, EU:C:1971:129, para. 12; *Haegeman* (fn 121), para7; 3/73, *Karl Schöttler*, EU:C:1973:81, paras. 6 ff; 119/79 and 126/79, *Lippische Hauptgenossenschaft*, EU:C:1980:154, para. 5.

EU law had been identified as being "solely a matter for the constitutional system of each State".[128] Lastly, the case law also established from an early stage that the Member States had retained autonomy in shaping their own systems of administrative justice. In *Lück* and *Salgoil*,[129] the Court held that EU law does "not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law".[130]

The Court's emphasis on the role of national authorities as the Union's default administration pays tribute to a logic of preservation of the Member States' prerogatives over their own bureaucracies. It also pays tribute to a logic of favouring the unaltered use of national administrative laws, which early cases went as far as describing "as a matter of principle".[131] Those laws remain fully applicable as long as they do not put the Member States' loyalty to the Union in question. Such will be the case if the Member States give claims based on EU law a less favourable treatment than those based on national law, or render the implementation of EU law excessively difficult or impossible[132]. Thus, and though not always in a manner consistent with its underlying values,[133] the Court's case law on national autonomy seems to echo one of the expressed desires of early Eurofederalists, namely, the aim of incorporating national authorities into the Union's emerging federal institutional system, while still respecting the right of Europe's nation-states to continue existing as such. As Dougan puts it in regard to the remedial aspects of national procedural autonomy, the challenge that underlies the case law is the balance between "legitimate Union concerns about its own legal effectiveness and uniformity and (…) equally legitimate, and legitimately different, national conceptions about the organization and functioning of the administration of justice".[134]

---

[128] Joined Cases 51 to 54/71, *International Fruit Company*, EU:C:1971:128, para. 4. See also Case 9-74, *Casagrande*, EU:C:1974:74, in which the Court makes explicit that it regards internal distribution of administrative tasks between regional or central bodies as "irrelevant", provided implementation of EU legislation is ensured.

[129] Cases 34/67, *Lück*, EU:C:1968:24 and 13-68, *Salgoil*, EU:C:1968:54, at 463. See also Case 26/74, *Roquette*, EU:C:1974:108, para. 11.

[130] *Lück* (fn 129), at 251.

[131] Case 94-71, *Schlüter & Maack*, EU:C:1972:45, paras. 10-11.

[132] Cases 118-76, *Balkan*, EU:C:1977:111, para. 5; *Lippische Hauptgenossenschaft* (fn 127), para. 10; and 54/81, *Fromme*, EU:C:1982:142, para. 6. These two notions came to be understood as the principles of equivalence and effectiveness. For recent case law, see Case C-61/14, *Orizzonte Salute*, EU:C:2015:655, para. 46.

[133] The promises of autonomy were later breached. The inroads of effectiveness and equivalence into national administrative procedural and remedial laws became so frequent, and so stringent, that some doubt if it still exists at all. Michal Bobek, (fn 33), 320 ff.

[134] Michael Dougan, 'Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts', in: Paul Craig/Gráinne de Búrca (Eds.), *The Evolution of EU Law*, (Oxford, 2011), 407-438, 411.

Before the implications of European integration for administration could become clear, it was commonly thought that "administrative law belongs to those branches of law in which the national character of a people and of a state is reflected the most".[135] The Court's promise to keep national administration and administrative law untouched can be understood, in effect, as a promise to respect the diversity of the Member States' national identities.[136]

5.3. The judicial crafting of the second-order administration

The *DM* formula states that, "in the absence of any contrary provision", implementation is generally a matter for national authorities. Symmetrically, and *a contrario sensu*, one may conclude that the EU level is only *exceptionally* competent to administer EU policies, in the presence of a provision that contradicts the general rule.[137]

The near absence of decision-making at EU level posed a considerable conceptual challenge to the first administrative lawyers who turned their attention to Community law. The fact that the Community administration generally lacked implementing powers, and therefore was not bound by immediate legal links to individuals, had prompted one of the most renowned Italian public lawyers to deny the very logical possibility of an administrative law of the Communities.[138]

Nevertheless, the exceptional nature of administrative powers at EU level did not impede the development of EU administrative law. Nor did the EU administration's focus on legal relations with authorities, rather than citizens. Indeed, this understanding of the role of the EU administration became a central aspect of EU administrative law, not least through the recurring use of the *DM* formula. The usage of that formula in the legal reasoning of EU courts suggests that they conceive of the Commission in a similar way to how the early federalist 'Eurolawyers' did. EU courts considered that EU authorities form an administration which, unless given the power to decide in respect of individuals, fulfils a mere *second-order* role.[139]

---

135 Ulrich Scheuner, 'Der Einfluß des französischen Verwaltungsrechs auf die deutsche Rechtsentwicklung', in: *Die öffentliche Verwaltung*, 19, (1963), 714-719.

136 One prominent scholar of national procedural autonomy argues that autonomy and its limits reflect the EU's political ethos of preserving unity in diversity. See Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?*, (Springer, 2010), 80-81.

137 Case T-244/00, *Coillte Teoranta*, EU:T:2001:124, para. 42.

138 Massimo Severo Giannini, 'Profili di un diritto amministrativo delle Comunità europee' (1967), published posthumously in 2003 in *Rivista Trimestrale di Diritto Pubblico*, foreword by Stefano Battini, 979-988, 985.

139 Similarly, some have pointed out how the *Nutral* ruling, which replicates the *DM* formula, defines the Commission's power as "limited and in every case subsidiary". See Loïc Azoulai, 'The Judge and the

The conception of EU authorities as a second-order administration went hand in glove with the account of a strict, dualistic division of power between national and EU administration. If the decisional power of the two levels is strictly separate, then so are its addressees. If the EU administration adopts decisions in respect of national authorities, it will only fall to the latter to decide in respect of individuals. Based on this line of thought, formalistic as it is, the Commission sometimes defends its own status as a second-order administration. It does so by arguing that such a status results from one of the implications derived from the separation principle and the *DM* formula – a "principle of the separation of legal relations" between the Commission and the Member States, on the one hand, and between the Member States and individuals, on the other.[140]

The conception of the EU administration as only exceptionally bound by legal relations to individuals is visible in how the *DM* formula is deployed to deny their standing before EU courts. The formula is invoked even where it is superfluous. In order to deny standing in actions for annulment, EU courts need only demonstrate that a person is either not individually,[141] or not directly concerned by a measure. Direct concern, in essence, means that an individual suffers an adverse change to her legal position that can be immediately imputed to a measure adopted by an EU body.[142] In order to dismiss an action for annulment on grounds of direct concern, EU courts need only show that there is no adverse change in the legal position of the applicant, or that this change resulted from the exercise of the discretion of national authorities.[143] What EU courts certainly do not need to do is to recall that, "according to the general principles which govern the relations between the Member States and the Union", national administrations are usually responsible for the implementation of EU legislation.[144] The only added value that can be attributed to the citation of the *DM* formula is the suggestion that, unless the EU legislature explicitly determines otherwise, the Commission does not decide in respect of individuals, or is bound by legal relations to them. In such cases, as the Commission has

---

Community's Administrative Governance', in: Christian Joerges/Renaud Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, (Oxford, 2002), 109-137, 110.

[140] See Cases *Regione Siciliana I*, (fn 13), para 38 and *Regione Siciliana II*, (fn 13), para. 33.

[141] For the meaning of individual concern and its evolution in the case law, see Paul Craig, (fn 51), 306 ff.

[142] See Case T-105/01, *SLIM Sicilia*, EU:T:2002:147, para. 45 and the case law quoted there.

[143] See for instance Alexander Türk, *Judicial Review in EU Law*, (Elgar, 2009), 37 ff.

[144] See José Luís Cruz Vilaça, 'Effective Judicial Protection with Regard to Community Funds – May One be Directly Concerned by a Decision Addressed to a Member State?', in: José Luís Cruz Vilaça, *EU Law and Integration: Twenty Years of Judicial Application of EU Law*, (Hart, 2014), 166-180, 178. Cruz Vilaça, Judge at the Court of Justice, equally doubts the pertinence of references to the nature of the Community and to the rules that govern the relationship between the Community and the Member-States in determining the presence of direct concern.

occasionally put it, the Member States "form a screen" standing between individuals and the EU administration.[145]

The view that the Commission's relations to individuals are intended to be rare pervaded the interpretation of standing requirements long before *Deutsche Milchkontor*. Though not subscribing to the federalist reading that many of his contemporaries shared of the Treaties, and of the relations between national and EU authorities, Donner gave a similar justification for the limited *locus standi* of individuals before EU courts.

Donner, who was the president of the Court when the conditions for *locus standi* were first interpreted, explained that the very possibility for individuals to sue EU authorities relies on the notion of immediate legal relations between the two. However, Donner acknowledged that that the EEC Treaty had enshrined stricter standing requirements than its predecessor, the ECSC Treaty. In this regard, he contended that "such strictness could well be justified by the different character of the powers" and the "looser framework of the Common Market".[146] What seems to be implied is that the exceptional *locus standi* under the EEC Treaty was simply reflective of the fact that, unlike the ECSC's High Authority, the EEC's bodies were generally not supposed to adopt individual measures in respect of individuals – i.e., to be bound by immediate legal relations to them. Restricting the immediate links between the EEC's authorities and individuals, it was thought, would shield the fledgling Community from the perennial "judicial meddling" and "impetuosities" of citizens.[147]

Donner provided one additional justification for the limited *locus standi* against the Commission: plaintiffs are in any event rarely individually and directly concerned by Commission decisions, since those decisions are usually addressed to the 'member governments'.[148] This account mirrors the conception of the EU administration already explained above, according to which the Commission constitutes an administration of a 'second-order' character. Indeed, the Commission's normal interlocutors are understood to be national authorities, rather than individuals.

Once again, this view is well illustrated by the use of the *DM* formula – more specifically, in the *Oleifici Italiani* ruling. The nebulous reference to the 'general principles' on the relations between the Member States and the Union is again made without any need, this time in order to deny the judicial reviewability of certain Commission measures. Those

---

[145] *Regione Siciliana II* (fn 13), para. 27
[146] Andreas Donner, (fn 55), 59-61.
[147] Antoine Vauchez, (fn 49), 48 and Andreas Donner (fn 55), 76.
[148] Andreas Donner (fn 55), 74-75. This is in line with the early view that the primary subjects of the EEC were the Member States – not their nationals. See Miguel Poiares Maduro, *We the Court*, (Hart, 1999), 342-343.

measures, addressed to national authorities, had been taken in the framework of the Commission's tasks of monitoring the implementation of agricultural policy at national level. The Union judges took the view that the adoption of the measures had to be read in the light of the legal context described in the *DM* formula. They were therefore to be considered as "part of internal cooperation between the Commission and the national bodies responsible for applying Community rules".[149] The ruling then proceeded to cite previous judgments according to which that relation of "internal cooperation" between the two levels of administration "cannot make the Community liable to individuals'.[150] In sum, the 'general principles' alluded to in the *DM* formula are taken to mean that the EU administration's normal role is to liaise and cooperate with national authorities. The relations between the two are 'internal' to them, and of no concern to individuals.

The emphasis on inter-administrative relations as the Commission's normal domain is also seen in how the Court justifies the legitimacy of comitology. Comitology is the practice of subordinating the exercise of the Commission's implementing powers to the scrutiny of committees composed by national officials. In *Westzucker*, the Court validated that practice by again alluding to certain structural features of the Union and of the mission of its institutions. "It is consonant with *the very idea of the Community*", it held, that "the Member States should emphasize their own interests, whilst it falls to the Commission to arbitrate (…) between possible of conflicts of interest free from the point of view of the general interest".[151] It is impossible not to notice the similarity of the ruling's argument with the mission that Hallstein ascribed to the Commission in Europe's supposedly emerging federation: to act as a mediator whenever clashes arose between the particular national interests of the constituent states.

6. Conclusion: Enshrined in Lisbon? Or an appearance of consensus?

The present Chapter attempted to bridge a gap that sometimes exists between EU administrative law and EU constitutional law discourse at large. While highlighting how different ideas about the nature of the EU and its institutions shaped the development of EU executive federalism, the Chapter hopes to have provided more than a contribution to the history of EU administrative law. Its main argument is not one of legal history, but is rather doctrinal. The judicial crafting of the EU executive federalism as a constitutional

[149] *Oleifici Italiani* (fn 111) para. 51
[150] Cases *Sucrimex* (fn 109), paras. 16 and 22; 217/81, *Interagra*, (fn 109), para. 8; and 109/83, *Eurico* EU:C:1984:321, para. 20. For a later judgment replicating this line of reasoning, see Case T-160/98, *Van Parys*, EU:T:2002:18.
[151] Case 57-72, *Westzucker*, EU:C:1973:30, para. 17.

doctrine was a process permeated by a broader political context. As one prominent EU legal historian writes, the early history of the European legal order is "one of federalist political and legal forces promoting, through different actors at different points in time, a particular constitutional thinking about the Treaties and the ECJ".[152] Such was also the backdrop to the judicial development of EU executive federalism in the early decades of European integration.

EU executive federalism emerged as a constitutional doctrine in the Court's case law as it became the Hallstein Commission's official doctrine on the administrative order established by the Treaties. It owes the substance of its concepts and principles to the federalist and neofunctionalist ideas that guided the first 'Eurolawyers' in the EU institutions.[153] The separation principle between national and EU administrations is grounded in a federalist conception of the Union according to which it constitutes an order of overlapping but independent spheres of power. The political aspiration to Europeanise but preserve the Member States' institutions in the emerging European federation found a more mundane expression in two ways. First, the logic of national autonomy and decentralised implementation of EU law and policies, and second, in the understanding that the Commission should enjoy only limited powers to adopt decisions in respect of citizens and firms. Lastly, the neofunctionalist emphasis on inter-administrative relations led to the Commission being conceived of as a 'second-order' administration, relating to national officials rather than to citizens.

These aspects of how early Eurofederalists saw the relations between national and EU authorities strongly resonate in how, over the years, the Court came to fashion the doctrine of EU executive federalism. The *Deutsche Milchkontor* formula, which is often used as a proxy for EU executive federalism itself, makes evident that the doctrine is seen as being constitutionally dictated by the Treaty's 'institutional system' and 'general principles'. Moreover, the application of the *DM* formula shows us what the Court specifically sees as the immediate implications of the Treaty. EU executive federalism, as constructed by the Court, aims first to preserve the strict mutual independence of national and EU administrative power. Second, it aims to ensure that the implementation of EU law, and the prerogative of exercising of public power in respect of citizens, fall primarily to national

[152] Morten Rasmussen, 'The Origins of a Legal Revolution: The Early History of the European Court of Justice', in: *Journal of European Integration History*, 14:2, (2008), 77-98, 98.
[153] Similarly, Franchini highlights the importance of federalist and neofunctionalist visions for the broader construction of EU administration. See Claudio Franchini, 'Les Notions d'Administration Indirecte et de Coadministration', in: Jean-Bernard Auby/Jacqueline Dutheil de la Rochère (Eds.), *Droit Administratif Européen*, (Bruylant, 2007), 245-645.

authorities. For this reason, unless it is explicitly provided with implementing powers, the Commission's administrative actions are considered as no more than measures adopted strictly in the context of relations of 'internal cooperation' with national authorities.

Nevertheless, in spite of being supposedly constitutionally embedded in the Treaties, EU executive federalism is largely a product of the Court's own creativity. The principle of loyal cooperation did enjoy a steady textual basis. However, it did not suggest that the cooperation between national and EU bodies was an 'internal' relation. Nor did it obviously turn national bureaucracies into the EU's 'indirect administration'. The provisions on the CJEU's competences were clear in granting it jurisdiction over the EU administration's power, but in no way an unequivocal foundation for a principle of 'double exclusivity'. As for the principle of strict separation between national and EU authorities, one will struggle to find a recognisable legal basis at all. The espousal of a federal conception of the EU and its administration, characterised by a strict separation of spheres of power, most likely explains why it seemed so evident that the Treaties directly instituted principles aimed at governing that separation. That the emerging EU administration oriented itself toward the German federal system seems to explain why loyal cooperation required of the Member States, much as if they were German *Länder*, that their authorities implemented EU law as a matter of their own responsibility.

What is perhaps most remarkable about the judicial crafting of EU executive federalism is that it resulted from a singular and even paradoxical interpretation of the Treaties. According to that reading, the absence of references to administrative matters is read as a sign that the Treaties had constitutionalised a federal administrative system. The least legally ambitious regime was interpreted as the most ambitious of political choices.

The Member States manifestly never subscribed to Hallstein's vision of a federal administrative order. It is not a federalist conception of the EU that makes EU executive federalism palatable to the Member States. It is its promise of an administrative system where Member States remain firmly in control over their own bureaucracies and laws as they implement EU law, and where the Union's own administration remains unintrusive. As some have rightly claimed, indirect implementation of EU law and policies is perceived – not least by the Member States themselves – as a matter of national "administrative sovereignty".[154] It is not by accident that the Lisbon Treaty rules out legislative harmonization of administrative law (Article 197 (2) TFEU). Or that it requires only of EU authorities – and not of their national counterparts – that they observe the fundamental

[154] Deirdre Curtin/Morten Egeberg, 'Tradition and innovation: Europe's accumulated executive order', in: *West European Politics*, 31:4, (2008), 639-661, 649.

administrative rights enshrined in Article 41 of the Charter. This concern with preserving control over administrative implementation at national level is most likely also the reason why the Treaty of Lisbon, for the first time, includes a provision enshrining the rule of decentralised administration.

It has been rightly argued that, in Article 291 TFEU, the Treaty of Lisbon "confirms and constitutionalizes the decentralized application of European law by the Member States – and with it the idea of executive federalism".[155] Article 291 TFEU textually recognizes that the Commission is to be endowed with implementing powers "where uniform conditions for implementing legally binding Union acts are needed". What is not stated in the provision's wording is that the Commission can *only* enjoy administrative implementation powers where those uniform conditions are needed. And yet, the case law makes it evident that this is the interpretation adopted by the Court. It is striking how, in one particular ruling, the Court transcribes Article 291 (2) TFEU in its entirety, but proceeds to add the adverb 'only'.[156] Following the lead of at least one of its judges,[157] the Court therefore takes the view that the Lisbon Treaty now makes explicit that EU authorities only exceptionally participate in administrative decision-making.[158] To a large extent, the case law since Lisbon gives continuity to the institutional balance of administrative implementation that had existed hitherto.[159]

Even though the CJEU's doctrine of executive federalism has shown great endurance, the reality of Europe's administrative system proved far more complex than the first Eurofederalist lawyers would have expected. As the relations of cooperation between national and EU authorities became ever more intricate and intensive, Europe witnessed the rise of what is often referred to as the EU's composite or multilevel administration. It became evident that at least some of the new forms of administration had little to do with the kind of administration that executive federalism was intended to govern.

Indeed, some forms of administration were not based on a strictly dualistic divide of power, as the early federalists envisaged. The principles of separation and double exclusivity were designed for an administration where decisional power is assumed to be exercised separately by either of the two levels, without the interference of the other. The

---

[155] Robert Schütze, (fn 36), 1397-1398.
[156] Case C-146/13, *Kingdom of Spain v European Parliament and Council*, EU:C:2015:298, para. 77.
[157] Thomas von Danwitz, (fn 21), 316
[158] Conversely, recent rulings have confirmed the strong preference of EU courts for decentralised administrative implementation, at national level. Much of the case law still emphasizes how the closeness of national authorities to their everyday matters makes them better placed than the Commission to carry out many EU policies, such as the Common Agricultural Policy. See Case T-384/14, *Italian Republic v European Commission*, EU:T:2016:298, para. 32 and the case law quoted there.
[159] Cfr. Merijn Chamon, (fn 34).

expansion of joint administrative decision-making – of composite procedures – contradicted that assumption. Composite decision-making was even at odds with the inspiration of EU executive federalism in the German federal system – which *constitutionally bans* composite procedures. In addition, in many instances of composite decision-making the EU administration only *nominally* fulfils a second-order role. It will often adopt decisions that profoundly affect individuals, even though the relevant legislation does not provide for contacts between the two.

The mismatch between composite procedures and EU executive federalism would have perhaps been less grave, if it were not for its purported constitutional status. Indeed, the understanding that EU executive federalism was constitutionally predetermined risked ossifying the CJEU's case law, rendering it too inflexible to accommodate the changing administrative landscape. Particularly if its postulates were given a rigid reading, EU executive federalism is unfit for purpose if it is applied where there is factually neither a strict separation of power, nor an EU administration fulfilling a mere 'second-order' role.

In the words of Carol Harlow, "the split-level, dual competence solutions devised by the ECJ were arguably inadequate to deal with the problems [of composite administration] and the ECJ was slow to face up to them".[160] When the CJEU did face up to those problems, it was not necessarily consistent. Yet eventually, as parts II and III of the dissertation will demonstrate, EU courts succeeded in developing a set of unique principles – specifically aimed to ensure the rule of law in composite decision-making. In order to detect the transition from conventional executive federalism, and to understand the nature of the challenges that composite procedures pose to EU courts, the dissertation will first need to address three questions. It will need to clearly define what composite procedures actually are, how they distinguish themselves from other forms of 'multilevel' administration, and why their mismatch with EU executive federalism raises significant rule of law problems. The three questions will be addressed in the following Chapter.

[160] Carol Harlow, 'Three Phases in the Evolution of EU Administrative Law', in: Paul Craig/Gráinne de Búrca (Eds.), *The Evolution of EU Law*, (Oxford, 2011), 439-464, 450.

CHAPTER 3

COMPOSITE ADMINISTRATION, COMPOSITE PROCEDURES, AND THE RULE OF LAW

1. Introduction: where does the problem actually lie?

As EU executive federalism became embedded in the Court's case law on administration, a more complex story unfolded in the administration itself. The present chapter maps the process by which European composite administration, and composite procedures in particular, emerged in the European Union. Composite administration is not a new phenomenon, and not all of its manifestations can be said to be composite procedures, or indeed to clash with EU executive federalism. The chapter will aim to shed some light on the conceptual distinction between composite administration and composite procedures. It will explain why it is that composite procedures are at odds with EU executive federalism, and why that mismatch generates risks for the rule of law.

Drawing on the existing literature, section 2 holds that cooperation between the various levels of administration in the EU constitutes the core of European composite administration. The chapter further distinguishes between three kinds of cooperation: informational (the exchange of information); institutional (expressed in the representation of different levels of governance in the same bodies); and procedural (the establishment of joint decision-making processes).

Despite a common view, not all forms of composite administration are logically incompatible with EU executive federalism. Indeed, as section 3 seeks to clarify, the informational and institutional kinds of cooperation are easy for EU executive federalism to account for. This does not mean, however, that they are not problematic from other perspectives.

Section 4 examines the structure of the form of composite administration that EU executive federalism *cannot* account for. The distinctive feature of composite procedures is that they involve national and EU decision-making in an interdependent fashion, whereas EU executive federalism presupposes an administration of strictly separated powers. The section will explain the rationale and the variety of roles fulfilled by the Member States' and the EU's authorities.

Section 5 explains in further depth why EU executive federalism as a doctrine fails to accommodate composite procedures. This results both from the assumption of strictly separated national and EU powers, on the one hand, and from the assumption that the EU's administration is generally not designed to interact with – let alone be accountable to – individuals. From the mismatch between composite procedures and EU executive federalism, serious risks to the rule of law may arise, both in terms of procedural rights and of judicial control.

Section 6 concludes the chapter by opening the way to the analysis of the CJEU's case law on composite decision-making. The early federalist conceptions of Europe and its administration formed the context for the rise of EU executive federalism as a constitutional doctrine. In turn, the stabilisation of EU executive federalism in the case law was the context in which one must understand the twists and turns of the crafting of the CJEU's principles of composite decision-making.

2. Composite administration and composite procedures

The implementation of EU law and policies occurs in a far more complex scenario than EU executive federalism's division of direct and indirect administration would suggest.[1] This has always been the case.

Even as the foundations of executive federalism were being laid in the case law, some members of the Court cautioned against taking its account of strict separation of the two levels at face value. As Andreas Donner wrote, "where the textbooks preached separation of legal powers and responsibilities, reality demonstrated that their cumulation and integration corresponded more to the facts of political life".[2] Similarly, when commenting on the *Humblet* ruling, Pescatore warned that the Court's reference to a principle of 'strict' separation seemed exaggerated in view of the relations of cooperation between national and Community bureaucracies.[3] Beyond the courtroom walls in Luxembourg, a whole new administrative order was emerging. Incrementally, and in a largely spontaneous fashion, national authorities and the Commission began to develop intricate networks of cooperative relations in view of policy implementation.

---

[1] Cfr. Morten Egeberg/Jarle Trondal, 'National Agencies in the European Administrative Space: Government Driven, Commission Driven or Networked?', in: *Public Administration*, 87:4, (2009), 779–790.

[2] Andreas Donner, *The Role of the Lawyer in the European Communities*, (Northwestern University Press, 1968), 14.

[3] Pierre Pescatore, 'Distribución de competencias y de poderes entre los estados miembros y las comunidades europeas', in: *Derecho de la Integración*, 1, (1967), 108-152, 111.

This development occurred even in policy areas that tend to be associated either with direct or indirect administration. In relation to policy implementation by the EU's own administration, reliance on cooperation began early.

Even though it was endowed by the Member States with far-reaching decisional powers, the High Authority of the ECSC in practice counted heavily on the cooperation of national authorities in obtaining the information it needed to adopt measures.[4] In the domain of the EEC, the Commission "came to rely ever more frequently on working "with and through" the Member States' administrations".[5] This was already clear in competition policy, in how the old Regulation No. 17/62 designed the inter-administrative relationships between the Commission and national authorities.[6] Similarly, some commentators have remarked that the first anti-dumping regulation, though based on a "rather rigid division of power between the national authorities and the Commission (…) appears to have been worked out in practice through a spirit of cooperation rather than antagonism".[7]

The same need for cooperation was soon also felt on the part of national authorities implementing EU law. Even in those domains that are typically associated with indirect administration, where it had no power to take decisions on particular cases, the Commission cooperated by monitoring and coordinating implementation, and by offering interpretive guidance to national authorities. As Harlow aptly puts it, the "Commission steered but did not row".[8]

Already in the early 1970s, national bodies were asking "the relevant General-Directorates how they should proceed in a given case".[9] In the Common Agricultural Policy in particular, it became common for national Ministries of Agriculture to "enter into contacts with their colleagues in the EEC".[10] Such contacts, initially established "solely" at

---

[4] Étienne Reuter, 'L'engagement général de coopération des Etats Membres avec la Haute Autorité et les nécessités de contrôle dans le domaine des prix', in: *Cahiers de Droit Européen*, (1966), 52-58.

[5] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges*, (Cambridge, 2015), 391.

[6] Paul Craig, *EU Administrative Law*, 2nd ed., (Oxford, 2012), 5-6. See Council Regulation No 17/1962 of 6 February 1962, and in particular Recital (8).

[7] Ivo van Bael, 'The EEC Anti-dumping Rules – A practical approach', in: *International Lawyer*, 12:3, (1978), 523-545, 530. See also the requirements of cooperation and information-sharing between the two levels expressed in the recitals of the first anti-dumping regulation (Regulation No 459/68 of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community).

[8] Carol Harlow, 'Three Phases in the Evolution of EU Administrative Law', in: Paul Craig/Gráinne de Búrca (Eds.), *The Evolution of EU Law*, (Oxford, 2011), 439-464, 444.

[9] Hans-Werner Rengeling, 'Nationaler Verwaltungsvollzug von Gemeinschaftsrecht: Die Gemeinschaftskompetenzen', in: *Europarecht*, (1974), 216-237, 233-235.

[10] Michel Melchior, 'La collaboration entre l'ordre juridique communautaire et les ordres juridiques nationaux dans le secteur de l'agriculture', *Rapport Belge présenté à la Commission I (Agriculture) du Vème Congrès International de Droit Européen*, (FIDE, 1970), 41 ff, 41-43. The minutes of the Stresa conference, where the foundations for the CAP were laid, show that the project of establishing close bonds of cooperation with national authorities was from the onset present in the Commission's agenda. Sicco Mansholt, Commissioner for Agriculture and

ministerial level, progressively began to extend to the lower echelons of agricultural administrations.[11] Cooperative practices of this kind coming from the side of national administrations became frequent. Some observers were confident enough to draw the conclusion that "nothing would be more inaccurate than conceiving the relations between the Communities and their members in accordance to a scheme of dualistic inspiration".[12]

50 years later, many scholars would subscribe to this view. Indeed, it has become common to say that EU executive federalism and its logic of strict division of power does not capture the variety of institutional and procedural arrangements in Europe's administration. The supposedly clear-cut divide between national and EU administration is said to have been blurred by the emergence of cooperative forms.[13] Many authors now argue that the dualistic model of EU executive federalism either ignores or oversimplifies existing administrative practices in the EU,[14] and that "purely direct implementation (…) and purely indirect administration (…) have become quantitatively marginal".[15]

Increasingly, the literature resorts to a new type of vocabulary to describe the current state of Europe's administrative order. Some have referred to the cooperative implementation of EU law and policies by institutions and authorities as "shared government". [16] Franchini and Harlow discuss it as "coadministration" and "shared administration" respectively.[17] Paul Craig has rather preferred to use the expression "shared management", which resonates with the language used in some sectoral legislation and in

---

future Commission President, argued that the implementation responsibilities for CAP measures should be distributed between the "*central*" and the "*decentralized*" levels of administration. While administration of the common agricultural policy should stay in the hands of the Member States' authorities as a rule, the Community's own bodies should adopt only the necessary decisions that national administrations would be incapable of adopting by themselves. See HAEU document BAC 026/1966_0028, *Conférence de Stresa du 3 au 12 juillet 1958 pour l'élaboration d'une politique agricole commune (PAC) : discours de M. Sicco MANSHOLT, président de la Conférence - 5 juillet 1958*, 12.

[11] Jean Martin Martinière, 'La collaboration entre l'ordre juridique communautaire et les ordres juridiques nationaux dans le secteur de l'agriculture', *Rapport Français présenté à la Commission I (Agriculture) du Vème Congrès International de Droit Européen*, (FIDE, 1970), 10.

[12] *Ibid.*

[13] See Sabine Pag, 'The Relations between the Commission and National Bureaucracies', in: Sabino Cassese (Ed.), *Divided Powers: European administration and national bureaucracies: the European Administration/L'Administration Européenne*, (International Institute of Administrative Sciences/European Institute of Public Administration, 1987), 443-493, 445.

[14] Edoardo Chiti, 'The administrative implementation of European Union law: a taxonomy and its implications', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law*, (Elgar, 2009), 9-34, 11.

[15] Edoardo Chiti, 'The Governance of Compliance', in: Marise Cremona (Ed.), *Compliance and the Enforcement of EU Law*, (Oxford, 2012), 31-56, 36. The same claim is made by Herwig Hofmann/Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences', in: *European Law Journal*, 13:2, (2007), 253-271, 255-256.

[16] Rob Widdershoven, 'European Administrative Law', in: René Seerden (Ed.), *Administrative Law of the European Union, its Member States and the United States*, (Intersentia, 2012), 245-319, 245 and 250.

[17] Claudio Franchini, *Amministrazione italiana e amministrazione comunitaria. La coamministrazione nei settori di interesse comunitario*, (CEDAM, 1993) and Carol Harlow, (fn 8), 450.

the well-known report of the Committee of Independent Experts that followed the downfall of the Santer Commission.[18] In the Report, shared administration is defined as the

> "management of those Community programmes where the Commission and the Member States have distinct administrative tasks which are inter-dependent and set down in legislation and where both the Commission and the national administrations need to discharge their respective tasks for the Community policy to be implemented successfully".[19]

Some political science literature has associated the networked relations between national and EU authorities with 'multilevel governance' and,[20] more recently, with 'multilevel administration'.[21] Both terms have shown the advantage of emphasising the involvement of subnational and regional agencies.[22] Nevertheless, multilevel governance theories do not necessarily refer to policy implementation strictly speaking, and often consider how the various levels join in *making* policy.[23] Moreover, and though its proponents would suggest otherwise,[24] the very term 'multilevel' often has hierarchical connotations.[25] Lastly, the term as such suggests only a plurality of loci of governance or administration, without implying what degree of interaction, if any, exists between them.

The terminology preferred in this book will be that of 'composite administration', though the term 'integrated administration', advanced by Hofmann and Türk,[26] is also apt as long as it is not incorrectly understood to represent a static state, but rather a dynamic and unfinished process. Composite administration highlights how Europe's administrative system is *composed* of different, and not necessarily hierarchically interrelated institutional

---

18 Paul Craig, (fn 6), 7.
19 Committee of Independent Experts, Second Report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud (10 September 1999), Vol. I, para. 3.2.2.
20 Helena Wockelberg, 'Why 'Multi-Level' and 'Governance' are Concepts of Relevance for our Understanding of Member State Implementation of EU Law', in: Anna-Sara Lind/Jane Reichel (Eds.), *Administrative law beyond the state: Nordic perspectives* (Nijhoff, 2013), 32-46.
21 Jarle Trondal/Michael Bauer, 'Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system', in: *European Political Science Review*, 9:1, (2017), 73-94.
22 Liesbet Hooghe/Gary Marks, *Multi-Level Governance and European Integration*, (Rowman & Littlefield, 2002) and George Pagoulatos/Loukas Tsoukalis, 'Multilevel Governance', in: Erik Jones/Anand Menon/Stephen Weatherill (Eds.), *The Oxford Handbook of the European Union*, (Oxford, 2012), 62-73.
23 Nick Bernard, *Multilevel Governance in the European Union*, (Kluwer, 2002).
24 Cfr. Nick Bernard (fn 23), 9.
25 Giacinto della Cananea, 'The European Administration: *Imperium* and *Dominium*', in: Carol Harlow/Päivi Leino/Giacinto della Cananea (Eds.), *Research Handbook on EU administrative Law*, (Elgar, 2017), 44-68, 64.
26 Herwig Hofmann/Alexander Türk, (fn 15), 253-271.

components at various levels of authority.[27] As von Bogdandy and Philipp Dann have put it, the different bodies involved in composite administration engage in routinized cooperation, but nevertheless retain their organizational separation.[28]

There have been valuable attempts to map Europe's composite administration and to conceptualise its different manifestations. Eberhard Schmidt-Aßmann helpfully distinguishes three different kinds of cooperation in the context of European composite administration, namely informational, institutional, and procedural.[29]

Informational cooperation consists in the exchange of information between the different levels of administration.[30] Indeed, one of the hallmarks of the EU's administrative order is the complexity of the way in which information is generated, gathered, processed, computed, and distributed.[31] Typically, the EU administration serves as a hub of information-sharing, receiving, storing and disseminating the information collected by the Member States' authorities. This is one of the key functions performed by European agencies.[32] The emphasis on information-sharing is intended to foster effective implementation of European policies without creating a large centralised administration.[33] Information-sharing practices vary in their degree of formality. Some instances of information-sharing are highly informal, and are not regulated by any binding legal instrument.[34] Others occur in the framework of highly structured and interoperable

---

[27] For just a sample of literature using the term 'composite administration', see Deirdre Curtin, *Executive Power in the European Union: Law, Practices, and the Living Constitution*, (Oxford, 2009), 65 ff; Eberhard Schmidt-Aßmann, 'Introduction: European Composite Administration and the Role of European Administrative Law', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 1-22; Jane Reichel, 'Communicating with the European Composite Administration', in: *German Law Journal*, 15:5, (2014), 883-906, especially at 886 ff.

[28] Armin von Bogdandy/Philipp Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority', in: *German Law Journal,* 9:11, (2008), 2013-2039, at 2016.

[29] Cfr. Eberhard Schmidt-Aßmann, 'Verfassungsprinzipien für den Europäischen Verwaltungsverbund', in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle, *Grundlagen des Verwaltungsrechts*, I, 2nd ed., (C. H. Beck, 2012), 261-340, 279 ff. see also Luca de Lucia, 'Strumenti di cooperazione per l'esecuzione del diritto europeo', in: Luca de Lucia/Barbara Marchetti (Eds.), *L'amministrazione europea e le sue regole*, (Il Mulino, 2015), 171-196, 181 ff.

[30] For an overview of European information-sharing mechanisms, see Jens-Peter Schneider, 'Basic Structures of Information Management in the European Administrative Union', in: *European Public Law*, 20: 1 (2014), 89-106.

[31] Herwig Hofmann, 'Seven Challenges for EU administrative law', in: Kars de Graaf/Jan Jans/Alexandra Prechal/Rob Widdershoven (Eds.), *European Administrative Law: Top-Down and Bottom-up*, (Europa Law Publishing, 2009), 37-59, 53.

[32] Edoardo Chiti, 'An important part of the EU's institutional machinery: features, problems and perspectives of European agencies', in: *Common Market Law Review*, 46, (2009), 1395-1442, 1403.

[33] Cfr. Diana-Urania Galetta/Herwig Hofmann/Jens-Peter Schneider, 'Information Exchange in the European Administrative Union: An Introduction', in: *European Public Law*, 20:1 (2014), 65-69, 68.

[34] Diana-Urania Galetta, 'Informal Information Processing in Dispute Resolution Networks: Informality Versus the Protection of Individual's Rights?', in: *European Public Law*, 20:1 (2014), 71-88.

information systems.[35] Especially in the Area of Freedom, Security and Justice, such information systems have been set up and managed by the EU in order for the Member States' authorities to exchange data on law enforcement,[36] asylum,[37] and internal border protection.[38]

Institutional cooperation refers to the representation of the various levels of administration in the same bodies. The paradigmatic examples are Agency boards and the hundreds of committees that assist and scrutinize the Commission as it adopts implementing measures.[39] National experts and officials are involved in decision-making at EU level, often with regard to the subject-matters for which they are responsible in their own countries.[40]

Lastly, there are procedural forms of cooperation. As some have noted, there has been a tendency for the EU's administrative order to gradually shift from informal types of cooperation to ever more proceduralised cooperative practices.[41] In the procedural form of cooperation, national and EU authorities are involved in joint-decision making processes, the stages of which unfold at both levels. This form of administrative cooperation, rightly described as the most preeminent form of composite administration,[42] consists in the use of composite, or 'mixed', decision-making procedures.

---

35 For an introduction to the EU's various information systems, see Kristina Heussner, *Informationssysteme im Europäischen Verwaltungsverbund*, (Mohr Siebeck, 2007) and Franziska Boehm, *Information Systems and Data Protection in the Area of Freedom, Security and Justice*, (Springer, 2011).

36 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

37 Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

38 See for example Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II); and Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

39 Luca de Lucia, (fn 29), 183-184.

40 Cfr. Deirdre Curtin, *Executive Power in the European Union: Law, Practices, and the Living Constitution*, (Oxford, 2009), 106 ff.

41 This has been accurately observed in the field of structural funds by Bettina Schöndorf-Haubold, 'Common European Administration: the European Structural Funds', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 25-54, 53.

42 Daria di Pretis, 'Procedimenti amministrativi nazionali e procedimenti amministrativi europei', in: Giandomenico Falcon (Ed.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario*, (CEDAM, 2008), 49-72, 52 and 55.

Considering the variety of the forms of cooperation between national and EU administrations, it becomes clear that institutional practice has indeed become far more complex than the simple dichotomy of direct and indirect administration would suggest. The constitutional doctrine of EU executive federalism, crafted by judges in Luxembourg, would appear to be contradicted by the complex web of administrative linkages protruding from Brussels into the bureaucracies of the Member States. However, some have opposed the view taken by authors such as Hofmann and Türk, according to whom the rise of composite administration implies that the clear-cut divide of EU executive federalism must be abandoned.[43] Ziller, for one, has claimed that composite administration – or "coadministration" – is "not exactly a third category of Community administration, which would have chronologically appeared after direct administration and indirect administration [but] rather the coordination of the two types of administration, direct and indirect".[44]

The extent to which the emergence of composite administration actually challenges EU executive federalism must be clarified. It will be contended that those who argue that EU executive federalism is a dated model – like Hofmann – and those who argue that is not incompatible with composite administration – like Ziller – are only partly right. Of the three forms of cooperation between national and EU administration, the first two – informational and institutional – represent no particular challenge to EU executive federalism. This should in no way be taken to mean that they are not problematic from other perspectives. The third form of cooperation, however, contradicts EU executive federalism in its most basic assumptions. Indeed, EU executive federalism is as a doctrine simply not designed to accommodate the kind of administration that is created by composite procedures.

The following sections will first attempt to demonstrate that the doctrine of EU executive federalism can easily account for informational and institutional cooperation. Those forms of cooperation do raise concerns in terms of important constitutional values such as accountability and transparency, but those concerns are not specific to composite administration. The Chapter will then turn to composite decision-making. It will define the unique and distinctive feature of composite procedures, and map their structure, before

---

[43] Herwig Hofmann/Alexander Türk, (fn 15), 270.

[44] Jacques Ziller, 'Introduction: les concepts d'administration directe, d'administration indirecte et de co-administration et les fondements du droit administrative européen', in: Jean-Bernard Auby/Jacqueline Dutheil de la Rochère (Eds.), *Droit Administratif Européen*, (Bruylant, 2007), 235-244, 243. Diana-Urania Galetta, 'Coamministrazione, reti di amministrazioni, *Verwaltungsverbund*: modelli organizzativi nuovi o alternative semantiche alla nozione di «cooperazione amministrativa» dell'art 10 TCE, per definire il fenomeno dell'amministrazione intrecciata ?', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2009), 1689-1698, 1694-1695.

explaining why they are at odds with EU executive federalism. From this mismatch between executive federalism and composite decision-making, several risks to the rule of law emerge. The failure to recognize that mismatch will lead to worrying cracks in the rule of law of Europe's administrative system. The recognition of that mismatch should lead EU courts to develop an alternative model of administrative law alongside EU executive federalism – despite its supposed constitutional rank. This dilemma sets the stage for the developments in the case law examined in parts II and III of the dissertation.

3. Composite bodies, composite information-sharing, and a misplaced concern

In order to establish whether a given form of administrative cooperation contradicts EU executive federalism, it is important to recall what it entails, and what it presupposes about the EU's administrative order.

First of all, as Chapter 2 sought to make clear, the principle of loyal cooperation between national and EU authorities has always been a part of EU executive federalism. The cooperation between the administrations, put simply, does not contradict EU executive federalism but is rather presupposed by it.[45] The interjurisdictional cooperation between authorities that generates composite administration is therefore not conceptually incompatible with EU executive federalism as such. If there is a mismatch, it will result from the remaining principles of EU executive federalism and, more importantly, from their background assumptions on the structure and nature of administration in the EU.

The principles of separation between national and EU authorities, and of 'double exclusivity' of national and EU courts in reviewing them, were historically built based on an assumption that the decisional power between the two levels is, indeed, separable. This reflects the early federalist conception of the EU and the structure of its administrative power. According to that conception, the two levels are mutually independent in the use of their respective authority.

The role of comitology committees and agency boards, and the exchange of information between different levels of administration, make it clear that administrative activity in the EU will rarely only include the *involvement* of either national or EU authorities.

---

[45] See Eberhard Schmidt-Aßmann, 'Cuestiones fundamentales sobre la reforma de la Teoría General del Derecho Administrativo. Necesidad de la innovación y presupuestos metodológicos', in: Javier Barnes (Ed.), *Innovación y Reforma en el Derecho Administrativo*, (Global Law Press, 2006), 15-132, 108: "the Union's administrative conception is based on two complementary constitutive principles. Separation in an organizational sense, and collaboration or cooperation in a from a functional point of view". See in this sense also Jürgen Schwarze, *Europäisches Verwaltungsrecht*, 2nd ed., (Nomos, 2005), CII-CIII and ff.

Nevertheless – and *crucially* – neither of these two forms of cooperation actually entail that the *exercise of decision-making power* will cease to be imputable to either the national or the EU level of administration. Put differently, in institutional and informational cooperation, the two levels work together, and assist each other, in the exercise of their respective decisional powers.

The assumption of clearly separate decisional power is not contradicted in any way by the composite composition of committees and agency boards – by the fact that they are formed by representatives of the states. To put it perhaps provocatively, they are no more composite than the Council or the European Parliament. The fact that the members of comitology committees or Agency boards come from a variety of Member States is immaterial from the perspective of which level, national or European, exercises power through them. Indeed, as Schütze has pointed out, the decisions of composite bodies such as these "will be fully assimilated to European law",[46] as the result of the exercise of an EU-level power.

Similarly, the fact that two authorities share useful information does not, in itself, call the independence of their respective decisional powers into question. As Schütze aptly states, information-sharing "takes place at the preparatory stage" of decision-making activity, and "simply improves the ability of either administration to decide autonomously".[47] Even if an authority requests assistance from another, in a different jurisdiction, that still does not undermine the independence of its own powers. This is so because "the primary burden of fulfilling the respective administrative tasks lies with the requesting authority which is given this responsibility under the law".[48]

In short, neither institutional nor informational cooperation, as such, call into question the autonomy of either level in exercising its own decisional powers. In turn, what that means is that neither form of cooperation actually undermines the doctrine of EU executive federalism, which is built on the assumption that the decisional powers of national and EU authorities can indeed be exercised independently from one another. Since that assumption holds true, both the separation principle and the principle of 'double exclusivity' can aptly be applied.

However, it must be emphasized that this does not mean that institutional and informational cooperation in composite administration are not highly problematic from other perspectives, which have nothing to do with executive federalism. Even if one can

[46] Robert Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union', in: *Common Market Law Review*, 47 (2010), 1385-1427, 1424.
[47] Robert Schütze, (fn 46) 1421.
[48] Jens-Peter Schneider, (fn 30), 91-92.

identify which of either level formally exercises decisional power, the dispersion of interlinked tasks along different levels of authority makes it far harder to establish accountability than in single-jurisdictional administrations.[49]

Moreover, informational cooperation raises a particularly acute problem. Information-sharing is ubiquitous in EU governance; and yet, it is unreviewable as such. As Hofmann rightly explains, the informal character of information exchange renders supervision and the enforcement of standards difficult.[50] The EU's system of judicial review is directed at binding acts. For that reason, the judicial control of the fluxes of information between levels of administration is extremely difficult.[51] EU courts do not seem particularly reluctant to strike down measures which are based on clear errors of factual assessment, even if the inaccurate information used in a given decision originates in a different level of administration.[52] What matters in those cases is the veracity of the information used by EU bodies, not who passed it on to them.

However, even if their power remains autonomous from others, authorities will often rely on each other's information without being necessarily well placed, or indeed having the means, to second-guess the accuracy of the information they receive from other jurisdictions. The facts of the *Tillack* case illustrate this problem well.[53]

Tillack was an investigative journalist. He published two articles on financial irregularities within the EU institutions. The articles' sources were leaked confidential documents held by OLAF (the EU's anti-fraud office). After launching an internal investigation, OLAF claimed that Tillack had received the documents in question by bribing one of its officials. It therefore sent information to German and Belgian prosecuting authorities setting out the results of its own investigation. Based on that information, the Belgian federal police opened an investigation for breach of professional secrecy, which ultimately led to Tillack's home being searched and to the apprehension of documents and other belongings. When Tillack brought an action for annulment against the decision to send information from OLAF to the national prosecuting authorities, the General Court dismissed the action.

---

[49] See Carol Harlow, *Composite Decision-Making and Accountability Networks: Some Deductions from a Saga*, Jean Monnet Working Paper No. 04/12, 2.

[50] Herwig Hofmann, 'Composite decision making procedures in EU administrative law', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: towards an integrated administration*, (Elgar, 2009), 136-167, 137.

[51] Mariolina Eliantonio, 'Information Exchange in European Administrative Law: a Threat to Effective Judicial Protection?', in: *Maastricht Journal of European and Comparative Law*, 23:3, 531-549.

[52] Case C-375/96, *Zaninotto*, EU:C:1998:517, paras. 34 ff

[53] See Cases T-193/04 R, *Tillack*, EU:T:2004:311; C-521/04 P(R), *Tillack*, EU:C:2005:240; and T-193/04, *Tillack*, EU:T:2006:292.

The General Court's argument was that the mere exchange of information in itself does not entail binding legal effects, and is therefore not a reviewable measure for the purposes of Article 263 TFEU. In what followed, the ruling's language is filled with references to how national authorities exercise their powers independently from interference from the EU administration. National authorities are "free to decide what action to take" after receiving information from an EU body, and are the "only authorities having the power to adopt decisions capable of affecting the legal position" of the individuals concerned. The mere forwarding of information did not bind them to initiate any action, as national authorities "*remain free*, in the context *of their own powers*, to assess the content and significance of that information". Therefore, the choice to initiate legal proceedings based on the forwarded information and the subsequent legal acts "are the sole and entire responsibility of the national authorities".[54] The problem, of course, is that national authorities will often trust the information passed on to them by the EU administration; and that courts will not have the possibility to check the veracity of that information.[55]

The difficulty in reviewing the sharing of information has been suggested to constitute one of the central challenges of European composite administration.[56] While this view is accurate, an important caveat must be appended. The unreviewability of information-sharing is a *pervasive* problem of composite administration, but is not specific to it. The problem is that EU law is ill-equipped to ensure the judicial control of informal action.

That problem transcends the interactions between levels of administration, or even the domain of administration itself. The answer of the CJEU on the reviewability of the information sent by OLAF would have most likely been the same, regardless of the level, or indeed the branch of government, to which the information was addressed. Though particularly common in composite administration, the issue of informality and information-sharing is, in short, not unique to it.

In this light, it also follows that the systemic problem of legal accountability in information-sharing is not specific to the third kind of cooperation in composite administration – procedural cooperation. Hofmann argues that the *Tillack* case exemplifies

[54] Case T-193/04 R, *Tillack*, EU:T:2004:311, paras. 69-70.
[55] Herwig Hofmann, (fn 50), 157 and the arguments of the intervening parties in Case C-521/04 P(R), *Tillack*, EU:C:2005:240, paras. 36-39.
[56] Herwig Hofmann/Morgane Tidghi, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks', in: *European Public Law*, 20:1, (2014), 147–164.

the legal problems raised by composite procedures.[57] However, whether one considers that the facts of the case concerned composite procedures at all is a matter of definition of what composite procedures – or administrative procedures more broadly – are. In a classical sense, which is adopted here and further explained below, administrative procedures are formed by a pre-established order of steps and preparatory measures that aim to produce a decision. In this light, one could argue almost provocatively that the exchange of information between OLAF and the Belgian or German authorities was no more a procedure than the occasional and informal email sent by one official to another. Indeed, the case resulted from a spontaneous exchange of information, which neither arose due to a legal requirement nor legally obliged the recipient authority to initiate any procedural steps.[58]

What is more problematic purely from the point of view of the distribution of tasks between the two levels is when the measure adopted by one authority *is legally conditioned* by steps or preparatory measures to be taken at a different level. According to the provisions governing some procedures, once a given authority receives a preparatory measure, or selected information, that were sent to it by a different level, it is obliged to follow suit by initiating a new procedural stage. In that stage, the recipient authority will adopt measures that it could not have legally enacted without the involvement of the other authority in the previous preparatory stage. In other words, in some instances of composite administration, there are administrative decisions whose adoption requires the exercise of decisional competences, combining preparatory measures adopted at both the national and EU level. Those instances of composite administration are composite procedures.

From what has been said, it becomes clear that the dissertation does not consider information sharing to be sufficient to qualify a certain linkage between national and EU authorities as a composite procedure. Given that the accountability challenges of information exchange are systemic rather than specific, information-sharing between the national and EU administration is a necessary, but not sufficient condition to establish an interaction between the two levels is a composite procedure. To this extent, the concept of

[57] Herwig Hofmann, 'Decisionmaking in EU Administrative Law – The Problem of Composite Procedures', in: *Administrative Law Review*, 61, (2009), 199-221 discusses the *Tillack* case at length to explain what the problems of composite procedures are.

[58] OLAF, as the Commission rightly said, "merely forwarded factual information which may or may not prompt the competent authorities to initiate proceedings to which neither OLAF nor the Commission would normally be a party". Moreover, the General Court held at para. 72 that "a duty of careful examination [resulting from loyal cooperation] does not, however, require an interpretation of that provision to the effect that the forwarded information in dispute has binding effect, in the sense that the national authorities are obliged to take specific measures".

composite procedure adopted in this dissertation departs from that defended by Hofmann and Lottini, which extends to informal information exchanges.[59]

The concept of composite procedure followed in this dissertation is problem-centred. It takes the joint exercise of decision-making powers explained above as the defining feature of composite procedures. This admittedly restrictive criterion of composite procedures has been adopted by others, such as Eckes and Mendes, Schütze, and Baroni.[60] The criterion reflects the problem that joint decision-making – or *interdependent* decision-making, as it will be called – directly challenges EU executive federalism. Indeed, and unlike the institutional and information-based forms of cooperation, composite procedures do not match the assumption of a strict division of powers between national and EU administrations. While EU executive federalism is premised on the combination of that separation of power between the two levels *and* their reciprocal cooperation, what makes composite procedures singular is that that cooperation is so intense that it annuls the very notion of separated power.

The criterion of decisional interdependence in identifying composite procedures will be explained further below. The mismatch between composite procedures and executive federalism, and why that mismatch leads to a threat to the rule of law, will become clear once that unique feature of composite decision-making is examined, and then compared with the kind of administration that EU executive federalism presupposes in order to function. Indeed, decisional interdependence between the Member States and the Union is entirely dysfunctional from the perspective of EU executive federalism. The way in which it blurs the division of power between the 'federal' and the 'state' level is the reason why in the German federal system, which inspired EU executive federalism, analogous forms of administration are deemed unconstitutional.

4. Composite procedures: origins, rationale, and structure

The proliferation of composite procedures is sometimes falsely characterised, together with the process of agencification, as one of the two landmarks of the

[59] Herwig Hofmann, (fn 50), 141 and Micaela Lottini, 'From 'Administrative Cooperation' in the Application of European Union Law to 'Administrative Cooperation' in the Protection of European Rights and Liberties', in: *European Public Law*, 18:1 (2012), 127–147, 134.

[60] Robert Schütze, (fn 46), 1420-1422 and 1426; Christina Eckes/Joana Mendes, 'The right to be heard in composite administrative procedures: lost in between protection?', in: *European Law Review*, 36:5, (2011) 651-670, 651; and Leonardo Baroni, 'I modelli di amministrazione: diretta, indiretta e altre forme "intrecciate"', in: Diana-Urania Galetta, *Diritto amministrativo nell'Unione europea: argomenti e materiali*, (Giappichelli, 2014), 231-256, 236.

development of EU administrative law in the 1990s.[61] What is more accurate is that they became more common in those years,[62] especially in the context of the project of completing the internal market. Nevertheless, composite procedures have existed in more or less incipient shapes since the 1960s.

A good example of this is found in the first instruments adopted in the framework of the Common Agricultural Policy. Most provisions of the 1962 common market organisations (CMOs) were intended to be implemented by national authorities alone. However, all five CMOs included a composite procedure for the adoption of safeguard measures.[63] If a development in the market threatened CAP objectives such as the stability of agricultural prices, national authorities adopted the necessary safeguard measures – e.g., suspending imports – and notified the Commission, which decided whether such measures were to be maintained, modified, abolished or replaced. In the *Toepfer* Case, following Advocate General Roemer's characterisation of the Commission's final decision as the result of "*multi-layered legal action*" (*Mehrstufigkeit rechtlichen Handelns*),[64] the Court considered that it had the constitutive effect of transforming national interim measures into definitive acts.[65]

It is therefore clearly not the case that composite decision-making is a phenomenon of recent decades. Rather, it simply took a long time before legal scholarship noticed it. After an initial interest in the administrative aspects of Community law, European legal scholarship turned to the grand issues of "constitutional glamour",[66] such as the legal nature of the Communities, the protection of fundamental rights, primacy, and direct effect.[67] Scholars of administrative law, for their part, showed scarce interest in the administrative law of the Community.[68] This was largely due to the fact that, until fairly

---

[61] Giovanna Mastrodonato, *Procedimenti amministrativi composti nel diritto comunitario*, (Cacucci, 2008), 81 and 95.
[62] Carol Harlow, (fn 8), 450.
[63] See Regulations 19/62, on the progressive establishment of a common market in cereals (Article 22), 20/62, on the progressive establishment of a common market in pigmeat (Article 15), 21/62, on the progressive establishment of a common market in eggs (Article 12), 22/62, on the progressive establishment of a common market in poultry (Article 12) and 23/62, on the progressive establishment of a common market in fruit and vegetables (Article 10).
[64] In the English version of the Opinion, the expression is translated as "*multi-tier system of legal action*".
[65] Joined Cases 106 and 107-63, *Toepfer*, EU:C:1965:65, at 411. Though critical of the ruling's merits, Zuleeg similarly qualified the underlying administrative procedure as *composite* (*zusammengesetzt*). See Manfred Zuleeg, 'Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten', in: *Jahrbuch des öffentlichen Rechts*, 20, (1971), 1-64, 35-39.
[66] Michal Bobek, 'Thou shalt have two Masters: The Application of European Law by Administrative Authorities in the New Member States', in: *Review of European Administrative Law*, 1:1, (2008), 51-63, 52.
[67] Herwig Hofmann, 'Seven Challenges for EU Administrative Law', in: Kars de Graaf/Jan Jans/Alexandra Prechal/Rob Widdershoven (Eds.), *European Administrative Law: Top-Down and Bottom-up: Proceedings of the First REALaw Research Forum*, (Europa Law Publishing, 2010), 37 ff, 37-38.
[68] There were, however, a few exceptions which should not be forgotten. See for instance Gianguido Sacchi Morsiani, *Il potere amministrativo delle Comunità europee e le posizioni giuridiche dei privati* (Giuffrè, 1965).

recent times, administrative law was conceptually shackled to the idea of sovereign statehood.[69] After EU administrative law gained real momentum in the late 1980s,[70] and after the rulings in the early 1990s gave them more visibility, composite procedures were finally noticed and studied by the literature.[71]

The rationale for the very existence of composite procedures is the need to accommodate national and European interests in the implementation of EU policies.[72] The Member States do not wish to abdicate from their control over implementation processes, or from the possibility of pursuing national interests in doing so. However, they admit that the EU administration intervenes in such processes, so as to preserve interests that are common to all.

In turn, the rationale for the multi-layered structure of composite procedures is the principle of subsidiarity.[73] Subsidiarity entails, in essence, that matters be decided as closely as possible to individuals.[74] The reverse side is that decision-making should be located at EU level if no satisfactory solution is likely to be found by a national administration acting on its own. Though most of the Treaty provisions on the application of the principle of subsidiarity relate to legislative processes, the wording of Article 5 (3) TEU allows it to also be applied in administrative implementation.[75]

Accordingly, the incorporation of national and EU procedural stages, and the definition of the role of the two levels, tends to result from a judgment of what contribution each level is better placed to give. National authorities are better placed to access relevant local information,[76] and will have a closer understanding of national circumstances and interests. By contrast, the intervention of EU authorities – usually the

---

[69] Edoardo Chiti, 'La Costruzione del Sistema Amministrativo Europeo', in: Mario Chiti (Ed.), *Diritto Amministrativo Europeo*, (Giuffrè, 2013), 45-88, 66-67.

[70] Jürgen Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, (Nomos, 1988).

[71] The pioneering study of composite decision-making was Claudio Franchini, *Amministrazione Italiana e Amministrazione Comunitaria*, 2nd ed., (CEDAM, 1993), 174 ff. See also Mario Chiti, 'I procedimenti composti nel diritto comunitario e nel diritto interno', in: *Quaterni del Consiglio di Stato: Attività amministrativa e tutela degli interessati. L'influenza del diritto comunitario*, (Centro studi e documentazione del Consiglio di Stato, 1997), 55-70, 60 and Giacinto della Cananea, 'The European Union's Mixed Administrative Proceedings', in: *Law and Contemporary Problems*, 68, (2004-2005), 197-217, 207.

[72] Mario Chiti, (fn 71).

[73] Mario Chiti, (fn 71), 58; Giacinto della Cananea, (fn 71), 207; and Claudio Franchini, 'I principi applicabili ai procedimenti amministrativi europei', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2003), 1037-1059, 1050.

[74] On the principle of subsidiarity in EU governance, see Patrick Birkinshaw, *European Public Law*, 2nd ed., (Wolters Kluwer, 2014), 229 ff.

[75] In this sense, Stefan Kadelbach, 'Artikel 5 EUV', in: Hans von der Groeben/Jürgen Schwarze/Armin Hatje, *Europäisches Unionsrecht*, 7th ed., (Nomos, 2015), 102-126, 118.

[76] By way of illustration, Article 11 of Regulation 708/2007, concerning use of alien and locally absent species in aquaculture, attributes to local authorities the competence to assess the potential effects of fish farms in the local environment.

Commission – is intended to ensure EU-wide public interests,[77] or that there is mediation at EU level if there are disagreements between national authorities.[78]

Given their justification in a logic of subsidiarity, composite procedures tend to result from the insertion of EU stages into what would normally be instances of decision-making at national level. National authorities usually fulfil a fact-finding role, or adopt preparatory acts for a final decision to be made. However, that final decision is not always technically adopted by the EU administration. Most composite procedures begin and end at national level, with an intermediate EU stage inserted in between. After a measure has been adopted at that intermediate EU stage, the national authority generally has no discretion. This is also why, in the view defended here, the classical categorisations of composite procedures in the literature must be taken with a grain of salt.

Giacinto della Cananea first classified composite procedures as bottom-up, top-down, and hybrid.[79] Bottom-up procedures begin at the national level and are concluded with a decision adopted by an EU authority. Top-down procedures start at EU, and end at national level. Hybrid procedures combine both 'motions' at different moments. Most composite procedures are hybrid, or 'back-and-forth' procedures,[80] as the literature has recently called them.

Composite procedures are administrative procedures established by EU law instruments. As with any administrative decision-making procedure, composite procedures consist of a pre-established order of phases, where different steps and acts lead to the adoption of a final decision.[81] In national laws, it is not uncommon to find administrative procedures that require several steps to be taken by different authorities.[82] However, what is distinctive about composite procedures is the decisional interdependence between authorities at *national and EU level*.[83] The final acts adopted pursuant to composite procedures require the cumulative exercise of decisional competences by national, and then

---

[77] For a ruling in which the intervention of the Commission in a composite procedure is understood as a tool to ensure EU interests, see Case T-239/00, *SCI UK*, EU:T:2002:175, para. 51 and the case law cited there.
[78] Gernot Sydow, *Verwaltungskooperation in der Europäischen Union: Zur horizontalen und vertikalen Zusammenarbeit der europäischen Verwaltungen am Beispiel des Produktzulassungsrechts*, (Mohr Siebeck, 2004), 46-48 argues that the inclusion of the Commission in composite procedures should always be justified in the light of subsidiarity.
[79] Giacinto della Cananea, (fn 71), 199.
[80] Mariolina Eliantonio, (fn 20), 73.
[81] Giacinto della Cananea, *Due Process of Law beyond the State: Requirements of Administrative Procedure*, (Oxford, 2016), 22.
[82] For Italy, see Aldo Sandulli, 'Il Procedimento', in: Sabino Cassese (Ed.), *Trattato di Diritto Amministrativo – Diritto Amministrativo Generale*, II, (Giuffrè, 2000), 927-1215, 989 ff.
[83] The view supported here is also the one taken by the ReNEUAL Draft Model Rules on EU Administrative Procedures. According to Art. I-4 (3) of the Draft Model Rules, "`Composite procedure´ means an administrative procedure where EU authorities and the authorities of a Member State or of different Member States have distinct functions which are inter-dependent".

by the EU administration. Decisional interdependence thus means that one level of administration may not exercise its competences in the procedure before the other level has concluded the previous decisional stage.

The notion of decisional interdependence is clearly present in the case law. EU courts at various points refer to procedures in which a domestic intermediate measure "constitutes a necessary step (…) for adoption of a Community measure".[84] In a recent case concerning the EU-wide registration of *Tokaj* wine as a protected designation of origin, the Court considered the procedure allowing the Commission to cancel the protection of wine names. It held that the Commission "may exercise that power only after the Member States have sent (…) the product specifications and national decisions of approval". Until then, the Court added, the Commission "is neither obliged nor authorised" to act.[85]

Decisional interdependence can exist in many forms. While the initiation of a later procedural stage depends upon the conclusion of preceding stages, it must be emphasised that there are significant differences in the extent to which the initial steps of a composite procedure condition decision-making at subsequent stages. This must be determined in light of the provisions that govern each composite procedure. In some composite procedures, the preparatory measures adopted at one level of administration may be reversed in a later procedural stage at another level. In others, those preparatory measures cannot be reversed, and therefore already predetermine the content of the final decision.

The fact that some measures are 'more preparatory than others' is a central issue in the case law on composite decision-making. For this reason, it is important to be aware of the different kinds of measures that are adopted in composite procedures, and of the role played by national and EU authorities at different stages. Below, two subsections consider the involvement of the two levels of administration in the interlocked phases that unfold at both levels.

---

[84] Case C-269/99, *Carl Kühne*, EU:C:2001:659, para. 57.

[85] Case C-31/13 P, *Hungary v Commission*, EU:C:2014:70, paras. 61-62. This same idea was expressed in *Association Greenpeace France*, where AG Mischo noted that according to the relevant legislation, the national preparatory act 'made possible' that the Commission adopted a decision in an ensuing procedural phase (see the Opinion of AG Mischo in C-6/99, *Association Greenpeace France*, EU:C:1999:587, para. 100). For an older judgment, see Case 148/87, *Frydendahl Pedersen*, EU:C:1988:438. In the latter case, the Court reproached the Commission for its delays in adopting a preparatory measure. Without that preparatory measure, the Danish customs authority deciding in the subsequent procedural stage was inhibited from taking the procedure's final decision.

4.1. The heavy-lifters: the role of national authorities in composite decision-making

The position of national administration varies greatly depending on the legislation that concretely governs any relevant composite procedure. There are at least three degrees of relative decision-making power that national authorities enjoy vis-à-vis the EU level.

First, there are composite procedures where national decision-making power clearly predominates. In other words, where the decisional powers enjoyed by national authorities are such that they may predetermine the final outcome of the procedure at EU level. This is so when the EU administration enjoys no discretion to diverge from national authorities, and is therefore obliged to decide by following the preparatory measures they adopt. Such measures may, for instance, be binding opinions. This distribution of decision-making is sometimes found in procedural schemes for the management of tariff quotas.[86] One procedure following this pattern, and which has had particular salience in the case law, is found in the regime of EU-wide registration of protected designations of origins of geographic indications. National authorities receive applications from groups for the classification and registration of products as PDOs or PGIs. After they make a positive assessment of the products' compliance with the EU requirements for registration, and if no objection is raised by any legal or natural person, national authorities support the applications and forward them to the Commission. The Commission is then obliged to register the products for EU-wide protection, without enjoying any margin of discretion.[87]

In other composite procedures, the EU administration may not adopt the final decision before it receives the preparatory measures taken by a national authority, but may nevertheless diverge from them. National authorities act as 'rapporteurs' by forwarding a

[86] Commission Regulation No 969/2006 of 29 June 2006, opening and providing for the administration of a Community tariff quota for imports of maize from third countries, and Commission Regulation No 2305/2003, of 29 December, opening and providing for the administration of a Community tariff quota for imports of barley from third countries. In both instruments, national authorities receive applications for import licences and submit to the Commission a list of those which, according to their discretionary assessment, are found eligible. The Commission's role is limited to checking whether traders have not defrauded the quota mechanism by submitting their applications to the authorities of more than one Member State.

[87] The same obligation arises if there *are* objections but the persons raising them and the applicants come to an agreement. See 53 (2) a) of Regulation No. 1151/2012 of 21 November 2012, on quality schemes for agricultural products and foodstuffs. Only when objections are raised, but not no agreement is reached to solve them, does the Commission enjoy an autonomous power of appraisal to adopt a decision on the registration. The lack of discretion of the Commission when there are no objections, or when those objections have been resolved by the parties involved, has been a recurrent aspect of the successive procedural regimes of PDOs and PGIs. See Art. 6 (4) and 7 (5) a) of Council Regulation 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and Art. 7 (4) and (5) of Council Regulation 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

draft final measure, which in some procedures are termed as 'proposals',[88] and in others as 'reports'.[89] The measure, while not binding the authority adopting the final decision to give it a specific content, will serve as the basis for that decision to be made. One good example is found in the procedural regime for the authorisation of detergents into the internal market. National authorities prepare an assessment report on their risk to human health or the environment and submit it to the Commission. The latter will adopt a final positive or negative decision which, may entirely diverge from the position taken in the national report.[90] One further, peculiar instance of national preparatory measures falling under this heading concerns safeguard measures and other urgent procedures. In domains such as food safety, national authorities may adopt interim measures, e.g. suspending the sale of a given product, if it emerges that it poses serious risks to public health.[91] Those interim measures will already entail binding effects, though only provisionally; and will be *preparatory* in respect of the final decision at EU level. Once adopted, safeguard measures are communicated to the EU administration so that it may decide on whether to uphold, modify, or reverse them.[92]

Lastly, there are composite procedures where national authorities merely serve as a kind of 'reception desk' for EU Agencies or for the Commission.[93] In that role, national authorities have no *substantive* decision-making tasks, but a merely *formal* competence to forward initial applications, documents and information to the EU bodies subsequently deciding on the substance of the case. The composite procedure for the authorisation of

---

88 Case T-228/02, *OMPI I*, EU:T:2006:384, para. 76.

89 See Article 13 (1) of Directive 2001/18 (release into the environment of GMOs).

90 See Art. 5(3)-(4) and 6 of Regulation No 648/2004 of the European Parliament and the Council of 31 March 2004 concerning detergents.

91 See Article 54 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. On the role of the Commission in composite procedures in food safety, see Mario Savino, 'Autorità e Libertà nell'Unione Europea: La Sicurezza Alimentare', in: *Rivista Trimestrale di Diritto Pubblico*, (2007), 413-442, 418, who highlights that the role of the Commission in the procedure is designed in view of the principle of subsidiarity. For other examples of similar safeguard clauses, see Article 20 of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency. For a mechanism of this kind in the market of detergents, see Article 15 of Regulation No 648/2004 of the European Parliament and the Council.

92 For just one example in the case law, see Case C-6/05, *Medipac-Kazantzidis*, EU:C:2007:337, especially at para. 59.

93 The term is used by Marine Friant-Perrot, 'The European Union Regulatory Regime for Genetically Modified Organisms and its Integration into Community Food Law and Policy', in Luc Bodiguel/Michael Cardwell (Eds.), *The Regulation of Genetically Modified Organisms: Comparative Approaches*, (Oxford, 2010), 79-100, 90, to describe the position of national authorities in the composite authorisation procedure for GMO food and feed.

GMO food and feed is a case in point.[94] While applications for an authorisation must be submitted to the competent national authority, its role is to be "no more than the intermediary in the process" between applicants and the deciding EU authorities.[95] In the *Hagenmeyer* Case, the General Court considered the composite procedure for the registration of admissible health claims in food products. Even though their role is limited to receiving applications and passing them on to the EU administration, the Court held that, unlike what one of the parties had argued, national authorities are more than a mere 'postbox'. Indeed, they still enjoy some minimal decision-making power in procedures of this kind – exercised, more specifically, in the examination of whether applications are in conformity with formal requirements.[96] Moreover, the forwarding to the EU administration of the applications received is necessary "in order to proceed to the next stage in the procedure" at EU level, between the ESFA and Commission.[97]

4.2. Managers, arbiters and custodians of uniformity: EU authorities in composite decision-making

Composite procedures require the involvement of bodies that belong to the EU administration. Depending on the legislative framework of the particular composite procedure, that body will be the Commission or, far more rarely, the Council.[98] In many composite procedures, the final decision will be taken by the Commission based on an opinion or draft measure sent by a European agency. The involvement of European agencies is particularly common in composite procedures that relate to the authorisation of entry to the internal market of certain products that require careful analysis from the point of view of environmental or public health risks. One example is the involvement of the European Medicines Agency in the authorisation procedure for the introduction of pharmaceuticals into the internal market.[99]

In general, the EU's own administration intervenes in composite procedures when its supranational and 'bird's-eye' position makes it better placed to decide in a manner that

---

[94] See Art. 5(2) a) and 17(2) of Regulation 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed.
[95] Damian Chalmers, 'Risk, anxiety and the European mediation of the politics of life', in: *European Law Review*, 30:5, (2005), 649-674, 653.
[96] See Article 15 of Regulation No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.
[97] Case T-17/12, *Hagenmeyer* EU:T:2014:234, paras. 133-136.
[98] For a composite procedure where the EU-level procedural stage involves the Council, see Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.
[99] Articles 29 and ff. of 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.

ensures EU-wide interests.[100] This is usually the case when the intended final decision entails EU-wide effects, and when Member States do not deem it convenient to entrust its adoption to national authorities alone.[101]

This general rationale unifies all EU stages in composite procedures. The intervention of EU authorities tends to fall into three main categories: the management of common resources, the ensuring of uniformity, and the resolution of disagreements between national authorities.

First, there are a number of composite procedures where the decisional powers of EU bodies involve evaluations on the sensible use of common financial or natural resources. Good examples of procedures on financial resources can be found in the domain of EU structural funds. The Commission, seen as an independent institutional actor, is considered to be the most appropriate authority to make final decisions on the management of the funds. This notion is enshrined in the Treaties in respect of the European Social Fund (Article 163 TFEU) and pervades the existing regulation on structural funds in general.[102] Similarly, one finds composite procedures where the EU administration's responsibility lies in ensuring that sustainable use is made of natural resources such as fisheries. This is visible in the regimes for the authorisation of fishing operations in some sea zones,[103] as well as in aquaculture.[104] It is also visible in the

[100] See recital 13 of the Regulation establishing the Single Supervisory Mechanism (Council Regulation 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions). The intervention of the European Central Bank in the composite procedure for the authorisation of new credit institutions is justified as follows: "As the euro area's central bank with extensive expertise in macroeconomic and financial stability issues, the ECB is well placed to carry out clearly defined supervisory tasks with a focus on protecting the stability of the financial system of the Union".

[101] This is the domain of transnational administrative acts. Some have referred to this particular form of decision-making, whereby one measure is valid throughout the Union, as implementation of an "one for all" kind (Luca de Lucia, *Amministrazione Transnazionale e Ordinamento Europeo: saggio sul pluralismo amministrativo*, (Giappichelli, 2009), 22 and 73 ff) See for example Recital 24 of Regulation No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs.

[102] On the management of common financial resources through composite procedures, see Article 75 of Regulation (EU) No 1303/2013 Of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

[103] Commission Regulation 2166/83, establishing a licensing system for certain fisheries in an area north of Scotland.

[104] Council Regulation 708/2007 of 11 June 2007 concerning use of alien and locally absent species in aquaculture.

establishment of composite procedures aimed at the adoption of urgent conservatory measures in cases of overexploitation of marine biological resources.[105]

In the second place, there are many composite procedures where the EU administration intervenes in order to secure uniformity in the implementation of EU legislation. Indeed, the legislative instruments of some composite procedures explicitly justify their establishment in light of the diversity of administrative provisions at national level. Those are deemed to be a possible hindrance to the free movement of goods and to unequal conditions of competition between market actors.[106] In some composite procedures, the EU administration's role is to ensure that provisions are applied in a uniform manner throughout the Union. A good example of this is found in customs law, where the Commission is involved in order to guarantee that the conditions for the repayment of remission ('forgiveness') of customs debts, which involve the use of quite vague concepts, are interpreted in the same way by all national customs authorities.[107]

Lastly, there are composite procedures where an EU authority intervenes as an arbitrator or broker in the case of scientific of technical disagreements between national authorities. Paradigmatically, this is visible in the plethora of decentralised authorisation procedures that germinated in the EU legal landscape from the 1990s. Currently, such procedures govern the introduction into the market of products such as biocides,[108] GMOs,[109] human and veterinary pharmaceuticals,[110] as well as the cross-border

[105] See Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy. Article 12 of the Regulation provides that "on duly justified imperative grounds of urgency relating to a serious threat to the conservation of marine biological resources or to the marine ecosystem based on evidence, the Commission, at the reasoned request of a Member State or on its own initiative, may, in order to alleviate that threat, adopt immediately applicable implementing acts applicable for a maximum period of six months".

[106] See Recital (4) of Regulation 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed.

[107] See the current regime in Articles 116(3), 119 and 120 of the Union Customs Code (Regulation (EU) No 952/2013 of 9 October of the European Parliament and of the Council) and in Articles 98-102 of the Union Customs Code Delegated Act (Commission Delegated Regulation No 2015/2446 of 28 July). See Timothy Lyons, *EC Customs Law*, (Oxford, 2008) 503 and Kathrin Limbach, *Uniformity of Customs Administration in the European Union*, (Hart, 2015), 211-212.

[108] Regulation No 528/2012 of the European Parliament and the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, Article 36.

[109] Maria Weimer, *Democratic Legitimacy through European Conflicts-law? The case of EU Administrative Governance of GMOs*, unpublished thesis, EUI, passim, discusses the arbitral role of the Commission in the framework of the general authorisation procedure for GMOs.

[110] Directive 2001/83/EC of 6 November of the European Parliament and the Council on the Community code relating to medicinal products for human use, Article 29, Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products, Article 33. See also Recital (12) of Directive 2001/83, "in the event of a disagreement between Member-States about the quality, the safety or the efficacy of a medicinal product, a scientific evaluation of the matter should be undertaken according to a Community standard, leading to a single decision".

transportation of waste.[111] These procedures essentially follow the same structure.[112] An application to market a certain product, or to move waste across different Member States, is presented to a national authority. The authority will then assess the application. In most cases, if it comes to a positive assessment, the rapporteur national authority will forward a draft authorisation to the EU administration and to the national authorities of the countries where the product is to be marketed (or where the waste shipment will pass).[113] Those other authorities will then have the opportunity to comment on or object to the authorisation being issued. The inclusion of this multilateral stage is the reason why Cassese has aptly referred to these composite procedures as 'choral' procedures.[114] If the other national authorities involved in this multilateral stage do not raise objections, their non-opposition will count as what is often known as an 'administrative silence',[115] an inaction to which legal consequences – such as a presumption of tacit approval – can be ascribed by the law.[116] If that is the case, the rapporteur national authority will then issue the final decision. If an objection is raised, however, a new procedural stage is opened at EU level, where the competent European Agencies or the Commission will rule on the concrete case.[117] Once the Commission has adopted its decision, the rapporteur national authority will 'ratify' it, in the sense of being obliged to implement that decision with no margin of discretion of its own.[118]

---

[111] Regulation No 1013/2006 of the European Parliament and the Council of 14 June 2006 on shipments of waste, Article 11 (3). In the past, a similar procedure also applied to the authorisation of the introduction of novel foods into the internal market (Regulation 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients, Articles 6(4) and 7(1)). The procedure has now been replaced by a more centralised process, where applications are sent to the Commission. See Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015.

[112] On composite procedures of this type, see the analysis carried out by Luca de Lucia, 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris)', in: *Review of European Administrative Law*, 5:1, (2012), 49-88.

[113] There is a slight variation in these procedure in what concerns a negative assessment by the rapporteur national authority. In some, such as the general procedural for the authorisation of GMOs (see Directive 2001/18), that negative assessment will result in the termination of the procedure with a final decision rejecting the application. In others (such as the recently repealed procedure for the approval of novel foods under Regulation 258/97) the negative assessment of the rapporteur authority will count as an objection and trigger the EU stage.

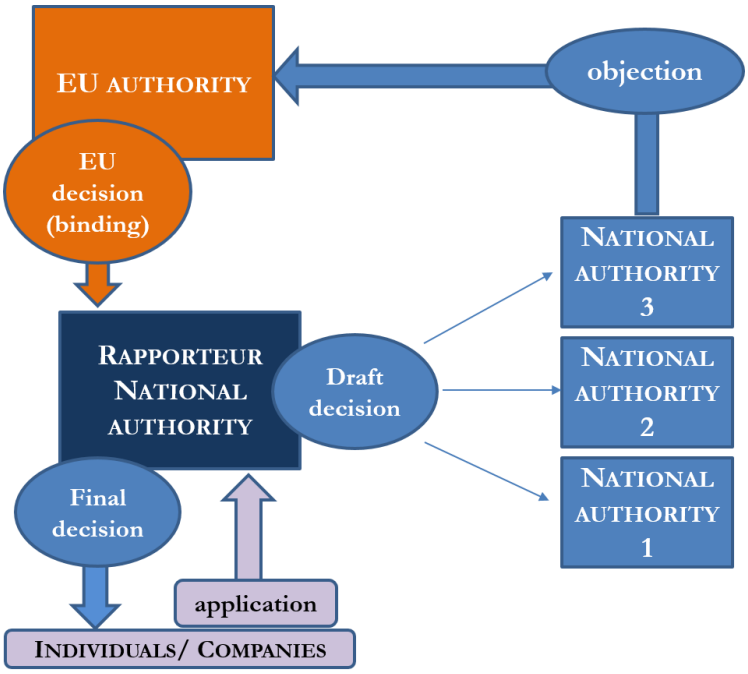
[114] Sabino Cassese, 'European Administrative Proceedings', in: *Law and Contemporary Problems*, 68, (2004-2005), 21-36, 28.

[115] Johannes Caspar, 'Zur Vergemeinschaftung von Verwaltungsverfahren am Beispiel von Gentechnik- und reformiertem Lebensmittelrecht', *Deutsches Verwaltungsblatt*, (2002), 1437-1446, 1438

[116] See Per Giorgio Lignani, 'Silenzio (diritto amministrativo)', in: *Enciclopedia del Diritto*, XLII, (Giuffrè, 1990), 559-575.

[117] Based on the description some have made of this stage as merely eventual, these procedures could be described as *eventual* composite procedures. See Nicola Bassi, *Mutuo Riconoscimento e Tutela Giurisdizionale: La circolazione degli effeti del provvedimento amministrativo straniero fra diritto europeo e protezione degli interessi del terzo*, (Giuffrè 2008) 38-39.

[118] See Johannes Caspar, (fn 116), 1439; and Estelle Brosset, 'The Prior Authorisation Procedure Adopted for the Deliberate Release into the Environment of Genetically Modified Organisms: the Complexities of Balancing Community and National Competences', in: *European Law Journal*, 10:5, (2004), 555-579, 565.



'Choral' composite procedures: typical structure

5. Composite procedures, executive federalism and the rule of law

One issue that cannot be explored in depth here is the fact that the decisional interdependence that characterises composite procedures would be unconstitutional in German executive federalism, the model which inspired the EU variant. For all their historical concern for keeping their administrations independent from the EU, the Member States in the Council promoted a form of administration which, put bluntly, is considered as excessively intrusive to the division between levels of administrative power, *even in the context of a federal state*.

As in EU executive federalism, German executive federalism not only entails that the states' authorities implement federal law in their own right.[119] One further constitutional aspect is the separation of the administrative spheres" of the *Bund* and the *Länder*.[120] They form "sealed administrative organisations".[121] This rigid separation is justified as a corollary of the separation of Federal and *Land* sovereignty itself.[122] As a

[119] Article 83 GG.
[120] BVerfGE 63, 1, (37).
[121] Hartmut Maurer, *Allgemeines Verwaltungsrecht*, 18th ed., (C. H. Beck, 2011), 577.
[122] Janbernd Oebbecke, 'Verwaltungszuständigkeit', in: Josef Isensee/Paul Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VI, (Müller, 2008), 743-810, 747.

consequence, hybrid forms of administrative action, dubbed *mixed administration* (*Mischverwaltung*), are inadmissible unless "explicitly authorised" by the Grundgesetz.[123]

The test of what constitutes 'Mischverwaltung' is perhaps the most intriguing from the perspective of European composite administration. In Germany, cooperation between the federal and the *Land* administrations, in itself, is not problematic.[124] What is unconstitutional is if a relation of hierarchy is established between them or – crucially – whenever the exercise of competences of one level is made conditional upon the exercise of competences from the other.[125] The logic is that neither of the two spheres of administration may be forced by legislators to abdicate from its own decisional autonomy.[126]

Ironically, composite procedures may well have been protected by the Treaties' silence on administrative law. While its case law was not always stable, the German Federal Constitutional Court has consistently held that mixed administration would always be inadmissible in cases of decisional interdependence in areas of the competence of the federal or *Land* governments.[127] The Treaties contain no such clear divide in the subject-matter where the two levels of administration are competent.[128] In fact, as one of the Treaty drafters put it, after the defeat of the ambitious EPC Treaty, the Treaty of Rome "stepped back [from] the possibility of mixed forms of administration".[129]

The European Union's doctrine of executive federalism, unlike German constitutional law, does not oppose the existence of composite procedures as such. That is because, instead of defining how administrative power *should* or *should not* be distributed, the

---

123 BVerfGE 32, 145 (156) and BVerfGE 39, 96 (119).

124 Cfr. Benjamin Küchenhoff, *Die verfassungsrechtlichen Grenzen der Mischverwaltung*, (Nomos, 2010), 116 ff.

125 This view was defended explicitly by the German Federal Constitutional Court already in 1960 (BVerfGE 11, 105 (124)). In the same vein, Jost Pietzcker, 'Zuständigkeitsordnug und Kollisionsrecht im Bundesstaat', in: Josef Isensee/Paul Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VI, (Müller, 2008), 515-566, 535 and Dirk Ehlers, 'Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat', in: Hans-Uwe Erichsen/Dirk Ehlers (Eds.), *Allgemeines Verwaltungsrecht*, 14th ed., (De Gruyter, 2010), 1-252, 245.

126 This was explicitly referenced as the German Federal Constitutional Court's underlying criterion in BVerfGE 41, 291 (311) and BVerfGE 106, 1 (26).

127 Josef Isensee, 'Idee und Gestalt des Föderalismus im Grundgesetz', in: Josef Isensee/Paul Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VI, (Müller, 2008), 3-200, 111-112, notes that the Federal Constitutional Court's case law seemed to have been reversed for a period beginning in 1983. In that year, the FCC stated that a form of "administrative organisation is not unconstitutional simply because it is to be characterised as mixed administration, but only when it is opposed to by mandatory norms of competence or organization or other provisions of constitutional law" (BVerfGE 63, 1 (38)). Another possible reading would be, however, that the FCC had simply developed a concept of mixed administration that encompassed instances of administrative organisation with and without decisional interdependence, and considered only the former to be incompatible with the Basic Law.

128 See Robert Schütze, (fn 46).

129 Carl-Friedrich Ophüls, 'Zur ideengeschichtlichen Herkunft der Gemeinschaftsverfassung', in: *Festschrift Walter Hallstein*, (Klostermann, 1966), 387-413, 405.

doctrine of EU executive federalism *governs* administrative power as it is assumed to in fact *be* distributed.

Nevertheless, EU executive federalism is not conceived to accommodate composite procedures, and is dysfunctional if applied to them. Its principles presuppose an administration where the decisional powers of national and EU authorities are strictly divided, and where decisions, along with the legal relations established between authorities and individuals, can be clearly imputed in an *either-or fashion* to one of the two levels.

The separation principle (which aims to preserve the 'strict' separation of administrative power) and the principle of 'double exclusivity' (which preserves the division of judicial jurisdiction over the two levels of power) only make sense under the background assumption of a clear divide between national and EU administrative power. Moreover, EU executive federalism was built based on an assumption of who the subjects of those divided powers usually are. Whereas national administrations adopt decisions vis-à-vis citizens and firms, the EU administration is assumed to decide generally only in respect of national authorities, as a 'second-order' administration.

These two aspects of the conception of administration on which EU executive federalism is based – divided power and EU authorities as a second-order administration – are contradicted by composite procedures. First, composite procedures are *not* an expression of divided, but rather *joint* – or *interdependent* – decisional power. Second, the role of EU authorities in many composite procedures is often not that of a mere 'second-order' administration. Indeed, the EU administration often adopts measures that immediately have an impact in the legal position of individuals. The mismatch leads to considerable rule of law challenges, though for different reasons.

After recalling the requirements of the rule of law in (EU) administrative law, the remainder of the chapter will demonstrate how the assumption of strict division of power and of EU authorities as a second-order administration may lead to interpretations of composite procedures that call key rule of law tenets into question.

5.1. Rule of law requirements of EU administrative law

Even formally understood, the rule of law aims, at the bare minimum, at rendering the law a standard capable of guiding the action of its subjects. The principle demands the subjection of public power to legal constraints, and the systematic and predictable enforceability of those constraints by independent and accessible courts, with a view to

protecting individuals from the excesses or mistakes of authority.[130] These ideas are also present in EU law. [131] The principle of the rule of law is a founding principle of EU constitutional law, and applies both to the states and the EU.[132]

The rule of law is also the justification for the most important principles of EU administrative law. This is unsurprising, since the rule of law has represented the historical lodestar of administrative law in many jurisdictions.[133] To a large extent, the functions of administrative law are the functions of the rule of law itself. One can refer to an objective function, of upholding the obedience of public power to the will of the legislature, and to a subjective function, of protecting individuals from its arbitrary exercise.[134]

While different models of administrative law accord different weights to the subjective and objective functions, both are vital in preserving the rule of law in public administration.[135] Moreover, both functions are present in the most important tools that administrative law employs in order to maintain the rule of law. This is visible in how EU administrative law incorporates those tools. Those tools include, on the one hand, the

---

130 Joseph Raz, 'The Rule of Law and its Virtue', in: *The Authority of Law: Essays on Law and Morality*, (Clarendon, 1979), 210 ff, 214-218 and Brian Tamanaha, 'A Concise Guide to the Rule of Law', in: Gianluigi Palombella/Neil Walker (Eds.), *Relocating the Rule of Law*, (Hart, 2009), 3-16, 3-6.

131 One historical example is found in Joined Cases 46/87 and 227/88, *Hoechst*, EU:C:1989:337. The Court exposed its understanding of the principle of legality – an implication of the rule of law – and of that principle's relation to the protection of the individual. It held that "in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law".

132 See Art. 2 TEU and Cases 294/83, *Parti écologiste "Les Verts"*, EU:C:1986:166 and C-2/88, *Zwartveld*, EU:C:1990:315, paras. 16-17. On the principle of the rule of law in the European Union, see Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', in: *Common Market Law Review*, 44, (2007), 1625-1656.

133 Bernardo Sordi, 'Révolution, Rechtsstaat and the Rule of Law: historical reflections on the emergence of administrative law in Europe', in: Susan Rose-Ackerman/Peter Lindseth (Eds.), *Comparative Administrative Law*, (Elgar, 2010), 23-36.

134 In the view supported here, this distinction in academic debate is often obscured by the partly overlapping distinction between subjective or objective *models* of administrative law and administrative justice. However, it is difficult to conceive of a system of administrative justice that does not include both functions, though of course in varying measures. It is therefore more appropriate to discuss subjective and objective *functions* of administrative law. Cfr. Walter Krebs, 'Subjektiver Rechtsschutz und objective Rechtskontrolle', in: *FS Chritian-Friedrich Menger zum 70. Geburtstag*, (Carl Heymanns, 1985), 191-210, 191-192. Still, for an overview of the objective and subjective models of administrative justice, see Jean-Marie Woehrling, 'Le contrôle juridictionnel de l'administration en Europe et la distinction entre droit objectif et droits subjectifs', in: Jürgen Schwarze (Ed.), *L'état actuel et les perspectives du droit administratif européen*, (Bruylant, 2010), 297-305 and René Barents, 'EU Procedural Law and Effective Judicial Protection', in: *Common Market Law Review*, 51, (2014), 1437-1462, 1445 ff.

135 See Saša Beljin, 'Rights in EU Law', in: Sacha Prechal/Bert van Roermund, *The Coherence of EU Law: The Search for Unity in Divergent Concepts*, (Oxford, 2008), 91-122, 96 ff; Stefan Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss*, (Siebeck, 1999), 379-381, José Carlos Vieira de Andrade, *A Justiça Administrativa*, 11th ed., (Almedina, 2011), 12 ff.

principle of respect for the rights of the defence, such as the right to be heard and the right to a reasoned decision and, on the other hand, mechanisms of judicial control.[136]

The right to be heard is recognized in EU law as an important implication of the rule of law.[137] The reasons for this are easy to grasp. The right requires that individuals have the opportunity to present their views before an adverse decision is taken in their respect (see Article 41 (2) a) of the Charter). This allows individuals to avoid 'surprise decisions', and to plan in advance for when the administration's measures become effective. Moreover, the right to be heard promotes decisional rationality, since it obliges the administration to be confronted with opposing points of view and to take into account the evidence adduced by interested parties.

The right to a reasoned decision, too, is closely linked to the rule of law. This is uncontroversial in the administrative laws of many Member States,[138] as well as in EU administrative law.[139] In essence, the right to a reasoned decision entails an obligation on the part of the administration to explain the reasoning that led it to adopt a certain measure (see Article 41 (2) c) of the Charter). The reasons-giving requirement fulfils a clear subjective function. It allows individuals to examine how solid the administration's stated reasons are, so as to weigh their options and judge the chances of success of an action for annulment.[140] In this light, it is unsurprising that the reasons-giving requirement is

---

136 More detail on the right to be heard, the right to a reasoned decision, and judicial control will be given in parts II and III of the thesis.

137 See the Opinion of AG Poiares Maduro in Joined Cases C-402/05 P and C-415/05 P, *Kadi*, EU:C:2008:11, para. 49 and, more recently, the General Court's ruling in Case T-138/14, *Randa Chart*, EU:T:2015:981, para. 112. On the relation between the rule of law and rights of participation, see Joana Mendes, *Rule of Law and Participation: a Normative Analysis of Internationalised Rulemaking as Composite Procedures*, JMWP NYU 13/13, 16 ff and Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, New York University Public Law and Legal Theory Working Papers. Paper 234, (2010), 17. Joana Mendes had already defended the same link in her ground-breaking monograph, *Participation in EU Rule-Making: A Rights-Based Approach*, (Oxford, 2011), 33. See also Takis Tridimas, *The General Principles of EU law*, 2nd ed., (Oxford, 2006), 371 and Herwig Hofmann/Gerard Rowe/Alexander Türk, *Administrative Law and Policy of the European Union*, (Oxford, 2011), 204.

138 For the perspective from Portuguese law, see José Carlos Vieira de Andrade, *O Dever de Fundamentação Expressa de Actos Administrativos*, (Almedina, 1991), 214 ff and Diogo Freitas do Amaral, *Curso de Direito Administrativo*, II, 3rd ed. (Almedina, 2017), 316-317. For the German example, Ferdinand Kopp/Ulrich Ramsauer, *Verwaltungsverfahrensgesetz*, 9th ed., (C. H Beck, 2005), annotation to para. 39, 654. Rather singularly, English administrative law does not recognize a general duty to give reasons, though some notable authors have argued that such a duty should be held to be derivable from the principles of natural justice and more particularly from the need to ensure judicial review of administrative action (See William Wade/Christopher Forsyth, *Administrative Law*, 10th ed., (Oxford, 2009), 436-439). Nevertheless, English courts have recognized that in some circumstances it would be unfair to refuse to give reasons, and have tended to expand the categories of situations in which that would be the case. See Martina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison*, (Springer, 2007), 144 ff.

139 See the Opinion of AG Kokott, in Case C-413/06 P, *Bertelsmann*, EU:C:2008:392, paras. 97-98. See also Kai-Dieter Classen, *Gute Verwaltung im Recht der Europäischen Union*, (Duncker & Humblot, 2006), 321.

140 In the recurrent formulation used by EU courts, the first purpose of the duty to give reasons for a decision is "provide the person concerned with sufficient information to make it possible to determine whether the act is well founded or whether it is vitiated by an error which may permit its validity to be contested". See Cases

construed by EU courts as an appendix to the right to an effective judicial protection.[141] On the other hand, the right to a reasoned decision performs an important objective role: it serves as a guarantee of decisional rationality or, as others put it, as a form of self-discipline for decision-makers.[142] If legally obliged to justify their decisions, administrators will need to conduct a self-conscious examination of the plausibility and reasonableness of their choices.[143] Lastly, statements of reasons expose bureaucracies' poor judgment, partiality, and maladministration. As Majone puts it, the reasons-giving requirement constitutes "the simplest and most basic means of improving agency transparency and accountability", as it "activates a number of other mechanisms for controlling regulatory discretion, such as judicial review, public participation and deliberation, peer review, policy analysis to justify regulatory priorities and so on".[144] For the three reasons explained – facilitation of judicial control, decisional rationality, and accountability – it is no wonder that the obligation to state reasons constitutes an "essential principle" reflecting the European Union's constitutional commitment to the rule of law.[145]

Lastly, in both EU and national law, the rule of law requires the judicial control of public power. EU case law iteratively associates the rule of law with the imperative of subjecting public power to the law and to judicial control.[146] Judicial control takes up such a large part of the conceptual scope of the rule of law under EU constitutional law, that it is not uncommon to see that principle being discussed almost entirely from the perspective of the role of the courts. For this reason, some have rightly pointed out that the Court's understanding of the principle of the rule of law is legalistic and procedural in character, since "it is closely related to the traditional and interrelated principles of legality, judicial

T-181/08, *Pye Phyo Tay Za*, EU:T:2010:209, para. 94; T-159/09, *Biofrescos*, EU:T:2012:307, para. 37; and T-509/10, *Kala Naft*, EU:T:2012:201, para. 72.

141 In similar terms, Loïc Azoulai, 'La protection juridique en matière d'exécution nationale du droit communautaire', in: Jürgen Schwarze (Ed.), *L'état actuel et les perspectives du droit administratif européen*, (Bruylant, 2010), 323-336, 329.

142 Robert Thomas, 'Reasons-giving in English and European Community Administrative Law', in*: European Public Law*, 3:2, (1997), 213-222, 213.

143 See Martin Shapiro, 'The Giving Reasons Requirements', in: *University of Chicago Legal Forum*, (1992), 179-220, 180.

144 Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance', in: *Journal of Public Policy*, 17:2, (1997), 139-167, 160. See also Jerry Mashaw, 'Reasoned Administration: the European Union, the United States and the Project of Democratic Governance', in: *George Washington Law Review*, 99, (2007), 99-124, 115 and Onno Brouwer/Deirdre Curtin, 'Why? The Giving Reasons Requirement of EU Administration', in: *Views of European Law from the Mountain – Liber Amicorum Piet Jan Slot*, (Kluwer Law International, 2009), 133-142, 135-136.

145 See Cases T-218/02, *Napoli Buzzanca*, EU:T:2005:343, para. 57; *Biofrescos* (fn 141), para. 37; and F-73/13, *AX*, EU:F:2015:9, para. 188.

146 Joined Cases T-222/99, T-327/99 and T-329/99, *Martínez*, EU:T:2001:242, para. 48 and Cases T-70/05, *Evropaïki Dynamiki*, EU:T:2010:55, para. 64 and C-335/09 P, *Republic of Poland v Commission*, EU:C:2012:385, para. 48. See also Koen Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law', in: Miguel Poiares Maduro/Loïc Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Hart, 2010), 295-315, 303 ff.

protection and judicial review".[147] Judicial control fulfils an obvious objective function – that of controlling the administration's fidelity to the legislature –[148] but also one that is subjective in nature. Any legal order that makes a credible commitment to the rule of law also enshrines the right to an effective judicial protection, and accords it "a prominent place in the firmament of fundamental rights".[149] This has long been the case in EU constitutional law.[150]

5.2. Locating the mismatch

Given that composite procedures do not follow a dualistic model of administrative power, or indeed accord the EU administration a mere 'second-order' role, one would have expected EU courts to cease to follow the doctrine of EU executive federalism. Most likely due to its perceived constitutional status, the abandonment of executive federalism to the benefit of an alternative model was only gradual, and not always consistent. Nevertheless, if the legislation establishing composite procedures is read in the light of EU executive federalism, the rule of law requirements explained above are threatened by different aspects of that doctrine.

5.2.1. The nominally second-order administration and the 'inter-administrative' reading

The preconception of the Commission as a second-order administration has tended to harm the subjective functions of rule of law mechanisms. EU courts interpreted the legislation on composite procedures in a rigid and formalistic manner. On the basis of the assumption that it is generally supposed to relate only to national authorities, the case law has often exonerated the EU administration from the obligation to respect the procedural rights of individuals or to be legally accountable to them.

As was explained above, composite procedures tend to be established in order to ensure national and European interests. This seems to be the priority of the legislation,

---

147 Laurent Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', in: *European Constitutional Law Review*, 6:3, (2010), 359-396, 372.
148 Cfr. José Carlos Vieira de Andrade, *A Justiça Administrativa*, 12th ed., (Almedina, 2012), 127-22.
149 Opinion of AG Poiares Maduro in *Kadi* (fn 138), para. 52.
150 For a recent case in point, see Case C-362/14, *Schrems*, EU:C:2015:650, para. 95: "Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. *The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law*" (emphasis added). For just a few of the Court's seminal rulings, see Cases 222/84, *Johnston*, EU:C:1986:206, paras. 18-19 and 222/86, *Heylens*, EU:C:1987:442, para. 14.

which often focuses almost exclusively in linking national and EU authorities.[151] In most cases, the legislation only provides for contacts between individuals and national authorities, on the one hand, and between national and EU authorities, on the other. Provisions concerning the position of affected private parties are often wholly absent.[152] The regime of some composite procedures even provides for a requirement of consultation, not to the benefit of affected individuals, but of the Member States involved.[153] This is so even if the EU administration only *nominally* occupies a second-order role – where its decisions, though formally addressed to national authorities, significantly impact upon the legal position of individuals.

EU courts have tended to interpret the legislative emphasis on the EU administration's relations with national authorities as a sign that it is indeed intended to serve as a second-order administration. Rather than being read as single, unitary processes, composite procedures are interpreted as a conjunction of autonomous procedures – as no more than mechanisms of "close cooperation" that are internal to EU and national administrations.[154] The procedural stage at EU level is taken to be what sometimes is called an 'infrastructural' procedure,[155] a sort of 'backstage' procedure between administrations that paves the way for later national procedures where decisions will be taken in respect of individuals. Following the separation principle, EU courts have proceeded to read the legislation as being based on a strict separation of legal relations, between the EU administration and national authorities, on the one hand, and between national authorities and individuals, on the other.[156]

This kind of interpretation of the legislation will be referred to as the 'inter-administrative' reading of composite procedures. For all talk of direct links between the EU and the citizens heralded in *Van Gend en Loos*, a whole different story unfolded in EU

---

151 Similarly, Christina Eckes/Joana Mendes, (fn 60), 665.

152 Daria di Pretis, (fn 42), 67-68, criticizes the apparent 'disinterest' of EU lawmakers in national procedural stages and the lack of procedural guarantees that the legislation enshrines for those stages.

153 For an instance of this in a legislative instrument in force, see the regime of financial corrections in the management of structural funds, which require the Commission to offer a hearing to the recipient Member State but not to the end-beneficiary who relies on the funds to finance her project (Articles 144-147 of Regulation No 1303/2013 of the European Parliament and of the Council of 17 December 2013). Another good example of a right to be heard being provided solely for interested Member States was found in the procedures for the registration of protected designations of origin and geographic indications under the first Regulation (See Article 7 (1) of Council Regulation No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs).

154 See case C-326/05 P, *Industrias Químicas del Vallés*, EU:C:2007:443, para. 6. The Court has also referred to composite procedures as 'specific forms of cooperation' – see Case *OMPI I*, (fn 88), para. 124 (on composite procedures for the blacklisting of terrorist organisations).

155 Aldo Sandulli, 'Il Procedimento', in: Sabino Cassese, *Trattato di Diritto Amministrativo – Diritto Amministrativo Generale*, II, (Giuffrè, 2000), 927-1215, 987.

156 See Chapter 2, sections 5.1 and 5.3.

administrative law. Inter-administrative readings of composite procedures led EU courts to conclude that the EU administration must *only* interact with national bureaucracies, regardless of how deeply its decisions affect individuals. This virtually exempted the EU administration from being answerable to affected individuals, both in terms of respecting their procedural rights, and in terms of being judicially accountable to them. In some policy fields, this unfortunate formalistic approach still persists.

5.2.2. Preserving the strict independence… of interdependent powers

The assumption that national and EU administration enjoy clearly delimited spheres of power is also problematic. It is because of that assumption that the principles of separation and of double exclusivity of national and EU courts were developed, in order to preserve the separation of national and EU administrative powers, and to ensure that their exercise can only be reviewed by their own courts. Nevertheless, composite procedures defy the assumption of separate decision-making powers, given that they are based on decisional interdependence. This makes the principles of separation and double exclusivity unsuitable to handle composite decision-making.

The risk in this case concerns the objective function of the rule of law mechanisms mentioned above. As was explained in Chapter 2, one of the key uses of the principle of separation was to ensure that either level of administration was exclusively responsible for the fulfilment of its own legal obligations.[157]

If applied to composite procedures, this would make it difficult for the authorities involved to comply with the duty to give reasons. This aspect of the separation principle would mean that, even though the final decision results from the joint decision-making power of national and EU authorities, the reasons provided for it would be limited to those relied upon by the level that concludes the procedure.

A similar problem wold occur in the review of the legality of the composite procedure. If the EU administration cannot be held responsible for the illegal measures of national authorities, its final decisions cannot be reviewed based on the irregularity of the preceding national procedural stages. In other words, the separation principle would make it difficult to ensure the control of the legality of the entire composite procedure.

Lastly, the division of judicial competences between national and EU courts makes it difficult to determine at what level judicial review should take place. If one assumes that national and EU administrative powers are strictly separate, and if one gives them the

[157] See Chapter 2, section 5.1.

according judicial treatment, the solution will invariably be one of two. Judicial review will either focus only on the level that adopts the final decision, or be carried out both by national and EU courts in respect of their own jurisdiction. The first solution leaves unchecked the level that *does not* adopt the final decision, thereby frustrating the objective purpose of judicial control. The second solution represents a duplication of judicial proceedings to review the same administrative procedure, which is detrimental to the right to effective judicial protection.

6. Conclusion: the erosion of a constitutional doctrine

The present chapter located composite decision-making in the broader European administrative landscape, and highlighted its unique features. Composite procedures distinguish themselves from other forms of composite administration in that they constitute forms of joint – or *interdependent* – decision-making.

The chapter also sought to demonstrate that the legal principles and conception of administration followed by EU executive federalism fit poorly with composite decision-making. First, because they are based on decisional interdependence of national and EU administration, composite procedures "do not mirror a constitutional structure based on separated powers".[158] Second, in many composite procedures, and though interacting solely with national authorities, the EU administration adopts decisions that change the legal position of individuals, and is therefore a 'second-order administration' in appearance only.

This mismatch would make it difficult to observe several key requirements of the rule of law in EU administrative law – the right to be heard, the right to a reasoned decision, judicial protection, and the control of legality. Whether those requirements are actually harmed or not, depends on whether EU courts persist in handling composite decision-making through the framework of EU executive federalism, or if they instead recognize the mismatch and provide composite procedures an alternative legal status.

Parts II and III of the dissertation examine the response of EU courts to the mismatch. The case law on the right to be heard (Chapter 4), on the right to a reasoned decision (Chapter 5), on judicial protection (Chapter 6) and on the review of legality (Chapter 7) reveals that EU courts have developed specific principles to address the rule of law challenges of composite decision-making.

What the development of the case law on composite decision-making attests is a continual but largely unmapped erosion of the separation principle. While the ultimate

[158] Giacinto della Cananea, (fn 71), 199.

rationale of EU executive federalism was to preserve the sensitive balance of power between the Member States and the Union, the deeper justification of the CJEU's principles on composite procedures is to preserve and prioritize the rule of law in spite of their multijurisdictional structure.[159]

In doing so, the case law of EU courts is largely based on a simple test – the location of the level of administration where the final decisional outcome is determined. This will tend to be the level that concludes a composite procedure, though not necessarily so. As will be illustrated in detail in the following chapters, the test of the location of discretion is used by EU courts to determine which of the two levels is ultimately obliged to observe individuals' procedural rights, to ensure the overall legality of the procedure, and to answer in court.

As with EU executive federalism, the judge-made principles of composite decision-making are based on certain assumptions about Europe's administrative system. 'Working backwards' from the principles of composite decision-making, one concludes that the very conception of administration of EU courts has shifted. The shift did not permeate all forms of administrative activity within the scope of EU law, but only those that take place in composite procedures. The powers of national and EU authorities are no longer seen as strictly separate – but rightly recognized as shared power. What is more, the judge-made principles of composite decision-making not only treat composite procedures as unitary decision-making processes, but even treat national and EU authorities as if they formed a *single administration*. In turn, the EU's own administration is not treated as a 'second-order administration', but rather as an administration that establishes direct links to individuals and is bound to them by fundamental procedural rights. In respecting those rights, the EU administration may rely on the assistance of national bureaucracies.

However, the transition from EU executive federalism to the principles of composite decision-making was not frictionless. Simply abandoning the doctrine of EU executive federalism from one moment to the other would have been untenable. After all, the Court had declared it a constitutional doctrine flowing immediately from the Treaty.

Yet, as Chapter 2 sought to illustrate, the supposed constitutional rank of EU executive federalism must be understood in the political and constitutional context in which the doctrine emerged – a context where many officials and judges shared a federal conception of the EU and its administrative system. In turn, the very fact that EU

[159] For the notion of 'deep justification', see Chapter 1, section 3.

executive federalism became entrenched in the case law provided the context for the difficult emergence of the law of composite procedures.

The following chapter will consider one of the domains where the conflicted transition from a dualistic to a unitary conception of administration is particularly visible. In its early rulings on the right to be heard in composite procedures, the Court of Justice followed EU executive federalism with might even be deemed excessive zeal. It held that the Commission was only bound by legal relationships to national authorities, and was therefore not obliged to give a hearing to individuals, irrespective of whether they were affected by its decisions.

Eventually, this purely inter-administrative reading of composite procedures was replaced by another approach, expressed in what will be termed the principle of unitary protection. That principle values the exercise of procedural rights more than any jurisdictional divide. If need be, by requiring the states' bureaucracies to act as an extension of the EU's own administration.

PART II

TOWARDS A PRINCIPLE OF UNITARY PROCEDURAL PROTECTION

CHAPTER 4

THE PRINCIPLE OF UNITARY PROTECTION AND THE RIGHT TO BE HEARD IN COMPOSITE PROCEDURES

1. Hearing through the national screen

It is commonplace to say that the EU is a Union of states and citizens. The idea has its origins in the Court's historical ruling in *Van Gend en Loos*,[1] which declared the subjects of the EU legal order to be not just the Member States, but also their nationals.[2] Accordingly, the ruling reflected what Pescatore called the *immediacy* of supranational power: the EU institution's ability to "pierce the screen of states", and to "address themselves directly" to individuals.[3]

These well-known tenets of EU constitutional law are at odds with the traditional view of EU authorities as a 'second-order' administration, relating to national bureaucracies rather than citizens. There is arguably no area of EU administrative law where this tension was more visible than in the case law analysed in this Chapter. The Chapter considers the right to be heard in composite decision-making.

As many have pointed out, composite procedures raise significant problems concerning the exercise of this right.[4] The division of decisional tasks between national and EU authorities makes it difficult to determine clearly which level, if any, is obliged to respect the procedural rights of the parties affected by the procedures' final outcomes. Unsurprisingly, EU courts have struggled to resolve this problem. The judgments they have produced in this regard have sparked much criticism. The literature often decries the case law as inconsistent or as affording an insufficient level of procedural protection.[5]

---

[1] Case 26/62, *Van Gend en Loos*, EU:C:1963:1.

[2] See also Case 28-67, *Molkerei-Zentrale*, EU:C:1968:3; Joined Cases C-6/90 and C-9/90, *Francovich*, EU:C:1991:428, para. 31; and Case T-24/07, *ThyssenKrupp Stainless*, EU:T:2009:236, para. 63.

[3] Pierre Pescatore, *The Law of Integration*: *emergence of a new phenomenon in international relations, based on the experience of the European Communities*, (Sijthoff, 1974), 53-54. Cfr. Joseph Weiler, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, NYU Jean Monnet Working Paper No. 10/2014, 8.

[4] For many, see Herwig Hofmann/Morgane Tidghi, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks', in: *European Public Law*, 20:1 (2014), 147–164, 151; Christina Eckes/Joana Mendes, 'The right to be heard in composite administrative procedures: lost in between protection?', in: *European Law Review*, 36:5, (2011) 651-670; Hanns Peter Nehl, 'Legal Protection in the Field of EU Funds', in: *European State Aid Law Quarterly*, (2011), 629-652, 633 ff, Sabino Cassese, 'European Administrative Proceedings', in: *Law & Contemporary Problems*, 68 (2004-2005), 21-36, 31 ff; Giacinto della Cananea, 'The European Union's Mixed Administrative Proceedings', in: *Law and Contemporary Problems*, 68, (2004-2005), 197-217, 211 ff, and Gernot Sydow, *Verwaltungskooperation in der Europäischen Union: Zur horizontalen und vertikalen Zusammenarbeit der europäischen Verwaltungen am Beispiel des Produktzulassungsrechts*, (Mohr Siebeck, 2004), 265-266.

[5] See for instance Gernot Sydow, (fn 4), 275.

Yet, as the Chapter will aim to demonstrate, the conflicted case law reflects the hesitation of EU courts to entirely abandon the conceptual framework of EU executive federalism. The case law on the right to be heard reveals a fundamental transition, which has yet to be mapped. The transition captures how, in the province of composite procedures, EU courts abandoned the constitutional doctrine of EU executive federalism, and began to replace it with alternative model of administrative law.

Section 2 begins by providing a roadmap to the transition at stake. An interpretation of composite procedures that is informed by EU executive federalism regards them as mere arrangements of internal cooperation between national and EU authorities. This 'inter-administrative' reading relies on a view of strict separation of the legal relations: between the EU 'second-order' administration and national authorities, on the one hand, and between national authorities and individuals, on the other. Such a reading elicits the denial of a right to be heard at EU level, which would supposedly not need to relate to, or observe the procedural rights of individuals. This is of course a formalistic interpretation of composite procedures, which does not adequately take their unique features into account.

Section 3 maps a period of the case law, which followed the 'inter-administrative' reading to its ultimate consequences. Though deferential to EU executive federalism and the logic of strict division of power, the Court's approach denied any responsibility of the Commission for the procedural protection of the parties affected by its decisions.

Section 4 sets out how, since the early 1990s, the case law shifted entirely in its approach. It now recognizes that, though formally intended to only interact with national bureaucracies, the EU administration establishes direct legal relations with the individuals affected by its decisions. It must hear those individuals, as it were, through the veil of the national authorities that stand between them. EU courts developed a new, but implicit principle that specifically aims to guarantee the rights of the defence in composite procedures. It will be referred to as the *principle of unitary protection*. Its rationale is that the division of administrative tasks between national and EU authorities should not harm the procedural protection of individuals.

In order to ensure that objective, the case law has produced a series of implicit rules that aim to coordinate national and EU authorities in fulfilling the right to be heard. These rules have at times been mistaken for contradictions on whether it is the national or EU level that has the duty to provide a hearing. What they do, instead, is to allow the EU administration to fulfil its obligation to provide a hearing by relying on the assistance of national authorities.

The three rules will be referred to as the rules of primary contact, confirmation, and delegability. The first concerns the duty to provide a hearing in national procedural stages, which

national authorities must do whenever they enjoy a power of appraisal. The latter two concern *how* the EU administration may observe the right to be heard. Instead of providing a hearing directly, the EU administration may simply confirm a hearing already given by national authorities, or request that they conduct a hearing on its behalf.

It would be mistaken to believe that the case law on the right to be heard in composite procedures is a story of an unbroken chain of progress in procedural protection.[6] One remarkable inconsistency in the handling of the right to be heard stands out in the case law on state aid. This last stronghold of the anachronic inter-administrative approach will be studied in section 5.

Section 6 summarizes the findings of the chapter, and establishes that the unitary protection principle relies on a conception of administration that is very different to that upon which EU executive federalism is based. Rather than being conceived of as hermetically separate spheres of power, national and EU authorities are treated as a single, integrated administration. In that integrated administration, EU authorities are no longer assumed to be confined to inter-administrative relations, but to have direct links to citizens. And perhaps most polemically, national authorities are treated as an extension of EU administration – as the EU's *ancillary administration*.

2. The rocky road to unitary procedural protection

The right to be heard, right to a fair hearing, or duty of *audi alteram partem*, has long been considered as a 'fundamental' principle, or right, resulting from the constitutional traditions common to the Member States.[7] Though many formulations have been used over time to refer to what thiis actually entails,[8] the right to be heard involves in essence the right of adversely affected parties to express their views on the likely decisional outcome of an administrative procedure

[6] Indeed, one can hardly take for granted "that there is such a thing as continuous extension of legal safeguards" in the evolution of administrative law. See Giacinto della Cananea, *Due Process of Law beyond the State: Requirements of Administrative Procedure*, (Oxford, 2016), 81.

[7] See Cases 17-74, *Transocean Marine Paint*, EU:C:1974:91, para. 15; 136/79, *National Panasonic*, EU:C:1980:169, para. 21; 85/87, *Dow Benelux*, EU:C:1989:379, para. 25; C-204–5/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland*, EU:C:2004:6, para. 64; and T-410/06, *Foshan City Nanhai Golden Step Industrial*, EU:T:2010:70, para. 109. According to some members of the Court, references to the 'fundamental' importance of the rights of the defence are to be read as a recognition that they enjoy "the rank of constitutional law in the [EU] legal order" (see Koen Lenaerts/Jan Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process', in: *Common Market Law Review*, 34, (1997), 531-569, 568). In general, on the Court's case law on procedural rights, see Deirdre Curtin, 'Constitutionalism in the European Community. The Right to Fair Procedures in Administrative Law', in: *Human Rights and Constitutional Law. Essays in Honour of Brian Walsh*, (Round Hall Press, 1992), 293-317; Jürgen Schwarze, *European Administrative Law*, (Sweet & Maxwell, 2006), 1320 ff and Herwig Hofmann/Gerard Rowe/Alexander Türk, *Administrative Law and Policy of the European Union*, (Oxford, 2011), 380 ff.

[8] See the contribution of Itai Rabinovici, 'The Right to Be Heard in the Charter of Fundamental Rights of the European Union', in: *European Public Law*, 18:1, (2012), 149-173.

before its conclusion.[9] Initially developed mostly in connection to competition law and staff cases,[10] the right was eventually declared by European courts as a general principle of EU law.[11] It has however only been part of primary law since the Charter, which today enshrines in Article 41 "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken".[12]

This general principle has often been applied to fill gaps of procedural protection in administrative procedures unfolding at EU level. According to settled EU case law, the respect for the rights of the defence, such as the right to be heard, constitutes an unwritten principle of EU law "which must be respected *in all circumstances*";[13] and *even in the absence of any legal provisions providing for those rights*.[14] The disregard for that those rights constitutes an infringement of essential procedural requirements, which the CJEU may scrutinize on its own motion. [15]

In this light, one would expect that the EU administration would be required to hear individuals affected by its decisions, even if the relevant composite procedure does not provide for contacts between the two. The case law reveals, however, that this was not easy for EU courts to accept initially.

2.1. A doctrinal transition

The root of the problem is, more often than not, that the legislation focuses almost exclusively on linking national and EU authorities.[16] The provisions framing many composite procedures completely omit any reference to the rights of the defence of individuals.[17] The

[9] For many, See Case T-260/11, *Kingdom of Spain v Commission*, EU:T:2014:555, paras. 62-63.
[10] See for instance Richard Lauwaars, 'Rights of Defence in Competition Cases', in: *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, II, (Nijhoff, 1994), 497-509.
[11] See Jürgen Schwarze, 'The Procedural Guarantees in the Recent Case-law of the European Court of Justice', in: *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, II, (Nijhoff, 1994), 487-496. The earliest European judicial decisions on the right to be heard related to staff cases. In Case 32/62, *Alvis*, EU:C:1963:15, at 55, the court recognized that the right of civil servants to be heard in disciplinary proceedings constitutes "a generally accepted principle of administrative law in force in the Member States".
[12] For an overview of the fundamental administrative procedural rights enshrined in Article 41 of the Charter, see Klara Kańska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', in: *European Law Journal*, 10:3, (2004), 296-326.
[13] See Cases 322/81, *NV Nederlandsche Banden Industrie Michelin*, EU:C:1983:313, para. 7 and T-30/91 *Solvay*, EU:T:1995:115, para. 59.
[14] See Cases 85/76, *Hoffmann-La Roche*, EU:C:1979:36, para. 9; 40/85, *Kingdom of Belgium v Commission*, EU:C:1986:305, para. 28; 259/85, *French Republic v Commission*, EU:C:1987:478, para. 12; and C-301/87, *French Republic v Commission*, EU:C:1990:67, para. 29.
[15] See, for instance, Cases C-291/89, *Interhotel*, EU:C:1991:189, para. 14; C-367/95 P, *Sytraval*, EU:C:1998:154, para. 67; C-286/95 P, *Imperial Chemical Industries*, EU:C:2000:188, para. 51; and T-240/10, *Hungary* v *Commission*, EU:T:2013:645, para. 70.
[16] Similarly, Christina Eckes/Joana Mendes, (fn 4), 665.
[17] Composite procedures which *do not* provide for the participation of affected private parties are legion. Just as a few examples from the internal market alone, one could list the EU's administrative procedures for the authorisation of food additives, food enzymes and food flavourings (Regulation 1331/2008), the authorisation procedure for permissible detergents in the internal market (Regulation 648/2006), the authorisation procedure for GMO food and

emphasis on inter-administrative relations, and the silence concerning legal relations between individuals and EU authorities, could be taken to mean that the legislator *did not intend* the EU administration to relate to individuals. In this interpretation, there would be no legal gap in the legislation. Rather, the silence would express a conscious political choice to confine the EU administration to legal relations with national bureaucracies, thereby also exempting it from any legal relation – or procedural rights obligation – to individuals.

This 'inter-administrative' reading, formalistic as it is, is the reading favoured by EU executive federalism. It was also the reading that the case law followed until roughly 1993. The Court's line of argument depicted the denial of the right to be heard at EU level as if it resulted from a literal interpretation of the legislation. However, it is no coincidence that the Court followed the 'inter-administrative' reading in a period that overlapped with the *Deutsche Milchkontor* jurisprudence – the jurisprudence that crystallised EU executive federalism as a constitutional doctrine.

As was highlighted in Chapter 2, EU executive federalism is based on a series of background assumptions concerning Europe's administrative order. First, it assumes that the power of national and EU authorities is strictly divided. As was explained before, it is based on this assumption that EU executive federalism entails the separation principle, which aims to preserve that divide. The principle has been used to make each level of administration exclusively responsible for the fulfilment of its own obligations, and to ensure neither administration would be entitled to intrude into its counterpart's relations with its own subjects. In later cases, and invoking the *Deutsche Milchkontor* formula, the Commission expressed this notion as a "principle of the separation of legal relations" between, on the one hand, the Commission and the Member States and, on the other, the Member States and individuals.[18]

---

feed (Regulation 1829/2003). There are also no provisions on procedural rights in the procedure for the granting of exclusive access to gas storage facilities to operators in the gas market (see Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas), or in the granting of authorisations to set up aquaculture facilities with potential cross-border environmental effects (see Regulation 708/2007 concerning use of alien and locally absent species in aquaculture).
Yet, to be fair, there are some which not only provide for procedural rights, but have even proven to be "remarkably applicant-friendly" "beyond any practicability" (Faroud Shirvani, 'Verfahrensgrundrechte in mehrstufigen, das EU-Recht vollziehenden Verwaltungsverfahren – Dargestellt am Beispiel des Arzneimittelzulassungs- und Gentechnikrechts –', in: *Deutsches Verwaltungsblatt*, (2011), 674-681, 678 and 681). Potential examples of such alleged procedural bias can be found in the field of GMOs. In the general authorisation framework, in Directive 2001/18 (as amended), applicants are given multiple opportunities to state their views (see Articles 13 (1), 14 (4) and 18 (1)). Similarly, in the decentralised procedure for the authorisation of pharmaceuticals in the internal market, applicants enjoy quite generous procedural protection of their interests. Not only will they have the right to be heard as many as three times, as they hold a 'qualified procedural right' to demand the authorisation to market the medication in Member-States that did not object in the multilateral stage. That is, even before the EMA had the opportunity to assess the safety of the pharmaceutical and the Commission has adopted a final decision. See Article 29 (6) of Directive 2001/83.

[18] See Cases T-341/02, *Regione Siciliana I*, EU:T:2004:228, para 38 and T-60/03, *Regione Siciliana II*, EU:T:2005:360, para. 33.

The separation of legal relations goes hand in hand with one other key assumption of EU executive federalism. That assumption is that, except where explicitly provided otherwise, the EU's own administration is supposed only to decide in respect of – and to be bound by legal relations to – national authorities. In other words, it is assumed to be a 'second-order' administration, bound by links of 'internal cooperation' with its national counterparts.[19]

Both assumptions underpin the 'inter-administrative' reading of composite procedures. In early cases on the right to be heard, the Court treated national and EU stages of composite procedures as if they were two separate procedures, governing the exercise of two strictly separate powers at national and EU level. In addition, the Court considered that the EU administration only needed to deal with national authorities. It therefore applied the logic of the separation principle. As the Commission desired,[20] the Court preserved composite procedures as dualistic and inter-administrative schemes. In following its constitutional doctrine of executive federalism, the Court found that refusing the right to be heard represented a necessary sacrifice.

The decisive question for the protection of the right to be heard before the EU administration is whether EU courts follow this superficial interpretation of composite procedures or, instead, detect the mismatch between composite decision-making and executive federalism.

The approach followed by the Court in this first period was flawed on numerous accounts. It ignored that composite decision-making is not based on strictly divided power, but on its joint exercise by national and EU authorities. The Court's approach also ignored that, in many composite procedures, the EU administration is only nominally a second-order administration. It will often enjoy the power to determine the procedure's final decisional outcome, and affect the legal position of individuals despite being only formally obliged to interact with national bureaucracies.[21] Since the right to be heard requires that an opportunity to be heard is given where it may most effectively influence the final decision,[22] it would also require hearings at the EU level, where decisions tend to be adopted in substance.[23]

---

[19] See Case 217/81, *Interagra*, EU:C:1982:222, para. 8.

[20] The Commission itself pled on occasion that the lack of procedural guarantees reflected the choice to maintain composite procedures as a matter between administrations. See Case T-260/94, *Air Inter*, EU:T:1997:89, para. 58.

[21] See Article 36 (9) of Directive 73/2009 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

[22] As Barbier de la Serre points out, the right to be heard under EU law means a right to be heard *effectively* (Eric Barbier de la Serre, 'Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends', in: *European Public Law*, 12:2, (2006), 225-250, 233). See Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line*, EU:T:2003:245, para. 138. Also stressing that "due process requires (…) that the person or undertaking concerned be given the occasion to influence the decision-making process", Deirdre Curtin (fn 7), 301.

[23] Cfr. Herwig Hofmann/Morgane Tidghi, (fn 4), 151.

Eventually, the inter-administrative reading was abandoned. The case law reveals a transition from that reading to a new approach. The guiding rationale of that approach is that the division of decision-making power between EU and national authorities should not impair the exercise of rights of the defence. The case law now holds the EU administration to be obliged to observe those rights, but also requires the two levels of administration to coordinate in order to ensure their exercise. For this reason, the second approach of EU courts will be referred to as the principle of unitary protection.

This development is clearest in the domain of the right to be heard, but also extended to the right to a reasoned decision, as the next Chapter will show. Based on an implicit idea of unitary protection, EU courts crafted a series of rules that specifically aim to guarantee the rights of the defence in composite decision-making.

As with the doctrine of EU executive federalism, those rules are based on certain background assumptions on the nature of the relations between EU and national authorities. However, EU executive federalism is based on a dualistic conception of European administration. By contrast, as will be show below, the rules drawn from the notion of unitary protection reflect a conception of a unitary, single administration. The rules treat national authorities as if they were seconded to the EU administration, in order to assist it in the observance of procedural rights. In composite decision-making, bureaucracies are conceived of as the EU's *ancillary administration*.

2.2. An almost universal transition

This transition of both doctrine and conception was visible in the case law in fields as different as structural funds and counter-terrorism. With the important exception of the case law on the procedure for state aid review, the shift was almost universal across composite procedures, and across policy fields. However, particular emphasis will be accorded to the composite procedures for the repayment and remission ('forgiveness') of customs duties. The fact that these procedures were subject to the two historical approaches in the case law, even though their legislative framework remained practically intact, makes them the best illustration of the transition examined in this chapter.

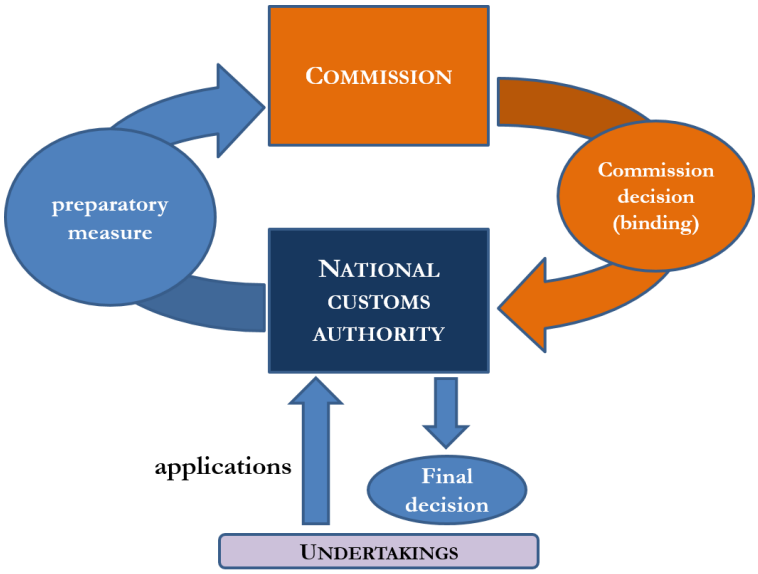


Figure 1: Structure of the composite procedures for customs debt relief

The procedures relate to the adoption of administrative measures granting customs duty relief to persons importing goods into, or exporting from, the internal market. One relates to the duty-free importation into the internal market of scientific instruments or apparatuses,[24] and the other two relate to the remission and repayment of customs duties.[25] If customs debtors have not yet paid the missing amount, they may request from national customs authorities that they adopt a decision to *remit* all or part of a customs debt. If that debt has already been paid, debtors may submit an application for *repayment*, so they are totally or partially reimbursed.

The procedures begin and end at national level, with an intermediate supranational stage in between.[26] National customs authorities are obliged to refer the case files on applications to the Commission so that the conditions for customs debt relief are interpreted in a homogenous

[24] This composite procedure, no longer in force, was found in Article 9 of Commission Regulation (EEC) 2784/79 of 12 December 1979. That Commission Regulation implemented Regulation (EEC) 1798/75 of 10 July 1975, on the importation free of Common Customs Tariff duties of educational, scientific and cultural materials. The procedure sought to strike a balance between the promotion of scientific research – by reducing customs costs of such instruments – and the protection of manufacturers situated in the EU. The intervention of the Commission in the procedure was based on the understanding that it was best placed to check whether no instrument of equivalent scientific value was produced in the common market, which was the condition for its duty-free importation to be possible.

[25] On these procedures, see Timothy Lyons, *EC Customs Law*, 2nd ed., (Oxford, 2008), 473 ff and Maurizio Gambardella/Davide Rovetta/Simon van Cutsem, *Remission and Repayment of customs duties in the EU*, (Wolters Kluwer, 2014).

[26] The insertion of the EU stage into the procedure is designed to ensure that that the conditions for repayment and remission, which involve indeterminate concepts such as 'good faith', 'negligence', 'special situation', are interpreted and applied homogenously throughout the Union (cfr. Kathrin Limbach, *Uniformity of Customs Administration in the European Union*, (Hart, 2015), 211-212). Such homogenous interpretation is instrumental to avoid discrimination between traders in different countries. In the case law, see Case C-419/04, *Conseil Général de la Vienne*, EU:C:2006:419, para. 42.

manner throughout the Union.[27] The same authority that initially examined the application is legally obliged to conclude the procedure by implementing the Commission's decision on the case.

3. An excess of doctrinal zeal: the inter-administrative approach

From 1983 to 1993, the Court ruled on a series on six cases relating to the composite procedures for customs debt relief.[28] In all six cases, the applicants claimed that the Commission's decisions had been adopted in breach of their right to be heard. They had been afforded no opportunity to express their views during the EU stage of the procedures.

Time and again, the Court addressed these pleadings by giving reason to the position supported by the Commission,[29] as well as by several Advocates General.[30] The argument, simple and terse, was that the legal framework of the procedures at stake did not establish a right to be heard before the Commission.[31]

Few have attempted to map this period of the case law.[32] The Court's rejection of rights of the defence contradicted other rulings it had delivered at around the same time. In *Al-Jubail*, it required EU institutions to be "all the more scrupulous" in observing those rights, given the relative underdevelopment of procedural guarantees in EU law comparatively to national laws.[33]

---

[27] In the first procedure, the customs authority must refer the case to the Commission when it is unable to make itself an assessment of 'equivalent scientific value'.
In the second procedure, the EU stage is triggered when the national authority is inclined to consider, or is in doubt as to whether to consider that the conditions for customs debt relief are met – that the amount legally due failed to be entered into the accounts as a result of an error of the customs authority which could not reasonably have been detected by the person liable for payment, and the latter had been in good faith when paying less than legally owed. Not to "enter into the accounts", in EU customs legislation, means that customs authorities will not include the remaining, legally due amounts in the official act which determines the total amount of duty to be collected.
In the third procedure, the national customs authority is bound to refer the case to the Commission when it considers that the application for repayment or remission is sufficiently supported by evidence of a 'special situation' not caused by any 'deception or obvious negligence' of the applicant.
The concrete phrasing of the conditions under which the EU stage of the second and third procedures is initiated have changed little over time. Currently, the applicable regime is found in Articles 116, 119, and 120 of the Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code) and 98-201 of the UCC delegated act (Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015).

[28] Cases 294/81, *Control Data*, EU:C:1983:84; 98/83 and 230/83, *Van Gend en Loos & Bosman*, EU:C:1984:342; 185/83, *Universiteit Groningen*, EU:C:1984:331; 203/85, *Nicolet I*, EU:C:1986:269; 43/87 *Nicolet II* EU:C:1988:130; C-121/91 and C-122/91, *CT Control & JCT Benelux*, EU:C:1993:285.

[29] For instance, *Van Gend en Loos & Bosman* (fn 28), 3773.

[30] See the Opinions of AGs Verloren van Themaat in *Universiteit Groningen* (fn 28), Mischo in *Nicolet I* (fn 28), and Mancini in *Nicolet II* (fn 28).

[31] *Universiteit Groningen* (fn 28), paras. 16 ff.

[32] One exception is found in Nehl's LLM thesis. Nehl briefly discusses this strand of case law, opining that the Court "stubbornly" refused to allow the participation of affected undertakings in the EU procedural stage (Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law*, (Hart, 1999), 78).

[33] Case C-49/88, *Al-Jubail Fertilizer Company*, EU:C:1991:276, para. 16. Indeed, as some members of the Court from this period pointed out, the lack of references to procedural rights in the Treaties historically made the Commission

And yet, the Court did not detect a gap of procedural protection that required the right to be heard to be observed at EU level.

It is important to note that Court never even questioned that the applicants were *directly concerned* by the Commission's decisions – that is, that the Commission's powers in the customs procedures *decided* the applicants' cases without leaving a margin of discretion to national authorities. The Court was fully aware that, even though only national authorities decide vis-à-vis applicants in the composite procedures for customs debt relief, it is the Commission, in effect, that decides on the substance of the applicants' cases. As some parties stressed,[34] the fact that they were directly concerned by the Commission's decisions should have entitled them to an opportunity to be heard, in accordance to the Court's own case law on procedural rights.

Other parties specifically alluded to the Court's judgments in competition and antidumping procedures. These were proceedings where the Court had been generous in recognizing gaps of procedural protection before EU authorities, and in filling them by deploying the general principle of the right to be heard. Applicants explicitly drew comparisons to the procedures aimed at the fining of undertakings in competition law enforcement, and claimed, though fruitlessly, that they should be granted like procedural protection.[35] In *CT Control & JCT Benelux*, the sharp contrast to the liberal recognition of procedural rights in competition and antidumping cases led the applicants to beseech the Court to revise its previous case law on customs duty relief.[36] The comparison between these procedures and the composite procedures in customs was dismissed via two fundamental arguments.

The Court's answer began by defending the need to differentiate between the degrees of procedural protection that are appropriate for different procedures. In the customs procedures in question, the final measure is simply the rejection of an application for remission, repayment or duty-free admission. By contrast, in the procedures aimed at fining abuse of dominant position or situations of dumping, the final measure is the imposition of a sanction. Consequently, the Court held that in procedures of the latter kind, aimed at "punishing" economic agents, the need to ensure the right to be heard "assumes special importance".[37]

---

reluctant to fully observe them. See Ole Due, 'Le respect des droits de la défense dans le droit administratif communautaire', in: *Cahiers de Droit Européen*, (1987), 383-396, 384.

[34] See for instance *Nicolet I* (fn 28), para. 13.

[35] See *Control Data* (fn 28). AG Slynn dismissed the argument by saying that it would be wrong to argue that "because a better procedure is adopted for other types of case, the procedure contemplated by these regulations is defective in such a way that the Court can interfere" (see the Opinion in the Case, at 938-939). Nevertheless, Slynn admitted not to be satisfied with the standards of protection afforded in the administrative procedure at stake.

[36] AG Verloren van Themaat also proposed a revision of the Court's position on rights of the defence in customs relief cases, but to no avail. See his Opinion in *Universiteit Groningen*.

[37] Case *CT Control & JCT Benelux* (fn 28), paras. 51-52. The same observation had been made in the Case by AG Gulman (see his Opinion at paras. 14-15).

However, as one will easily conclude, it does not follow from the 'special importance' of procedural protection in procedures concluded with sanctions that such protection is not required in other kinds of procedures. The right to be heard applies to any procedures leading to measures that adversely affect individuals – which certainly need not be penalties.[38] The Court was surely aware of this, so the fact that the measures at stake were not sanctions was not even the decisive counterargument.

The second and *decisive* argument for the rejection of the applicants' claims is illuminating for the preceding judgments. What mattered in antidumping and competition cases was that the final measures of those procedures *immediately envisage* and are addressed to a private party. By contrast, in the composite procedures in customs law, the Commission's decision is requested by, and addressed to, national authorities. Only national authorities participate in the procedural stage at EU level. The Court denied the right to a fair hearing at EU level *because it did not consider the Commission to be bound by any legal relationship to the applicants.*

This idea is expressed in the case law in a number of ways. The Court systematically describes the stages of the procedures at stake in a light that stresses that the Commission, in accordance to the procedures' provisions, is only supposed to interact with national administrations.[39] Repeatedly, the Court emphasises that it is national authorities that initiate the EU stage by requesting the Commission for a decision[40]. Lastly, the claims that the Commission is bound to provide hearings to private parties are dismissed because the decision adopted in the intermediate EU stage "is addressed only to the Member States [and] notified only to the Member States". "Conversely", the Court continues, the decision "is not notified to the applicant".[41] The only contacts that the applicant has are with national authorities, which receive and make a preliminary assessment of her application, and notify her of the final decision.[42]

In essence, this line of argument denied a right to be heard by the Commission on the grounds that it was intended only to interact with national administrations; and that only national administrations established legal relations with individuals. Following the conceptual scheme of EU executive federalism, the Court made a purely 'inter-administrative' reading of the procedure's provisions.

---

[38] See the Opinion of AG La Pergola in Case C-32/95 P, *Lisrestal*, EU:C:1996:226, at para. 32. For more recent case law, see Joined Cases T-91/12 and T-280/12, *Flying Holding*, EU:T:2014:832, para. 64.
[39] *Van Gend & Bosman* (fn 28), para. 8.
[40] See Cases *Nicolet I*, (fn 28), paras. 11-17 and *Nicolet II* (fn 28), para. 13. See also the Opinion of AG Mancini in *Nicolet II*, (fn 28), para. 3.
[41] *Universiteit Groningen* (fn 28), paras. 21-22. See also the Opinion of AG Mischo in *Nicolet I* (fn 28), 2052 ff.
[42] *Van Gend & Bosman* (fn 28), paras. 8-9.

In spite of its own description of the procedure as a single procedure 'comprising several stages' at national and EU level,[43] the Court treated the links between national and EU authorities as a concatenation of two distinct procedures, aimed at the exercise of distinct national and EU powers. In one procedure, national authorities adopted decisions in respect of private parties; and in the other, the EU administration decided in respect of national authorities. Following the logic of the separation of legal relations, the Court therefore held that there was a duplication of legal relations between the Commission and national administration, on the one hand, and national administration and the applicants, on the other.

The Court also adopted a reading of the role of the Commission, as that of a 'second-order' administration. In the absence of provisions stating otherwise, the Commission was held not to be supposed to be in any legal relationship with individuals. It is telling that the Court did not contradict the description of the procedure made by the Commission as 'internal' to national and EU authorities.[44] The account resonated with the Court's old understanding of cooperation between the two being an internal affair between bureaucracies.[45]

In short, given that it was neither obliged, nor intended, to relate to individuals, the Commission was held by the Court not to have any duty to observe their right to be heard. However, the Court was not entirely insensitive to the applicants' position. It sought to justify why it was that the applicants' fundamental right to be heard was respected, even though they could not present their views to the Commission, the authority that in effect determined the procedure's outcome.

That justification, which apparently never caught the attention of the literature, is surprising, to say the least. Yet it also suggests that the Court struggled to find an adequate form of procedural protection while still being scrupulous in observing the procedural rules under the logic of executive federalism. The Court held that the right to be head was satisfied in the composite procedure's legislation because it allowed individuals to put forward their views in their *initial applications* to national authorities.[46]

The only form of procedural protection that the Court admitted to be granted by EU law was an unconvincing *right to submit an application* to national authorities.[47] The reason for this was

[43] *Van Gend & Bosman* (fn 28), para. 8.
[44] *Control Data* (fn 28).
[45] See Case 133/79, *Sucrimex*, EU:C:1980:104.
[46] This was a position also supported by several Advocates General. See the Opinions of AG Verloren van Themaat in *Universiteit Groningen* (fn 28); AG Mancini in *Van Gend en Loos & Bosman* (fn 28); and AG Slynn in *Control Data* (fn 28).
[47] See Cases *Control Data* (fn 28), para. 17; *Van Gend en Loos & Bosman* (fn 28), para. 9, *Universiteit Groningen* (fn 28), paras. 18-22; and CT *Control & JCT Benelux* (fn 28), paras. 48-49.

that applications were the only form of individual participation provided by the relevant legislation. This is problematic on two accounts.

First, an initial application is hardly a meaningful form of procedural protection. By admitting that the exercise of the right to be heard can be replaced by a mere initial application, the Court seemed to betray its own historical jurisprudence of procedural rights. As the Court had to know, the right to be heard is a *right of the defence*. Its purpose is to provide affected parties with an opportunity to give their version of the facts based on which the administration will enact the procedure's final decision. That purpose can evidently not be fulfilled with the simple filing of an application. The moment of the procedure in which applications are submitted precedes the stages in which the administration even begins to evaluate the facts and to form its will. It is a moment in the life of an administrative procedure in which there is *nothing* from which individuals yet need to defend themselves.

Second, there is one particularly perverse implication in the Court's notion that the submission of an initial application is sufficient for the right to be heard to be respected. Some procedures, by definition, begin with an application: for instance, those aimed at the issuing of a permit or indeed an exemption from a customs duty. The logical implication of equating applications with the exercise of the right to be heard is that, as long as national authorities simply receive the applications in a composite procedure, they are *not obliged to provide hearings*. This added insult to the injury of rejecting the right to be heard at EU level. The Court signalled, in a nutshell, that either level of administration was exempted from providing hearings, whenever a composite procedure begins with the submission of an application to a national authority.

The logic of this first period may be seen as a tribute to the constitutional doctrine of executive federalism. The Court read composite procedures in the light of executive federalism's conception of European administration. It maintained the view that EU authorities form a second-order administration – one which, in the absence of rules explicitly prescribing otherwise, relates to national authorities and not to individuals. In addition, the Court continued to conceptualise the relations between national and EU administrations as it generally did under executive federalism. Rather than recognizing that composite procedures constitute a decisional continuum from the national to the EU level, the Court conceptualised them as a concatenation of two separate procedures, aimed at the exercise of entirely separate national and EU administrative powers.

Based on this reading, the Court ignored the unique features of composite procedures. It sought to preserve the separation between EU and national power by applying the separation principle. It maintained relations with individuals, and the responsibility for observing their

procedural rights, as a matter for the prerogatives of the Member States. Moreover, the Court of Justice preserved the privileged position of national authorities as the exclusive interlocutors of the EU administration. Indeed, by denying the right of individuals to be heard at EU level, it effectively barred anyone but national administrations from influencing the Commission's decisions.

The case law examined in this section illustrates what deeply dysfunctional consequences can arise if the doctrine of executive federalism is applied to composite procedures. Had the procedures at stake in the cases been strictly national, then national administrative laws would have likely ensured that private parties had the right to be heard by the national authorities receiving their applications. Had the procedure been strictly a matter of EU administration, then the case law of the Court on rights of the defence would have certainly been followed. The Court's inter-administrative reading led to private parties being offered *no opportunity* to be heard at all, simply because composite decision-making is shared between the two levels. The judicial findings of this period were nothing short of an excess of doctrinal zeal in favour of EU executive federalism.

4. A doctrinal U-turn: the unitary protection principle

The Court's doctrinal U-turn began in 1991 with the *Technische Universität München* ruling.[48] The case concerned the composite procedure for the duty-free admission of scientific instruments into the internal market. The Technical University of Munich, which had imported a particular type of microscope, applied for a customs duty exemption.

The Commission rejected the application without giving the university the opportunity to be heard. In the case, it relied on the case law from the period explored in section 3 to argue that if individuals are to look for opportunities to have their views heard, they should do so before the relevant Member State's authorities.[49] The Commission argued that the procedure was intended "to be one between the Commission and the Member States only", and one whose "applicable rules [were] not designed to establish a procedure in which arguments are exchanged" with affected parties[50]. In its reply, the Court acknowledged that the procedure's provisions did not provide for opportunities for the importing institutions to submit their views at the EU level.[51]

[48] Case C-269/90, *Technische Universität München*, EU:C:1991:438.
[49] *Technische Universität München*, Report for Hearing, I – 5479.
[50] *Idem*, *ibidem*.
[51] *Technische Universität München* (fn 48), para. 23.

However, and unlike what had occurred in the previous decade, the Court declared the Commission decision to be vitiated by the breach of the University's right to be heard.[52]

Since *Technische Universität München* (*TUM*), EU courts have progressively developed a body of case law which follows the opposite logic to that explored in section 3. Rather than preferring the strict separation of EU and national power to the protection of the right to be heard, the case law since 1991 has reflected the view that "the protection of the individual should not suffer as a result of the division of the proceeding between two different administrations".[53]

This general notion may be termed as the principle of unitary protection. The principle was concretized in the case law with several rules. Those rules aim to coordinate national and EU authorities in providing affected parties an opportunity to be heard, and to ensure an adequate standard of procedural protection throughout all stages of composite procedures.[54]

That standard is ensured by subjecting all procedural stages to a unitary, basic test of when the right to be heard applies. The test is the same as that which is generally used to determine when EU authorities must give hearings[55] – but in composite procedures, is also applied to *national stages*. The test is the presence of powers of appraisal, the exercise of which may negatively affect private parties.[56]

Based on this test, EU courts demanded that the right to be heard was respected in the same composite procedures in customs law where it had previously been denied.[57] The test later came to be extended to composite procedures in areas as unrelated as fisheries,[58] air traffic,[59] and counter-terrorism.[60]

The same development also occurred in the financial procedures for the disbursement of EU funds.[61] The EU stage of such procedures was most likely intended as a merely 'second-order' stage, in which the EU and national administrations cooperate to check the correctness of

---

[52] *Technische Universität München* (fn 48), paras. 24-25 and 28. For a view of the case, see Jürgen Schwarze, 'Developing principles of European administrative law', in: *Public Law*, (1993), 229-239, 232.
[53] Sabino Cassese, (fn 4), 34.
[54] A similar interpretation of the case law seems to be made by Eric Barbier de la Serre (fn 22), 241.
[55] See, for instance, T-297/11, *Buzzi Unicem*, EU:T:2014:122, para. 147 and *National Panasonic* (fn 7), para. 21.
[56] See Case T-141/01, *Entorn*, EU:T:2005:10, para. 113; T-42/96, *Eyckeler*, EU:T:1998:40 paras. 76-78; and Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97, T-217/97, T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, *Kaufring*, EU:T:2001:133, para. 155.
[57] Cases T-346/94, *France-Aviation*, EU:T:1995:187; *Eyckeler* (fn 56); T-50/96, *Primex*, EU:T:1998:223; T-290/97, *Mehibas*, EU:T:2000:8; and *Kaufring* (fn 56).
[58] Case C-135/92, *Fiskano*, EU:C:1994:267.
[59] *Air Inter* (fn 20).
[60] See below at section 4.3.
[61] On these procedures, see Paul Craig, 'Shared administration, disbursement of community funds and the regulatory state', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law*, (Elgar, 2009) 34-62.

expenditure. Nevertheless, the CJEU began in this period to demand that the Commission offer beneficiaries of EU funds the opportunity to express their views.[62]

Much of the case law examined below is not entirely new in the academic debate about the role of procedural rights in composite procedures. However, much of the attention given to this topic in the literature has been dedicated to the discovery of a single, 'master key' test in the case law that would clearly determine at which stage of a composite procedure the right to be heard needs to be ensured. The authors who have attempted this have usually come to the conclusion that the case law is inconsistent in its solutions. The case law is often read as oscillating somewhat erratically between requiring that the right to be heard be observed at the national or the EU level.[63]

In the view defended here, these inconsistencies are more apparent than real. The appearance of inconsistency derives both from the textual ambiguity of the rulings and from the singularity of the rules constituting the unitary protection principle. As will be elaborated in greater detail below, the case law in this period is actually responding to two different issues. First, *what level* has the obligation to ensure the right to be heard. Second, in the case that the obligation falls to the EU administration, *how* may it be fulfilled.

The notion that the procedural protection of individuals cannot be lost between the various stages of composite procedures is merely the starting point for the principle of unitary protection. In relation to the observance of the right to be heard, EU and national authorities must actively seek to act in a concerted manner, rather than as two entirely separate administrations. Yet at the same time they sought to ensure the effectiveness of the right to be heard, EU courts still aimed to preserve the role that the legislation intended for the national and EU authorities involved in composite procedures. In other words, the unitary protection principle seeks to accommodate the right to be heard, while deferring as much as possible to the EU legislator's choice to maintain EU authorities as an administration which in principle only relates to national bureaucracies.

The key to achieving that balance is privileging the interactions between private parties and national authorities as the primary forum for the exercise of the right to be heard. This is a concern that underlies all three rules drawn from the notion of unitary protection. Those rules

---

[62] See for example Cases C-462/98 P, *Mediocurso I*, EU:C:2000:480, para. 36; T-199/99, *Sgaravatti*, EU:T:2002:228, para. 55; and T-159/07, *Cofac II*, EU:T:2009:490, paras 33-34. Even the older literature thought of administrative procedures of this kind to only constitute legal relations between national and EU authorities. It once considered as but natural that there were less procedural protection in the management of EU funds than in competition or staff dismissal cases. See Valentine Korah, 'The Rights of the Defence in Administrative Proceedings under Community Law', in: *Law and Contemporary Problems*, 33, (1980), 73-97, 73.

[63] See for instance Herwig Hofmann/Morgane Tidghi, (fn 4), Christina Eckes/Joana Mendes, (fn 4), and Sabino Cassese, (fn 4), 31.

may be termed as the rule of primary contact, the rule of confirmation and the rule of delegability. The first refers to the right to be heard in national stages. The latter two refer to *how* EU authorities may observe that right with the assistance of national administrations.

4.1. The rule of primary contact

During the period explored in the previous section, all EU courts were willing to afford to individuals was a dubious 'right of the application'. This was based on a deferential attitude to the perceived preserve of the Member States to govern the legal relations between citizens and their own authorities.

By contrast, as the principle of unitary protection developed, EU case law abandoned that deferential approach. It incorporated the rights of the defence as a mandatory element of the national stages of composite procedures.

The first rule developed by EU courts establishes the national stages of composite procedures as the "privileged moment" for the exercise of the right to be heard.[64] The rule, which can be termed as the rule of *primary contact*, holds that

1. If the legislation on a given composite procedure establishes a national authority as the first (or only) interlocutor of individuals; and
2. If that authority enjoys a power of appraisal,

Then that authority must provide the opportunity for individuals to express their views on the preparatory measure that it will send to the EU authority.

Here, it is key that the national administration holds a power of appraisal in accordance with the legislation of the relevant composite procedure. In all cases where EU courts have demanded the observance of right to be heard at national level, the procedure made national authorities competent to collect the relevant facts,[65] or to adopt a preparatory measure,[66] which served as the basis for the final decision at EU level. Affected parties will then have a right to intervene in the procedure before the national authority's case file or preparatory measure is transmitted to EU bodies. Presumably, the right to be heard will also apply where national

[64] Cfr. Giacinto della Cananea, *Diritto amministrativo europeo: principi e istituti*, 3rd ed, (Giuffrè, 2011), 242, who uses this expression to describe the solution found by EU courts in *France-Aviation* (fn 57), para. 30.
[65] See e.g. the rulings quoted in fn 57 and Case C-32/95 P, *Lisrestal*, EU:C:1996:402.
[66] An example of this is found in the case law concerning the procedures for the freezing of funds of organisations associated to terrorist activities. See Giacinto della Cananea, 'Return to the due process of law: the European Union and the fight against terrorism', in: *European Law Review*, 32:6, (2007), 986-907, especially at 900.

authorities have the power to reject applications and thereby terminate the procedure by before it even reaches the EU stage.[67]

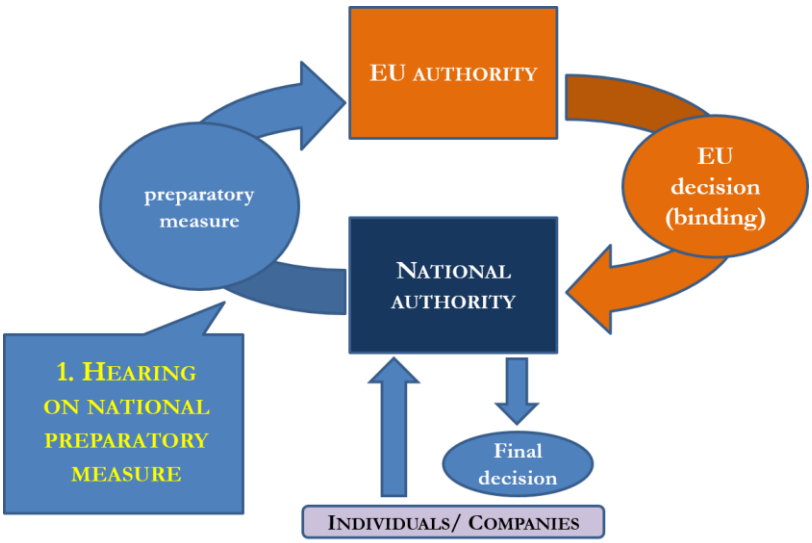


Figure 2: Primary contact rule: functioning in a prototypical composite procedure.

One can infer a few cases of composite procedures in which the right to be heard would *not* apply in national stages, even without the case law of EU courts up to this point in time. Since the test is the presence of a power of appraisal, national authorities are not obliged to respect rights of the defence if that power is absent. This occurs in composite procedures where national authorities simply receive and examine the formal sufficiency of applications before they are forwarded to EU authorities for a decision on the substance of the case.[68]

In addition, it would seem unreasonable to require hearings in national stages that *follow* the exercise of discretionary powers at EU level, and in which national authorities merely implement whatever has been decided in preceding stages by EU authorities. Rather, it is the EU administration, which holds discretion in procedures of this kind, that should be expected to provide the opportunity for a hearing before the composite procedure reaches this stage. The composite procedures in customs law set out in Section 2.1. represent a case in point.

Lastly, it seems clear that national authorities are not required to provide hearings if their role, in accordance to the relevant legislation, is to adopt measures that will have no effect upon the *substance* of the procedure's outcome.[69] Consider, for instance, what were earlier referred to as

[67] In this sense, Foroud Shirvani, (fn 17), 679. See for example the authorisation procedure for the setting up of new credit institutions in the Single Supervisory Mechanism (Article 14 (2) of Regulation 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).
[68] See Chapter 3, section 4.1.
[69] Similarly, Foroud Shirvani, (fn 17), 676.

'choral' proceedings.[70] In such procedures, national authorities can oppose the granting of an authorisation proposed by an authority in a different Member State. The legal effects of such objections are not to 'veto' those measures, but rather to trigger a conciliatory stage, where disagreements will be examined and ruled on by the EU administration.[71]

Today, and in spite of the Charter's wording, it may be taken for granted that EU constitutional law requires the Member-States' authorities to observe the right to be heard.[72] Nevertheless, long before the Charter, EU courts introduced that right in areas such as competition and antidumping policy, to ensure procedural protection against the Commission. They were historically far more reluctant to extend the same procedural rights standards to *purely* national decision-making.[73] Yet, EU courts have consistently declared that, in composite procedures, the right to a fair hearing must "be secured in the first place in the relations between the person concerned and the national administration".[74]

The appropriate level of procedural protection that national administrations must ensure is dictated by what would apply under similar circumstances at the EU level.[75] The right to be heard is ensured in the same terms that are prescribed for the EU's own administration.[76]

---

[70] See the examples in Chapter 3, section 4.2.

[71] See Luca de Lucia, 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris)', in: *Review of European Administrative Law*, 5:1, (2012), 49-88.

[72] Whereas Article 51 (1) CFREU binds the authorities of the Member States to observe the fundamental rights enshrined in the Charter, Article 41 constitutes a derogation from that rule in that it only obliges EU authorities to comply with the right to a good administration, which includes the right to be heard. Nevertheless, as the jurisprudence of EU courts has clarified, this does not mean that national authorities were exempted from complying with the right to be heard when the Charter became binding law. Though refusing to extend the scope of Article 41 itself to national administrations (See Case C-482/10, *Cicala*, EU:C:2011:868, para. 28), EU courts have made left no doubt that fundamental procedural rights such as the right to be heard apply as *general principles* at the state level (see Case C-249/13, *Boudjlida*, EU:C:2014:2431, paras. 32-34). For a view of the literature on this point, see Herwig Hofmann/Bucura Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case', in: *European Constitutional Law Review*, 9:1, (2013), 73-101 and Ton Duijkersloot, 'Consequences of the Violation by Administrative Authorities of the Right to be heard under EU Law: the Case M.G. and N.R.', in: *Review of European Administrative Law*, 7:1, (2014), 81-96, 90. Before these clarifications in the case law, there was some concern in the literature that the wording of Article 41 CFREU could lead to setbacks in the protection of the right to be heard in the national stages of composite procedures. See Klara Kańska, (fn 12), 309.

[73] See Hanns Peter Nehl, (fn 32), 88 and Takis Tridimas, *The General Principles of EU law*, 2nd ed., (Oxford, 2006), 416. Only recently have EU courts introduced the right to be heard in administrative procedures where only national authorities are involved. This development occurred not least by way of a spill-over effect from the case law on composite procedures. See Case C-349/07, *Sopropé*, EU:C:2008:746 and Joined Cases C-129/13 and C-130/13, *Kamino*, EU:C:2014:2041, with some precedents in Case C-28/05, *Dokter*, EU:C:2006:408. For an analysis of the influence of EU law in the introduction of rights of the defence at national level, see Ton Duijkersloot, (fn 72), 81 ff.

[74] *France-Aviation* (fn 57), para. 30. Other cases say this implicitly when declaring that the right to be heard must be ensured both in national and EU stages. See Cases *Mehibas* (fn 57), para. 45; *Kaufring* (fn 56), paras. 160-161; and T-228/02, *OMPI I*, EU:T:2006:384, para. 118.

[75] Similarly, speaking in this regard of 'vertical convergence' of EU and national legal standards, Hanns Peter Nehl, (fn 32), 80-81.

[76] Loïc Azoulai, *Les garanties procédurales en droit communautaire: recherches sur la procédure et le bon gouvernement*, EUI thesis, unpublished, (2000), 148. Azoulai rightly noted that, in *France-Aviation* (fn 57) the General Court demanded the respect of the rights of the defence in national stages, *as they are guaranteed at EU level*.

However, it must also be pointed out that at least some of the *limitations* of rights of the defence that are deemed legitimate during EU-level procedures are also extensible to national procedural stages.[77] One of those limitations concerns those procedures that do not seem compatible with fair hearing requirements, such as procedures aimed at urgent decisions or decisions that should not be expected by their addressees. In EU competition law, the Commission has long been exempted by the case law from the need to hear undertakings affected by decision to proceed with so-called 'dawn raids'. Dawn raids are unannounced inspections to the premises of undertakings to collect evidence in the context of investigation for anticompetitive practices.[78] The rationale of the case law has been that, if the affected undertakings had to be heard prior to decisions to carry out dawn raids, the very purpose of the procedure would be defeated. The purpose is the finding of evidence before the undertaking suspected of anticompetitive behaviour destroys or conceals it. This is why investigations of this kind require a certain element of surprise.[79]

This reasoning was explicitly incorporated into the case law on some composite procedures, without making any distinction between EU and national decisional stages. Consider *OMPI*, a case concerning decisions to freeze the funds of suspected terrorist supporters. The GC used the same line of argument as in competition law. The EU and national authorities involved in those procedures, the General Court argued, did not need to ensure the right to be heard before the adoption of initial decisions to freeze funds.[80] Those decisions need to be adopted unexpectedly in order to be effective. If groups and individuals supporting terrorist actions were made aware of the impeding freezing of their assets, they would simply transfer them elsewhere and out of the European Union.[81] Hence, the same restrictions to the right to be heard as in 'dawn raid' cases were employed, explicitly and by analogy,[82] in cases involving counter-terrorist sanctions.

The case law reveals, in general, that there was a 'transplant' onto national stages of the standards of procedural protection that generally apply to EU authorities. However, this did not occur without two small but not insignificant adaptations. First, EU courts demand that national

---

[77] See *Dokter* (fn 73), para. 75 and Ton Duijkersloot, (fn 72), 89.

[78] For an overview of the regime of 'dawn raids' in EU law and of the fundamental rights concerns they raise, see Helene Andersson, 'Dawn Raids under Challenge', in: *European Competition Law Review*, 35:3, (2014), 135-140.

[79] See Case *National Panasonic* (fn 7).

[80] The General Court rightly differentiated between the initial decisions to blacklist groups and individuals, and subsequent decisions to keep them blacklisted. In regard to the latter, no element of surprise needs be ensured, since the targeted individuals are already aware of the freezing of their funds. Therefore, in procedures leading to subsequent decisions to freeze funds, EU courts have considered that the rights of the defence need to be fully respected.

[81] *OMPI I* (fn 74), paras. 127-130.

[82] It is noteworthy that the Court quotes AG Warner in *National Panasonic* (fn 7), 2033, 2061, 2068-2069) to justify such limitations of the right to be heard in national stages, whereas the case law concerned the restrictions of the rights of the defence *against EU authorities*.

authorities hear individuals before they adopt preparatory measures that will be forwarded to the EU administration. This is a considerable shift away from the traditional logic in EU case law, according to which the Commission itself is not obliged to provide hearings before it adopts mere preparatory measures.[83] Second, the case law has slightly adjusted the test that attaches the right to be heard to the presence of a power of discretion. Usually, EU authorities are only obliged to provide hearings if they intend to exercise their decisional powers by adopting measures that may *adversely affect* individuals.[84] In composite procedures, national authorities deciding must hear interested parties even in regard to national preparatory measures that, by definition, are favourable to those parties. This becomes apparent in the *France-Aviation* line of case law: EU courts held national customs administrations to be under the obligation to provide a hearing even though they were inclined to *agree* to the applicant's requests.

4.2. Direct links and mediated hearings: the right to be heard during EU procedural stages

Since the early 1990s, the Court has generally found that the actual legislative framing of relations between EU and national authorities, on the one hand, and between national authorities and individuals, on the other, should not preclude the exercise of procedural rights against the EU administration. However, the transition from handling composite procedures and rights of the defence under the scheme of executive federalism did not occur without friction. The shift in the Court's case law was met with reluctance by the Commission. Until as late as 2001,[85] the Commission insisted that its intended 'second-order' role in composite procedures exempted it from being obliged to hear private parties.[86]

---

[83] See Case *National Panasonic* (fn 7), para. 21.

[84] See the wording of Article 41 (2) (a) of the Charter of Fundamental Rights and Case 40/85, *Kingdom of Belgium v Commission*, (fn 14), para. 28.

[85] *Kaufring* (fn 56), paras. 141-142.

[86] Arguments of this type were made by the Commission in several fields. It almost invariably failed to convince EU courts. This was the case not only in the fields of customs law, but also in the area of air transport (see *Air Inter*, [fn 20] paras. 58-60), and in the many judgments on the European Social Fund.
In T-450/93, *Lisrestal*, EU:T:1994:290, para. 40, the Commission denied to be bound by rights of the defence by relying on the Court's inter-administrative description of the financial procedures of the European Social Fund in Cases like 310/81, *EISS*, EU:C:1984:105. The Commission sought to strengthen its argument by pointing out that the Court itself had recognized the "central role" of the Member States in ESF procedures (see for instance C-334/91, *Innovation et Reconversion Industrielle*, EU:C:1993:211, para. 24). In the Commission's view, that 'central role' was most visible in the fact that the ESF financing procedures *do* provide for a duty of the Commission to provide hearings – but to the benefit of *the Member State affected by the withdrawal of funds* rather than of the affected beneficiaries. This line of argument was dismissed by the General Court on several occasions, on the grounds that the consultation requirement that the ESF establishes in favour of of the Member States "does not justify the conclusion that a principle of Community law as fundamental as that which guarantees every person the right to be heard before the adoption of a decision capable of adversely affecting him does not apply" (see Joined Cases T-194/97 and T-83/98, *Branco III*, EU:T:2000:20, para. 53).

What is more puzzling is that, even though the inter-administrative approach was abandoned, its language persisted and was even reinforced in the case law. EU courts continued to use a description of composite procedures that, at least semantically, conceptualised EU authorities as a *second-order* administration. Consider the *France-Aviation* ruling, a case concerning a composite procedure for customs debt relief. The General Court considered that the procedure

> "provides *only* for contacts to take place between the person concerned and the administration, on the one hand, and between the administration and the Commission, on the other".[87]

Similar descriptions were used for the procedures on financial assistance in the European Social Fund. In *EISS*, the Court adjudged those procedures to create

> "a financial relationship between the Commission and the Member State on the one hand and between that Member State and the institution which is the recipient of the financial assistance on the other".[88]

Moreover, a new term was added to the language utilised by the EU judicature to describe composite procedures. The term emphasized their role as instruments for the coordination between two separate decision-making procedures and authorities. The national administrative authority involved in composite procedures began to be identified as the "sole" or "privileged interlocutor" of the Commission.[89] Such a description has consistently appeared in the case law to this day.[90]

However, EU courts no longer consider that the lack of references to private parties in the legislation is a decisive argument for denying a right to be heard in EU-level procedural stages. Nor do they oppose the recognition of that right simply because, in that legislation, the EU administration need only interact with the Member States' bureaucracies. In fact, and somewhat surprisingly, EU courts consider that the fact that national authorities are "the sole

---

[87] *France-Aviation* (fn 57), para. 30.
[88] *EISS* (fn 86), para. 15.
[89] See Cases C-304/89, *Oliveira*, EU:C:1991:191; C-157/90, *Infortec*, EU:C:1992:243; *Interhotel*, (fn 15), para. 16; *Innovation et Reconversion Industrielle*, (fn 86), para. 24; *Primex*, (fn 57), para. 58; *Eyckeler*, (fn 56), para. 75; T-72/97, *Proderec*, EU:T:1998:179, para. 72; and T-102/00, *Vlaams Fonds*, EU:T:2003:192, para. 60.
[90] For a more recent example, see T-159/07, *Cofac II* (fn 62), para. 34.

interlocutor" and "only contact" of EU authorities does not preclude that the latter are bound by a "direct link" to individuals.[91]

The coexistence of the two notions is quite odd, to say the least. Moreover, if one takes a closer look at what these 'direct links' are, they are revealed to represent a mere a shorthand for an EU decision-making power which directly affects a private party.[92] 'Direct links' are therefore a simple rephrasing of the normal test for the right to be heard to apply. So why does the case law on composite procedures resort to the idea of 'direct links', when this idea has no autonomous justificatory value?

The expression is employed as a rhetorical device. It is intended to emphasize that the power held by EU administration has an immediate influence upon the legal position of individuals, regardless of whether the legislation provides for immediate contacts between the two. The notion of 'direct links' suggests that, even though the provisions on composite procedures often confine it to inter-administrative relations, the EU administration's power over individuals establishes an immediate bond with them; a bond that entails the responsibility for the observance of those individuals' rights.

However, once it is established that the EU administration is under a duty to provide a hearing, a distinct question arises. The question concerns *how* the EU administration may fulfil that obligation without disregarding the fact that the EU legislature only intended it to relate to national bureaucracies.

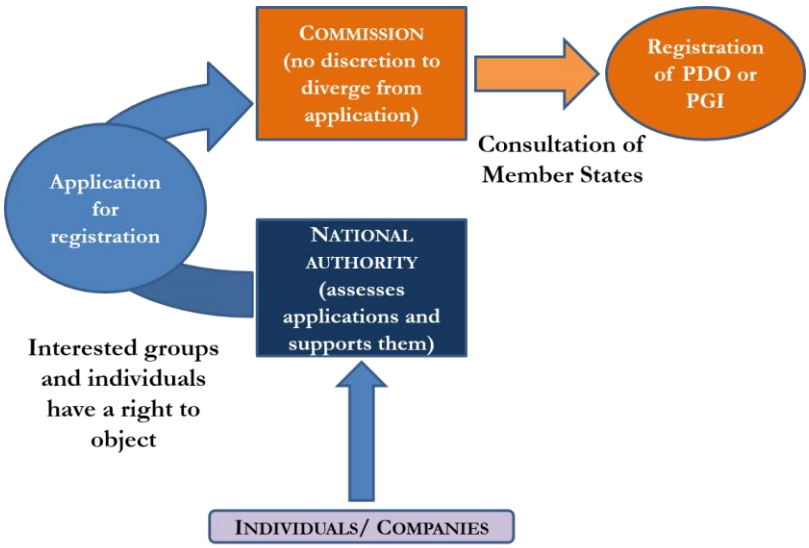
4.2.1. Direct links

The presence of discretionary power at EU level is decisive in establishing a 'direct link' with citizens, and therefore the obligation to observe their right to be heard.[93] This is clearly seen in the case law on the procedures for the EU-wide registration of protected designations of origin and protected geographical indications (PDOs and PGIs).[94]

In the relevant procedural scheme, national authorities receive applications from groups for the classification and registration of products as PDOs or PGIs. After they make a positive assessment of the products' compliance with the EU requirements for registration, and if no

[91] Case *Lisrestal*, (fn 65), para. 47.
[92] Case T-105/01, *SLIM Sicilia*, EU:T:2002:147, paras. 56-57.
[93] See Case T-23/03, *CAS*, EU:T:2007:32, para. 87 and T-329/00, *Bonn Fleisch*, EU:T:2003:48, para. 45. See also Case T-205/99, *Hyper*, EU:T:2002:189, para. 49, which finds it to be "well-established case law" that, in the view of its power of appraisal in customs debt relief procedures, the Commission must respect the applicants' rights of the defence.
[94] Today, the procedures for the registration of PDOs and PGIs are found in Regulation No 1151/2012 of the European Parliament and the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs.

objection is raised by any legal or natural person, national authorities support the applications and forward them to the Commission. The Commission is then obliged to register the products for EU-wide protection, without enjoying any margin of discretion.[95] It is important to highlight that interested groups and individuals have the right to express their objections to the registration (or its scope) by submitting them to the competent national authority.[96] There are, however, no procedural safeguards provided for those affected parties during the EU stage of the registration procedure. In principle, the only participation rights foreseen for that stage concern the right of Member States to lodge objections.[97]



Structure of the composite procedure for the registration of protected designations of origin and geographic indications.

The lack of procedural guarantees for citizens at EU level became problematic in a series of cases concerning the registration for EU-wide protection of certain types of cheeses, honey and cider.[98] Unlike what had occurred in other judgments, on customs and the use of the ESF, EU courts refused to bind the EU stage to the respect for procedural rights. The defining

[95] The same obligation arises if there *are* objections but the persons raising them and the applicants come to an agreement. See 53 (2) a) of Regulation 1151/2012. Only when objections are raised, but not no agreement is reached to solve them, does the Commission enjoy an autonomous power of appraisal to adopt a decision on the registration. The lack of discretion of the Commission when there are no objections, or when those objections have been resolved by the parties involved, has been a recurrent aspect of the successive procedural regimes of PDOs and PGIs. See Articles 6 (4) and 7 (5) a) of Council Regulation 2081/92 and Article 7 (4) and (5) of Council Regulation 510/2006.

[96] See Article 51 (2) of Regulation 1151/2012.

[97] Exception is made for interested parties established in third states, which indeed have the right to send their objections to the Commission (Article 51 (1) of Regulation 1151/2012).

[98] See Cases T-114/99, *Pampryl*, EU:T:1999:281, para. 55; T-370/02, *Alpenhain-Camembert-Werk*, EU:T:2004:209, para. 67; T-381/02, *Confédération générale des producteurs de lait de brebis et des industriels de Roquefort*, EU:T:2005:445, para. 58; and T-35/06, *Honig-Verband*, EU:T:2007:250, para. 53.

argument was the decision-making structure of this composite procedure,[99] and more specifically that,

> "under the scheme [of the procedure for the registration of PDOs and PGIs], the procedural safeguards expressly afforded to individuals fall exclusively within the scope of responsibility of the Member States and do not involve the exercise of any power of assessment on the part of the Commission".

Therefore, since "the Commission is bound by [the competent national authority's] decision", it "may not consider an objection communicated to it by any person other than a Member State".[100]

The line of reasoning, though applied to the more limited field of PDOs and PGIs, is entirely based on the structure of the relevant composite procedures.[101] It can easily be generalised to any other procedure where the EU authority enjoys no autonomous decisional powers, and is therefore bound to simply implement national measures at EU level. Since it enjoys no power to differ from the position taken by national authorities, it would not make much sense to oblige the EU administration to hear individuals before adopting a decision it cannot influence. After all, the very point of hearings is to enable the affected party "to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content".[102]

Things are however very different when the EU authority in a composite procedure *does* have a power of appraisal of its own, and is therefore allowed to diverge from the position taken

---

[99] It must be pointed out that the GC made clear that even if the Commission enjoyed a power of appraisal, the composite procedure for the registration of PDOs and GIs is concluded with the adoption of measures of general application. For that reason, a right to be heard in the EU stage would have been ruled out unless explicitly provided for in the legislation (See *Pampryl* (fn 98), paras. 50-51). Indeed, and controversially, EU courts deny that individuals generally enjoy a right to be heard in rulemaking procedures (see Joana Mendes Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach*, (Oxford, 2011)). For an example in the case law where the Commission *did* enjoy discretion to diverge from the position of national authorities, but the right to be heard was denied because the composite procedure ended with an act of general application, see Case T-296/12, *Health Food Manufacturers' Association*, EU:T:2015:375, paras. 98-100.

[100] See *Pampryl* (fn 98), paras. 52 and 58. An almost identical line of reasoning was followed in Case T-215/00, *La Conqueste*, EU:T:2001:23, paras. 44, 49 and 50.

[101] The link becomes apparent in the summary of the *Pampryl* ruling. The Court acknowledged that the provisions of the PDO and PGI registration procedure "*do not involve the exercise of any power of assessment on the part of the Commission*. *This means* that no specific procedural safeguards have been established at Community level for individuals" (emphasis added).

[102] Case C-166/13, *Mukarubega*, EU:C:2014:2336, para. 49.

by national authorities in the preceding procedural stages. In such cases, which comprise the overwhelming majority of composite procedures, the EU administration has the obligation to observe the right to be heard of affected individuals. Yet, as will be shown below, the case law has fashioned different avenues for it to do so. The EU administration has at its disposal several ways to ensure hearings are given, without necessarily having to enter into direct contacts with individuals. It may count on the assistance of national authorities, who after all tend to be the EU administration's 'sole interlocutors'.

4.2.2. Mediated hearings

Much of the case law on the unitary protection principle revolves around a delicate balance. EU courts strive to integrate the right to be heard in EU procedural stages, while preserving to the greatest degree possible the structure of the procedure as intended by the EU legislature.

The key to this balance is perhaps the most conceptually innovative aspect of the case law. However, at the same time, it is an aspect that has often been interpreted by the literature as an inconsistency in the case law.

The unitary protection principle relies on the dissociation between *being bound by the obligation to provide a hearing* and *taking the concrete practical steps that are necessary to do so*. This distinction represents the conceptual touchstone of the rules of confirmation and delegability.

Both of those rules rely on a nuanced understanding of the distribution of labour when it comes to observing the right to be heard of affected parties. If the EU authority enjoys discretion in a composite procedure, it is under a duty to ensure that those parties have the opportunity to express their views. However, once it is established that an EU authority is indeed bound to that duty, a distinct question follows of *how* that duty may be fulfilled. The EU administration may then provide a hearing itself, or choose to rely on the cooperation of national authorities as intermediaries. In the words of the General Court, an applicant's right to be heard before the Commission may be observed "either directly in its dealings with the Commission or indirectly through the [national] authorities, or through the combination of those two administrative channels".[103] In other words, the EU authority's duty to observe the right to be heard of private parties may be fulfilled through *hearings mediated by national administrations*.

The rule of confirmation entails that the EU authority may avail itself of hearings already offered by national authorities. The rule of delegability means that the EU authority may request national authorities to provide hearings on its behalf. In either case, it is the EU authority that

[103] See *Air Inter* (fn 20), para. 65.

complies with the obligation to ensure the right to be heard, but it does so by relying on the administrative manpower of the national authorities involved in the composite procedure. Both rules are, so to say, about the 'national means' for the fulfilment of an EU-level obligation.

The dissociation between the allocation of the obligation to provide hearings, and of the practical steps to fulfil that obligation, is not a common feature of the EU case law on the right to be heard. This is probably why the dissociation is often not made explicitly, as there are not judicial precedents from which EU courts might draw a vocabulary that would best describe their line of reasoning. Unfortunately, the absence of a clear conceptual apparatus to refer to mediated hearings has created ambiguity in the case law. Indeed, EU courts have considerably damaged the intelligibility of their own, otherwise nuanced case law, simply because they did not clearly explain that the duty to provide hearings *in EU stages* may be fulfilled *through national authorities*. The result has been that many now interpret the case law as exempting EU authorities in composite procedures from respecting the right to be heard, and as shifting the entire responsibility for the observance of that right to national administrations. For example, Eckes and Mendes, writing on the case law concerning the European Social Fund, contend that

> "offering a possibility to be heard exclusively at the national level is not consistent with the rule according to which a direct link is established between the Commission and the beneficiary of the financial assistance where received subsidies are reduced".[104]

That EU courts demand hearings "exclusively at the national level" is a possible reading of the case law. And if they indeed did, the solution would indeed be inconsistent with the notion of 'direct links' between EU authorities and the individuals. More specifically, the interpretation made by Eckes and Mendes could find support in three elements of the case law:

(i) the demand of EU courts that the right to be heard be "ensured in the first place" in the relations between individuals national authorities;[105]

(ii) the fact that the right to be heard is deemed to have been respected when the EU authority checks that national authorities already gave affected parties an opportunity to express their views,[106] and

[104] Christina Eckes/Joana Mendes, (fn 4), 657. See also Giacinto della Cananea, *Diritto amministrativo europeo: principi ed istituti*, 3rd ed., (Giuffrè, 2011), 240-242 and Hanns Peter Nehl (fn 32), 78 ff.
[105] See section 4.1.
[106] See for instance *Vlaams Fonds*, (fn 89), para. 61.

(iii) the idea that the right is also held to be respected when the EU authority requests national authorities to provide that opportunity.[107]

However, in the interpretation undertaken here, only the first of those elements actually refers to hearings provided during national procedural stages – to the rule of primary contact, as explained above. The latter two, which correspond to the rules of confirmation (ii) and delegability (iii), refer to the duty to provide a hearing during the EU stages of composite procedures. Though in a textually somewhat clumsy manner, the case law aims to explain that it is possible to have hearings during EU stages, but offered at national level – that is, hearings that fall to EU authorities, but that are conducted by national administrations.

This conceptual distinction became clearer in *Mehibas*. The General Court rejected the interpretation of *France-Aviation* according to which hearings are only to be provided during national procedural stages.[108] This reading of the ruling was shared by the Commission, which even reformed the procedures for customs debt relief accordingly.[109] The reformed procedures required the applicant to sign a statement that she had nothing to add to the comments made to the measure prepared by the national customs authority.[110] In effect, this meant that applicants would waive any claim to present their views in the ensuing EU procedural stage.

This solution was rejected by the General Court, which held that the right to be heard had to be ensured both during the national and the EU stages.[111] However, the General Court then proceeded to state that, during the EU stage, the Commission may comply with that right by requesting the realisation of hearings at the national level.[112] The reasons for this solution are stated: the Commission's power of appraisal in the procedure obliges it to respect the right to be heard of applicants, but in accordance to the legislation, it was also only required to interact directly with national customs authorities.[113]

---

[107] See *France-Aviation* (fn 57) paras. 30 and 36.
[108] See *Mehibas* (fn 57), at para. 44.
[109] This reform was introduced by Commission Regulation (EC) No 12/97 of 18 December 1996. Recital (12) of that regulation justified the reform with the consideration that "the right to a hearing of persons affected by a decision on post-clearance entry in the accounts of import and export duties and of applicants for a repayment or remission of import or export duties should be guaranteed".
[110] See Case *Mehibas* (fn 57), para. 44. The CJEU considered that the changes introduced by the Commission in the implementing regulation "only partly" met the demands of *France-Aviation* (fn 57). Indeed, the reform of the implementing regulation only demanded that the interested party is given a hearing during the national stage. Surprisingly, the analysis of *Mehibas* is left out in Gernot Sydow's otherwise comprehensive research on the right to be heard in composite procedures. Sydow affirms that EU courts abandoned the 'earlier' solution of admitting indirect hearings, and now require the realization of direct hearings at EU level. Yet Sydow omits the study of a ruling which rebuts this claim. See Gernot Sydow, (fn 4) 274-275.
[111] *Idem,* at para. 45.
[112] *Idem*, *ibidem*. The Court adds that this was the position it had adopted both in *Eyckeler* (fn 56) and *Primex* (fn 57).
[113] *Idem*, at para. 46.

A closer look at the general case law on the right to be heard will reveal that there is no inconsistency here. In fact, it is interesting to note that EU courts sometimes seem to feel obliged to recall what that right actually entails immediately before making arguments about the admissibility of mediated hearings. Take *OMPI I*, a ruling that will be explored in greater depth below. Just before applying the rule of confirmation in the case, the General Court carefully delimited what the essence of the right to be heard was, in accordance with the "settled case law". The right entails, first, that the party concerned must be informed about the factual basis of the procedure's proposed final measure, and second, that that party should be afforded the opportunity to effectively make known his views on that factual basis and the proposed measure.[114]

What EU courts *do not* recognize to be an essential element of the right to be heard is the opportunity to benefit from an *oral* or *formal* hearing before EU authorities;[115] it suffices for them to give affected parties an opportunity to submit written observations on the envisaged final measure.[116]

This renders it easier for EU courts to justify that national administrations involved in composite procedures do all the 'bureaucratic heavy-lifting' that is necessary for the EU-level authority to fulfil its own duty to provide a hearing.[117] In composite procedures, to have a *direct link* with EU authorities, and to be entitled to be heard by them, does not necessarily confer *direct access* to them.[118]

In sum, the case law admits that EU-level obligations to observe the right to be heard may be fulfilled by national authorities. This is the guiding logic of what will be termed as the rules of confirmation and delegability.

---

[114] See *OMPI I* (fn 74), at para. 93. On the content of the right to be heard in EU law, see Paul Craig, *EU Administrative Law*, 2nd ed., (Oxford, 2012), 324 ff.

[115] See for instance Case T-202/12, *Bouchra Al Assad*, EU:T:2014:113, para. 79 and Jürgen Schwarze, *European Administrative Law*, 2nd ed., (Sweet & Maxwell, 2006), 1363–1364. Oral hearings are a centrepiece of the Commission's competition law enforcement proceedings, which are described by some authors as the 'Rolls Royce' of procedural protection in EU administrative law (See Francesca Bignami, 'Three Generations of Participation Rights before the European Commission', in: *Law and Contemporary Problems*, 68, (2004-2005), 61-83, 66). The undertakings concerned by the procedures may opt for the submission of written observations or for a hearing in the presence of a Commission Hearing Officer. In practice, the right to choose an oral hearing is exercised in about 75% of cases. See Michael Albers/Karen Williams, 'Oral Hearings – Neither a Trial Nor a State of Play Meeting', in: *Competition Policy International Antitrust Journal*, (March 2010) and Wouter Wils, 'The Oral Hearing in Competition Proceedings before the European Commission', in: *World Competition*, 35:3, (2012), 397-430.

[116] See for instance *Sgaravatti*, (fn 62), para. 58.

[117] See Case T-256/07, *OMPI II*, EU:T:2008:461, para. 93. The ruling applies analogically the judgment in Joined Cases T-134/03 and T-135/03, *Common Market Fertilisers*, EU:T:2005:339, where the General Court denied the right to an oral hearing in customs debt relief procedures.

[118] *Common Market Fertilizers*, (fn 117), paras. 108-109.

4.3. The rule of confirmation

The judge-made rule that is here dubbed the *rule of confirmation* operates something that could hardly occur under the strict application of executive federalism, and of its separation principle more specifically. As Chapter 2 highlighted, one of the historical uses of that principle was to maintain a strict separation in the responsibility that national and EU authorities have for the fulfilment of their own obligations. By contrast, the rule of confirmation makes it possible for the EU administration to fulfil its obligation to hear affected parties *retroactively*, by 'ratifying' a hearing provided by a national authority in an earlier procedural stage.

If the EU's own administration merely *confirms the findings of national authorities in their entirety*, it does not need to give private parties the opportunity to express their views. Instead, it may as an alternative simply check that individuals already disposed of such an opportunity during the national stages.[119] Schematically, the presuppositions for the rule of confirmation to apply are that:

1. According to the procedure's provisions, the authority involved in the first, national stage of the procedure exercises discretion or a fact-finding role;
2. That national authority provides affected private parties with an opportunity to be heard on the collected facts and, if applicable, on the decisional outcome it will propose to the EU administration;
3. The EU authority enjoys discretion in the subsequent stage; and
4. The EU authority adopts the definitive decision of the procedure based on *the exact same facts* and approving the *exact same* decisional outcome proposed by the national authority.[120]

[119] This is a paraphrase of the Court's findings in *Lisrestal* (fn 91), para. 49 and *Proderec*, (fn 89), para. 127. The General Court held that the Commission "was not entitled to adopt a decision reducing an ESF aid without first giving the beneficiary the possibility, *or ensuring that it had had the possibility*, of effectively setting forth its views on the proposed reduction in assistance". The same notion is found *Vlaams Fonds* (fn 89), para. 61.

[120] Notice that in *OMPI*, the duty of the Council to hear the targeted organisation was affirmed, even though the Council made the same assessment as the national authorities involved, because the factual basis for the final decision had changed at EU level as a result of additional information. The opposite occurred in the many customs debt relief cases. Though based on the same facts as national authorities, the Commission was inclined to make a different assessment of them, and one that would lead to a disadvantageous decision for the affected parties.

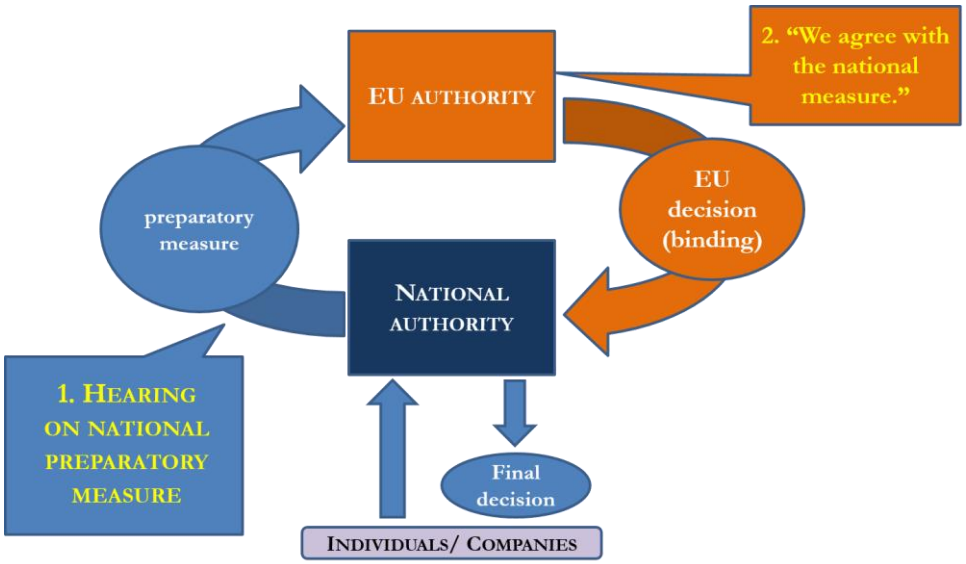


Figure 4: Rule of confirmation in a composite procedure of a prototypical structure.

The legal consequence of the rule is that the EU authority in the procedure is deemed to "have properly discharged its obligation" to ensure that private parties have the opportunity to state their views, even though all factual conducts and practical steps taken in regard to hearings be carried out by national authorities.[121] In short, the observance of the right to be heard by national authorities is retroactively imputed to the EU administration, if it unreservedly approves their findings.

Application of this judge-made rule is clearly seen in many cases in customs law or the European Social Fund. Very often, the question as to whether the EU authority has respected the right to be heard boils down to a test of whether it has decided based on the facts, or an assessment of facts, that were brought to it by national authorities.

Consider the case law on customs debt relief as it has emerged since the 1990s. EU courts hold that the Commission is obliged to give a hearing to applicants when it disagrees with the assessment made by national authorities that the requirements for remission and repayment are met. Even if the applicants are in the preceding national stages, the Commission must provide a fresh hearing whenever it contemplates exercising its discretion – its "exclusive authority" over the outcome of the procedure, as it is sometimes termed in the case law[122] – by "diverging from the position taken by the competent national authorities".[123] As the General Court clarified in *Kaufring*, this applies even if the Commission adopts a decision that diverges from the national

[121] See Case *Proderec*, (fn 89), para. 129.
[122] Case *Hyper* (fn 93), para. 49.
[123] See *France-Aviation* (fn 57), para. 36, *Hyper* (fn 93), para. 49, *Eyckeler*, (fn 56), para. 84, *Primex*, (fn 57), para. 67, *Mehibas* (fn 57), para. 45, *Kaufring* (fn 56), para. 152.

authority, but that nevertheless is based on the same facts.[124] Unless both the measures proposed by national authorities *and* their factual basis are *confirmed* in the subsequent EU stage, the EU administration must give affected parties an opportunity to be heard again.[125]

The same rule was applied by the General Court in *Cofac*,[126] a case relating to the older financial procedure of the European Social Fund. According to that procedure, if national authorities detect irregularities, they propose a reduction or withdrawal of funds to the Commission. The Commission then adopts the final decision.

The General Court ruled in *Cofac* that it sufficed that the Commission made sure that beneficiaries already enjoyed the possibility to present their views to the national authorities before they propose the reduction of ESF contributions.[127] The Commission had "based the contested decision on information provided by the Portuguese administration and followed the proposals of the preparatory decision". The beneficiary had already been heard by the national authority on the factual basis and on the proposals before they were forwarded to the Commission. There was no additional argument that Cofac could have discussed with the Commission that it had not already presented before Portuguese authorities.[128] This was of decisive importance for the General Court to consider the Commission to have respected Cofac's right to be heard.[129]

This argumentative pattern is found in the litigation on autonomous sanctions in the framework of counter-terrorism.[130] Common Position 2001/931/CFSP and Regulation (EC) No 2580/2001 establish a composite procedure to define the lists of persons or groups suspected of supporting terrorist activities. In the presence of serious evidence of such support, national authorities adopt a decision to freeze the funds owned by the targeted individuals or groups. In the following stage, the Council, acting by unanimity, adopts a regulation listing the persons and groups whose assets are to be frozen across the Member States. Measures of this nature are intended to avoid that the suspects' funds are used to finance terrorist groups. This is why the

---

[124] *Kaufring* (fn 56), para. 161.

[125] Gernot Sydow, (fn 4), 274-275 makes a very different reading of the case law, which he considered to have abandoned the notion of indirect hearings to the benefit of 'double hearings' in both national and EU stages, in those cases in which EU courts held that fresh hearings should have been held by EU authorities. In the view supported here, this reading confuses the abandonment of the confirmation rule with case law in which its conditions for application were not met.

[126] See Cases T-158/07, *Cofac I*, EU:T:2009:489 and T-159/07, *Cofac II* (fn 62) EU:T:2009:490.

[127] *Cofac I* (fn 126), para. 39 and *Cofac II* (fn 62), para. 37.

[128] *Cofac II* (fn 62), para. 48.

[129] See *Cofac I* (fn 126), paras. 42 and 54 and *Cofac II* (fn 62), paras. 40 and 52. The same line of reasoning had already made an appearance in *Vlaams Fonds* (fn 89), para. 83.

[130] Autonomous EU sanctions, which are based on national measures, are distinct from EU sanctions based on UN blacklisting instruments. A classic example of the controversies caused by the later kind has been the *Kadi* Case. For the distinction, see Christina Eckes, 'Test Case for the Resilience of the EU's Constitutional Foundations', in: *European Public Law*, 15:3 (2009), 351-378, 353.

autonomous 'blacklisting' procedures in fact foresee two kinds of decisions: *initial* and *subsequent* listings. Both kinds of listings are adopted pursuant to the same bottom-up process. The *initial listing decision* is taken with a view to causing a certain 'surprise effect', without which the funds could be moved outside of the EU. However, those initial listings of groups and individuals are re-examined periodically, every six months. Should the national authorities and the Council consider that maintaining the initial listing is justified, then a *subsequent* listing is adopted.

In *Organisation des Modjahedines du Peuple d'Iran I* (*OMPI I*),[131] the General Court (GC) was seized by OMPI, which challenged the procedural legality of a subsequent decision to freeze its funds. As the GC itself acknowledged, the procedure does not foresee any opportunities for the targeted persons to intervene and defend themselves.[132] Yet, it was precisely because it had not been provided an adequate hearing that OMPI sought to annul its listing.

The GC agreed with the applicant and annulled the Council decision. In so doing, the GC left detailed indications on how the right to be heard was to be ensured. It held that that right was to be guaranteed, in principle, at both stages:[133] in the first place, before the competent national authority, and subsequently before the Council.[134]

In essence, the GC found that, at the EU stage of the procedures in question, "the observance of the right to be heard had a relatively limited purpose".[135] Nevertheless, the Council is obliged to observe the right to be heard itself if it adopts the final blacklisting measure based on evidence brought *after* the national procedural stage, on which the affected party could not yet have expressed her views.[136]

In *OMPI I*, the party affected by the decision had been afforded the opportunity to take cognisance of and comment on the facts used by the Council, since it had been given a hearing upon the adoption of the national decision in the procedures. In cases such as this, the GC explained, "the observance of the right to be heard at Community level does not (…) require, at that stage, that the party concerned *again* be afforded the opportunity to express his views".[137] The underlying reasoning is that targeted individuals and groups must be allowed to exercise their right to be heard "at the level where in fact the evidence or clues which led to the hearing were

131 Case T-228/02, *OMPI I*, EU:T:2006:384.
132 *OMPI I* (fn 74), para.160.
133 *OMPI I* (fn 74), para. 118.
134 *OMPI I* (fn 74), paras. 119-120.
135 *OMPI I* (fn 74), para. 126.
136 *OMPI I* (fn 74), para. 125. See also Christina Eckes/Joana Mendes, (fn 4), 657-658.
137 *OMPI I* (fn 74), para. 121. The quote omits the word "usually" in the passage, which is employed in the judgment to pave the way for the two exceptions explained above.

assessed".[138] If all such evidence and clues are already assessed and commented on during the national stage, the right to a fair hearing is considered to have been already exercised. However, in the presence of newly-adduced evidence after the adoption of the first, national measure, the Council cannot adopt the final blacklisting decision without first giving the affected party a fresh opportunity to express her views.[139]

In *OMPI I*, the GC referred to a previous case in which this same rule of confirmation had been deployed. The GC argued that a precedent found in *'Invest' Import und Export* (*IIE*) could be applied by analogy.[140] The case concerned the freezing of funds and a ban of investment in relation to Yugoslavia. Pursuant to an administrative procedure which followed a very similar procedure in regard to the one at stake in *OMPI I*,[141] a number of companies associated to the President of Yugoslavia Slobodan Milosevic had their funds frozen. When confronted with IIE's claims that its right to be heard had been breached, the GC found that that right was to be first exercised during the first, national procedural stage.[142] However, the court did not reproach the Commission for not hearing the affected parties in the subsequent stage. The additional reasons given by the GC in *OMPI I* explain why: the Commission had exercised its discretion by agreeing to the facts and the request made by the national authorities involved in the procedure; in turn, those national authorities had already given a hearing to IIE during the first, national stage. Once again, the Commission was held to have respected the right to be heard, even though that right was exercised before a national administration.

4.4. The rule of delegability

The rule of confirmation makes it possible for EU authorities to claim to have observed the right to be heard by availing themselves of hearings that took place during national procedural stages. The rule of delegability, by contrast, holds that the EU administration, *during EU procedural stages*, may request national authorities to conduct hearings on its behalf. In other words, EU authorities may *delegate* their responsibility to provide hearings to national authorities.

---

138 This was accurately identified by Christina Eckes, 'Case T-228/02, *Organisation des Modjahedines du people d'Iran* v. *Council and the UK (OMPI)*, Judgment of the Court of First Instance (Second Chamber) of 12 December 2006', in: *Common Market Law Review*, 44, (2007), 1117-1129, 1126-1127.

139 *OMPI I* (fn 74), para. 125. See also Christina Eckes/Joana Mendes, (fn 4), 657-658.

140 *OMPI I* (fn 74), para. 118. See Case T-189/00 R, *'Invest' Import und Export*, EU:T:2000:203.

141 The only apparent difference was that the EU authority involved in this composite procedure was the Commission, and not the Council.

142 *IIE* (fn 140), para. 40. To this effect, the GC quotes *France-Aviation* (fn 57). The Court highlights that undertakings are blacklisted "on the initiative of the competent national authorities in a two-stage administrative procedure in which those authorities (…) play a considerable part". As Christina Eckes points out, in the listing procedure for companies associated to Yugoslavia "the bulk of the decision is formed at the national level", which is why "it is reasonable that the responsibility to hear those listed lies in the first place with the national authorities" (Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights*, (Oxford, 2009), 318).

Again, one can have a clearer picture of this rule if the conditions for its application are identified. If

1. in a composite procedure the EU authority enjoys decisional power; and
2. if that authority does not intend to follow the facts and assessments of facts made by national authorities in the preceding stage,[143]

   Then the EU authority may satisfy its duty to provide a hearing by requesting national authorities to offer one on its behalf.

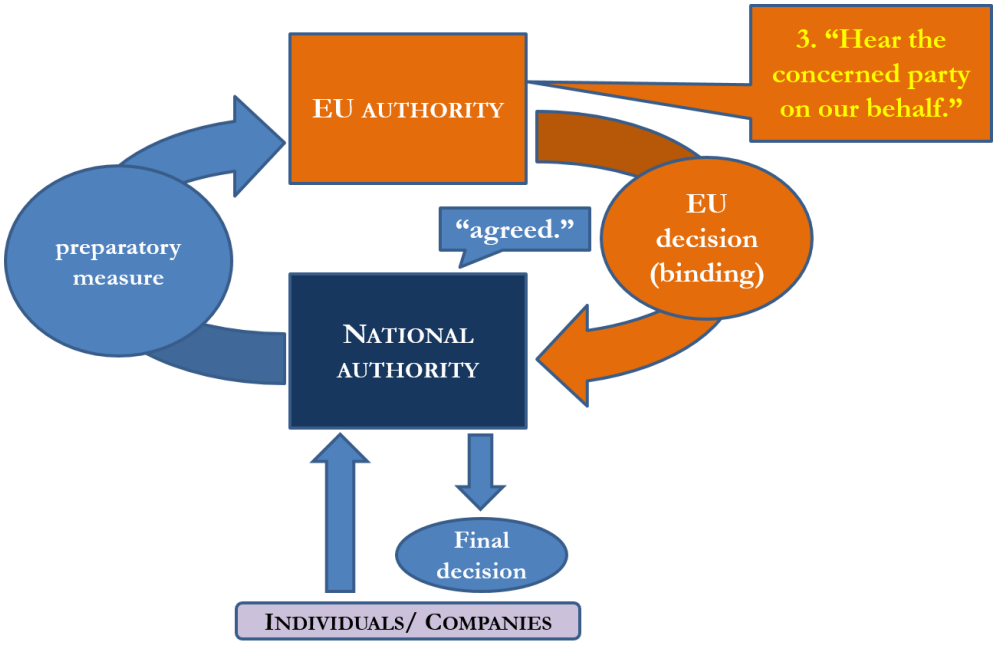


Figure 5: Rule of delegability in a composite procedure of a prototypical structure.

The earliest example of this rule being used dates back to *France-Aviation*. As was explained earlier, the GC held that the national authorities involved in the first stage of the procedure should also be the first to offer a hearing to applicants for customs debt relief. However, it also emphasized that applicants have a right to be heard during the subsequent EU procedural stage.

However, as is evident from this case, the fact that the Commission is obliged to provide a new opportunity for the applicant to submit her views does not equate to the Commission providing a hearing itself. Instead, the GC held that

> "In so far as the Commission contemplated diverging from that position [of national authorities] and rejecting the application for

[143] That is – if it does not intend to apply the rule of confirmation as explained before.

> repayment (…) it had a duty *to arrange* for the applicant to be heard *by the French authorities*".[144] (emphasis added)

The legal basis upon which the GC grounded this arrangement was the rule found in the regulation that the Commission may ask for additional information from the Member State concerned.[145] It was based on this rule that

> "the Commission should have made such a request in order *to ensure* that the applicant's right to be heard was respected through the provision of additional explanations first provided by the applicant to the French administration and subsequently transmitted to the Commission" (emphasis added).[146]

Other cases in customs followed suit.[147] In *Mehibas*, the GC established that, while the right to be heard needs to be ensured during the EU procedural stage, the Commission "need only deal with the Member State concerned".[148] The GC therefore established that, during the EU stage, the Commission "is under a duty to ensure that the person is heard by the national authorities".[149] The Commission's pleadings in *Kaufring* are also illustrative. The Commission argued that the observance of the right to be heard on its part "does not necessarily require that a person who is likely to be adversely affected by the decision to be taken must be heard by the institution itself".[150] It added that "there are many procedures in which the interested party is

---

144 *France-Aviation* (fn 57), para. 36.

145 This possibility is still provided for in Article 116(3) of the Union Customs Code and Articles 98 ff of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 (delegated act of the UCC).

146 *France-Aviation* (fn 57), para. 30.

147 In *Eyckeler* (fn 56), para. 84 and *Primex* (fn 57), para. 67), the GC was somewhat less clear, as it omitted the reference to hearings *by national authorities* when quoting *France-Aviation*. Nevertheless, that the choice of words remained otherwise the same is telling: over the Commission impends the "duty to arrange for the applicant to be heard", rather than the duty *to hear the applicant*. This is corroborated by the judgment's version in French, which states that the Commission is under a duty to "faire entendre".
Hanns Peter Nehl (fn 32), 79 makes a different reading of these cases. He interprets the cases' reference to a right to be heard in the procedure 'before the Commission' as a demand that hearings take place directly before the Commission. The ambiguity of the wording is resolved by looking at other language versions. What is intended is that, *chronologically*, hearings take place *during the procedural stage which takes place before the Commission*; not that affected parties have a right to be directly placed *before the Commision* in order to express their views on their case. This becomes clear from para. 86 of the *Eyckeler* ruling, which refers to hearings being ensured by the Commission "in the procedure before it" not least in the light of other language versions (such as the Portuguese, Spanish, German and French versions) which paraphrase this as the Commission giving the applicant an opportunity to express its views "in the procedure unfolding before it".

148 *Mehibas* (fn 57), para. 46.

149 *Mehibas* (fn 57), para. 45.

150 *Kaufring* (fn 56), para. 145.

heard only by the national authorities and not by Commission staff".[151] Neither observation was denied by the GC.

Support for delegable hearings can be found in some cases concerning the European Social Fund.[152] *Mediocurso I* is a case in point. There, the GC held that a Commission decision reducing the amount of ESF assistance to a project was invalid because the beneficiary's right to be heard had been breached. Because of that right, the beneficiary should have been given an opportunity to express its views on the grounds for the decision's adoption. That opportunity, the GC explained, could have been given by making "an invitation to the appellant *by or on behalf of the Commission* to submit its observations".[153]

As Nehl and Sydow point out, the case law here admits a "peculiar" "indirect right to be heard".[154] EU authorities may request that hearings be offered at national level, but in their name. National authorities will then offer hearings, but, much like in the rule of confirmation, the fulfilment of the duty to hear the affected parties is imputed to the EU administration. EU authorities are considered to have respected the right to be heard themselves by requesting national administrations to carry out the actual hearings. The legal basis for those requests are defined by the case law as those provisions in the legislative framework of composite procedures that establish duties to exchange information, including information supplied by interested private parties. From this it can be concluded that delegated hearings are allowed wherever the relevant legislative instrument of a composite procedure includes provisions requiring the cooperative sharing of information between the authorities involved.[155]

This method of ensuring the right to be heard has been termed by some as "baroque",[156] or even as an unnecessary "bureaucratic detour".[157] It was by no means an inevitable outcome of the case law. At least in abstract, EU courts could have just as well have recognized a right to always be directly heard by EU authorities in composite procedures.[158] Nehl, who is critical of delegated hearings, argues that the idea that EU authorities may hear interested parties *through* national administrations is unconvincing because the right to be heard must, in the light of EU constitutional law, be protected even in the absence of specific legislative provisions.[159]

---

[151] *Kaufring* (fn 56), para. 146.
[152] For an example in the domain of the European Regional Development Fund, see Case T-189/02, *Ente per le Ville vesuviane*, EU:T:2007:233, paras. 93 ff.
[153] *Mediocurso I*, para. 43.
[154] Hanns Peter Nehl, (fn 32), 79 and Gernot Sydow, (fn 4) 272 ff.
[155] In addition to the provisions already deployed by EU courts in the domain of the customs union, see for instance Article 5 (2) a) (iii) of Regulation 1829/2003, which governs the approval procedure for GMO food and feed.
[156] Sabino Cassese, (fn 4), 31.
[157] Hanns Peter Nehl, (fn 32), 79.
[158] Sabino Cassese, (fn 4), 31.
[159] Hanns Peter Nehl, (fn 32), 79.

However, at least in the reading supported here, such a protection *was* afforded by EU courts. The delegability rule is, as was explained before, not about *whether* the right to a fair hearing applies, but about *how* it may be observed by EU authorities. EU authorities are considered to have respected the right to be heard by requiring national administrations to carry out the practical steps needed to provide affected parties with an opportunity to express their views.

The dissociation between being *bound* to provide a hearing and *carrying out the practical steps* required to hear represented a crucial conceptual step in the case law. It allowed EU courts to integrate the right to be heard into composite procedures without disfiguring their intended structure. The notion that the EU authorities' duty to hear concerned parties may be fulfilled by national authorities reflects the concern of EU courts to guarantee the right to be heard, while doing as much justice as possible to the procedural structure intended by the EU legislature, which only provides for contacts between affected parties and national administrations, on the one hand, and between national and EU authorities, on the other.

Perhaps some of Nehl's concerns would be dispelled today due to developments in the case law. EU courts now make clear that EU authorities are not *under a duty* to delegate hearings. Earlier rulings, such as *France-Aviation*, seemed to suggest that the EU administration was *obliged* to request national authorities to provide hearings on its behalf. The textual framing of delegated hearings in the more recent *Mediocurso I* judgment suggests that, in composite procedures, EU authorities may choose between the alternatives of hearing affected parties directly, or requesting national authorities to offer a hearing on its behalf.

EU courts can thus be said to have transitioned from a rule of *delegation* to a rule of *delegability*. This reflects an evolution within the principle of unitary protection itself. The first rulings on the delegation of hearings, suggesting that it was of a mandatory character, were more mindful of the dualistic structure of composite procedures set out in the relevant legislation. Those first rulings effectively made sure that national officials would remain the *sole interlocutors* of the EU administration at all times; and that it would fall *exclusively* to national administrations to interact directly with firms and citizens. Subsequently, the case law ceased to *demand*, and began simply to *allow* the delegation of hearings. This suggests that the CJEU itself has recognized that the merits of granting hearings at EU level, or delegating them to national administrations, will depend of the circumstances of each individual case.[160]

[160] There may be sound policy reasons to delegate hearings. For example, it might be more practical for individuals to go to the same 'desk' at every stage of the procedure. In the domain of the customs procedures, it must be borne in mind that national customs officers are the "human face" of the customs union (see Timothy Lyons, (fn 25), 120). From the perspective of firms, it might even be preferable to have a hearing with the same national officials who assessed the initial application.

5. State aid: the last stronghold of an outdated approach

The advances for the right to be heard are apparent in the case law on many composite procedures. The early argumentative pattern of the Court of Justice, which handled composite procedures through the framework of executive federalism, was visibly abandoned in fields as diverse as customs law, structural funds, and counter-terrorism. Nevertheless, it would be misguided to believe that the story of the rights of the defence in composite decision-making is one of unabated progress. One composite procedure evaded the tide of change. For over thirty years now,[161] the Court of Justice has continually denied in state aid the same level of procedural protection that it has demanded in other composite procedures. Once the case law of unitary protection is considered, the CJEU's understanding of the implications of the structure of state aid procedure appears as outdated and arbitrary.

It may be useful to recall the procedural structure of State aid review procedures. Though the Commission can also initiate the procedure following a complaint,[162] it will usually begin at the national level. If a given Member State intends to give aid to an undertaking, it must notify the Commission thereof.[163] The Commission then assesses whether the planned aid is compatible with the internal market – that is, whether it distorts competition or not. This occurs in two EU-level stages. The first stage, the preliminary investigation procedure, is intended to allow for a quick decision whenever the Commission has no doubt that the aid is lawful. If the Commission is in doubt or inclined to declare the aid incompatible with the internal market, it must open the second review stage, known as the detailed investigation procedure.[164] After gathering evidence and a sufficient factual basis, the Commission will rule on whether the aid is compatible with the internal market. In the case of a negative decision, it will order the Member State to recover the aid. What typically follows at the national level is that the beneficiary is ordered to return the aid it received.

EU courts have rightly held that no rights of the defence need to be ensured in the preliminary investigation procedure.[165] This is a solution that is entirely consistent with the settled

[161] This strand of case law seems to have originated in Case 323/82, *Intermills*, EU:C:1984:345, para. 17 and has continued until as recently as Joined Cases T-427/04 and T-17/05, *France Télecom*, EU:T:2009:474, paras. 146 ff and Case T-362/10, *Vtesse Networks*, EU:T:2014:928, para. 95.
[162] See Article 24 (2) of Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.
[163] The procedure may however also start at EU level, if the Commission receives information on unlawful aid. See Article 12 of Council Regulation 2015/1589.
[164] See Cases C-225/91, *Matra*, EU:C:1993:239, para. 33 and *Sytraval* (fn 15), para. 39.
[165] Case T-88/09, *Idromacchine*, EU:T:2011:641, para. 35.

case law on the scope of those rights.[166] The preliminary investigation procedure is not concluded with any decision that affects the Member State or the aid beneficiary. Rather, it is concluded with a decision to *start* a detailed investigation. Only a decision enacted at the end of that investigation and declaring the aid incompatible with the internal market will have the effect of imposing on the Member State an obligation to abolish the aid. The issue of the right to be heard in state aid procedure concerns only that decision, which ultimately also implies that national authorities must demand the recipient to repay the aid. In spite of the significant financial burden imposed on beneficiaries, EU courts have consistently rejected pleas to grant them fair hearing rights.

To be fair, EU courts have been firm in demanding that parties concerned– including the aid recipient and its competitors – have the opportunity to participate in the procedure. However, and crucially, that participation has been recognized in very restricted terms. Concerned parties have only the right to submit comments once the Commission takes the decision to *initiate* the detailed investigation procedure.[167] In sharp contrast with the case law of the unitary protection principle, and with Article 41 (2) (a) of the Charter,[168] aid recipients have no right to be heard before the Commission takes the decision that *concludes* the detailed investigation procedure. They do not have the right to be informed of the facts based on which the Commission intends to take that decision, or the opportunity to rebut its evaluation of the aid's compatibility with the internal market. The sole consolation that EU courts give to aid beneficiaries and their competitors is allowing them to bring an action for annulment against the Commission's decision – and to plead that the right to be heard *of the Member-State* was infringed upon.[169]

The Court's justification for the limited procedural rights of beneficiaries is familiar from the earlier case law examined in section 3. Following what has been the traditional view,[170] the Court sees the review of state aid as being structured in a strictly *inter partes* procedure between the Commission and the Member State.[171]

---

166 See Case *National Panasonic*, (fn 7), para. 21, where the Court explicitly denied that undertakings had the right to be heard before the decision to initiate an investigation procedure in the enforcement of Article 101 TFEU.

167 See for instance Joined cases C-75/05 P and C-80/05 P, *Kronofrance*, EU:C:2008:482, para. 37, Case C-198/91, *Cook*, EU:C:1993:197, para. 22, *Matra*, (fn 164), para. 16 and *Sytraval* (fn 15) para. 38.

168 See Hanns Peter Nehl, 'The Imperfect Procedural Status of Beneficiaries of Aid in EC State Aid Proceedings: Note on Case C-276/03 P, Scott SA v. Commission', in: *European State Aid Law Quarterly*, (2006), 57-63, 61 and Herwig Hofmann/Claire Micheau, *State Aid Law of the European Union*, (Oxford, 2016), 345-347.

169 Cases *Sytraval* (fn 15), para. 41, *Intermills* (fn 161), para. 16 and T-198/01, *Technische Glaswerke Ilmenau* (*TGI*), EU:T:2004:222, paras. 200-204.

170 Andreas Bartosch, 'Procedural Rights Denied for Too Long: Is Legal Conservativism Finally Heading for Its "Götterdämmerung"?', in: *European State Aid Law Quarterly*, (2011), 579-580, 579.

171 See Case C-276/03 P, *Scott*, EU:C:2005:590, para. 33-34, where the ECJ explicitly said that "the procedure provided for in Article [108 (2) TFEU] takes place primarily between the Commission and the Member State concerned. It is initiated against that Member State and not against the beneficiaries". See also the opinion of AG

The Member State is considered as the sole interlocutor and addressee of the Commission's decisions.[172] The case law describes the procedure as one "initiated in respect of the Member State responsible in light of its obligations for granting the aid".[173] Since only the Member State is a party to the procedure before the Commission, only the Member State enjoys the right to be heard.[174] Accordingly, since the state aid review procedure is *not* considered to be initiated in respect of aid recipients,[175] the Court holds them not to have any "special role" "by virtue of which it or they could rely on rights as extensive as the rights of the defence as such".[176]

The opportunity that a private party has to comment on the initial decision to start the formal investigation procedure, the CJEU adds, does "not confer on it the status of a party to the procedure".[177] Rather, the "sole aim" of that opportunity is "to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action".[178] The beneficiaries of aid and their competitors, the Court says, merely "play the role of a source of information for the Commission".[179]

This "rather formalistic" line or reasoning,[180] or "traditional dogma", as others have put it,[181] is based on the same kind of inter-administrative reading that pervaded earlier case law on customs debt relief.[182] The lack of procedural protection is only compensated in the case law by the vague recognition that aid beneficiaries "have only the right to be involved in the

---

Jacobs in the case, at para. 68 and Adinda Sinnaeve, 'General Principles', in: Martin Heidenhain (Ed.), *European State Aid law,* (C. H. Beck, 2010), 573-590, 575. It is striking how some judges of the Court, in their robes of legal academics, used to write about procedural rights in state aid – without including a word on the rights of private parties. See Ole Due, (fn 33), 395-396, who examines exclusively the right of the Member State to be heard in judgments such as Case 234/84, *Belgium v Commission*, EU:C:1986:302.

[172] See Jean Paul Keppene/Carlos Urraca Caviedes, 'General Questions on Procedure. Controls of State Aid Compatibility. Council's Decision-Making Power', in: Luis Ortiz Blanco (Ed.), *EU Competition Procedure*, (Oxford, 2013), 875 ff, 884 ff and Cases *Sytraval* (fn 15), para. 45 and T-62/08, *ThyssenKrupp*, EU:T:2010:268, para. 166.

[173] See Joined Cases C-74/00 P and C-75/00 P, *Falck*, EU:C:2002:524, para. 81 and Cases *TGI* (fn 169), para. 191, Joined cases T-228/99 and T-233/99, *Westdeutsche Landesbank*, EU:T:2003:57, para. 122; *ThyssenKrupp*, (fn 172), para. 161, *France Télecom*, (fn 161), para. 146, *Idromacchine* (fn 165), para. 33, T-354/05, *Télévision française*, EU:T:2009:66, para. 99. The earliest judgment that EU courts quote to support this view seems to date back to *Belgium v Commission*, (fn 171), para. 29.

[174] See Cases *Falck*, (fn 173) para. 82, *Sytraval* (fn 15), para. 59, T-109/01, *Fleuren Compost*, EU:T:2004:4, paras. 42-43, *ThyssenKrupp*, (fn 172), para. 162, *Idromacchine* (fn 165), para. 34 and Case T-468/08 *Tisza Erőmű*, EU:T:2014:235, para. 206.

[175] Cases T-68/03, *Olympiaki Aeroporia Ypiresies*, EU:T:2007:253, para. 43 and T-565/08, *Corsica Ferries France*, EU:T:2012:415, para. 50.

[176] See *Fleuren Compost*, (fn 174), para. 44; *Falck*, (fn 173), para. 83; *ThyssenKrupp*, (fn 172), para. 163; and *Télévision française*, (fn 173) para. 101.

[177] *Scott*, (fn 171), para. 34.

[178] Cases 70/72, *Commission v Germany*, EU:C:1973:87, para. 19 and *Westdeutsche Landesbank*, (fn 173), para. 124.

[179] See Cases T-266/94, *Skibsværftsforeningen*, EU:T:1996:153 para. 256; Joined Cases T-371/94 and T-394/94, *British Airways*, EU:T:1998:140, para. 59; *TGI*, (fn 169), para. 192 ff; *Scott*, (fn 171), para. 34; *France Télecom* (fn 161), para. 147, and *Vtesse Networks* (161), para. 95.

[180] Hanns Peter Nehl, (fn 168), 61.

[181] Andreas Bartosch, (fn 170), 579.

[182] This understanding was consolidated by the EU legislator in successive reforms in 1999, 2013 and 2015 to the provisions governing the application of Article 108 TFEU. See Hanns Peter Nehl, '2013 Reform of EU State Aid Procedures: How to Exacerbate the Imbalance between Efficiency and Individual Protection', in: *European State Aid Law Quarterly*, (2014), 235-249, 235 and current Article 24 of Council Regulation (EU) 2015/1589 of 13 July 2015.

administrative procedure to the extent appropriate in the light of the circumstances of the case".[183] Yet, this is no adequate form of protection. It means that it is for the Commission's to decide, on a *discretionary* basis, whether aid beneficiaries and competitors may participate in the procedure, and only to the extent that they are useful 'information sources'.[184]

Maier and Werner accurately identify the crux of the case law's problem: the beneficiary of state aid must ultimately bear the costs of a negative state aid decision, but nonetheless enjoys no rights of defence.[185] State aid is often given as a lifeline for failing undertakings. A Commission decision ordering that aid to be withdrawn may threaten their very survival.[186]

Much like other composite procedures, the review procedure in state aid law was designed as a purely two-way procedure between the EU administration and the Member States. Yet, in contrast to what happened in other composite procedures, EU courts have stood firm in denying that general principles of good administration, such as the right to be heard, require individuals to be treated as parties to the administrative procedure and enjoy the according procedural rights.[187] In fact, in recent years, the right of undertakings to be heard by the Commission has been denied, even if they are individually and directly concerned by its decisions.[188] This reading can hardly be reconciled with the explicit demand in the Charter that a person be heard before a measure is taken which *adversely affects* her.

The case law on state aid shows that the Court did not make the same transition that was visible in its 1990s case law on other composite procedures. Its interpretation of the procedure ossified around the old inter-administrative understanding of composite procedures, which read the relations between national authorities, the Commission, and private parties in the light of EU executive federalism.

Even though its decisions in effect determine whether the recipient's aid will be withdrawn, the Commission is considered to relate only to national authorities. In tandem, aid recipients are considered only to relate to national authorities. Since the procedure formally only establishes a power of the Commission to decide vis-à-vis the Member State, and not the

[183] See Cases T-362/10 *Vtesse Networks* (fn 161), para. 95 and *ThyssenKrupp*, (fn 172), paras. 161-162.
[184] In this sense, Herwig Hofmann/Claire Micheau, (fn 168), 342.
[185] Martina Maier/Philipp Werner, 'Judgment of 30 November 2009 in Cases T-427/04 and T-1 7/05, France and France Telecom SA v Commission: Comments on Cases T-427/04 and T-1 7/05', in: *European State Aid Law Quarterly*, (2011), 713-722, 717 and 722.
[186] This point was raised by the applicant in *TGI*, (fn 169), para. 178.
[187] See Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, *Territorio Histórico de Álava*, EU:T:2009:315, para. 269; *ThyssenKrupp*, (fn 172), para. 167, *Vtesse Networks* (fn 161), para. 96, and *TGI*, (fn 169) para. 194.
[188] See *Vtesse Networks* (fn 161), para. 96.

beneficiary of aid, the Commission is held not to be bound by the rights of the defence in regard to the latter.[189]

This line of reasoning considers legal links between the Commission and the Member State to be mutually exclusive from legal links between the EU administration and private parties. This is evident where the case law – wrongly – automatically equates the aid recipients not being the formal addressees of the decision with them not being a party to the procedure or enjoying procedural protection.[190] The implicit argument here is that individuals enjoy legal relations and procedural rights *either* in regard to national authorities *or, when they are the immediate addresses of EU decisions*, in regard to the EU administration. As in the early cases on customs law, the denial of a right to be heard before the Commission is anchored in an assumption of strict separation between the EU and national spheres. It is also based on the understanding that the EU administration is a second-order administration, in the sense of being generally supposed to relate only to national administration, and not to individuals, unless explicitly granted the power to decide directly on their cases.

The Court's persistent refusal of the aid recipient's right to be heard by the Commission has not occurred without the protests on the part both of litigants and legal scholars.[191] It has often been argued that the failure to recognize a right to be heard to the benefit of aid beneficiaries is inconsistent with the degree of protection afforded in other procedures of competition law.[192] Laprévote identifies another inconsistency. Recipients of aid given by Member States enjoy far less procedural protection than beneficiaries of subsidies given by third states,[193] even though the distortions of competition caused are substantially similar. Lastly, Nehl has exposed how the judgments in state aids fit poorly with the case law produced "in neighbouring areas of [EU] administrative law",[194] and in particular in the domain of structural funds and customs.

However, or so it is argued here, the real point of inconsistency is not in the fact that the case law has offered different solutions for substantively related policy fields. The real

---

[189] This line of reasoning is explicitly used by the Court to reject the argument that the procedural guarantees of aid recipients should be analogous to the ones offered in procedures for anticompetitive practices and abuse of dominant position under 101 and 102 TFEU. See *TGI*, (fn 169), para. 194.

[190] See for instance *Westdeutsche Landesbank*, (fn 173), para. 125.

[191] Hanns Peter Nehl, (fn 168), 60; Martina Maier/Philipp Werner, (fn 185); François-Charles Laprévote, 'A Missed Opportunity? State aid Modernization and Effective Third Parties Rights in State aid Proceedings', in: *European State Aid Law Quarterly*, (2014), 426-439, 436 ff; and Herwig Hofmann/Claire Micheau, (fn 168), 341 ff. A different view is offered by Bierwagen, who argues that the CJEU's restrictive case law is fully justified from the perspective of decision-making efficiency and of the wish of the Member States to preserve their privileged status in state aid proceedings (see Rainer Bierwagen, 'Review of Judgment in Case T-198/01 Technische Glaswerke Ilmenau v. European Commission', in: *European State Aid Law Quarterly*, (2004), 671-703, 702).

[192] See for instance Case *TGI*, (fn 169), para. 179.

[193] François-Charles Laprévote, (fn 191), 436-438.

[194] Hanns Peter Nehl, (fn 191), 62-63.

inconsistency is that the inter-administrative reading of composite procedures was abandoned almost thirty years ago as a plausible justification for denying procedural rights.[195] That national authorities are formally the EU administration's 'sole interlocutors' is nowhere else a sufficient argument whenever it decides the fate of individuals' legal positions. This is not to say that there might not be any convincing arguments to deny a right to be heard in state aid.[196] It is simply the case that the procedure's intended design as an affair between bureaucracies is not one of them.

6. Conclusion: hearings, the ancillary administration and the demise of the separation principle

This chapter explored the transition between two approaches to the right to be heard in composite procedures, and more specifically to the lack of provisions on that right. The shift between the two approaches reveals not only a change in how EU courts solve cases, but in their very conception of European administration.

The first approach, based on an 'inter-administrative' reading of composite procedures, rigorously followed the conceptual scheme of EU executive federalism. It privileged the integrity of the vertical division of EU and national power over the protection of individuals, thereby denying their right to be heard. This inter-administrative approach appears to have been abandoned everywhere but in state aid review. One possible explanation is that EU courts consider that the purely inter-administrative character of the procedure results not from the legislation, but from the Treaty itself.[197]

The second approach, the unitary protection principle, aims to ensure that the division of decisional tasks between national and the EU authorities does not stand in the way of the rights of the defence. Yet the way in which EU courts gave effect to this preference is nothing short of rewriting composite procedures. EU courts sought a compromise solution that required EU authorities to observe the rights of the defence but still respect that the legislature intended to privilege the interactions between individuals and national administration.[198] In the domain of the right to be heard, the principle of unitary protection strives for that compromise by

---

[195] Cfr. Hanns Peter Nehl, (fn 191), 62 and Herwig Hofmann/Claire Micheau, (fn 168), 346.

[196] Given the diffuse systemic effects in market relations that may come from giving aid to a given undertaking, it may be hard to identify all market participants who are affected by that aid, and unfeasible to grant them all access to an adversarial procedure. It may also be arbitrary and possibly discriminatory to decide a priori that the aid recipient needs to be afforded procedural rights, whereas its competitors or other market participants do not. In this sense, the Opinion of AG VerLoren van Themaat in Case 323/82 *Intermills*, EU:C:1984:260).

[197] See the Opinion of AG Jacobs in Case C-276/03 P, *Scott*, EU:C:2005:229, para. 74, where the view is presented that the Treaty provisions on state aid procedure show no "systematic concern to protect the interests of beneficiaries".

[198] This is acknowledged by Christina Eckes/Joana Mendes, (fn 4), 656.

1. demanding national authorities to provide a hearing in the first stages of composite procedures (the primary contact rule);
2. allowing an EU authority to refer back to a hearing already provided by a national authority if it agrees with that authority's opinion (the rule of confirmation); and
3. allowing an EU authority to request that hearings are offered to private parties on its behalf, at national level (the rule of delegability).

The rules of confirmation and delegability reveal perhaps the most radical change. They make clear that the case law on the right to be heard in composite decision-making is about far more than procedural protection. Under the guise of rights of the defence, EU courts redefined the relations between EU and state administration – and abandoned core tenets of EU executive federalism.

First, the case law reveals that the separation principle, heralded as the key principle of EU executive federalism since the 1960s, was forsaken by the same Court that crafted it. Two of the separation principle's historical postulates had been the notions that legal relations to individuals fall *either* to national, *or* to EU authorities; and that either level is exclusively responsible for the observance of its own legal obligations.[199] The first notion was contradicted by the recognition of *direct links* between individuals and the EU administration, even when national authorities are its sole intended interlocutors. The second notion is clearly abandoned by the rules of confirmation and delegability, which allow the EU administration to share its own burden to fulfil the right to be heard with its national counterparts.

Second, the shift in the case law also captures how the unitary protection principle departs from the *conception* of European administration that underpinned the construction of EU executive federalism. From the reasoning of EU courts, it becomes apparent that they no longer conceive of the EU administration as confined to a 'second-order' role, and of national and EU authorities as two hermetically separate spheres of power.

By crafting the unitary protection principle, as one author puts it, EU courts "have shown a determination to 'pierce the Member State's veil' and to acknowledge a private party's rights of the defence vis-à-vis the institution concerned even though, formally, the Member State is its sole interlocutor".[200].The EU administration is considered to be bound by 'direct links' to individuals, and by a duty to hear them, whenever their legal position is substantially affected by its decisions.[201] Such 'direct links' are one of the very few legal concepts that EU courts developed in

[199] See Chapter 2, Section 5.1. (in particular, fn 111).
[200] Eric Barbier de la Serre, (fn 22) 240.
[201] Sandro Mento, 'I poteri amministrativi della Commissione europea in materia di fondi strutturali', in: *Rivista Trimestrale di Diritto Pubblico*, (2007), 135-172, 163. Mento points out that what matters in the case law is not that the

an explicit manner for composite decision-making. The notion emphasises that EU authorities are connected by legal relations to individuals, even if a screen of national bureaucracies exists between them. This reverses the old notion that the EU's administration, unless explicitly provided otherwise, decides in regard to, and relates only with, national administrations.

The old conception of strictly divided powers, too, has now been disowned. EU courts ultimately recognized that, though comprising national and EU phases, a composite procedure is a single, unitary decision-making process.[202] Indeed, the Court's understanding of composite procedures goes even further. What the case law reveals, from customs procedures to the European Social Fund, is that EU courts have adopted "a unitary conception of [the] public authorities" involved in composite procedures.[203] It is not just that EU and national authorities are no longer seen as hermetically separate in their power – they are conceived of as *the same, integrated administration*.

Some have noticed how the primary contact rule subjects the two levels of administration to the same standards of procedural protection.[204] It is not uncommon for EU courts to expect the Member States to ensure the protection of individuals in similar terms to those enshrined at EU level. However, the expectation that national authorities observe the right to be heard *as the EU administration would* is particularly important in light of the rule of confirmation. After all, the hearings offered by national authorities may be retroactively attributed to the EU administration at a later stage. If the EU administration is willing to entrust the fulfilment of its own procedural obligations to national authorities, it must also take responsibility when national authorities provide defective hearings or fail to provide hearings at all. In such cases, those hearings will need to be held against the same standards as if they had been offered by the EU administration itself.[205]

National authorities are required to comply with the EU administration's standards of protection of the right to be heard because they are expected to act as an *extension* of the EU administration in the fulfilment of that right. This holds true not just for the rule of confirmation, but also for the rule of delegability. Consider the language of the *France-Aviation* case. The General Court held that, "in order to *ensure* that the applicant's right to be heard was respected", the Commission "should have made (…) a request" to the French authorities for a hearing to be

---

Member States' authorities are the only *formal* addresses of the Commission's decisions, but that those decisions substantively impact the legal position of individuals. See for instance Joined Cases T-180/96 and T-181/96, *Mediocurso I*, EU:T:1998:208, para. 100.

[202] This view has also been supported by Hanns Peter Nehl, (fn 32), 93-94, Sabino Cassese, (fn 4), 31-32, and Giacinto della Cananea, (fn 104), 243.

[203] Takis Tridimas, (fn 73), 388.

[204] Loïc Azoulai, (fn 76), 148.

[205] As Chapter 7 will explain, this is of particular importance in determining the extent to which irregularities occurring at national level can be imputed to the EU administration.

given.[206] This implies that, when individuals are heard by national officials, it will count as if they were being heard by the EU administration. The EU administration may choose to pass its own burden of providing hearings by instructing national authorities to conduct them on its behalf; as if they were its representatives, or indeed, an extension of itself.[207]

In sum, both the rule of confirmation and the rule of delegability rely on an understanding that, in composite procedures, national authorities act as an extension of the EU administration. They are understood to act as an auxiliary bureaucracy that may be expected to carry out the EU administration's duty to observe the rights of the defence. National and EU authorities are not treated as separate entities. In fact, they are treated as if they were a single, integrated administration. In composite procedures, to put it shortly, national authorities are conceived of as the *ancillary bureaucracy of an integrated European administration*.

This conception of administration is also visible in cases relating to another fundamental procedural right. The case law on the right to a reasoned decision is an additional chapter of the story of how the principle of unitary protection emerged – and how the constitutional doctrine of EU executive federalism eroded.

[206] *France-Aviation* (fn 57), para. 30.

[207] It is worth pointing out that delegated hearings are not unheard of in national administrative laws. It is nevertheless telling that hearings of this kind tend to occur in the context of hierarchical relations between different administrative bodies. For the example of the UK, see William Wade/Christopher Forsyth, *Administrative Law*, 9th ed., (Oxford, 2004), 530-531.

CHAPTER 5

THE PRINCIPLE OF UNITARY PROTECTION AND THE RIGHT TO A REASONED DECISION IN COMPOSITE DECISION-MAKING

1. 'Part and Parcel': national reasons, EU decisions

This chapter examines how EU courts ensure the duty to give reasons in composite procedures. It argues that EU case law contains judge-made rules on the right to a reasoned decision that are unique to composite decision-making, and that those rules are based on an integrated conception of European administration.

The right to a reasoned decision is by far the least studied procedural right in composite decision-making. It is usually afforded no more than a short paragraph in articles sketching out the concept and general problems of composite procedures.[1] This is reflective of the fact that the study of the duty to state reasons has been neglected by EU legal scholarship – surprisingly so, given that, quite literally, every single binding EU measure must be accompanied by a statement of reasons.[2] The scant literature that has been more attentive to the matter tends to present composite procedures as just one of many domains where the reasons-giving requirement applies.[3] In doing so, it has overlooked the distinctive ways in which the requirement is interpreted in composite decision-making.

---

[1] For instance, Giacinto della Cananea, 'The European Union's Mixed Administrative Proceedings', in: *Law and Contemporary Problems*, 68, (2004-2005), 197-217, 208-209.

[2] Similarly, for a contribution pointing out how the reasons-giving requirement has remained undertheorized, see Jerry Mashaw, 'Reasoned Administration: the European Union, the United States and the Project of Democratic Governance', in: *George Washington Law Review*, 99, (2007), 99-124, 101. For a few studies that have made up for this analytical disinterest on the part of legal scholarship, see Martin Shapiro, 'The Giving Reasons Requirements', in: *University of Chicago Legal Forum*, (1992), 179-220; Onno Brouwer/Deirdre Curtin, 'Why? The Giving Reasons Requirement of EU Administration', in: *Views of European Law from the Mountain – Liber Amicorum Piet Jan Slot*, (Kluwer Law International, 2009), 133-142 and Giacinto della Cananea, *Due Process of Law Beyond the State: Requirements of Administrative Procedure*, (Oxford, 2016), 61 ff.

[3] To be fair, Hanns Peter Nehl's path-breaking dissertation does examine the right to a reasoned decision in composite procedures – though as a mere example of procedures in which that right applies. By doing so, the dissertation entirely overlooks dynamics of the right to a reasoned decision that are unique to composite decision-making. As will be further elaborated below, this misleads the analysis in Nehl's book in two regards. The first is that it ignores the nuanced ways in which EU courts translate the structure of composite procedures into conditions that statements of reasons must specifically respect in procedures of that kind. The second is that Nehl's analysis considers that the application of the EU case law on reasons-giving at national level is irrespective of the composite or purely national character of a given administrative procedure.

The duty to give reasons is sometimes explicitly enshrined in the legislation creating composite procedures.[4] Generally speaking, however, the case law has ensured the reasons-giving requirement in ways that are not of the making of the EU legislature, but rather the product of judicial creativity.

Section 2 begins by mapping the general position and function of the reasons-giving requirement in EU constitutional law. EU law is generally clear as to when national and EU decisions must be reasoned. This is probably the reason why, unlike what occurred in the domain of the right to be heard, EU courts never needed to address doubts as to whether the reasons-giving requirement applies to composite procedures.

Section 3 considers the particularities of the case law on the right to a reasoned decision in composite procedures. Though of significantly less complexity, the case law on reasons-giving is closely intertwined with the jurisprudence concerning the right to be heard. Some solutions on the right to a reasoned decision *presuppose* the compliance with the right to a fair hearing. Yet, more importantly, the jurisprudence of EU courts on reasons-giving reflects the adoption of the same principle of unitary procedural protection examined in the preceding Chapter.

Though its original framing in the Treaties suggests the duty to give reasons to be an objective requirement of EU authorities, the case law has recognized it as a counterpart of an individual procedural right. The right to a reasoned decision is considered, alongside the right to be heard, as a corollary of the principle of the respect for the rights of the defence.[5] In composite procedures, that principle has been used as the justification for the notion that the procedural rights of individuals cannot be undermined by the involvement of multiple levels of administration.

This is also the rationale of two implicit rules that EU courts have developed to ensure the reasons-giving requirement in composite procedures. The two rules – termed here as the rules of replicability and referral – do not relate to *whether* the EU administration must give reasons, but to *how* it may do so. The rule of replicability requires that the EU administration incorporate the reasons contained in national preparatory acts into its own statements of reasons, if those acts relevantly influenced the final decision at EU level. The

[4] See for example Article 6 (6) of Regulation 1829/2003, which binds EFSA to a duty to substantiate the opinions it issues in the procedures for the authorisation of GMO food or feed. The EMA is under the same duty when issuing opinions concerning the approval of pharmaceuticals (see Article 32 (5) of Directive 2001/83).

[5] For just a few recent rulings, see Cases C-277/11, *M. M.*, EU:C:2012:744, para. 88; C-417/11 P, *Bamba*, EU:C:2012:718, para. 49; T-383/11, *Makhlouf*, EU:T:2013:431, para. 60; C-249/13, *Boudjlida*, EU:C:2014:2431, para. 38; T-593/11, *Al-Chihabi*, EU:T:2015:249, para. 61; and T-145/15, *Romania v Commission*, EU:T:2017:86, para. 43.

rule of referral allows the EU administration to give reasons to its own measures by simply pointing out to previous national preparatory acts. The EU administration's statement of reasons thereby becomes a *composite statement of reasons* in the truest possible sense, as it is scattered in different national and EU measures.

Section 4 reflects upon the implications of the rules of replicability and referral from the point of view of the doctrine of EU executive federalism. It is argued that both reveal a significant departure from key tenets of that doctrine. Indeed, the two rules entirely abandon the assumption that national and EU authorities form strictly separate spheres of administrative power. Rather, the case law reflects an integrated conception of administration in composite decision-making, where national and EU authorities are joined as a single organic whole. Moreover, the case law is based on an implicit understanding that national authorities fulfil an ancillary role to the benefit of EU administration, in the sense that the EU level may rely on the assistance of national authorities to fulfil its own procedural obligations.

Almost as if it had an 'administrative touch of Midas', the EU administration may comply with the reasons-giving requirement by transforming the reasons given by national authorities into EU statements of reasons. The reasoning of national authorities becomes, as EU courts say, "part and parcel" of the EU administration's decisions.[6]

2. The duty to give reasons: rationales and place in EU constitutional law

The reasons-giving requirement, or right to a reasoned decision, means that administrative authorities must explain the motives underlying the measures they adopt. Article 296 (2) TFEU (and its predecessors) have long established a general duty on the part of EU bodies to state reasons.[7] The duty covers all EU measures entailing binding legal effects,[8] regardless of whether they are preparatory or final; regardless of whether they of individual or general application;[9] and regardless of whether they are favourable or adverse to private parties, though in the latter case the bar is set higher for how detailed the reasons must be.[10] Today, the duty is enshrined in Article 41 (1) c) of the Charter as a

[6] The expression is found in Case T-199/99, *Sgaravatti*, EU:T:2002:228, para. 103.
[7] A different question is whether, "exceptionally", interests of public security may justify the absence of a detailed disclosure of motives for the adoption a given measure, such as blacklisting decision. This was the rationale of the General Court's ruling in Case T-228/02, *OMPI I*, EU:T:2006:384, paras. 147-48.
[8] See Giacinto della Cananea, (fn 2), 77 and Maria Geismann, 'Artikel 296', in: Hans von der Groeben/Jürgen Schwarze/Armin Hatje (Eds.), *Europäisches Unionsrecht*, 7th ed., (Nomos, 2015), 1420 ff, 1423.
[9] Paul Craig, *EU Administrative Law*, 2nd ed., (Oxford, 2012), 341.
[10] See the Opinion of AG Kokott in Case C-413/06 P, *Bertelsmann*, EU:C:2008:392, para. 98. Nevertheless, some rulings emphasize how statements of reasons are all the more important when the measures at stake

fundamental right, at least with regard to the reasoning of individual decisions taken by EU authorities.[11]

As was already explained,[12] the reasons-giving requirement represents an important implication of the rule of law in administrative procedures.[13] The requirement promotes a culture of administrative transparency and accountability.[14] It obliges the administration to lay bare the motives behind its decisions, and thereby facilitates the detection of misguided or arbitrary exercise of power.

The CJEU's understanding of the rule of law, which tends to emphasise judicial control of public power,[15] reflects in how it construes the main purpose of the reasons-giving requirement. Indeed, the case law associates the duty to give reasons with both the objective and subjective functions of judicial control.[16]

The objective function concerns the enforcement of the legal limits to the exercise of public power. Statements of reasons fulfil that function by assisting courts in determining whether the administration has made manifest errors of appraisal or misuse of power in the exercise of its discretion, or whether the factual and legal conditions for the adoption of a measure have been met.[17] The subjective function relates to the protection of individual rights against authorities. Accordingly, the reasons-giving requirement is

---

entail adverse effects to individuals. See for instance *Sgaravatti* (fn 6), para. 101. The General Court emphasized the Commission's responsibility to clearly set out its reasons to adopt a decision reducing the amount of ESF assistance, given that decisions of that character cause serious consequences to beneficiaries. See also Cases C-181/90, *Consorgan*, EU:C:1992:244, paras. 16-18; C-41/00 P, *Interporc*, EU:C:2003:125, para. 55; T-196/01, *Aristoteleio Panepistimio Thessalonikis*, EU:T:2003:249, paras. 52-53; and C-417/11 P, *Bamba*, EU:C:2012:718, para. 49.

11 Article 41 (1) c) of the Charter only enshrines a fundamental right to reasoned *decisions*, and not to acts of general application. Nonetheless, the latter are covered by the general reasons-giving requirement of Article 296 (2) TFEU.

12 See Chapter 3, section 5.1.

13 An additional justification for the right to receive reasons is given by Jerry Mashaw, (fn 2). Mashaw holds that the reasons-giving requirement contributes to the moral and political legitimacy of the administration. In his view, by giving reasons, the administration allows its decisions to be "explicable as a plausible instance of rational collective action" (at 118). Reasons-giving "treats persons as rational moral agents who are entitled to evaluate and participate in a dialogue about official policies on the basis of reasoned discussion" – as subjects and not as objects of the law.

14 See Deirdre Curtin, *Executive Power in the European Union: Law, Practices, and the Living Constitution*, (Oxford, 2009), 208-209 and Damian Chalmers/Adam Tomkins, *EU Public Law*, (Cambridge, 2007), 447. Carol Harlow, *Accountability in the European Union*, (Oxford, 2002), 160, points out that the interpretation of the reasons-giving requirement by EU courts does tend to emphasize the protection of rights and judicial review, but nevertheless "also extends to an embryonic public principle of transparency".

15 Laurent Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', in: *European Constitutional Law Review*, 6:3, (2010), 359-396, 372.

16 Interestingly, Giacinto della Cananea, (fn 2), 65, explains that each of the two functions was behind the judicial development of the right to a reasoned decision in France and Germany. In the former, the rationale was the protection of individual rights; in the latter, that of preventing the infringement of the law, "considered objectively".

17 See *inter alia* Cases 42/84, *Remia*, EU:C:1985:327, para. 34; and T-260/11, *Kingdom of Spain v Commission*, EU:T:2014:555, para. 63.

understood as being required as a tenet of the right to an effective judicial protection.[18] The two functions are quite present in the standard formulations of the duty to state reasons. According to settled case law,

> "the reasons stated for a measure must disclose clearly and unequivocally the reasoning of the Community authority which adopted it, so as to make the persons concerned aware of the reasons for the measure and thus *enable them to defend their rights*, and so as to *enable the Community Courts to exercise their supervisory jurisdiction*" (emphasis added).[19]

Recent case law has restated the twofold purpose of statements of reasons. In *Romania v Commission*, the General Court highlighted that, though it constitutes a corollary of the principle of the rights of the defence, the right to a reasoned decision is not limited to those rights. Rather, it also "contributes to the achievement of a more general objective, namely to ensure that the EU Courts are able to review the legality of the measure challenged before them".[20]

The adequacy of any given statement of reasons will depend on how accessible it is, in each concrete case,[21] to the parties potentially interested in the review of the measure. That accessibility is judged both in the light of the wording of the reasons, and of the decisional context from which the measure emerged.[22] While they need not state *all* legal and factual reasons leading to the decisions taken, EU authorities must explain those which were of *decisive* important in that context.[23] The absence of reasons for a measure, or their

---

[18] See Case T-461/08, *Evropaïki Dynamiki*, EU:T:2011:494, para. 122, which describes the duty to state reasons as "an essential procedural requirement, intended inter alia to ensure that the person adversely affected by the measure in question has the right to an effective remedy". In the field of counter-terrorism policy and freezing of funds, a case in point is T-390/08, *Bank Melli Iran*, EU:T:2009:401. At para. 105 of the ruling, the General Court held that "the effectiveness of judicial review means that the Community authority in question is bound to communicate the grounds for freezing its funds to the entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable its addressees to exercise, within the periods prescribed, their *right to bring an action*. Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to *defend their rights* in the best possible conditions" (emphasis added). In the same vein, see Cases T-202/12, *Al-Assad*, EU:T:2014:113, paras. 60-62 and T-433/13, *Petropars Iran*, EU:T:2015:255, para. 115. See also C-300/11, *ZZ*, EU:C:2013:363, para. 53.

[19] See Cases T-305/00, *Conserve Italia*, EU:T:2003:338, para. 45; C-76/01 P, *Eurocoton*, EU:C:2003:511, para. 88; and Joined Cases T-44/01, T-119/01 and T-126/01, *Vieira*, EU:T:2003:98, para. 193.

[20] Case T-145/15, *Romania v Commission*, EU:T:2017:86, para. 43.

[21] EU courts rarely fail to stress that the sufficiency of statements of reasons depends from the specificities of each case. See for instance Cases T-24/05, *Alliance One International*, EU:T:2010:453, para. 149; T-89/07, *VIP Car Solutions*, EU:T:2009:163, para. 62; and T-165/12, *European Dynamics Luxembourg*, EU:T:2013:646, para. 64.

[22] Case T-177/10, *Alcoa Trasformazioni*, EU:T:2014:897, para. 48.

[23] For many, see Cases T-185/06, *L'Air liquide*, EU:T:2011:275, para. 64; T-123/09, *Ryanair*, EU:T:2012:164, para. 178; and T-386/14, *FIH Holding*, EU:T:2016:474, para. 94.

inadequacy, constitutes a breach of an essential procedural requirement which can be raised by EU courts on their own motion.[24]

The obligation to state reasons also extends to national administrations whenever they take decisions under the scope of EU law. However, Articles 296 (2) TFEU and 41 (1) c) of the Charter do not cover national authorities, but only EU bodies.[25] Instead, the duty of national administrations to give reasons applies has been derived from the principle of effective judicial protection.[26]

The *Heylens* Case provided the seminal ruling in this regard.[27] The case concerned a judicial challenge to a French administrative act, which refused to recognise the equivalence of a Belgian certificate of qualification for a professional football trainer. That negative decision had been adopted by an administrative body based on a preparatory measure, a non-binding opinion, submitted to it by another body. The national court asked the Court of Justice whether EU law required that opinion to be subject to judicial review and the duty to give reasons.

In its reply, the Court followed the Opinion of Advocate General Mancini, and entirely rephrased the question. Mancini cautioned the Court not to engage in a fruitless examination of whether effective judicial protection and the reasons-giving requirement apply to mere preparatory, and therefore unreviewable, acts. In order to give the national court "an answer which is truly useful", Mancini proposed that the Court should focus on whether EU law extends the requirements of reasons-giving and effective judicial protection to national decisions.[28] The preliminary reference was therefore answered as if it had inquired whether the *final* national measure, rather than the *preparatory opinion* on which it was based, was subject to those principles. After declaring the right to an effective judicial protection a general principle of EU law, the Court answered the question in the affirmative: Member States must provide effective judicial protection against national administrative decisions, and consequently disclose the reasons for their adoption.[29]

---

[24] *Bertelsmann*, (fn 10), para. 174.
[25] See Case C-482/10, *Cicala*, EU:C:2011:868, para. 28.
[26] This distinction was explicitly made by the Court in Case C-70/95, *Sodemare*, EU:C:1997:301, para. 19. The ruling clarified that the obligation of national authorities to state reasons "concerns only individual decisions adversely affecting individuals against which the latter must have some remedy of a judicial nature".
[27] Case 222/86, *Heylens*, EU:C:1987:442. On the ruling, see Louis Dubois, 'A propos de deux principes généraux du droit communautaire (droit au contrôle juridictionnel effectif et motivation des décisions des autorités nationales qui portent atteinte à un droit conféré par la règle communautaire)', in: *Revue Française de Droit Administratif*, (1988), 691-700.
[28] See the Opinion of AG Mancini in *Heylens*, at 4107-4108.
[29] *Heylens*, (fn 27), paras. 14-16.

The CJEU implicitly held that the obligation to state reasons does not cover purely preparatory acts.[30] The link between effective judicial protection and the obligation to state reasons was later used to deny that obligation in respect of measures that are not reviewable under EU law. It is safe to say that the obligation does not cover purely preparatory acts, national measures of general application,[31] or purely factual conducts such as the sending of requests for additional information from citizens.[32]

3. Restate or refer: reasons-giving in composite procedures

The case law on the reasons-giving requirement in composite procedures is not nearly as complex as the case law concerning the right to be heard. One of the reasons for this is that, unlike what occurred with regard to the right to be heard, there was no significant body of case law that read the reasons-giving requirement in composite procedures against the backdrop of the doctrine of executive federalism. One does, however, find a few exceptions in the *Universiteit Groningen* and *TGI* rulings.

In *Universiteit Groningen*,[33] the Court was asked about the sufficiency of the reasons stated for a Commission decision. The decision, adopted pursuant to the composite procedure for the duty-free importation of scientific instruments, rejected the university's application for exemption from customs duty. The university contended that it had not been informed of the reasons for which the Commission rejected its application. The Court's answer was that the applicant had no claim to demand information from the Commission concerning the basis for its decision.[34] The argument was that the Commission's decision in the administrative procedure was only addressed and notified to the Member States. The argument rested upon an 'inter-administrative' reading of the

---

[30] See in particular para. 15. The same interpretation is made by Hanns Peter Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung „mehrstufiger" Verwaltungsverfahren*, (Duncker & Humblot, 2002), 407-409 and Koen Lenaerts/Ignace Maselis/Kathleen Gutman, *EU Procedural Law*, (Oxford, 2014), 113.

[31] See *Sodemare* (fn 26), para. 20. It should be borne in mind that EU law generally does not require the Member States to establish remedies against national measures of general application. See Case C-432/05, *Unibet*, EU:C:2007:163, para. 65.

[32] See Case C-127/95, *Norbrook Laboratories*, EU:C:1998:151, para. 103. The Court explains that the obligation to state reasons "does not extend to measures (….) relating to the examination of an application, by which the competent authority asks an applicant for marketing authorisation to provide further information". In the same paragraph, the Court cautions that the reasons-giving requirement would however apply if the failure to comply with the request for further information would result in the application for the autorisation being rejected.

[33] The ruling was already alluded to in Section 3 of the preceding chapter, as it also entailed important findings in what concerns the right to be heard.

[34] See Case 185/83, *Universiteit Groningen*, EU:C:1984:331, para. 22.

legislation. It relied on a conception of the Commission as a second-order administration, generally bound only by legal relations to national authorities.

As Chapter 4 explained, such 'inter-administrative' readings are still common in composite procedures for the review of state aid, where they hamper the fulfilment of the right to be heard. Yet, the same problem arises only sporadically in respect of the right to a reasoned decision. The *TGI* ruling is an example of the latter. The General Court resorted to the 'inter-administrative' reading to conclude that the room for the right of undertakings to a reasoned decision was limited. The General Court held that,

> "When examining whether the obligation to state reasons was satisfied (…), it should be pointed out that the procedure for reviewing State aid is a procedure initiated in respect of the Member State responsible for granting the aid and that the parties concerned within the meaning of Article [108 (3) TFEU], which include the recipient of the aid, cannot themselves seek to debate the issues with the Commission in the same way as may the abovementioned Member State".[35]

However, the most likely explanation for the relative simplicity of the case law is that, as results from the previous section, EU law is quite clear about when national and EU authorities must state the reasons for the decisions they adopt. EU authorities must *always* reason their decisions; national authorities must reason all reviewable measures. The doubts as to *which* level of administration is obliged to state reasons in composite procedures are therefore less concerning than some authors, such as Mattarella, have suggested.[36]

This is not to say that the duty to state reasons is entirely unproblematic in composite procedures. However, the problems lie not in *when* that duty applies, but in *how* it may be fulfilled. The question is how the statement of reasons should reflect the fact that the final decision results from the exercise of both national and EU decisional power.

More specifically, the case law reveals two doubts as to how the EU administration should reason its decisions when it follows the position of national authorities. The first doubt is whether EU authorities must include the reasons found in national preparatory

[35] T-198/01, *Technische Glaswerke Ilmenau* (*TGI*), EU:T:2004:222, para. 61. See also Case C-367/95 P, *Sytraval*, EU:C:1998:154, para. 59.
[36] Bernardo Giorgio Mattarella, 'Procedimenti e Atti Amministrativi', in: Mario Chiti (Ed.), *Diritto Amministrativo Europeo*, (Giuffrè, 2013), 327-377, 337.

acts in their statements of reasons. The second doubt is whether EU authorities may fulfil their duty to give reasons simply by simply referring back to national preparatory measures.

The answer to the two doubts has given rise to two innovative and judge-made rules that are specific to composite decision-making. Both are concretizations of the broader trend of EU courts to seek to ensure unitary procedural protection in composite procedures.

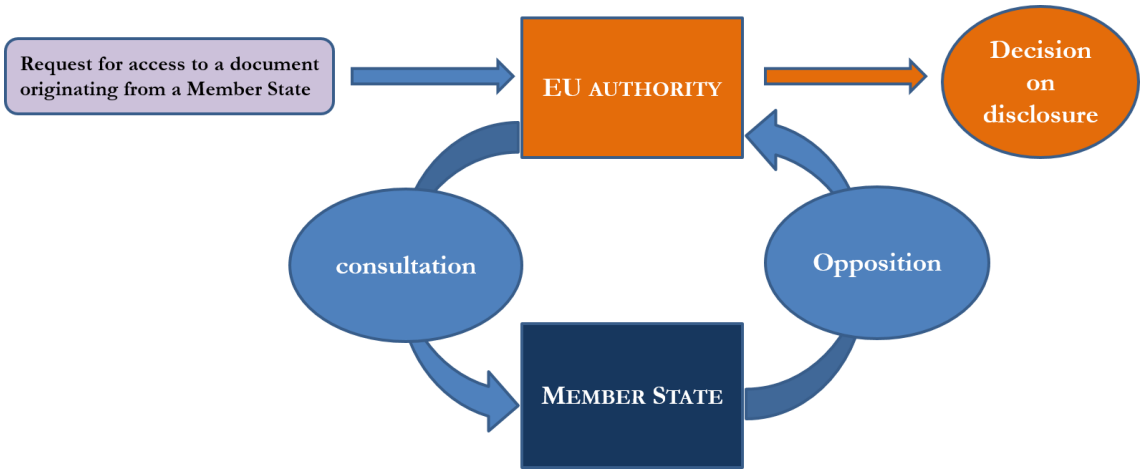
3.1. The rule of replicability

The first doubt is whether an EU body may simply reproduce the reasons set out in a national preparatory measure. This issue has been most visible in the case law on access to documents held by EU authorities, but which originate in the Member States.

The regime established in Regulation No 1049/2001 aims to ensure the transparency and openness of EU decision-making processes. The regime is built on the assumption that, in principle, all documents held by EU institutions should be accessible to the public.[37] However, it also allows those institutions to refuse access to documents based on a number of 'substantive exceptions' – that is, if their disclosure undermines public interests such as public security and international relations, or the privacy and integrity of individuals.[38]

The procedure for disclosure of documents is composite when it involves documents that are held by EU bodies but that nevertheless originate from the Member States. In such cases, the Member States enjoy the option of opposing disclosure. The national act of opposition must offer an explanation in the light of the 'substantive exceptions' mentioned above.

[37] See recital (11).
[38] See Article 4 (1) and (2).

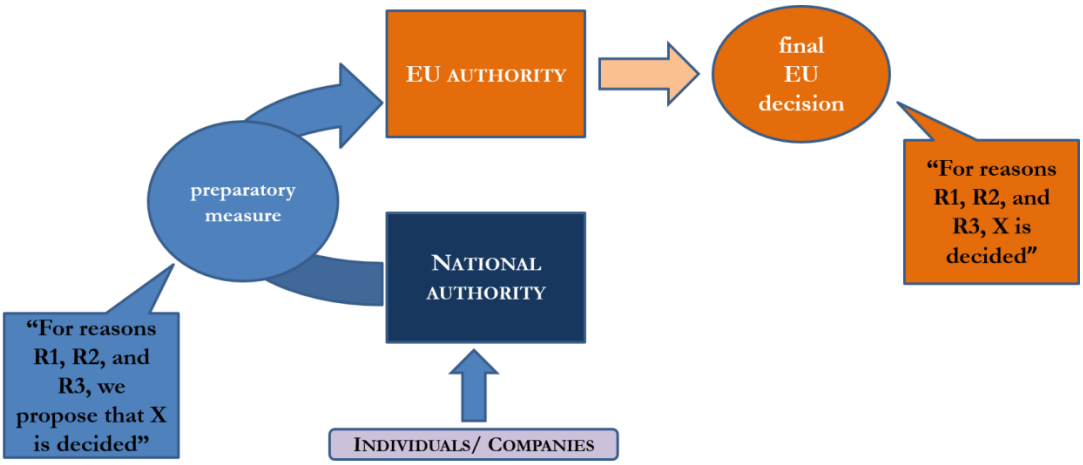


Composite procedure for the granting of access to documents in the possession of EU authorities, but which originate in Member States

The legal effects of that opposition will be analysed in Chapter 7, which examines their implications in determining whether an unlawful act of opposition by a Member State may render invalid the final decision at EU level. What is important to note at this point is that the EU authority can reject the request for access to documents on the grounds that it has been opposed by the national authority.

EU courts have firmly denied that the division of administrative tasks between national and EU authorities should in any way harm the right to a reasoned decision. Even if the final decision is taken at EU level, its statement of reasons must set out all the relevant motives for its adoption – including those that originate from the national level.

What is termed here as the *rule of replicability* concerns the fact that EU courts require statements of reasons at EU level to reproduce the reasons contained in a national preparatory measure, if they were relevant in the adoption of the final decision.



Rule of replicability: functioning

This notion has been most present in the case law on access to documents. Since the ruling in *Sweden v Commission*, EU courts have repeated a formula that has remained roughly constant:

> "before refusing access to a document originating from a Member State, the institution concerned must examine whether that State has based its objection on the substantive exceptions in Article 4(1) to (3) of Regulation No 1049/2001 and has given proper reasons for its position. Therefore, when taking a decision to refuse access, the institution *must* make sure that those reasons exist and *refer to them in its decision refusing access at the end of the procedure*" (emphasis added).[39]

There is no reason why, in essence, the line of argument cannot easily be extended to other composite procedures. Indeed, the line of argument relies purely on the structure of the procedure, where a national authority adopts a preparatory measure and the final decision is adopted by an EU authority. If the facts set out in the preparatory measure are decisive for the final decision, then the EU authority should include them in its statement of reasons.

[39] T-344/15, *French Republic v Commission*, EU:T:2017:250, para. 41. See also Cases C-64/05 P, *Sweden v Commission*, EU:C:2007:802, para. 99; C-135/11 P, *IFAW*, EU:C:2012:376, para. 62; and T-669/11, *Spirlea*, EU:T:2014:814, para. 53.

3.2. "We agree": composite statements of reasons and the rule of referral

The EU administration may find the reasons contained in national preparatory acts so compelling that it decides to follow them in their entirety. When such is the case, the EU administration has developed, at least in some policy fields, a practice of simply pointing out the measures taken by national authorities. As Advocate General La Pergola explained, this practice ensures that there is no "pointless duplication" of the work of national and EU authorities.[40] A different question is whether the practice is admissible.

EU courts answer the question in the affirmative. They have developed in this domain a rule that is symmetrical to what was termed the rule of confirmation, in the case law on the right to be heard. As was explained, EU courts accept that European authorities fulfil their duty to provide a hearing in composite procedures by relying on hearings already offered in preceding national stages. If an EU authority simply confirms the position already taken by a national authority in its entirety – both the facts *and* the evaluation of those facts – it does not need to offer affected parties a new opportunity to express their views.[41]

Similarly, EU courts have developed a rule according to which will be termed here as the *rule of referral*. If EU authorities simply agree with the reasons contained in a preparatory measure taken by a national administration, they may fulfil their duty to state reasons by simply referring back to that position. EU authorities have at their disposal the possibility to adopt statements of reasons *per relationem*.[42] This term, which is familiar to the administrative laws of several Member States, is occasionally translated in the English version of the case law as "referential statements of reasons".[43]

Referential reasons-giving is not unknown in EU case law. Indeed, there are a few rulings in which the Commission was held to have validly reasoned a given decision by simply referring to similar decisions it had previously adopted.[44] What is unique about referential statements of reasons in composite procedures is their structure and the set of conditions to which they are subject.

---

[40] Case C-32/95 P, *Lisrestal*, EU:C:1996:402, para. 37.

[41] See Chapter 4, subsection 4.3.

[42] This term has been felicitously used before by Giacinto della Cananea in regard to this kind of statements of reasons in composite procedures. See Giacinto della Cananea, (fn 1), 208-209.

[43] See *Mediocurso I*, para. 97.

[44] See Case C-119/97 P, *Ufex*, EU:C:1999:116, para. 57: "the statement of reasons for an administrative act may refer to other acts and, in particular, take note of the content of an earlier act, especially if it is connected". In the ruling, the Court followed the Opinion of AG La Pergola, who had held that "there is nothing to prevent the statement of reasons of an administrative act from referring to other acts, particularly if they are connected or related to each other. Likewise, in such cases, there is nothing to prevent the author of the act from using the existence of a previous act and its content as a logical argument leading to certain conclusions when examining a later act" (see para. 20 of the Opinion). For a more recent example, see Case T-25/07, *Iride*, EU:T:2009:33, paras. 72-76.

Indeed, the rule of referral permits a form of reasons-giving which consists of "composite statements of reasons" in the fullest possible sense. The rule specifically applies to reasons-giving for EU measures concluding a composite procedure. Composite statements of reasons are composed of national and European elements – of the reasons contained in national preparatory measures and of a referral made by an EU authority to them. The conditions of the rule of referral are jointly fulfilled by the national and EU administrations.

The case law on the older regime of the European Social Fund shows a host of instances in which statements of reasons of this kind were accepted, at least in principle. Composite statements of reasons seem to be used frequently by the Commission when it intends to withdraw or reduce financial assistance. Surprisingly, this concept does not appear to have been applied in much case law beyond the domain of the ESF.[45] Nevertheless, the same line of reasoning can easily be extended to other composite procedures of a similar structure, where a national procedural stage precedes a final decision at EU level.

The logic of referential statements of reasons has appeared in ESF case law since the *Branco I* ruling.[46] The formula used by the CJEU then suffered hardly any variations, and is still good law:

> "*a decision of the Commission reducing financial assistance may be regarded as adequately reasoned if it* either clearly sets out itself the reasons which justify the reduction in assistance, or *refers with sufficient clarity to a measure of the competent national authorities* of the Member State concerned in which *those authorities set out clearly the reasons* for such a reduction, in so far as the undertaking in question has been *able to take cognisance of the measure*" (emphasis added).[47]

This – rather complex – formula expresses a rule of about *how* the EU authority in a composite procedure may fulfil its duty to give reasons as set out in Article 296 (2) TFEU.

---

[45] Some exceptions can be seen in *Sgaravatti* and *Le Canne*, which concerned agricultural funds rather than financial assistance drawn from the ESF.

[46] Case T-85/94, *Branco I*, EU:T:1995:4, para. 34.

[47] *Sgaravatti* (fn 6), para. 102. See also T-89/94 (122), *Branco II*, EU:T:1998:156, para. 36; T-551/93 and T-231/94 to T-234/94, *Industrias Pesqueras Campos*, EU:T:1996:54, paras. 142-144; Joined Cases T-180/96 and T-181/96, *Mediocurso I*, EU:T:1998:208, para. 100; T-72/97, *Proderec*, EU:T:1998:179, paras. 104-105; T-126/97, *Sonasa*, EU:T:1999:239, paras. 68-69; T-182/96, *Partex*, EU:T:1999:171, para. 77; T-80/00, *Associação Comercial de Aveiro*, EU:T:2002:117, para. 38; Joined Cases T-251/05 and T-425/05, *Mediocurso II*, EU:T:2007:162, para. 41; T-102/00, *Vlaams Fonds*, EU:T:2003:192, paras. 96 ff; T-51/11, *AECOPS I*, EU:T:2013:203, para. 81 ff, T-52/11, *AECOPS II*, EU:T:2013:204 paras. 84 and T-53/11, *AECOPS III*, EU:T:2013:205, paras. 80 ff.

The formula permits, rather than imposes, that EU authorities resort to composite statements of reasons. This is most visible in the emphasis given in the case law to the option accorded to EU authorities of adequately reasoning their decisions *either* by clearly setting out themselves the motives for the final decision, *or* by referring to a preparatory measure issued by national authorities.[48]

However, composite statements of reasons are subject to a number of conditions. An EU authority *may* resort to such statements of reasons when the four conditions of the rule of referral are met:

1. It purely and simply confirms the preparatory measures proposed by national authorities;[49]
2. The reference made to those measures in the EU authority's statement of reasons is sufficiently clear;[50]
3. The reasons contained in the national measures referred to are themselves clearly set out;[51] and
4. The affected parties were able to take cognisance of those preparatory national measures before the adoption of the final EU decision.[52]

---

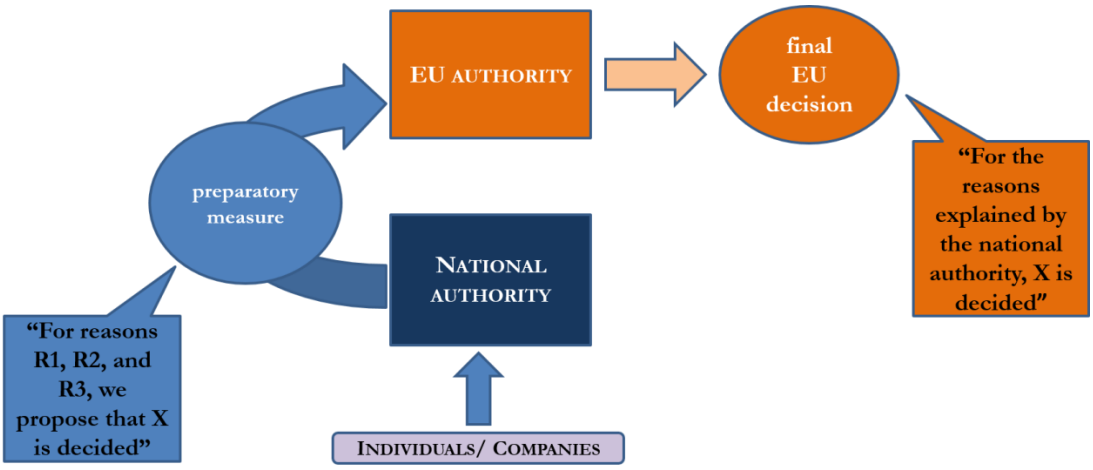
[48] See for instance *Mediocurso I*, (fn 47), para. 100.

[49] This is clearly stated in *Sgaravatti* (fn 6), para. 100, *AECOPS I*, (fn 47), para. 81, *AECOPS II*, (fn 47), para. 84 and *AECOPS III*, (fn 47), para. 80.

[50] Case T-241/00, *Le Canne*, EU:T:2002:57, paras. 56-57 illustrates a situation in which the CJEU annulled a decision to reduce aid because the Commission was not specific in referring to what aspects of the preparatory national measures it agreed with.

[51] This is a demand also placed by other legal orders in which referential statements of reasons are considered lawful. Article 153 (1) of the Portuguese Code of Administrative Procedure admits that statements of reasons "may consist in a mere declaration of agreement with the reasons of preceding opinions, notices or propositions". The case law of the Portuguese Supreme Administrative Court has interpreted the provision in the sense of legitimizing statements of reasons *per relationem*, provided that the average addressee could understand the reasons contained jointly in the statement of reasons and in the measures to which it refers (See Ruling STA 10-02-2010 (Rapporteur: Jorge de Sousa)). As that same court held in Ruling STA 06-02-2007 (Rapporteur: Adérito Santos), "when the law accepted statements of reasons of this kind (*per relationem*), it only did so without prejudice to the clarity, congruency and sufficiency that are also legally required (…) therefore, one cannot consider as adequately reasoned an administrative act (…) if it does not indicate the concrete motives of fact and law, of the decision it contains, nor enables cognition of those reasons by way of reference [to other measures]".
Similar conditions of clarity and cognoscibility are placed to referential statements of reasons in Spanish Administrative law. See Ramón Parada, *Derecho Administrativo*, I, 12th ed., (Marcial Pons, 2007), 135. In Germany, it is key that the addressee of an administrative decision is able to discern that the reasons given in another measure are seen by the deciding authority as valid for the decision taken. See Ferdinand Kopp/Ulrich Ramsauer, *Verwaltungsverfahrensgesetz*, 9th ed., (C. H. Beck, 2005), Annotation to Article 39, 661.

[52] For this latter requirement, see *Proderec*, (fn 47), para. 105; *Partex*, (fn 47), para. 77; *Sgaravatti* (fn 6), para. 102; *Associação Comercial de Aveiro*, (fn 47), paras. 39-40.



Rule of referral (composite statements of reasons)

The fourth condition, the cognisance condition, requires some additional explanation.[53] It is the only condition of the four that relates neither to the reference made in the EU authority's statement of reasons, nor to the characteristics that the national preparatory measures referred to must have. Rather, the cognisance condition relates to the acquiescence of those preparatory measures by the individuals concerned by the final decision of the composite procedure.

3.2.1. The cognisance condition

The cognisance condition is perhaps of the most intriguing requirement of composite statements of reasons. It is generally not demanded of referential statements of reasons, when they concern procedures taking place at EU level only. The condition requires that affected parties have the opportunity to take due notice of the referred national preparatory acts *before* they are forwarded to the EU authority.[54]

This demand results in a degree of procedural protection that is relatively high in comparison to the administrative laws of some Member States. Italian administrative law only requires that the administration, upon notifying the addressee of the final decision, indicates that the measures referred to in the statement of reasons will be made available upon request.[55] Similarly, Dutch administrative law allows referential statements of reasons

[53] On this condition, see Giacinto della Cananea, (fn 1), at 208-209. Contrary to the view supported here, della Cananea holds that the cognisance condition is actually the only condition placed by EU courts referential reasons-giving.
[54] This is what is discussed in *Proderec*, (fn 47), paras. 39-47. See also T-53/11 *AECOPS III*, (fn 47), para. 83.
[55] See the decision of the *Consiglio di Stato*, IV, 22 March 2013, Number 1632. In the ruling, the Italian Council of State considers that "reasons-giving per relationem is legitimate under the condition that the acts referred to are indicated and made available". However, and such only requires that interested parties have the opportunity to "to request and to obtain a copy of them based on the legal framework on the right of access

to opinions adopted in the preparation of a decision, "if the opinion itself contains the reasons *and notice of the opinion has been or will be given to the interested parties*" (emphasis added).[56] However, the case law of EU courts concerning the statement of reasons in composite procedures seems closer to the standard of protection offered in countries such as Spain. Spanish administrative law admits referential statements of reasons, provided that they refer to acts that were a part of the administrative procedure leading up to the final decision, and the addressee of that decision had access to them.[57]

Requiring that the party affected by an EU decision in a composite procedure has previously had access to the national preparatory measures is fully justified from the perspective of judicial control, the main rationale of the reasons-giving requirement in EU law. Affected parties must be in possession of the statement of reasons at the time they are notified of a decision.[58] Since the notification of a measure starts the clock for the strict two-month period to bring actions for annulment,[59] the effective possibility for the affected party to defend herself and for the CJEU to review a measure would be seriously impeded if access to the statement of reasons were not given as soon as possible.

The same logic justifies the demand that the parties concerned had previous access to the referred measures. If the parties concerned by the final decision are kept adequately informed in the course of the composite procedure, they will be familiar with the preparatory acts referred to by the final EU decision and will therefore be able to discern the reasons upon which that decision is based. Consequently, the persons affected by the decision will be able to know, from the moment they become aware of the final decision, whether it is sufficiently reasoned – all they need to do is to consider the national preparatory measures of which they were kept informed.

The logic of the cognisance condition is that the choice of the EU administration to provide merely referential reasons should not harm the procedural and judicial protection of individuals. Nevertheless, the requirement that individuals were previously able to take

---

to administrative documents". Crucially, the *Consiglio di Stato* specifies that the administration does not have an obligation to "notify the interested party of all acts", but rather only "an obligation to indicate the particulars of those acts and to place them at the disposal of the interested party upon her request".

[56] Section 4:19 of the Dutch General Administrative Law Act.

[57] See the Judgment of the Spanish Supreme Court of 09-07-2010 and case law referred there. The Spanish Supreme Court holds that the addressee of the act is accorded the possibility to be aware of the justification for the administration's decision. Following the lead of its 1992 predecessor, the current Spanish Law of Administrative Procedure (Law 39/2015), enshrines in Article 88 (6) the general admissibility of referential reasons-giving.

[58] The General Court was explicit in this sense in Joined Cases T-174/12 and T-80/13, *Syrian Lebanese Commercial Bank*, EU:T:2014:52, para. 75.

[59] See Article 263 (6) TFEU.

cognisance of the national preparatory measures begs the question: how exactly is that access to the national preparatory measures to be ensured?

A closer look reveals that the answer to this question is found in the case law explored in Chapter 4, in the rule of primary contact and the rule of confirmation. The first requires national authorities to offer a hearing, if they are the first administration with which individuals interact in a composite procedure and enjoy powers of appraisal. Similarly, the EU administration is bound by the right to a hearing whenever it holds a power of appraisal. The rule of confirmation allows the EU administration to observe that right by referring back to a hearing already provided by a national authority, if it merely agrees with that authority's position.

National authorities are bound to allow affected parties to take cognisance of their preparatory measures as part of their duty to respect the right to be heard pursuant to the primary contact rule. Indeed, that right means that national authorities must not only consider the comments of the parties concerned by the procedure's final decision, but must also share with them something *upon which to comment*. In other words, national authorities must provide access to the preparatory measures they will forward to the EU administration as a part of the steps to ensure a hearing.[60] To this extent, it is fair to say that the need to respect the right to be heard is embedded into the conditions of lawfulness of composite statements of reasons.[61]

The *Proderec* case illustrates well how the rules of primary contact and confirmation relate to the rule of referral and the condition of cognisance.[62] The Commission wholly agreed with the position taken by the national authorities to reduce ESF financial assistance. The primary contact rule was fully respected: the affected beneficiary was kept informed by those authorities on the proposal for reduction of assistance, and had the opportunity to comment on it. This was decisive to establish that the Commission had complied with the right to be heard, though no hearing was actually offered during the EU stage of the procedure. This was a clear application of the rule of confirmation. However, the fact that the affected beneficiary was kept informed by the national authorities during the first stage was also key to establish that the Commission's decision had been adequately reasoned. Since the beneficiary had been heard on the proposal to reduce its financial

[60] If one may recall, the first implication of the right to be heard is that affected parties have a right to be informed of the factual basis of the administration's envisaged measure. See Cfr. Takis Tridimas, *The General Principles of EU law*, 2nd ed., (Oxford, 2006), 386.
[61] Similarly, Giacinto della Cananea, (fn 1), 209.
[62] Case *Proderec*, (fn 47).

assistance, it had surely been able to take cognizance of the content of that proposal. The fourth condition the rule of referral was therefore fulfilled.

The fact that the EU authority is not obliged to give a second hearing makes it all the more important that the right of individuals to be heard is ensured in national stages. Hearings at national level give individuals the opportunity to become aware and express their views on the preparatory national measures, *before* the latter are forwarded to the EU administration. Once the composite procedure reaches the EU stage, the EU administration may simply adopt a decision by agreeing to the national authorities involved, without the need hear itself the affected individuals on that decision's legal and factual basis.

4. Replicability, referral, and the administrative touch of Midas

The rules of replicability and referral both extend to the domain of reasons-giving the same logic of the rulings on the right to be heard. As was the case for that case law, EU courts have crafted solutions that are unified by an implicit overarching aim of ensuring that the division of tasks between national and EU authorities does not harm the procedural protection of individuals. The constitutional justification for those solutions, which are specific to composite procedures, is the principle of respect for the rights of the defence. The principle of unitary protection expresses the demand for observance of those rights in the realm of composite decision-making, and requires that both levels of administration coordinate in their fulfilment.

Whilst the EU authority in a composite procedure is under a duty to give reasons for its decisions, it is entirely free to choose *how* those reasons are given, provided they clearly convey the motives for their adoption. The rules of replicability and referral reflect two different ways of giving reasons for acts resulting from joint decision-making.

Though in different ways and to different degrees, the two rules are difficult to reconcile with the orthodoxies of EU executive federalism. They are at odds with one of the oldest implications of the logic of the separation principle: the rule that EU and national administrative bodies are exclusively and entirely responsible for the observance of their own legal requirements.[63] Moreover, neither rule on reasons-giving in composite procedures reflects a conception of EU administration as consisting of two, strictly divided, spheres of power.

[63] See Chapter 2, section 5.1.

The rule of replicability requires the EU administration to restate the reasons contained in a national preparatory measure, if they were relevant for the adoption of the final decision at EU level. This obviously assumes that the composite procedure is a single decision-making process, rather than two distinct procedures governing the exercise of separate national and EU powers. Though decision-making power is shared by both administrations, the EU level bears the overall responsibility for the adequacy of the reasons given for the final decision. This is so even if those reasons were first given by a national authority.

This becomes apparent from the case law on access to documents held by EU authorities, but originating from a Member State. The CJEU considers to have the jurisdiction to review whether the refusal to grant access is duly reasoned in the light of the substantive exceptions to disclosure, "regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State." "From *the point of view of the person concerned*", the CJEU continues, the Member State's intervention does not affect the EU nature of the decision. Consequently, the EU authority is responsible for the reasons given for the refusal, even if they were provided by the Member State.[64]

According to the rule of referral, if the EU administration agrees with the substance of the national preparatory measures, then it should not be expected to mechanically copy-paste the reasons contained in those measures into the final statement of reasons. Instead, the EU administration may resort to what was called composite statements of reasons – it may simply allude to national preparatory measures where the reasons for the final decision can be found.

The rule of referral and its various conditions mark a visible departure from core tenets of EU executive federalism. They abandon the separation principle, and the conception of strictly divided administrative power.

Indeed, one could well say that composite reasons-giving allows EU authorities to shift onto national authorities the burden of ensuring the adequacy of statements of reasons of decisions adopted at EU level. If the lawfulness of an EU level statement of reasons can depend from the clarity of national measures, and from whether national authorities transmitted those measures to the individuals concerned, then a good deal of the EU authorities' responsibility to ensure adequate reasons-giving is passed on to national

[64] Cases, *Sweden v Commission*, (fn 39), para. 94 and T-250/08, *Batchelor*, EU:T:2011:236, para. 67.

administrations. This is the opposite of the separation principle, and its view that the two levels of administration are exclusively responsible for their own procedural obligations.

The fact that national authorities are co-responsible for the fulfilment of the EU administration's obligations contradicts the traditional conception of a clear divide between national and EU administration. The composite procedure, in its national and EU components, is considered to be a single exercise of decision-making power. This is visible in how the reasoning of national authorities, though expressed in different measures, is treated as an integral part of the reasoning of the EU administration.

The rules of replicability and referral ensure that the right to a reasoned decision is observed, even though the reasons for the decision are drafted by two different levels of administration. What is perhaps most remarkable about the two rules is the technique they use to do so; the manner in which they assign ultimate responsibility for the sufficiency of the reasons given.

One could think of the technique as a sort of administrative touch of Midas. EU courts consider that the EU administration *transforms* national reasons into EU reasons. By restating or simply indicating them, the EU administration turns the reasons contained in national preparatory acts *ipso facto* into part of its own statements of reasons. National reasons-giving is, put briefly, *appropriated* as EU reasons-giving. This is the conceptual step that allows EU courts to review the sufficiency of reasons contained in national preparatory acts as if they had been drafted by the EU administration itself

This is clear from the rule of replicability, where the EU administration's choice to copy the reasons given by a national body renders irrelevant that they ever originated from a Member State. However, the language of EU courts when explaining the rule of referral is also striking. The mere indication of national preparatory measures converts them into "part and parcel" of the final EU decision.[65] The case law explicitly considers that "the content of [national preparatory] measures forms part of the reasons given for the Commission's decision".[66] In this light, the General Court does not shy away from checking whether national proposals for the reduction of EU funds are sufficiently

[65] The expression is found in *Sgaravatti* (fn 6), para. 103.

[66] See Cases *Associação Comercial de Aveiro*, (fn 47) para. 39; *Partex*, (fn 47) para. 77; and *Proderec*, (fn 47), 105. The notion that referential statements of reasons incorporate the measures referred to is common in the administrative laws of the Member States. Interpreting Article 153 (1) (previously Article 125 (1)) of the Portuguese Code of Administrative Procedure, the Portuguese Supreme Administrative Court has held that "the referential statement of reasons (…) consists in the referral to the terms of a notice, opinion or proposal which contains itself the justification of the act, in such terms that that referral should be understood in the sense that the administrative act absorbed and appropriated their motivation or justification, which thus become an integral part of it" (See Ruling 02-12-2010 (Rapporteur: Pais Borges)).

reasoned.[67] It also scrutinizes whether the referential statements of reasons of the Commission, taken together with the national measures they refer to, suffice for affected parties to understand why a certain decision was taken.[68]

The EU administration may benefit from the assistance of national authorities in fulfilling its duty to give reasons – but is also responsible for their failures when doing so. If EU authorities do not detect, or not correct, the mistakes of national authorities when they aid the EU administration, those mistakes become imputable to the EU level, and reviewable by EU courts.[69] While it is far from evident that this would be allowed by the 'double exclusivity' of the jurisdiction of national and EU courts, the case law has developed a series of conditions under which the irregular preparatory measures of national authorities can be considered in the review of the final decision at EU level. This issue will be considered in Chapter 7.

5. Conclusion: reasons-giving beyond executive federalism

This chapter sought to address an important gap in the literature. It examined how the structure of composite procedures affects the right to a reasoned decision. The Chapter argued that the case law has developed two rules that specifically aim to ensure that right in composite decision-making.

Those rules – termed the rules of replicability and referral – are concretizations of the same implicit principle of unitary protection that largely unifies the case law on the right to be heard. Their rationale is that the division of tasks between national and EU authorities in composite procedures should not impair the exercise of the rights of the defence. Much as the remaining rules of unitary protection, the rules of replicability and referral reflect a conception of administration that is unlike the conception of administration that animated the judicial crafting of traditional EU executive federalism.

The rules of replicability and referral are premised on the idea that the EU administration is obliged to observe procedural rights, but may trust in the cooperation of national authorities when doing so. According to the rule of replicability the EU administration may incorporate into its own statements of reasons the reasoning found in the preparatory measures brought to it by national authorities. According to the rule of referral, the EU administration may fulfil its duty to give reasons with a blanket reference

---

[67] See *Mediocurso I*, (fn 47), para. 100. For a few recent cases in point, see *AECOPS I*, (fn 47), paras. 82 ff and *AECOPS II*, (fn 47), paras. 85 ff.
[68] See *Associação Comercial de Aveiro*, (fn 47), para. 62.
[69] See Bucura Mihaescu Evans, *The Right to Good administration at the Crossroads of the Various Sources of Fundamental Rights in the EU Integrated Administrative System*, (Nomos, 2015), 293.

to national preparatory measures, provided some conditions are met. Those conditions require close coordination between the two levels. EU authorities must indicate the relevant national preparatory measures in a clear fashion. For their part, national authorities must ensure that the reasons contained in their preparatory measures are themselves clearly set out, and that affected parties have an opportunity to be heard on those measures.

The rules of replicability and referral, as the remaining rules drawn from the implicit principle of unitary protection, suggest that EU courts conceive of composite procedures as forming single administrative procedures. Indeed, only in that light do the two rules make sense. Both treat the reasoning of national and EU authorities as continual, and pertaining to the same decision-making process.

However, it is not just that composite procedures are conceived of as unitary decision-making processes. Much as the remaining rules of unitary protection, the very conception of administration that underlies the rules of replicability and referral reflects a view of national and EU authorities as an integrated administration, where national authorities serve as a sort of ancillary administration to the EU.

If it finds the reasons provided by national administrations convincing, the EU administration may reproduce them in its final decision. If it wants to resort to a composite statement of reasons, the EU administration must be able to claim that national authorities performed certain tasks to its benefit – by making preparatory measures clear and by hearing affected parties. All this means that EU and national administrations are not treated as entirely separate spheres of administrative power. They are treated as interdependent pieces of one and same administration, in which the legal obligations of EU authorities can be fulfilled, albeit in part, by the administrations of the Member States.

One question that the present Chapter did not address was the extent to which national authorities are subject to the duty to give reasons in composite decision-making. The *Heylens* case law examined in section 2 implies that any challengeable national administrative decision must be reasoned. Yet, this only provides a partial answer to the question. It certainly follows from *Heylens* that there must be a statement of reasons for national decisions adopted at the conclusion of composite procedures.[70] What is far less clear, and has never been explicitly addressed by EU courts, is whether the duty to give reasons also applies to national *preparatory* measures *in composite decision-making*.[71]

[70] This same reading of the *Heylens* case law is made by Hanns Peter Nehl, (fn 30), 407.

[71] The provision governing some composite procedures actually do foresee to a duty to provide reasons for national acts which are not final decisions. In the 'choral' procedures set out in Chapter 3, national authorities may raise "reasoned objections" to the granting of an authorisation proposed by an authority of a different

One could be tempted to derive an implicit affirmative answer from the cases on the rule of referral, and more specifically from the fact that EU courts demand national preparatory measures to be clear and communicated to affected parties. However, as was argued, these demands relate not to the right to a reasoned decision, but to the right to be heard, which also requires public administration to give access to the facts based on which it intends to decide.

Nehl suggests that the *Heylens* Case also provides an answer to this question: it implicitly held that, since national preparatory measures are usually not reviewable, they are not subject to the reasons-giving requirement.[72] However, something quite unique to composite procedures is that EU case law requires certain national preparatory measures to be subject to judicial review by the Member States' courts. If effective judicial protection requires the reviewability of at least some national preparatory measures, then it also requires that those measures be reasoned so as to facilitate judicial review. Which measures those are, will be examined in the ensuing chapter.

Chapter 6 considers the most perennial question posed by composite decision-making. The question is how to ensure the judicial control of joint decision-making by national and EU authorities, when the EU's judicial system assumes a strict division between them.

Member State. However, the purpose of the reasons in those objections is to delimit the points of scientific disagreement on which the EU level is requested to adjudicate.

[72] Hanns Peter Nehl, (fn 30), 408.

PART III

JUDICIAL CONTROL OF COMPOSITE DECISION-MAKING

CHAPTER 6

JUDICIAL PROTECTION AGAINST COMPOSITE DECISION-MAKING

1. Introduction

The European Union's system of judicial review has long been based on a strict division between the power of national and EU courts. According to that division, only EU courts may review the exercise of EU powers, and only the Member States' courts may review the exercise of national powers.

This notion, which some describe as a principle of 'double exclusivity',[1] presupposes that any given legal act is adopted by *either* EU *or* national authorities. Composite decision-making, however, relies on the exercise of *both* national and EU decisional powers, and is therefore difficult to accommodate within the dualistic judicial distinction. Moreover, EU executive federalism was historically premised on the assumption that the EU administration is a 'second-order' administration, in the senseof generally deciding in respect of, and relating to, national authorities. In composite procedures, however, it will often adopt decisions which, though formally concerning only national authorities, considerably affect the position of individuals.

This mismatch between composite procedures and the conventional preconceptions of EU executive federalism provides the backdrop to the present chapter. The key claim is that the case law on the judicial review of composite decision-making gives an ambivalent answer to the question whether EU courts have succeeded in overcoming the preconceptions of EU executive federalism.

On the one hand, the case law goes beyond executive federalism when it comes to identifying reviewable measures. Indeed, rather than being treated as pertaining to the exercise of two strictly separate powers, the national and EU stages of composite procedures are treated as one and the same continual decisional process. The chapter further argues in this regard that, to identify the competent judiciary, EU courts use a substantive test, based on the intended legal effects of a measure within a composite procedure. The case law requires judicial review to be directed at the level that enjoys the power to define the procedure's final decisional outcome. As will be explained, that level of administration – the one that enjoys the 'final word' over the decision – is not necessarily

[1] See Chapter 2, section 2.1.

the level that formally concludes the procedure – the level with the 'last word' over the decision.

On the other hand, the preconception of the Commission as a second-order administration continues to bear ill tidings for individuals affected by composite procedures. As the case law on structural funds demonstrates, this view still informs the interpretation of composite procedures, and leads to inadequate judicial protection of private parties.

Section 2 explains why composite procedures are at odds with a strict dualistic understanding of the EU's judicial system. It further argues this mismatch to pose a risk to the rule of law in European administration.

Section 3 examines three possible solutions to the mismatch. While the first two appear the most consistent with traditional EU executive federalism, EU courts chose the third, which locates the competent judiciary at the level where, in substance, the procedure's outcome is decided.

Section 4 analyses the case law on the judicial review of bottom-up composite procedures. In these procedures, national authorities adopt preparatory measures, and the EU administration takes the final decision. The cornerstone of the case law is an implicit distinction between different kinds of national preparatory measures, based on their legal effects on the procedure's final outcome. The greatest innovation of the case law is the contested *Borelli* case law. *Borelli* concerns only those composite procedures where the EU administration is obliged to decide in accordance with a national authority's preparatory acts. In such cases, national courts must accept to review national preparatory measures. In most composite procedures, however, the power to determine the final decisional outcome ultimately falls on an EU body. In such procedures, EU courts did not need to be inventive, and use the same substantive test of reviewability as in contexts of decision-making at EU level only.

Section 5 explores the case law on the judicial review of top-down composite procedures, where, after an EU procedural stage, a national authority adopts the final decision. In such procedures, the problem is not in the identification of reviewable measures – which is also subject to the substantive test – but rather in the *locus standi* of individuals. The section analyses the ways in which old preconceptions about the Commission as a 'second-order' administration have led to 'inter-administrative readings' of composite procedures. Based on such 'inter-administrative' readings, EU courts unjustifiably deny the direct concern of structural funds beneficiaries.

Since it is possible for the same composite procedure to include both bottom-up and top-down stages, the analysis in sections 4 and 5 should be understood as complementary, where appropriate.

Section 6 summarizes the chapter's findings. The section argues that the case law on reviewable measures departs from the dogmas of executive federalism. It reflects a conception of a single, integrated European administration. By contrast, the cases on *locus standi* in structural funds litigation show that the shift away from EU executive federalism has not been universal. It is suggested that the old understanding of EU executive federalism as a constitutional doctrine might be at the root of why EU courts sometimes persist in its use, even where it results in dysfunctional consequences for judicial protection and the rule of law.

2. Divided courts and the integrated administration

The rule of law not only requires that public power be legally limited. The observance of those limits must also be effectively reviewable by courts.

As was already highlighted,[2] judicial control, performs an important objective function, of maintaining the executive's obedience to the legislature. However, it also fulfils a subjective function, by protecting individuals against public power. This subjective function is often constitutionally guaranteed, under the fundamental right to effective judicial protection. It was from the rule of law itself, [3] and from the constitutional traditions of the Member States,[4] that that right was derived by EU courts – long before it was enshrined in the Treaties.[5] Effective judicial protection requires that the rights of

---

[2] See Chapter 3, Section 5.1.

[3] See Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462, paras. 38-39. A seminal ruling seems to have been Case 101/78, *Granaria*, EU:C:1979:38, para. 5. The Court explained that "respect for the principle of the rule of law within the community context entails for persons amenable to community law the right to challenge the validity of regulations by legal action". It must be noted that there was a predecessor for the principle of effective judicial protection in the early use of the principle of effectiveness as a limit to national procedural autonomy in the creation of remedies. Yet that principle of effectiveness, unlike effective judicial protection, was not drawn from the rule of law and the imperative to observe fundamental rights, but rather from the principle of loyal cooperation (see to this respect Case 33-76, *Rewe-Zentralfinanz*, EU:C:1976:188, para. 5: "applying the principle of cooperation laid down in article 5 of the treaty , it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of community law"). For a view of the intricate relations between the principle of effectiveness and effective judicial protection, see Paolisa Nebbia, 'The Double Life of Effectiveness', in: *Cambridge Yearbook of European Legal Studies*, 10, (2007-2008), 287-302 and, for the even more complex link between them since the Lisbon Treaty, Johanna Bergström, 'The Principle of Effective Judicial Protection After the Lisbon Treaty', in: *Review of European Administrative Law*, 4:2, (2011), 53-68.

[4] See for instance Cases C-424/99, *Commission v Republic of Austria*, EU:C:2001:642, para. 45; C-467/01, *Eribrand*, EU:C:2003:364, para. 61; C-432/05, *Unibet*, EU:C:2007:163, para. 37; and C-279/09, *DEB*, EU:C:2010:811, para. 29.

[5] See Articles 19 TEU and 47 CFREU.

individuals be protected with effective remedies *in each case*,[6] if necessary by reinterpreting rules of judicial process in their favour.[7]

Though they are essential to the rule of law in the EU, [8] both the objective and subjective functions of judicial control are threatened in composite decision-making. This is so because composite procedures do not fit easily into the EU's judicial system.[9] That system is predicated upon a clear division of tasks between national and EU courts in ensuring the subjection of national and EU authorities to the law.[10]

In its old *Humblet* ruling, the Court did not just refer for the first time to the principle of strict separation between national and EU *authorities*. It also proclaimed a principle of 'strict separation' between national and EU *judiciaries*.[11] EU courts are exclusively responsible for the review of EU measures; and national courts exclusively responsible for the review of national measures. This notion, which was already discussed before, has been aptly described by some scholars as the principle of 'double exclusivity'.

The strict division that EU courts distilled between the jurisdiction of national and EU courts went hand in hand with the principle of separation between national and EU authorities. Indeed, as much of the case law attests, the exclusive jurisdiction of national courts to scrutinize the legality of national decision-making is understood as an extension on the judicial level of the division of administrative power between national and EU authorities.[12] In the EU's judicial system, the question of *which* level of administration

---

[6] See for instance Cases 222/84, *Johnston*, EU:C:1986:206, para. 19 and C-243/15, *LZ*, EU:C:2016:838, para. 65.

[7] See for example Cases *Unibet* (fn 4) and C-521/06 P, *Athinaiki Techniki*, EU:C:2008:422, para. 45, para. 44. One additional requirement of effective judicial protection is that individuals have access to an independent and impartial court. See Cases C-506/04, *Wilson*, EU:C:2006:587, para. 48 and C-685/15, *Online Games Handels*, EU:C:2017:452, paras. 60-61.

[8] Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', in: *Common Market Law Review*, 44, (2007), 1625-1659, 1626.

[9] See, for the many, Claudio Franchini, 'I principi applicabili ai procedimenti amministrativi europei', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2003), 1037-1059, 1055; Eberhard Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd ed., (Springer, 2006), 406; Eva Nieto Garrido/Isaac Martín Delgado, *European Administrative Law in the Constitutional Treaty*, (Hart, 2007), 103; Herwig Hofmann/Alexander Türk, 'Legal challenges in EU administrative law by the move to an integrated administration', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, (Elgar, 2009), 355-379, 373; Andrea Keessen, *European Administrative Decisions: how the EU regulates products on the internal market*, (Europa Law Publishings, 2009), 228; Carol Harlow, 'Three Phases in the Evolution of EU Administrative Law', in: Paul Craig/Gráinne de Búrca (Eds.), *The Evolution of EU Law*, (Oxford, 2011), 439-464, 450; Hanns Peter Nehl, 'Legal Protection in the Field of EU Funds', in: *European State Aid Law Quarterly* (2011), 629-652, 648; Jens Hofmann, 'Legal Protection and Liability in the European Composite Administration', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 441-466, 461, and Mariolina Eliantonio, 'Judicial Review in an Integrated Administration: the Case of 'Composite Procedures', in: *Review of European Administrative Law*, 7:2, (2014), 65-102, 66 ff.

[10] See for instance Case 294/83, *Parti écologiste "Les Verts"*, EU:C:1986:166, para. 23.

[11] See Case 6/60, *Humblet*, EU:C:1960:48, at 572.

[12] Cases T-93/95, *Laga*, EU:T:1998:22, para. 33 ff and T-94/95, *Landuyt*, EU:T:1998:23, paras. 33 ff.

decides thus precedes the question of *which* judiciary is empowered to conduct judicial review.[13]

As EU courts sharpened principles aimed at preserving the strict separation between national and EU authorities and courts, they relied on a fundamental background assumption – the assumption that, national and EU authorities do, as a matter of fact, exercise their respective powers separately.[14] Only in a setting where one can clearly distinguish between national and EU decision-making does it make sense to recognize an exclusive competence of national and EU courts to review those decision-making processes.

However, the EU's judicial system, based as it is on the separation of judiciaries, is at odds with the decisional structure of composite procedures, where national and EU authorities decide jointly. Since neither EU nor national courts are competent to review the decision-making process in its entirety, there is a risk that the actions brought by individuals will be accepted by neither of them. In other words, the EU's dualistic judicial system risks generating situations not just of impunity of public power, but of denial of justice. The strict divide between national and EU judiciaries therefore risks putting into question the very rule of law in composite decision-making.[15]

3. Three alternatives

EU courts needed to find a way to ensure judicial review of composite decision-making without disregarding the boundaries between the competences of national and EU courts. There were, in abstract terms, three solutions from which they could have chosen.

The first solution is a *formal* one. It would involve locating the level at which judicial protection may be offered by extending to composite procedures the same test that is usually applied in contexts of purely national or European administration. The competent courts would be determined by the level at which the final decision of the administrative procedure is adopted.[16] This would be an insufficient solution for two reasons. First, in many composite procedures, the administrative jurisdiction that takes the final decision is

[13] For a case where the qualification of a certain administrative body as European or national was crucial to establish which of the two judiciaries was competent to review its measures, see Case C-562/12, *Liivimaa Lihaveis*, EU:C:2014:2229, paras. 46-51.

[14] The Court's historical case law on the shared liability of national and EU authorities, which requires the lodging of actions for damages before national courts before the Court rules on liability at EU level, has been at times justified as being "in conformity with the division of powers between the Member States and the Community". See the Opinion of AG Lenz in Case 62/83, *Eximo*, EU:C:1984:148.

[15] Hans-Christian Röhl, 'Procedures in the European Composite Administration', in: Javier Barnes (Ed.), *Transforming Administrative Procedure*, (Global Law Press, 2008), 77-96, 94-95.

[16] Mariolina Eliantonio, (fn 9), 77.

not the administration that decides on the substance of a case.[17] The formal test would often lead to judicial review being directed against authorities which, while adopting the final formal decision in a composite procedure, had but a minimal relative weight in the decisional process as a whole. In such circumstances, one can hardly say that the objective function of judicial control, the exercise of public power, is effectively carried out. Second, the complete judicial review of a composite procedure would never be possible if it were concluded at EU level, since it might well happen that the final EU measure is based on an illegal national preparatory act. Unlike what occurs in the opposite scenario, there are no 'reverse preliminary references' allowing EU courts to ask national judges for a ruling on the legality of the national acts. Consequently, judicial review would need to be restricted to the EU stage, without considering how national administrations exercised their power. In spite of these two reasons, some authors – such as Nehl – suggest that, with the notorious exception of the *Borelli* judgment, EU courts have followed this formal test in composite procedures.[18]

A second solution would be to use a test, which, for want of a better term, might be dubbed an *institutional* one. What would matter then would not be at what level the final act of a procedure is enacted, but which levels of administration are involved in that procedure. An individual would bring actions for annulment against the action of national authorities *and* against the action of EU authorities. The advantage is that all measures adopted within a composite procedure, and all of the authorities that enacted them, would be subject to the scrutiny of their respective courts. While benefitting the objective function of judicial control, this solution would come at a significant price to its subjective function. Every single situation where an individual would seek judicial protection would involve a duplication of annulment proceedings at national and EU level. Moreover, by the time one annulment proceeding ends, the time-limits for the annulment of the other level might have already passed.

A third solution would locate the competent judiciary based upon a *substantive* test. What would matter, then, would not be the level at which a composite procedure's final

---

[17] A case in point is found in the procedures for the remission or repayment of customs debts, where a national authority supports an application for customs debt relief, and the Commission determines whether the relevant case fulfils the conditions for the debt to be 'forgiven' or repaid. In a subsequent stage at state level, the national customs authority adopts the final decision, but without any margin of discretion to diverge from the Commission's decision. Supposing that only the national authority could be sued, as the enactor of the final decision, it would need to answer in court for a decision in whose formation it had a very limited role.

[18] Hanns Peter Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung „mehrstufiger" Verwaltungsverfahren*, (Duncker & Humblot, 2002), 419 ff. The *Borelli* ruling is considered below under section 4.1..

decision is taken, or which authorities were involved throughout that procedure's stages. To put it simply, the test to define the competent judiciary would involve the identification of the level at which, according to the relevant legislation, the decision is formed in substance – the level which determines the procedure's outcome. This 'substantive-test' solution tends to overlap with the first, 'formal-test' solution explained above, but not necessarily so. Indeed, the reason why the test of the final decision is used is that it is assumed that the *last word* in a procedure is the same as the *final word* – that only the concluding measure of a procedure expresses the definitive will of the administration. This is the reason why, in many legal orders, non-final measures are thought incapable of directly affecting individuals' legal position and are deemed unreviewable as such.[19] Yet, as the example from customs law shows, it may well be the case that the final measure in a procedure merely implements an intermediate measure previously adopted by another authority which pre-empts the final decisional outcome. The use of the substantive test would fit best with the rationale of the CJEU's case law, which focuses on the substance of measures to establish whether they can form the object of judicial review by EU courts.[20] In determining whether a measure constitutes a reviewable act, is matters little whether its formal appearance is that of a regulation or decision,[21] or whether it formally closes a decision-making process.[22] It matters that it is the "material manifestation of the will of an authority",[23] expressed in the "exercise, upon the conclusion of an internal procedure laid down by law, of a power provided for by law which is intended to produce legal effects".[24] In the most common formulation, it must be a measure which "definitively lays down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision".[25]

The first two solutions would have been the most harmonious with respect to the traditional views of EU executive federalism. The formal test handles the review of final

---

[19] See Mariolina Eliantonio, *Europeanisation of administrative justice? : the influence of the ECJ's case law in Italy, Germany and England*, (Europa Law Publishing, 2009), Chapter 1.

[20] EU courts often stress that "an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form". See, for instance Case T-95/10, *Cindu Chemicals*, EU:T:2013:108, para. 35 and the case law quoted therein. More specifically on administrative decision-making, see Case T-309/10, *Klein*, EU:T:2014:19, para. 79: "the legal effect of any administrative act must always be examined in terms of its substance rather than its formal appearance".

[21] See Case C-583/11 P, *Inuit Tapiriit Kanatami*, EU:C:2013:625, para. 56 and the case law referred to therein.

[22] See Joined cases T-125/03 and T-253/03, *Akzo*, EU:T:2007:28, paras. 45-46. See also the Opinion of AG Ruiz-Jarabo Colomer in Case C-249/02, *Portuguese Republic v Commission*, EU:C:2004:483, para. 44: "preparatory acts may be contested separately in so far as, by producing legal effects, they have a decisive influence on an issue in the main procedure".

[23] Case T-673/13, *European Coalition to End Animal Experiments*, EU:T:2015:167, para. 23.

[24] Case 182/80, *Gauff*, EU:C:1982:78, para. 18.

[25] See for instance Cases T-676/14, *Spain v Commission*, EU:T:2015:602, para. 13 and T-584/15, *POA*, EU:T:2016:510, para. 33.

decisions *as if* they resulted only from the exercise of power at the level which formally concluded the procedure. The 'institutional' test requires separate review by national and EU courts, *as if* national and EU powers were themselves strictly separate.

However, the solution of EU courts to ensure judicial protection while complying with the division of judicial jurisdictions has been to adopt the third, substantive, test. In exceptional circumstances, it combined with the second test.[26] The four ensuing sections examine how the test of the location of discretion is employed and combined with other mechanisms, depending on the structure of the composite procedure in question. The basic solution is that judicial review is directed against the level of administration that determines the decisional outcome of a composite procedure.

The use of the substantive test has one important implication. Since judicial review is conducted by "the courts having jurisdiction over the authority issuing the measure, (…) then it is inevitable that some challenges need to be directed against measures which are initial or intermediate in the decision making process".[27] Some preparatory measures are more preparatory than others. EU courts therefore distinguish between two kinds of preparatory measures. Some are 'purely preparatory', in the sense that they merely pave the way for the procedural stage where discretion will be exercised. Others in effect already entail the final outcome of the procedure, and should be treated in the same way as the procedure's final decision. While the test remains the same, its concrete use is determined by two factors: the order in which national and EU authorities are involved, and which of the two levels enjoys discretion.

4. Bottom-up composite procedures: partial innovation

The location of discretion in a composite procedure is decisive for how its judicial review is conducted. EU courts use the substantive test to determine which measures in a composite procedure may be subject to an autonomous judicial review. Autonomous judicial review means that a given act can, as such, form the object of judicial proceedings. If it cannot – that is, if it entails no binding effects of its own – that act can only be relied upon as part of the judicial review of another measure.

The use of the substantive test represents no significant change to the review of measures adopted in contexts of decision-making at EU level only. The *IBM* case law, which embodies that test, has long been used by the CJEU to identify acts that can be

[26] See below, at 4.1.1.
[27] Mariolina Eliantonio, (fn 9), 78.

autonomously reviewed. Typically, that is the case of acts concluding a decision-making process. As for preparatory acts, the acts adopted *in the course* of an EU decision-making process, the substantive test acts as a sieve through which EU courts separate two kinds of measures. Some preparatory acts have no binding external effects and are therefore 'merely' preparatory – in which case, they can only be reviewed indirectly, in a challenge against the act that expresses the definitive position of an authority.[28] Other preparatory acts, however, already entail definitive binding effects of their own, and may – but need not – be subject to autonomous review.[29]

The case law on autonomously reviewable national measures is less clear. What can be said with certainty is that, under EU law, the right to effective judicial protection does not require the judicial review of 'purely preparatory measures'. This was already implicit in the landmark ruling in *Heylens*, but was explicitly confirmed in later cases.[30] More recently, the case law draws on *IBM* to state that national administrative acts must be reviewable if they entail binding legal effects – which suggests that, in contexts of strictly national administrative decision-making, individuals *may* seek the autonomous challenge of preparatory measures if they fulfil that condition.[31]

What is an innovation that is exclusive to composite procedures is the fact that individuals not only can, but *must* seek judicial protection against national preparatory measures, if the EU administration is obliged to follow them. This is the domain of the *Borelli* line of case law, where the substantive test is used to require national courts to review national preparatory measures of this kind. However, *Borelli* also seems to incorporate the formal test since, as some authors have pointed out, it implies that a second annulment claim must be directed against the final EU measure if the first challenge before national courts is successful.

---

[28] Case T-23/12, *MAF*, EU:T:2013:632, para. 33.

[29] Jürgen Schwarze, 'Judicial Review of European Administrative Procedure', in: *Law and Contemporary Problems*, 68, (2004-2005), 85-105, 89-90.

[30] Case C-69/10, *Diouf*, EU:C:2011:524, paras. 55-56. See also the analysis of the *Heylens* Case in Section 2 of Chapter 5.

[31] In a more recent ruling, the General Court uses the substantive test in *IBM* to justify that a national measure could be reviewable (Case T-309/10, *Klein*, EU:T:2014:19, para. 79).

4.1. The jurisdictional *Borelli* principle: national decisional dominance and the substantive test

The *Borelli* Case is often referred to as the first case where the CJEU addressed the issue of judicial review in instances of composite decision-making.[32]

The Italian undertaking *Borelli* had applied for agricultural aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) in order to build an oil mill. Under Regulation No. 355/77, it was the role of national authorities to assess whether projects conformed to the requirements for the payment of funds. As each project had to be co-funded by the EU and by the Member State in which it would be carried out, the granting of aid by the Commission depended on the issuing of a positive opinion by the relevant national authority,[33] in this case, the Region of Liguria. Following a negative opinion, the Commission refused to grant aid. Borelli brought an action for annulment to the ECJ, claiming that the national intermediate measure on which the Commission decision was based had made an erroneous assessment of the facts and documents included in the application for aid.

Borelli argued that the Court had to accept the challenge to the Commission's final act, since Liguria's negative opinion was qualified in Italian law as a preparatory measure, and was therefore excluded from judicial review. In the company's view, a final Commission decision adopted in such conditions should be annulled, as it 'encapsulates all the decisions of the institutions and bodies involved in the procedure' and *absorbs* in itself the irregularity of intermediate acts.[34]

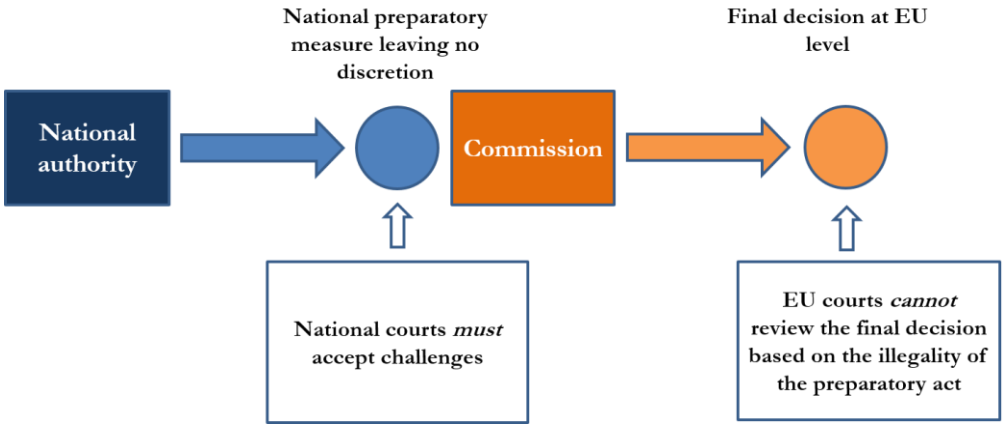
The Court's answer, which followed the opinion of Advocate General Darmon, entailed two connected, but nevertheless distinct aspects, which tend not to be distinguished in the literature. The *Borelli* case law in effect articulates two principles, which aim to answer two basic questions that are posed in any action for annulment: the *jurisdictional* question of locating the competent judiciary to review a measure, and the *substantive* issue of its grounds of invalidity. The two principles together form what can be

[32] Case C-97/91, *Oleificio Borelli*, EU:C:1992:491. See Roberto Caranta, 'Sull'impugnabilità degli atti endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione', in: *Foro Amministrativo*, (1994), I, 752-765 and Luis Maeso Seco, 'I Procedimenti Composti Comunitari: Riflessioni Intorno alla Problematica della Impossibilità a Difendersi ed Eventuali Alternative', in: Giacinto della Cananea/Matteo Gnes (Eds.), *I Procedimenti Amministrativi dell'Unione Europea. Un'Indagine*, (Giappichelli, 2004), 11-32.
[33] Articles 17 and 13(3) of the Regulation.
[34] See the Report for the Hearing in the *Borelli* Case.

termed as the *Borelli* doctrine.[35] As later case law has shown, they apply to any composite procedure whenever

(i) a national authority adopts a preparatory measure which, according to the relevant EU legislation, "*forms part* of a Community decision-making procedure"; and

(ii) that measure "*is binding* on the Community decision-taking authority *and therefore determines the terms* of the Community decision to be adopted".[36]



If, as in the now defunct Regulation No. 355/77, there is a composite procedure where national authorities enjoy the power to adopt preparatory measures that leave no discretion to the EU administration, then the two principles crafted in the *Borelli* judgment apply.

The first principle of the *Borelli* case law may be referred to as the *jurisdictional Borelli* principle. It aims to establish which judicial jurisdiction must grant judicial protection against composite decision-making. It simulatenously entails a prohibition and a command.

First, EU courts may not entertain actions for annulment against final decisions adopted at EU level, whenever the adverse effects of those decisions on individuals derive from national preparatory measures from which the EU administration is not legally allowed to diverge. Second, the jurisdictional *Borelli* principle holds that it is the task of national courts to ensure the right of individuals to judicial protection by admitting annulment claims against national preparatory measures, such as binding opinions, which

[35] For a more detailed account of the *Borelli* ruling, see Filipe Brito Bastos, 'The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice', in: *Review of European Administrative Law*, 8:2, (2015), 269-298.

[36] *Borelli* (fn 32), at para. 10. See also Cases T-114/99, *Pampryl*, EU:T:1999:281, para. 57; C-269/99, *Carl Kühne*, EU:C:2001:659, para. 57; C-64/05 P, *Kingdom of Sweden v Commission*, EU:C:2007:802, para. 92; and C-343/07, *Bavaria NV*, EU:C:2009:415, at paras. 55-7 and 64-67.

determine in themselves the final outcome of the procedure.[37] Thus, if such national preparatory measures are 'capable of adversely affecting third parties', they must be subject to judicial review before national courts, on 'the same terms on which they review any definitive measure adopted by the same national authority'.[38] As Advocate General Darmon explained, measures such as Liguria's binding negative opinion entail definitive adverse effects by necessarily determining what the final decision of the Commission will be. The CJEU cannot review that final EU decision without reviewing national preparatory acts – something for which it lacks jurisdiction. Nevertheless, given the principle of effective judicial protection, judicial redress must be available against the decision. Therefore, national preparatory measures such as that in *Borelli* must be open to judicial review by national courts.[39] If national law opposes judicial challenges to preparatory acts, individuals may request the national court to refer to the ECJ to clarify if that exclusion is in conformity with EU law.[40]

It is precisely from this jurisdictional limitation of the competence of EU courts that the *substantive Borelli* principle was first drawn.[41] The principle holds that no final EU decision may be illegal simply because it is based on an illegal national preparatory measure. This is expressed in the repeated formula that "[an] irregularity that might affect the [national] opinion cannot affect the validity of the decision by which the Commission refused the aid applied for".[42] The 'contamination effects' of illegal national acts upon EU decisions pose particularly complex constitutional problems. The substantive *Borelli* principle will therefore be studied in greater depth in the next Chapter.

4.1.1. *Borelli*: further development

Shortly after the *Borelli* ruling was delivered, the Court reached similar conclusions in *Emerald Meats*.[43] Even though the *Borelli* judgment itself was not quoted, and though decided by different chambers, the two cases were pending during the same period, and the justification for their most important passages was a similar allocation of discretion to national authorities. In the relevant procedure, national authorities drew a list of applicants

[37] See the Opinion of AG Darmon in C-97/91, *Borelli*, EU:C:1992:254, paras. 31-33.
[38] *Borelli* (fn 32), paras. 10 and 13.
[39] Opinion of AG Darmon in *Borelli* (fn 37), paras. 32 and 33.
[40] *Ibid*., para. 33.
[41] *Borelli* (fn 32), para. 9.
[42] *Borelli* (fn 32), para. 12.
[43] Joined Cases C-106/90, C-317/90 and C-129/91, *Emerald Meats*, EU:C:1993:19. On the case, see Alexander Türk, 'Judicial Review of Integrated Administration in the EU', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: towards an integrated administration*, (Elgar, 2009), 218-256, 224.

for a limited number of licences to import frozen beef from third countries, pursuant to an import quota. The Commission's role was limited to "checking that a given applicant does not appear on more than one list and to determining, having regard to the quantities indicated in the various national lists and to the total quota to be allocated, in what proportion the national authorities can accept the applications admitted by them".[44] Therefore, the Court held that the importers should seek judicial protection before national courts, against the competent national authorities.

However, most visible application of the jurisdictional *Borelli* principle has been in the field of protected designations of origin and geographic indications. The structure of the relevant composite procedure for the registration of PDOs and PGIs has already been explained.[45] The procedure accords a pivotal role to national authorities, which define the scope of the protection. If no objections are raised, the Commission is legally obliged to implement the applications supported by national authorities, and to register the designation of origin or geographic indication at EU level. For that reason, the Court has extended the jurisdictional *Borelli* principle to that procedure. EU courts may not entertain actions for annulment against the Commission's final decision where such would necessarily involve the review of the national preparatory measures. As the General Court stated in *Pampryl*, practically reproducing the formula used in *Borelli*,

> "[i]n an action brought under Article [263 TFEU], the Community judicature has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority even if the measure in question forms part of a Community decisionmaking procedure, where it clearly follows from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision-taking authority and therefore determines the terms of the Community decision to be adopted".[46]

In later rulings, such as *Carl Kühne* and *Bavaria*, the Court restated that, where the Commission has limited or no discretion vis-à-vis national authorities, domestic courts must review their preparatory measures as they would review any final administrative act.[47] In *Pampryl*, the General Court even went as far as to state that a refusal of a national court

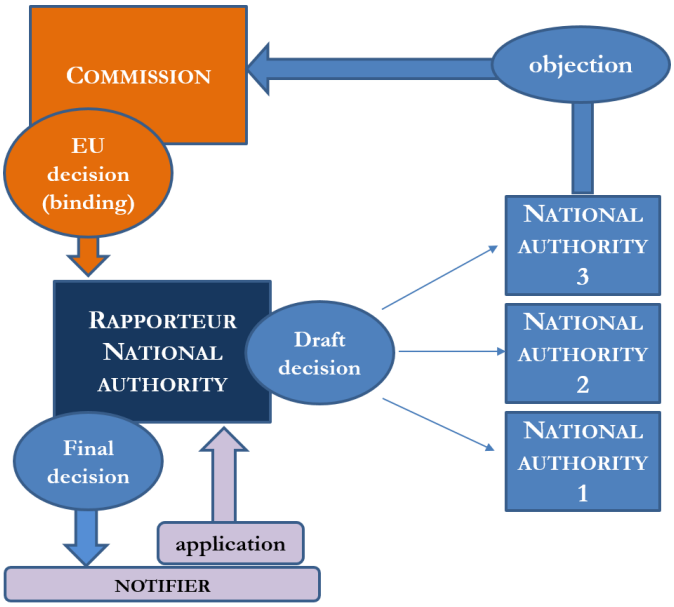
[44] *Emerald Meats*, (fn 43), paras. 38, 40 and 50.
[45] See Chapter 4, section 4.2.1.
[46] Case *Pampryl*, (fn 36), para. 57.
[47] Cases *Carl Kühne*, (fn 36), paras. 57-58, and *Bavaria*, (fn 36), para. 57.

to do so would constitute a sufficiently serious breach of EU law to condemn the Member State in infringement proceedings.[48]

The jurisdictional *Borelli* principle was also applied in *Association Greenpeace France*. The Case related to the general authorisation procedure for the placing of GMO products on the market. The CJEU examined whether national preparatory measures could the object of a separate judicial review.[49]

The procedure neatly fits in the category of 'choral' composite procedures examined in Chapter 3.[50] Following an application by the interested undertaking, the competent authority of the Member State where the product is to be first placed on the market carries out an assessment of public health and environmental. If positive, the authority's assessment report is sent to the Commission, along with all the information provided by the applicant (or 'notifier'). The Commission will then open a multilateral stage by distributing the report to all the other relevant national authorities, which may then lodge objections to the issue of the authorisation. The absence of objections will count as tacit agreement. The first authority then ends the procedure by giving its 'consent in writing' to the applicant. However, an objection will trigger a European dispute settlement stage in which the Commission will decide on the matter. If the Commission then decides to authorise the placing on the market of the GMO product, the first national authority issues its consent in writing.[51]

[48] Case, *Pamplyl*, (fn 36), paras. 57-59.
[49] See Case C-6/99, *Association Greenpeace France*, EU:C:2000:148. The case also raised the important issue of whether the national preparatory measures could determine the invalidity of the Commission's final decision if they were themselves invalid. This aspect of *Association Greenpeace France* will be examined in Chapter 7.
[50] See Chapter 3, Section 4.2.
[51] The procedure for the authorisation to the placing on the market of GMO products was originally established in Directive 90/220, and is essentially still the same under Directive 2001/18.



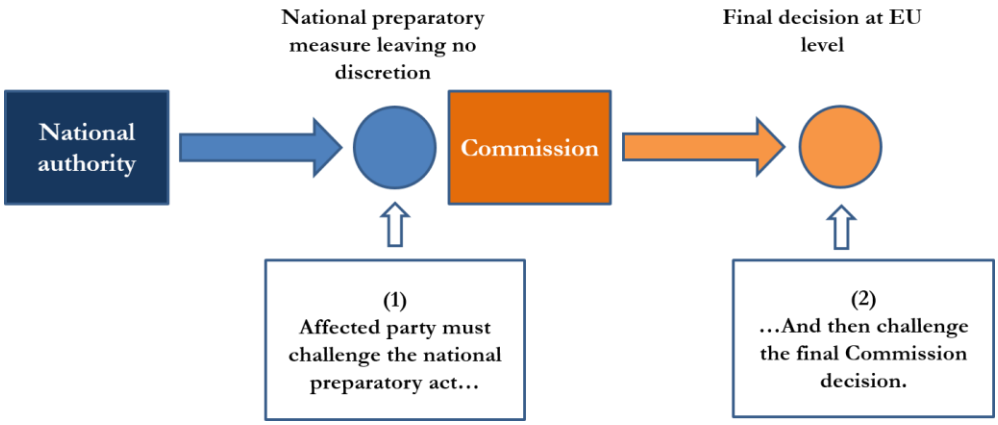
The authorisation procedure for GMOs under Directive 2001/18

In *Association Greenpeace France*, the Court of Justice held that a national intermediate measure such as the positive assessment report could be autonomously challenged before national courts. The Court held that what has been termed here as the jurisdictional *Borelli* principle should apply.

The reason is that, as the CJEU recognised, the "decision of the competent authority is the prerequisite for the Community procedure and, *in the absence of any indication to the contrary* from another Member State", the positive assessment report adopted in the first national stage of a composite procedure "*may even determine its outcome*".[52] From this line of reasoning, it is right to infer, as Eliantonio does, that the *Borelli* case law requires the reviewability of national draft authorisations and positive assessment reports adopted in composite procedures with the same structure as the authorisation procedure for GMOs.[53] The *Association Greenpeace France* ruling made clear that national preparatory measures of that kind must be held reviewable in composite procedures for the authorisation of the introduction of biocides and pharmaceuticals into the internal market.[54]

[52] See *Association Greenpeace France*, (fn 49), para. 51.
[53] Mariolina Eliantonio, (fn 9), 93-94. Where Eliantonio's reading of the case law seems to go too far is in the claim that, as a consequence of the *Borelli* ruling, the *objections* raised by other national authorities to the draft measure of the rapporteur national authority should be held as reviewable (See Mariolina Eliantonio, (fn 9), 94). This claim is hard to reconcile with the case law's letter and reasoning. Such measures of objection have no other effect than triggering a new procedural stage. Unlike the draft decision of the rapporteur national authority, such objections raised by other Member States will not even potentially bind the authorities deciding subsequent stages to give any specific content to the final measure.
[54] See the procedures discussed under Chapter 3, subsection 4.2..

The operation of the jurisdictional *Borelli* principle raises doubts with respect to the review of the procedure once it has already been concluded at EU level. The Court has never given an explicit answer to the question posed in this regard. However, one can assume, as some members of the Court do,[55] that if an individual has not challenged the national preparatory measure before the composite procedure has reached the EU stage, she must challenge successively that national measure, and then the final EU decision.



4.1.2. *Borelli*: addressing three objections

The literature's reception of the *Borelli* ruling was initially scarce in volume,[56] and has remained largely critical in tone. Commentators have tended to oppose *Borelli*'s prohibition for EU courts to entertain annulment claims on grounds of effective judicial protection. By contrast, the command to national courts to accept the autonomous review of national preparatory measures been criticized based on two grounds. The first is concerns coherence. By requiring the review of preparatory measures, the Court supposedly obliges national courts to offer a standard of judicial protection that it would itself be unwilling to give, under analogous circumstances, against EU authorities. The second argument concerns national procedural autonomy. It holds that, by requiring the review of national preparatory measures, EU courts unduly intrude into the policy choices of the Member States in shaping their own laws on administrative justice. The three arguments used against the jurisdictional *Borelli* principle – effective judicial protection, incoherence, and national autonomy – will be addressed in in the following paragraphs.

[55] Thomas von Danwitz, *Europäisches Verwaltungsrecht*, (Springer, 2008), 644.
[56] Giacinto della Cananea, 'The European Union's Mixed Administrative Proceedings', in: *Law and Contemporary Problems*, 68, (2004-2005), 197-217, 197, note 8.

Some considered it 'unexpected',[57] and a worrying potential cause of gaps in judicial protection, that the Court in *Borelli* prohibited challenges against final Commission decisions that are based on national preparatory measures. It was claimed that *Borelli* ruling casts private parties into a 'no-man's-land' between domestic and European administration, and deprived them of judicial protection.[58] Others highlight that effective judicial protection is also imperilled by the *Borelli* ruling to the extent that it may lead to unreasonably prolonged litigation, since it suggests that a duplication of judicial proceedings may sometimes be needed. If a composite procedure were already concluded, affected individuals would need to challenge both the national preparatory measure before national courts and, if successful, seize the General Court for the annulment of the final Commission decision.[59]

Considering such sustained criticism, it is almost paradoxical that the *Borelli* ruling is often cited by the EU courts as an emblematic judgment on effective judicial protection.[60] Nevertheless, in the view offered here, the *Borelli* case law shows that European Courts have gone to great lengths to ensure effective judicial protection.

They have done so in spite of the principle of 'double exclusivity' of judicial competences, which bans the review of national administrative action before EU courts. This is because EU courts take with one hand what they give back with the other. While the jurisdictional *Borelli* principle imposes a prohibition on EU courts in order to maintain the limits of their jurisdiction, it also addresses a command to national courts to counter the risks of the rigidity of those limits. EU courts require the right to an effective judicial protection to be fully observed – at the national level, where the decision is formed in substance.[61]

Occasionally, even some members of the Court have acknowledged in retrospect that the prohibition in the *Borelli* ruling is "harsh".[62] Yet, a more permissive approach risked "call[ing] into question the division of powers between the national court and the Court, as defined in the case law of the Court", something that would be "be most unwise and would

---

[57] *Idem*, at 198 and also in Giacinto della Cananea, *Diritto amministrativo europeo: principi ed istituti*, 3rd ed., (Giuffrè, 2011), 166.
[58] Luis Maeso Seco (fn 32), 12 and 29. Similarly, Bernardo Giorgio Mattarella, 'Procedimenti e Atti Amministrativi', in: Mario Chiti (Ed.), *Diritto Amministrativo Europeo*, (Giuffrè, 2013), 327-377, 338.
[59] Thomas von Danwitz (fn 55), 644.
[60] See for instance Cases C-459/99, *MRAX*, EU:C:2002:461, para. 101 and T-315/01, *Kadi*, EU:T:2005:332, para. 210.
[61] The jurisdictional *Borelli* principle thus neatly fits into the concept of 'remedial complementarity' developed by Safjan and Düsterhaus. The authors explain that complementarity as "the obligation imposed on the Member States to compensate the limited scope of, and restricted access to, judicial review by the EU courts" (Marek Safjan/Dominik Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU', in: *Yearbook of European Law*, 33:1, (2014), 3-40, 6).
[62] Opinion of AG Mischo in C-6/99, *Association Greenpeace France*, EU:C:1999:587, para. 98.

do nothing to promote the cause of respect for the rule of law within the Community legal order".[63]

It would thus seem that no judicial protection can be afforded at all without disfiguring the constitutional division of competences between national and EU courts.[64] EU courts cannot review the final decision, because doing so would imply reviewing national preparatory acts as a previous step in checking that decision's legality. However, national courts cannot review the final decision of the Commission either, since that would subvert the Treaty's system of judicial competences.

Given its concern to respect the limits of its own jurisdiction, the Court could have hypothetically treated the *Borelli* case as previous cases where it had been faced with actions for annulment against purely national measures.[65] Indeed, it could have immediately dismissed *Borelli*'s action as inadmissible on grounds of incompetence, by way of reasoned order. However, this would have represented a simplistic solution, and one that would have led to a total lack of judicial protection, both before EU and national courts. It would have amounted to a kind of denial of justice that would be irreconcilable with the Court's commitment to fundamental rights, as well as with its assurance that the EU enjoys a complete system of judicial protection 'under the Treaties' constitutional charter'.[66]

The Court, in other words, could not have remained indifferent to the special vulnerability of individuals trapped in the vacuum between the jurisdictions of EU and national courts. For that reason, instead of resorting to a mere reasoned order to deny jurisdiction, the Court explained in considerable depth why the national measure should be reviewable and affirmed that it would stand by the applicants' side if a national court refused to offer them judicial protection.

A second point of criticism raised against *Borelli* concerns its consistency with the Court's own case law on what counts as a reviewable EU measure. Herwig Hofmann criticises the CJEU for tending "to refer cases to Member States' courts and oblige them to

---

[63] Idem, para. 99.

[64] Some have aptly referred to this risk as a catch-22 situation. See Roberto Caranta, 'Judicial Protection Against Member States: a New *Jus Commune* Takes Shape', in: *Common Market Law Review*, 32, (1995), 703-726, 716.

[65] Cfr. Cases 46/81, *Benvenuto*, EU:C:1981:64; 142/83, *Nevas*, EU:C:1983:267; and 285/90, *Tsitouras*, EU:C:1991:84.

[66] Cases *Les Verts*, (fn 10), para. 26; 314/85, *Foto-Frost*, EU:C:1987:452, para. 16; C-2/88, *Zwartveld*, EU:C:1990:315, para. 16; C-314/91, *Weber*, EU:C:1993:109, para. 8; T-236/00, *Stauner*, EU:T:2002:8, para. 50; C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462, para. 40; and Joined Cases C-402/05 P and C-415/05 P *Kadi*, EU:C:2008:11, paras. 281-285.

offer legal protection in much more lenient conditions than it itself is ready to give".[67] In Hofmann's view, the jurisdictional *Borelli* principle is inconsistent with the CJEU's own case law – in particular, with the *IBM* ruling. That judgment clarified that actions for annulment against EU bodies' purely preparatory measures are inadmissible.

The view defended here begs to differ. Once examined closely, the command entailed in *Borelli* operates an extension to the national level of the *same* standards that are generally used in actions for annulment against EU bodies. This is visible not only with regard to the concept of challengeable act but also with regard to standing requirements.

Hofmann's claim that European Courts would not have reviewed intermediate measures analogous to the act adopted by the Italian authorities in *Borelli* seems to result from a certain reading of the *IBM* ruling. The passage Hofmann quotes is the ruling's 10th paragraph:

> 'In principle an act is open to review only if it is a measure definitely laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision'.

This somewhat ambiguous paragraph is frequently interpreted by the literature as barring the review of anything short of the final measure in a decision-making procedure.[68] However, a close look at the *IBM* case law, including its later development, shows that the CJEU is actually formulating an argument based on the distinction between two kinds of measures.[69] Some intermediate measures are of a merely preparatory nature and only pave the way for the final decision. Others already have legal effects that are capable of affecting the interests of the applicant. This will be the case when they bring about "a distinct change in his legal position",[70] either because they constitute the final act in a distinct sub-procedure that is binding in its effects,[71] or because in substance they already entail the final decision.[72] As Advocate General Slynn explained in the *IBM* Case,

---

[67] Herwig Hofmann, 'Composite decision making procedures in EU administrative law', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: towards an integrated administration*, (Elgar, 2009), 136-167, 154.
[68] See, for instance, Fausto de Quadros/Ana Maria Guerra Martins, *Contencioso da União Europeia*, 2nd ed., (Almedina, 2006), 140.
[69] Jürgen Schwarze, (fn 29), 89-90.
[70] Case 60/81, *IBM*, EU:C:1981:264, para. 9.
[71] Joined Cases 8 to 11/66, *Cimenteries*, EU:C:1967:7 118; Case 53/85 *Akzo*, EU:C:1986:256, paras. 16 ff; Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse*, EU:T:2006:151, paras. 64-65.
[72] See Cases T-277/94, *AITEC*, EU:T:1996:66, para. 51 and T-37/92 *BEUC*, EU:T:1994:54, para. 27.

> 'one should not examine too minutely whether a step marked the culmination of an administrative procedure', since 'it is not the preliminary or definitive nature of the examination which matters (…), but only the question whether the concrete legal effects intended by the measures in question are provisional ones'.

Preparatory measures may be subject to review when they constitute a gravamen for the applicant 'independently from the final decision' which formally closes the procedure.[73] In the *IBM* Case, the CJEU established a substantive test to identify reviewable measures. It is this same substantive test that the *Borelli* case law extends to the review of national preparatory measures. It relies on the idea that a decision that expresses the administration's definitive position on a matter need not to be the final measure that formally concludes a procedure.[74]

Although the *IBM* ruling is not quoted in *Borelli*, the language used by the CJEU in both cases is remarkably similar. What matters for the purposes of judicial review is whether the challenged measure "*definitely has an adverse effect*" on the applicant.[75] What matters to the CJEU is that (1) there is a national preparatory measure, the legal effects of which predetermine the content of the final decision in the procedure, and (2) that those legal effects are detrimental to the applicant's legal position. With this step in its reasoning, the CJEU completes the jurisdictional *Borelli* principle by giving indications both on the identification of reviewable intermediate measures *and* the assessment of the standing of applicants. Since the test of that standing is whether the measures adopted by national authorities immediately impose a gravamen on the applicant's legal position, it reproduces, in essence, the test of direct concern in actions under Article 263 TFEU.[76]

A third objection to the *Borelli* case law relates to national procedural autonomy. The notion broadly refers to the margin of discretion that the Member States enjoy in

[73] René Barents, *Remedies and Procedures before the EU Courts*, (Wolters Kluwer, 2016), 165, Alexander Türk, *Judicial Review in EU Law*, (Elgar, 2009), 21 and Hans-Christian Röhl, 'Die Anfechtbare Entscheidung nach Art. 230 Abs. 4 EGV', in: Eberhard Schmidt-Aßmann/Bettina Schöndorf-Haubold (Eds.), *Der Europäische Verwaltungsverbund*, (C. H. Beck, 2005), 319-351, 330.
[74] Jürgen Schwarze, 'Artikel 263', in: Jürgen Schwarze (Ed.), *EU-Kommentar*, 3rd ed, (Nomos, 2012), 2176-2208, 2180.
[75] AG Darmon in *Borelli* (fn 37), para. 32.
[76] On the test of direct concern, see the discussion below under 5.2.

fashioning their own administrative and judicial procedural laws.[77] The argument is that, by requiring national courts to afford judicial protection against preparatory measures, the Court demanded that national courts provide an *ad hoc* remedy against national administrations. In doing so, the Court not only intruded unduly into the sphere of competences of national legislators. It also broke its old promise that the Treaties do not require the creation of new remedies.[78]

First of all, it is far from clear that, under Italian law, *Borelli* would not have been able to challenge the relevant preparatory measure by the Region of Liguria.[79] As for the question whether, generally speaking, the jurisdictional *Borelli* principle would be incompatible with the notion of national procedural autonomy, it is appropriate to examine whether the Court's solution in *Borelli* finds support in the principles that usually justify the limitations to that autonomy. Other than the more well-known principles of equivalence and effectiveness, the Court has also resorted on occasion to the requirement of uniform implementation of EU law to justify certain adaptations in national laws. Indeed, as Galetta has pointed out, the demand of uniformity of EU law has been present in some of the landmark cases on national procedural autonomy.[80]

This is perfectly in line with the Court's seminal defence of the homogeneity of the EU legal order as an implication of the *Community* character of EU law. In the Court's vision, if it would "vary from one Member State to the other", then the very "authority of Community law" would be compromised.[81] The loss of its unity would inevitably jeopardize the entire Community project.[82] One may well wonder if the uniformity of EU law could be satisfied without an EU-wide test to determine how to review national preparatory measures in composite procedures.

---

[77] For a broad overview of national procedural autonomy, see Rostane Mehdi, 'L'Autonomie Institutionnelle et Procédurale et le Droit Administratif', in: Jean-Bernard Auby/ Jacqueline Dutheil de la Rochère (Eds.), *Droit Administratif Européen*, (Bruylant, 2007), 685-726.

[78] Eduardo García de Enterría, 'La ampliación de la competencia de las jurisdicciones contencioso-administrativas nacionales por obra del Derecho Comunitario. Sentencia Borelli de 3 de diciembre de 1992 del Tribunal de Justicia y el artículo 5 CEE', in: *Revista Española de Derecho Administrativo*, (1993), 297-314, 311 and Luis Maeso Seco, (fn 32), 25. See Case 158/80, *Rewe-Handelsgesellschaft Nord*, EU:C:1981:163.

[79] See Mariolina Eliantonio, (fn 19), 36 and 42. At the time of *Borelli* there had already been case law in which intermediate measures constituting definitive gravamens were reviewed by Italian courts. There had also long been doctrinal support of this solution – see for instance Pietro Virga, *La Tutela Gurisdizionale nei confronti della Pubblica Amministrazione*, 3rd ed., (Giuffrè, 1982), 249.

[80] Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?*, (Springer, 2010), 79-80. Galetta refers in this respect to Joined Cases 205 to 215/82, *Deutsche Milchkontor*, EU:C:1983:233. See also Adelina Adinolfi, 'The "Procedural Autonomy" of Member States and the Constraints Stemming from the ECJ's Case Law: Is Judicial Activism Still Necessary?", in: Hans-Wolfgang Micklitz/Bruno de Witte, *The European Court of Justice and the Autonomy of the Member States*, (Intersentia, 2012), 281-304, 294-296.

[81] Case 55-77, *Maris*, EU:C:1977:203, para. 27.

[82] Case 44/79, *Hauer*, EU:C:1979:290, para. 14.

Given that such measures form "part of a procedure which leads to the adoption of a Community decision",[83] judicial protection against the administrations involved cannot depend on particular national conceptions of what constitutes a reviewable administrative act.[84] The jurisdictional *Borelli* principle does indeed create a new remedy.[85] However, that remedy is designed only for instances of composite decision-making, which national systems of administrative justice traditionally did not have to take into account and may be unsuited to accommodate. The EU's own substantive test of what constitutes a reviewable (preparatory) act was therefore transplanted onto the national level. Uniform conditions of judicial protection are ensured in the same composite procedure, regardless of the Member State in which it begins.

4.2. Beyond *Borelli*: judicial review in composite procedures where EU decision-making predominates

The section considers the judicial review of instances of composite decision-making that do not meet the two conditions of the *Borelli* case law. Put differently, it examines the judicial control of composite procedures where the EU administration enjoys the discretion to entirely diverge from the preparatory measures adopted by national authorities.

In that regard, the section answers two questions. First, whether the decisions adopted by the EU administration in such procedures can be subject to judicial review; and second, whether national preparatory measures can, or must, be subject to judicial review. As it turns out, the answer is given by the substantive test explained before. Judicial review must take place at the level where the final decisional outcome of a composite procedure is defined.

EU courts routinely accept annulment claims against EU measures adopted in a composite procedure, whenever it is at the EU level that the final position of the administrations involved is determined.[86] This is so even where the EU measures at stake are not, technically speaking, the *last* measures adopted in the relevant composite procedure.

---

[83] *Borelli* (fn 32), paras. 13 and 15.
[84] Compare with Case 17/81, *Pabst*, EU:C:1982:129, para. 18: "the legal classification in Community law of a national measure does not depend upon how that measure is viewed of appraised in the national context".
[85] Cfr. Herwig Hofmann, 'The Right to an 'Effective Judicial Remedy' and the Changing Conditions of Implementing EU Law', Faculty of Law, Economics and Finance of the University of Luxembourg – Law Working Paper 2013-2, 10.
[86] See for example Cases C-269/13 P, *Acino*, EU:C:2014:255 and C-361/14 P, *McBride*, EU:C:2016:434.

Today, this seems incontrovertible, in spite of past short-lived and unsuccessful attempts of the Commission to dodge judicial challenges in composite procedures. A good example of this is *Control Data*, a case concerning a procedure in customs law of the structure explained before.[87] The Commission initially sought to persuade the Court that its decision was not an act culminating a procedure, and could therefore not be challenged. It was in its view an act 'internal to the Community and the Member States: the final act is that of the [national] authorities who implement the decision'. Advocate General Slynn opposed this claim, and suggested that the Commission had done well at the hearing "not to insist" on the point. Slynn argued that a Commission decision can be final, *even if it is to be followed by another legal act*; and *not least* if, in the subsequent stage, national authorities can only 'automatically apply' that decision.[88]

As for the judicial review of national preparatory measures, there seems to be disagreement in the literature. Some authors seem to hold that the *Borelli* case law applies to all national preparatory measures adopted during composite procedures, irrespective of whether, under the relevant legislation, the EU authority adopting the final measure is obliged to follow them or not.[89]

However, that reading is at odds with the wording of *Borelli*. Quite explicitly, the ruling restricts the demand of an autonomous review to national intermediate measures which, according to the relevant legislation, "determine the terms of the EU decision to be adopted".[90] If they do not, such national measures only 'pave the way for the final decision' at EU level.

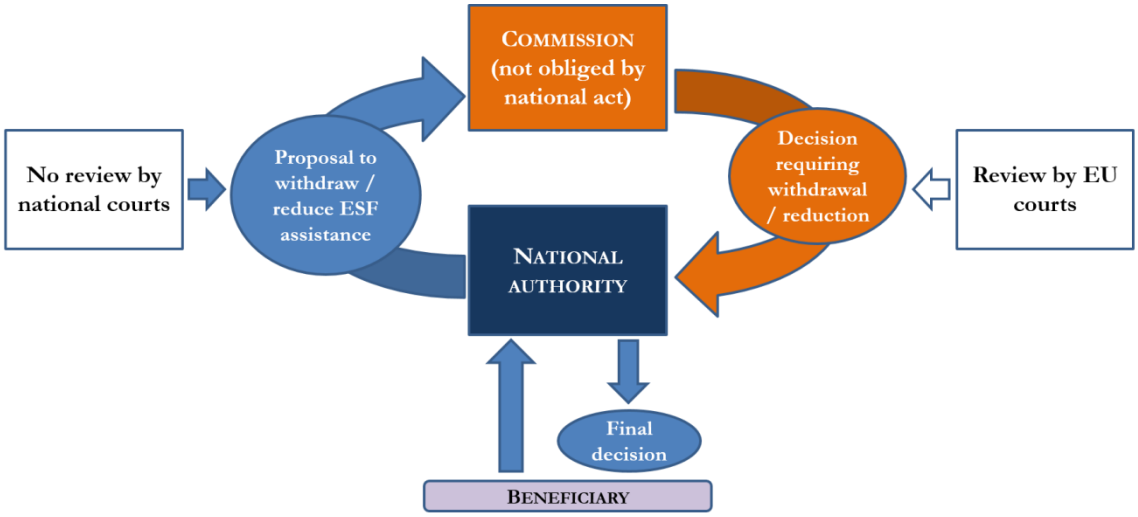
Since these measures are not encompassed by the two conditions of the *Borelli* case law, the standard solution of EU law applies: the right to an effective judicial protection does not require their autonomous judicial review by national courts. This appears to be confirmed by various lines of case law on composite procedures.

In *Branco I*, the applicant had brought an action for annulment against a Commission decision reducing financial support from the European Social Fund, on the grounds that some of Branco's expenditure was ineligible for funding. According to the

---

[87] Case 294/81, *Control Data*, EU:C:1983:84.
[88] See pages 937-938 of the AG Slynn's Opinion in *Control Data*.
[89] This is the view supported by Mariolina Eliantonio (fn 9), 92 ff.
[90] *Borelli* (fn 32), para. 10. The same interpretation of the scope of *Borelli* supported here is shared by a majority of the literature. Hanns Peter Nehl (fn 9), 648 ff, Roberto Caranta, (fn 64), 716, and Giovanna Mastrodonato, *Procedimenti amministrativi composti nel diritto comunitario*, (Cacucci, 2008), 115. In the same reading of the Borelli case law, and considering its implications for the recent procedural regimes of the Banking Union, Laura Wissink/Ton Duijkersloot/Rob Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', in: *Utrecht Law Review*, 10:5, (2014), 92-115, 97.

relevant procedure, the national authority competent for the management of ESF funds *proposes* to the Commission the withdrawal or suspension of financial assistance. Thereafter, the Commission adopts a decision based on the national preparatory measure proposing withdrawal or suspension. Once the Commission decides, the national authority is obliged to implement that decision. Since its decision-making powers predominated in the procedure, the General Court rejected the Commission's claim that the beneficiary of ESF funding should only enjoy judicial protection against the national authority,[91] the only authority adopting final measures vis-à-vis the beneficiary. This same line of argument has been used by some national courts to refuse the review of national preparatory acts in the framework of the ESF.[92]



The inadmissibility of an autonomous review of 'purely preparatory' national measures has also been strongly suggested by recent case law concerning other composite procedures. Consider the *Globula* and *Moravia Gas* Cases.[93] Globula (which was later renamed as *Moravia Gas*) applied to the competent Czech authority for an authorisation to build an underground gas storage facility. The application was coupled with a request for an exemption from the obligation to ensure third party access to the facility. The national competent authority approved the request and, pursuant to the administrative procedure

[91] Case T-85/94, *Branco I*, EU:T:1995:4, para. 18.
[92] Portuguese administrative courts have long rejected the autonomous challenge of national preparatory acts of certification of expenses adopted in composite procedures relating to the European Social Fund. Such rejection has been explicitly based on the view that "the certification decision adopted by national authorities does not bind or preempt the final decision that is exclusively enacted by the Commission". Such national measures therefore must be considered as merely "instrumental", as acts that simply open the EU procedural stage where the final outcome of the procedure is decided. Consequently, their autonomous review as administrative acts is denied. See the Judgments of the Portuguese Supreme Administrative Court STA 26-09-2002 (Rapporteur: Isabel Jovita), 07-05-2003 (Rapporteur: Isabel Jovita), 29-06-2004 (Rapporteur: António Madureira), and 12-03-2009 (Rapporteur: Pais Borges).
[93] See Cases T-465/11, *Globula*, EU:T:2013:406 and C-596/13 P, *Moravia Gas Storage*, EU:C:2015:203.

established for the granting of such exemptions, notified the measure to the Commission for a final decision to be adopted. Contrary to the opinion of the Czech authority, the Commission held that the substantive requirements for an exemption to be granted were not met. As the General Court rightly recognized, the relevant procedure was a single procedure, though one that "takes place partly at national level and partly at European Union level"[94].

As the Advocate General and the Court held on appeal, the procedure's outcome was determined at EU level, since the Commission could overturn the national preparatory measure. [95] As only the final EU measure will conclusively express the definitive legal effects intended by the administration, only that measure will constitute a reviewable act. Accordingly, "no individual has an interest worthy of protection (…) until the Commission adopts a final decision".[96]

In short, unless national authorities enjoy the power to determine a composite procedure's final outcome, their preparatory measures fall outside the scope of *Borelli*, and cannot be subject to an autonomous judicial review. Individuals will therefore need to seek judicial protection before EU courts, and only once the EU administration has adopted the final decision.

Considering the constitutional justification as to why EU courts deny the autonomous judicial review of purely preparatory EU measures, the solution could not be any different. That justification pertains to the case law on the review of preparatory measures adopted by EU authorities in contexts of decision-making purely at the EU level. Nevertheless, it is argued, the same line of argument must be held to be valid in composite procedures.

The reason why EU courts do not review purely preparatory measures derives from a logic of separation of powers – of respecting the EU administration's autonomy in making its own decisions.[97] A pre-emptive review of EU administrative procedures would

---

[94] *Globula*, (fn 93), para. 32. See Article 36(8) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55.

[95] The preparatory character of the Czech measure must be understood with a grain of salt. According to the relevant legislation, the exemption of undertakings from ensuring third party access to gas storage facilities is granted with *provisional* effects by national authorities until the Commission adopts the decision to make that exemption *definitive*. It must thus be concluded that the national measure is *final* in view of its provisional effects, but *preparatory* in view of the definitive definition of the legal position of the interested undertaking.

[96] See para. 71 of the Opinion in *Moravia Gas Storage* (fn 93). This reading was explicitly endorsed by Court in the ruling, at paras. 43-44.

[97] In this regard, the case law of the European Court of Justice is strikingly similar to that of the Supreme Court of the United States. One crucial presupposition for the reviewability of agencies' measures in US administrative law is *ripeness*. The administration's acts are only ripe for review if they have an adverse effect on individuals, which will not be the case of purely preliminary or procedural measures (See Bernard

deprive EU authorities even of an opportunity to exercise their decisional power. It would make it necessary for EU judges to "arrive at a decision on questions on which the [EU administration] has not yet had an opportunity to state its position definitively".[98] As the Court stated in the seminal *IBM* ruling, the result of a review of merely preparatory acts by the EU judicature would "anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial". Such a review would therefore

> "be incompatible with the system of the *division of powers between the Commission and the Court* and of the remedies laid down by the treaty, as well as the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed in the Commission" (emphasis added).[99]

It is difficult to see how this same argument from separation of powers would not apply in composite procedures. The practical result of an autonomous challenge to such measures would be the same: it would deprive the EU administration of an opportunity to decide on a matter of its competence, and prompt *national* courts to anticipate arguments on the substance of a case that is for the EU administration to solve. EU courts do not allow themselves to pre-empt an EU authority's decision. It would be simply untenable for them to allow national courts to do so.[100]

5. Top-down composite procedures: *locus standi* and the illusion of a 'second-order' administration

The two preceding sections considered the challenges of EU courts in identifying reviewable measures adopted in the framework of composite procedures unfolding bottom-up. This section examines judicial review of composite decision-making that

---

Schwartz, *Administrative Law*, 2nd ed., (Little, Brown and Company, 1984), 523). Judicial review may only be carried out where "the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication" (SCOTUS Case Port of Boston Marine Term. v. Rederiaktiebolaget, 400 U. S. 62, 71 (1970)). The justification for the criterion of ripeness is, as the US Supreme Court has put it, "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" (Abbot Laboratories v. Gardner, 387 US 136, 148 (1967).

98 See Case T-41/16, *Cyprus Turkish Chamber of Industry*, EU:T:2016:613, para. 42.

99 *IBM*, (fn 70), para. 20. See also Case T-64/89, *Automec*, EU:T:1990:42, para. 46.

100 Thomas von Danwitz, (fn 55), 645-646, makes a similar argument for the inverse situation. In von Danwitz's view, private parties cannot bring actions for failure to act against national authorities if, to be enacted, the desired national administrative measure presupposes the adoption of a previous preparatory measure by an EU body.

proceeds top-down – where EU procedural stages are followed by a national decision-making stage.

The case law is not complex from the point of view of reviewable measures. Indeed, the cases on top-down composite decision-making use the substantive test examined in the preceding sections. An EU act is reviewable whenever it determines the final outcome of the composite procedure – i.e., then it irreversibly defines the binding legal effects that will be introduced into the legal order at its conclusion. This is so even if it is followed by a subsequent national final measure.

Consider the case law on the remission and repayment of customs debt and the older regime of the European Social Fund. The procedures governing both were already examined in Chapter 4. Since the adoption of a decision by the Commission predetermined the final decisional outcome in an ensuing national stage, EU courts accepted to review that decision without much hesitation.[101] Conversely, EU courts have denied the review of preparatory measures adopted at EU level that have no bearing per se on the final decision taken by national authorities.[102]

The difficulty of ensuring judicial control in top-down composite procedures does not lie in the reviewability of measures. Rather, it lies in the standing of applicants for actions for annulment.

There are two avenues for judicial challenge to an EU decision adopted in a top-down composite procedure. Individuals may choose to wait until the conclusion of the procedure to challenge the final national measure, and then request the national court for a preliminary ruling concerning the EU decision on which that measure is based.[103] If

---

[101] See for instance Cases C-291/89, *Interhotel*, EU:C:1991:189, para. 13; C-32/95 P, *Lisrestal*, EU:C:1996:402, para. 46; T-72/97, *Proderec*, EU:T:1998:179, para. 34; T-102/00, *Vlaams Fonds*, EU:T:2003:192, para. 60; and T-53/11, *AECOPS I*, EU:T:2013:205, para. 52.

[102] See Case T-160/98, *Van Parys*, EU:T:2002:18. In the management of a tariff quota for the importation of bananas, the Commission is only responsible for preventing inaccurate declarations of traders applying for licences and to eliminate instances of double counting on the market in bananas. Amongst other things, the information gathered by the Commission includes an examination of the quantities imported into the single market by traders. On an annual basis, national authorities forward to the Commission the lists of operators requesting licences to import certain quantities under the tariff quota. The Commission then informs national administrations whether, from the information collected from the other national authorities, any irregularity can be identified. The trader van Parys brought an application for annulment against a 'worksheet' prepared by the Commission in which the quantities previously brought by van Parys into the single market were allegedly wrongly stated. The General Court held that, since the ultimate responsibility for determining the quantities covered by the allocated import licences is a matter for national authorities, the Commission's worksheet could not be considered as a measure subject to judicial control (*Van Parys*, para. 64).

[103] In this case, as some have written, the challenge of the national final decision is a mere prelude to a preliminary reference where the EU judge is called upon to become the true judge of the case (Barbara Marchetti, 'Fondi Strutturali e tutela giurisdizionale: Variazione degli schemi regolatori e conseguenze sull'architettura giudiziaria dell'UE', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2012), 1105-1128, 1120-1121).

however they meet the *locus standi* requirements of Article 263 (4) TFEU, individuals may bring actions for annulment against the EU measure directly before EU courts.

While the test of *individual* concern generally tends to be at the heart of controversies on judicial protection before EU courts,[104] it is the test of *direct* concern that is more problematic in composite decision-making.[105] Direct concern as a test requires that a challenged EU measure "directly affect the legal situation of the individual, and that it leave no discretion to the addressees of that measure, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from European Union rules without the application of other intermediate rules".[106] Given the intermediate position that national authorities occupy between individuals and the EU administration, direct concern may be hard to establish.

However, the case law in this domain is not just pertinent from the narrower perspective of judicial review of composite decision-making. Rather, it showcases, it at least two ways, the kind of broader challenges that EU courts have faced in fitting composite procedures into the traditional moulds of EU administrative law and EU executive federalism more specifically.

First, the shifting case law on decisions in structural funds illustrates particularly well how conceptions of administration have been decisive in shaping different interpretations of the legislative provisions governing composite procedures. Indeed, case law varies greatly, depending on whether EU courts recognize the specificities of composite procedures, or persist in reading them in the light of the traditional conceptual apparatus of EU executive federalism. Second, the case law in structural funds litigation demonstrates how deficiencies in judicial protection may result from EU courts inappropriately using the doctrine of EU executive federalism in cases involving composite procedures.

5.1. Structural funds: inter-administrative and unitary readings

The provisions governing the management of structural funds are particularly complex and may undergo significant changes for every programming period. Since the present subsection analyses case law relating to the legislative frameworks in force for different programming periods, it will only offer a summary account of the key structural

[104] See for instance Paul Craig, *EU Administrative Law*, 2nd ed., (Oxford, 2012), 312 ff.
[105] Alexander Türk, (fn 43), 230-231 and Angela Ward, 'Locus Standi under Article 230 (4) of the EC Treaty: Crafting a Coherent Test for a 'Wobbly Polity'', in: *Yearbook of European Law*, 22:1, (2003), 45-77, 68. See also Hanns Peter Nehl, (fn 9), 648.
[106] Case T-346/10, *Borax*, EU:T:2011:510, para. 22.

features of the procedures contained in them.[107] On the basis of operational programmes that are proposed by the Member States and negotiated between them and the Commission, funds are committed to the Member States from the various structural funds. The most important funds encompassed by the EU's structural funds are the European Social Fund (ESF), the European Regional Development Fund (ERDF) and the Cohesion Fund. Those funds are then allocated to beneficiaries for the implementation of projects, which must necessarily be co-funded by the Member State. This is a requirement that flows from the principle of additionality, according to which "contributions from the Structural Funds shall not replace public or equivalent structural expenditure by a Member State".[108]

The expenditure incurred by the beneficiaries, which is periodically monitored, can be charged to the various funds. National certifying authorities draw up certified statements of the beneficiaries' expenditure and submit them to the Commission, which then pays regularly certified expenditure onto the Member States. The management of the funds, including the selection of projects, is primarily a matter for the Member States' authorities. Projects involving operations whose particularly high cost meets a certain threshold – i.e., 'major projects' – must be approved by both the Member State and the Commission.[109]

If there are irregularities in the expenditure incurred into by the beneficiary, the national managing authorities may reduce or cancel financial assistance. Based on the expenditure certificates and audit reports it receives, the Commission may also adopt decisions addressed to the relevant Member State, withdrawing partly or entirely the financial assistance devoted to a given project. Those decisions imply both that a Member State ceases to be entitled to financial assistance from EU structural funds, and that it is obliged to return the sums already advanced for a given project.

Commission decisions withdrawing assistance from EU structural funds have given rise to significant litigation. This is particularly true of the European Social Fund and of the European Regional Development Fund. Even though the decisions are addressed to the Member States, they affect the financial interests of the final beneficiaries who implement the projects – often local or regional authorities. This is so because, as a consequence of the Commission's decisions, the Member States may demand from the beneficiaries the repayment of the sums they had transferred to them to cover certified expenditure, and

---

[107] For a more complete description of the legal discipline of structural funds, see Andrew Evans, *The EU Structural Funds*, (Oxford, 1999) and Bettina Schöndorf-Haubold, *Die Strukturfonds der Europäischen Gemeinschaft: Rechtsformen und Verfahren europäischer Verbundverwaltung*, (C. H. Beck, 2005).

[108] See Article 15 of Regulation No 1083/2006 and Recital (87) and Article 95 (2) of Regulation No 1303/2013 of the European Parliament and of the Council of 17 December 2013.

[109] See Articles 36 ff of Regulation No 1083/2006 and 100 ff of Regulation No 1303/2013.

decide that, without the Union's contribution to co-finance a project, it has become too costly to support with purely national budgetary resources. In other words, the Member States may determine that the end-beneficiaries of the financial assistance should bear the costs of its withdrawal.

The problem raised by Commission decisions adopted in these circumstances is that the relevant procedure is subject to different interpretations, and is notably ambiguous in what relationship, if any, is established between the Commission and the final beneficiary. At least two readings can be made in this regard. They mirror to the two opposing readings historically used by EU courts in introducing the right to a fair hearing into composite procedures.

One corresponds to the 'inter-administrative' reading of composite procedures, which was already examined before. It is favoured by the traditional conception of public administration that underlies EU executive federalism. The inter-administrative reading emphasises the Commission's role as a 'second-order' administration, and a supposed clear-cut division of administrative power. Accordingly, the inter-administrative reading of composite procedures does not see them as unitary decision-making processes, but as the conjunction of two separate procedures, aimed at the exercise of two separate powers. In the first procedure, the Commission adopts a decision addressed to the Member State requiring it to reimburse the amounts of financial assistance already provided. In the second procedure, the Member State's authorities decide on whether they will demand repayment from the beneficiary, or to bear the entirety of the costs excluded from structural fund coverage. Assuming therefore that the Commission's decision only affects the Member State, and that the latter's authorities would enjoy a margin of discretion in deciding whether the beneficiary should repay the sums it already received, the inter-administrative reading would argue that the beneficiary is not directly concerned by the Commission's measures. Rather, she would be a simple third party in respect of the administrative relations between the Commission and national authorities.

The other reading of the decisional processes prescribed in the legislation is unitary. The measures taken by national authorities are seen as the continuation, at the state level, of the same procedure in which the Commission decides on the withdrawal of financial assistance. The two consecutive acts would be part of a single decision-making process with EU and national stages – a *composite* procedure. The Member States' authorities would then be "mere intermediaries" between the end-beneficiaries and the Commission,[110]

[110] Case T-512/14, *Green Source Poland*, EU:T:2017:299, para. 49.

which, though formally addressing its decision to the Member State, substantively affects the legal position of the beneficiary by imposing the recovery of the sums she received.[111] The national final measures demanding repayment merely implement the Commission's decision.[112]

5.2. The Regione Siciliana saga

After a brief period of uncertainty and competition between the two readings in the *Regione Siciliana* cases, EU courts eventually settled for the inter-administrative approach. To this day, they deny direct concern in structural funds cases. When in doubt, the EU judicature gives meaning to the ambiguous legal provisions by using the old conceptual framework of EU executive federalism.

The Region of Sicily applied for funding from the ERDF for two major projects. Italy supported the application and requested the Commission for financial assistance, which was granted. The two projects, relating to the construction of a dam and of a motorway, were funded under the programming periods of 1985-1988 and 1994-1999 respectively. After detecting several irregularities, in 2002 the Commission adopted two decisions cancelling ERDF financial assistance. The Region of Sicily brought actions against the two decisions before the General Court.

The fact that the two challenges were pending simultaneously before the Third and the First Chambers of the General Court, and that they still came to the opposite findings, is reflective of the interpretive uncertainties of the legal regimes at stake.

The *Regione Siciliana I* Case followed the inter-administrative reading.[113] The Third Chamber, deciding by way of reasoned order, declared the Region's action inadmissible. It found the Region of Sicily not to be directly concerned by the Commission's decision.

The General Court entirely gave reason to the Commission, which argued that the relevant legislation was "based on the principle of the separation of the legal relationships existing, on the one hand, between the Commission and the Member States and, on the other hand, between the Member States and the beneficiaries".[114] The Court found that

---

[111] See Barbara Marchetti, (fn 103), 1126.

[112] José Luís Cruz Vilaça, 'Effective Judicial Protection with Regard to Community Funds – May One be Directly Concerned by a Decision Addressed to a Member State?', in: José Luís Cruz Vilaça, *EU Law and Integration: Twenty Years of Judicial Application of EU Law*, (Hart, 2014), 166-180, 179. The reading is even more plausible if one considers that the national authority's role will often be restricted to notifying the beneficiary of the need to reimburse the sums at stake as a consequence of the Commission's decision.

[113] Case T-341/02, *Regione Siciliana* (*Regione Siciliana I*), EU:T:2004:228.

[114] *Regione Siciliana I* (fn 113), para. 38. See also Case T-60/03, *Regione Siciliana* (*Regione Siciliana II*), EU:T:2005:360, para. 33.

there could be no direct link between the beneficiary and the Commission,[115] and that the latter's decision only produced effects "in the context of the legal relations between the Commission and the Italian Republic".[116]

The General Court even recalled the *Deutsche Milchkontor* formula – that, "according to the institutional system of the Community and the rules which govern the relations between the Community and the Member States, it is for the Member States, in the absence of any contrary provision of Community law, to ensure that Community regulations are implemented within their territory".[117] The formula, which, as was seen in Chapter 2, is often used as a proxy for EU executive federalism, was deployed to justify an interpretation of the ERDF instruments in its light.[118] Furthermore, the Commission's decision only required the Member State to repay the funds already invested in the motorway, and that, in light of the principle of additionality in cohesion policy, it could well be the case that Italian authorities could want to finance the completion of the project out of Italian funds.[119] For these reasons, the General Court held it to be "evident" that the beneficiary was not directly concerned by the decision.[120]

In *Regione Siciliana II*,[121] the General Court's First Chamber did not find this so evident.[122] Though ultimately dismissing the action on substantive grounds, the General Court found the applicant to be directly concerned by the Commission's decision. The Commission again pleaded that, since it only adopted decisions in respect of the Member States, the exercise of its decisional powers in the management of structural funds would not place it in any "direct legal relationship" with the beneficiaries.[123] Evocatively, the Commission even claimed that "the Member States form a screen between the Commission and the final beneficiary of the assistance".[124]

---

115 *Regione Siciliana I*, (fn 113), para. 84.
116 *Idem*, para. 86.
117 *Idem*, para. 59.
118 *Idem*, para. 59 and 61.
119 *Regione Siciliana I*, (fn 113), para. 75. In a preceding ruling (Case T-105/01, *SLIM Sicilia*, EU:T:2002:147), there had been clear indications that the relevant Member State intended indeed to finance the project regardless of EU financial assistance. It had decided to grant a subvention for the entirety of the project, even before the Commission had made a decision on whether to co-finance that project under the ERDF.
120 *Regione Siciliana I*, (fn 113), para. 78.
121 Case T-60/03, *Regione Siciliana*, EU:T:2005:360.
122 In the meantime, there had also been Cases in which the General Court, though empowered to perform an *ex officio* examination, did not dismiss as inadmissible several annulment claims that were brought forward under the same circumstances (Daniela Caruso, 'Direct Concern in Regional Policy: The European Court of Justice and the Southern Question', in: *European Law Journal*, 17:6, (2011), 804-827, 807-808). For just one example, see Case T-107/03, *Regione Marche*, EU:T:2006:20.
123 *Regione Siciliana II*,(fn 114), para. 24.
124 *Idem*, para. 27.

Yet, the General Court held that the fact that the legislation only foresaw relations between the Commission and the Member State was not decisive in determining whether the Region of Sicily, as a beneficiary, could be directly concerned by a Commission measure cancelling funds. What was decisive was rather the substance of that measure – that is, whether it was a measure with immediate effects on the interests of a person and that brought about a change in her legal situation.[125] The General Court held that the implications of the Commission's decision met this substantive test. Since the decision withdrawing ERDF financial assistance disrupted a situation of certainty of continued funding for the project and rendering it potentially unviable, the Region of Sicily was held to be directly concerned by it.[126] As the General Court held, "the effect of the contested decision is directly to change the applicant's legal status from that of unarguably being a creditor in respect of [ERDF] sums, to that of debtor, at least potentially" since, by the Commission decision, it was "no longer impossible for the national authorities under Community and domestic law to demand repayment from the applicant of the sums advanced".[127] The General Court was not convinced by the Commission's argument that national authorities had discretion in choosing whether to cancel public financing of the project or to cover the entirety of its costs. It considered that any national measure granting domestic financial assistance was simply intended to countervail the negative implications of the Commission's decision for the beneficiary.

The Court of Justice was requested to rule on appeal on the issues in *Regione Siciliana I* and *II*. Following the Advocate General's views,[128] the Court took the side of the Commission. It denied that the Region of Sicily was directly affected by the Commission's decision to withdraw financial assistance to Italy. Even though the Region was referred to in the annex of that decision as the authority responsible for the implementation of the project, that still did not mean that it was *entitled* to continued funding from the ERDF. Italian authorities could decide to resume subsidizing the project and to assume the costs of reimbursing the Commission. Therefore, the final beneficiary could not be held to be directly concerned by the Commission's decision.[129]

---

[125] *Idem*, paras. 64-66.
[126] *Idem*, para. 49.
[127] *Idem*, paras. 53-54.
[128] AG Ruiz-Jarabo Colomer nevertheless recognized that the view supported by the General Court in *Regione Siciliana II* was "not entirely unattractive" (See the Opinion in Case C-417/04 P *Regione Siciliana* (*Regione Siciliana I*), EU:C:2006:282, para. 80).
[129] Cases C-417/04 P, *Regione Siciliana* (*Regione Siciliana I*), EU:C:2006:282, paras. 26 and 30 and C-15/06 P, *Regione Siciliana* (*Regione Siciliana II*), EU:C:2007:183, paras. 32-36 and para. 39.

The Court of Justice's intervention was not the end of the matter. In *Ente per le Ville vesuviane*,[130] the General Court seized the change to mitigate the consequences of a wholesale exclusion of direct concern in structural funds litigation. It attempted to differentiate the legal situation of the applicant in the case from that of the Region of Sicily in the previous cases.

The Ente per le Ville vesuviane was a public body devoted to the conservation of an architectural complex of 18th century villas and gardens in the Vesuvius area. It was a recipient of ERDF financial assistance, in order to promote tourism and to preserve the villas' infrastructure. Due to irregularities in the execution of the project, the Commission decided in 2002 to reduce the financial assistance. The Commission required national authorities to formally notify its decision to the final beneficiary – the Ente –, given that it could be individually and directly concerned by it.

The Commission seems to have changed its mind on direct concern once Ente did in fact seize the General Court. It employed the same line of argument as in the *Regione Siciliana* saga,[131] and argued that the Ente lacked direct concern.

The General Court held, instead, that there was a "direct link" between the Ente and the Commission, and that it was directly concerned by the contested decision.[132] First, decision actually referred to the Ente as the 'beneficiary' of the project.[133] Second, the Italian authorities had made it explicit to the Commission, from the very beginning, that they intended to recover the cancelled sums from the beneficiary and had no intention of substituting the reduced financial assistance with their own funds. For the General Court, this meant that it was purely hypothetical to consider that the national authorities would not exercise their discretion to the detriment of the Ente.[134]

Even though it ultimately *won* the case on the merits, the Commission was not satisfied by the General Court's judgment, which made it vulnerable to hundreds of potential actions for annulment. It appealed to the Court of Justice, which in 2009 ended the debate once and for all. It could not be ruled out, the Court held, "that special

[130] Case T-189/02, *Ente per le Ville vesuviane*, EU:T:2007:233. On the case, see Delia Ferri, 'Il requisito dell'"interesse diretto": un'altra occasione persa per rendere veramente accessibile ai singoli il sistema di protezione giurisdizionale comunitario?', in: *Diritto Pubblico Comparato ed Europeo*, (2010), 191-197.
[131] Before doing so, the Court gave the parties an opportunity to comment on whether the ruling it had delivered in the meantime in C-417/04 P *Regione Siciliana* (*Regione Siciliana I*) should have any bearing on *Regione Siciliana II*.
[132] *Idem*, para. 50.
[133] *Ente per le Ville vesuviane*, para. 43.
[134] *Idem*, para. 44 and 47.

circumstances might lead the Italian State (…) to forebear from claiming the repayment from Ente".[135]

It has since been settled case law that beneficiaries are not directly concerned by Commission decisions withdrawing financial assistance from EU structural funds. Almost invariably, EU courts have used the same line of argument.

The primary role in selecting and managing projects falls to the Member States, so they may freely decide to use their own funds to finance a project or to abandon it in its entirety.[136] A decision on financial assistance from structural funds is only addressed to the Member State.[137] "According to case law", that assistance takes place "solely in the context of the relations between the Commission and the Member State",[138] and is based on a "system" functioning only between the two[139]. It is the Member State, not the beneficiary, which is entitled to financial assistance,[140] and the effects of the decisions refusing or withdrawing that assistance are "confined" to relations between the Union and the Member State.[141] The Member State's obligation to notify the Commission's decisions to the final beneficiary does not mean that the latter is automatically required to bear the costs of the reimbursement of amounts drawn from structural funds to the Commission.[142] Therefore, even if those decisions mention a given entity as responsible for the implementation of the project, or its beneficiary, it is not "in a direct legal relationship" with the Commission and its financial assistance.[143] Since beneficiaries lack direct concern, their judicial protection must be effectively guaranteed before national courts, which are required to interpret and apply domestic procedural rules in a manner which will enable the former to challenge the legality of any national measure relating to the "application to

---

135 Joined cases C-445/07 P and C-455/07 P, *Ente per le Ville vesuviane*, EU:C:2009:529, paras. 57-60.
136 Case T-403/15, *JYSK*, EU:T:2017:300, para. 37.
137 Cases T-189/02, *Ente per le Ville vesuviane*, para. 51 and T-403/13, *APRAM*, EU:T:2015:317, para. 38.
138 Cases *JYSK*, (fn 136), para. 28 and *Green Source Poland*, (fn 110), para. 37.
139 Cases T-401/07, *Caixa Geral de Depósitos*, EU:T:2011:72, para. 69, *JYSK*, (fn 136), para. 30 and *Green Source Poland*, (fn 110), para. 39.
140 Cases T-84/10, *Regione Puglia*, EU:T:2011:468, paras. 30-34, *APRAM*, (fn 137), para. 37-38, *JYSK*, (fn 136), paras. 29 and 60, *Green Source Poland*, (fn 110), para. 80.
141 *Green Source Poland*, (fn 110), para. 64.
142 Cases T-225/02, *Cámara de Comercio e Industria de Zaragoza*, EU:T:2006:357, para. 47; T-102/06, *Investire Partecipazioni*, EU:T:2007:355, para. 48; T-324/06, *Município de Gondomar*, EU:T:2008:337, para. 40; Case T-26/07, *Lipor*, EU:T:2008:339, para. 43; T-69/09, *Provincie Groningen*, EU:T:2010:423, para. 43; *Regione Puglia*, (fn 140), para. 39; *APRAM*, (fn 137), para. 40.
143 Cases *Investire Partecipazioni*, (fn 142), para. 51; *Provincie Groningen*, (fn 142), para. 38, *Regione Puglia*, (fn 140), para. 30, *APRAM*, (fn 137), para. 36, *JYSK*, (fn 136), para. 31, *Green Source Poland*, (fn 110), paras. 38-40 and 47.

them" of the Commission's decisions, by pleading the invalidity of those decisions and asking national courts to refer to the Court of Justice for a preliminary ruling.[144]

5.3. 'Second-order administration' and the denial of direct concern: another case of misuse of EU executive federalism

The current approach significantly departs from previous EU case law on the cancellation of financial assistance from the European Social Fund. Even though the relevant legislation foresaw national authorities as its sole interlocutors, not only were the Commission's decisions considered to be of direct concern to ESF beneficiaries[145] – the explicit mention of those beneficiaries in the decisions' text was treated as a relevant element in detecting direct concern.[146]

While the previous ESF legal framework was clearer that a Commission decision obliged national authorities to recover the sums from the beneficiary,[147] EU courts could have invoked the exact same argument as they have since the *Regione Siciliana* saga. They could have denied direct concern based on the discretion of the Member States to finance the relevant projects entirely from their budget after reimbursing the cancelled ESF amounts to the Commission. Moreover, it is far from unequivocal that under the structural funds regulations at the origin of the case law since *Regione Siciliana* accord the Member States as much discretion in recovering amounts paid from EU financial assistance as EU courts suggest.[148]

In any event, in the view supported here, the General Court was right to consider the applicant in *Regione Siciliana II* as directly concerned. This is because, *regardless of national implementing measures*, the cancellation of ERF support by the Commission *instantly* casts considerable uncertainty over a project's financial sustainability. The beneficiary, who could previously rest assured about the continuity of the line of financing, will suddenly need to find alternative sources of funding, and may from one moment to the next be required to repay sums that it may well already have invested.

---

144 Cases *Município de Gondomar*, (fn 142), para. 46, T-825/14, *IREPA*, EU:T:2016:345, paras. 48-49, *JYSK*, (fn 136), para. 61, *Green Source Poland*, (fn 110), para. 55.
145 See the case law quoted in footnote 101 above.
146 See for example Cases *Lisrestal* (fn 101), para. 26 and *SLIM Sicilia*, (fn 119), para. 57.
147 See, inter alia, *Interhotel*, (fn 101), para. 13. Article 6 (2) of Council Regulation No 2959/83 explicitly stated that the Member State had 'secondary liability' for the repayment of the sums irregularly transferred to the beneficiary. EU have understood that the current procedural regimes of structural funds, by contrast, accord the Member State a large margin of appreciation in deciding whether to recuperate the sums from the beneficiary or not. See for example *APRAM*, (fn 137), paras. 55-57.
148 Barbara Marchetti, (fn 103) 1123-1124 and José Luís da Cruz Vilaça, (fn 112), 178-179.

If the beneficiary's legal situation is not immediately changed as a consequence of the Commission's decision, it is difficult to understand why the latter often affords beneficiaries an opportunity to be heard.[149] It would also be puzzling that the Commission even requires the Member States to notify the beneficiary that the funding of its project will be cut off.[150]

The case law gives disproportionate relevance to the fact that the legislation foresees national authorities as the Commission's sole interlocutors. In arguing that its decisions create no immediate legal links with beneficiaries, or directly affect their legal situation, the Commission frequently starts by first emphasizing that those decisions are only addressed to the Member States. EU courts routinely accept this reasoning in order to conclude that the Commission's decisions are of no direct concern to financial assistance beneficiaries.[151] Applicants have been right to decry this line of argument as overly formalistic.[152] Moreover, in light of the wording of article 263 (4) TFEU, it is also a blatant non sequitur. The need to examine if a claimant is individually and directly concerned by a measure only comes into play if it is not that measure's addressee. In establishing direct concern, it is immaterial that the Commission only interacts with national authorities or that its decision is addressed to a Member State. It is therefore surprising that EU courts find this to be a decisive argument.

The case law on direct concern in structural funds showcases how a misplaced attachment to the old preconceptions of EU executive federalism leads to dysfunctional outcomes. EU courts consider that the mechanisms of the financing of cohesion policy mirror the same division of labour between national and EU authorities as in *Deutsche Milchkontor*, as well as the 'general principles' on which that division is predicated. Since its decisions are only addressed to national authorities, and regard only such authorities, the Commission establishes no direct links with beneficiaries, which are therefore supposedly not directly concerned by the withdrawal of financial assistance. In short: the decisional powers enjoyed by national and EU administrations, and the legal relationships founded upon their exercise, are portrayed as strictly separate; and the Commission, as confined to

---

[149] See *Regione Siciliana I* (fn 113), para. 10 and *Green Source Poland*, (fn 110), para. 47. It should be pointed out that the Commission often enters into contacts with the final beneficiary before withdrawing financial assistance, even though it is not obliged by the relevant regulations to do so. Indeed, in the legislation in force at the time of the rulings examine in this section, the Commission was only bound to hear the Member State. See Article 100 (1) and (3) of Regulation No 1083/2006 of 11 July 2006 and, in the case law, *LIPOR*, (fn 142), para. 49.

[150] Indeed, the Commission decisions often refer to the beneficiary of financial assistance as the "affected beneficiary". See for instance *Município de Gondomar*, (fn 142), para. 8.

[151] See for instance *JYSK*, (fn 136), paras. 28-29; *Município de Gondomar*, (fn 142), paras. 34-35 and *LIPOR*, (fn 142), paras. 41-42.

[152] *Green Source Poland*, (fn 110), para. 29.

the role of a second-order administration that deals only with other (national) administrations.

However, this account does justice neither to the distribution of decisional power within the procedures for withdrawal of financial assistance, nor to the impact of the Commission's decisions upon the legal situation of beneficiaries. First, the recovery of financial assistance from the beneficiary results not from the exercise of strictly separate decisional powers, but from shared decisional power. It is determined by national authorities, but only an immediate consequence of the Commission's decision on the project. Second, and even though national authorities are formally its sole interlocutors, the Commission cannot be considered as a mere second-order administration. It takes decisions that immediately and substantially change the legal situation of the beneficiary.[153]

The doctrine of EU executive federalism is not designed to accommodate composite procedures, such as those for the withdrawal of structural funds. It is mistaken to interpret the provisions governing those procedures in the light of that doctrine. Yet, this is precisely what EU courts do.

This is perhaps most visible in how the *Deutsche Milchkontor* formula, and the *Coillte* ruling which restated it, are invoked in the interpretation of the provisions guiding the withdrawal of financial assistance from structural funds. However, since the two cases related to financial processes in the common agricultural policy (CAP) that could neatly be fit in the scheme of EU executive federalism, they can hardly serve as useful rulings in handling Commission decisions concerning cohesion policy.

As the General Court accurately stated in *Coillte*, "the clearance on the expenditure incurred by Member States under the EAGGF has a declaratory rather than a constitutive function",[154] since it merely recognizes ex post whether that expenditure was chargeable to the EU's agricultural funds. The recovery of agricultural aid from recipients results solely from autonomous decisions of national authorities: the Commission "has no power to interfere directly regarding the granting or withholding of aid and consequently it cannot require the national authorities to adopt specific individual measures".[155]

In contrast, the Commission's decisions in cohesion policy have the *constitutive* effect of terminating financial assistance for individual projects which it originally deemed fundable and, pace the claims of EU courts, the default legal consequence of that

---

[153] Sandro Mento, 'I poteri amministrativi della Commissione europea in materia di fondi strutturali', in: *Rivista Trimestrale di Diritto Pubblico*, (2007), 135-172, 163.
[154] Case T-244/00, *Coillte Teoranta*, EU:T:2001:124, para. 44. See also AG Cruz Vilaça in Joined cases 89 and 91/86, *Étoile Commerciale*, EU:C:1987:337.
[155] *Coillte Teoranta*, (fn 154) para. 44.

termination is that the funds must be recovered from the beneficiary.[156] As Cruz Vilaça has rightly noted, this fundamental difference should have led EU courts to adopt a different approach.[157]

6. Conclusion

Composite procedures are joint decision-making processes. For that reason, they are difficult to accommodate into the EU's dualistic judicial system. That system was traditionally based on the assumption that the exercise of power can be clearly ascribed to either the EU or the national level.

The Chapter took as its point of departure that judicial protection may be compromised by the preconceptions of orthodox EU executive federalism. This is true both of the assumption that European administration is composed of two strictly separate spheres of power, and of a certain conservative view that, except where provided otherwise, the EU's own administration only relates to national authorities. The case law is ambivalent: the rulings on reviewable acts in composite procedures contradict the first assumption; the rulings on *locus standi* confirm the second.

With regard to the reviewability of measures, EU courts made a less rigid reading of the 'double exclusivity' of the jurisdiction of national and EU courts. They did so to ensure that the divide of judicial competences would not lead to denial of justice or ineffective judicial review. The case law on reviewable measures does not reflect the old conception of an administration of strictly divided powers, which underpinned the development of EU executive federalism. Rather, EU courts tend to treat composite procedures as unitary processes of will formation, and to treat the national and EU authorities involved in a composite procedure as a single, integrated administration.

For the review of EU measures adopted during composite procedures, EU courts did not need to invent new tools. They continue to use the substantive test, which dates back to *IBM*. The admissibility of autonomous judicial review depends on whether an EU measure entails binding legal effects. Just as in purely EU-level decision-making, it is immaterial in composite procedures that a measure is not the formal conclusion of a procedure.

---

[156] Indeed, from Article 70 of Regulation No 1083/2006, it becomes apparent that the default consequence of the withdrawal of financial assistance is the recovery of the amounts from the beneficiary. The same reading is implicitly made by José Luís da Cruz Vilaça, (fn 112), 179.
[157] José Luís da Cruz Vilaça, (fn 112), 178.

Where the discretion to define a composite procedure's outcome lies with the EU's own administration, only the latter's measures will represent the "material manifestation of the will of an authority".[158] In this regard, it is remarkable how the description made by EU courts of composite decision-making fits almost exactly with the description of EU-level procedures in the *IBM* case law.

Despite its multijurisdictional structure, a composite procedure is a single 'procedure involving several stages'.[159] Judicial review is only possible against the decision that definitively lays down the position of the EU administration. National preparatory acts are treated as measures that merely pave the way for the final decision to be made at EU level. Were they adopted by an EU body, the *IBM* case law would refer to such preparatory measures as being "only (…) internal to the administration",[160] and adopted pursuant to an "internal procedure".[161] It is striking that EU courts handle national preparatory measures in the same terms – as 'internal' to a single, joint administration composed of EU and national authorities.

The only actual innovation of the case law on composite procedures concerns what is expected of national courts. The jurisdictional *Borelli* principle not only *allows* but *requires* the autonomous judicial review of national preparatory measures which leave no discretion to the EU administration. This demand has no parallel in the case law on judicial control of either purely national or purely EU-level decision-making.

Though less evidently so, the *Borelli* case law also reflects a unitary conception of European administration. Against this reading, it will be objected that *Borelli* requires composite procedures to be 'severed in half' for the purposes of judicial protection. Even so, EU courts never fail to stress that the exercise of decisional power by national authorities is but a step of a (single) 'Community', or '*European*' decision-making procedure. For that reason, the jurisdictional *Borelli* principle requires a uniform standard of judicial protection, regardless of the Member State where the composite procedure begins. That standard is based on the same substantive test that EU courts use for the review of EU-level measures. In short: since national stages are simply part of a *unitary* and *European* administrative procedure, where the 'administration's definitive position' is taken at national level, national courts are required to offer judicial protection to individuals on the similar terms as EU courts would.

---

[158] Case T-673/13, *European Coalition to End Animal Experiments*, EU:T:2015:167, para. 23.
[159] See *Globula*, (fn 93), and *Moravia Gas*, (fn 93).
[160] Case T-320/09, *Planet AE*, EU:T:2011:172, paras. 37-39.
[161] Case T-29/15, *International Management Group*, EU:T:2017:56, para. 35.

Despite developments in issues of reviewability, the stance of EU courts on locus standi still appears to be influenced by the old preconceptions of EU executive federalism. As the case law on structural funds reveals, the CJEU still clings onto a conception of strictly divided power; and of EU authorities as a second-order administration.

Many tenets of executive federalism are visible. EU courts clearly support the Commission's view that the structural funds regulations are based on a "principle of the separation of the legal relationships existing, on the one hand, between the Commission and the Member States and, on the other hand, between the Member States and the beneficiaries". EU courts resort to the *Deutsche Milchkontor* formula, the archetypal expression of EU executive federalism, to justify an entirely inter-administrative reading of the legislation. Invoking that formula's abstract appeal to 'general principles' on the relations between the EU and the Member States, EU courts still treat the EU's own administration as one that is generally not intended to relate, let alone be accountable, to individuals. In so doing, the CJEU sacrifices the judicial protection of individuals at the altar of its old preconceptions on the EU's administrative system.

Even judges of the Court, such as Cruz Vilaça, have criticized the formalism of this approach. It is an approach that reflects how difficult it is for EU courts to shun the old ways of conceiving Europe's administrative order. The shift away from EU executive federalism is certainly not always easy. The cases on structural funds show that it is sometimes still understood to be constitutionally dictated by the Treaties' "general principles".

CHAPTER 7

THE PRINCIPLE OF IMPUTATION: NATIONAL ILLEGALITIES, EU RESPONSIBILITY

1. Introduction: contamination effects in composite decision-making

Chapter 6 examined the possibilities of judicial review of composite decision-making. According to the case law of EU courts, judicial review is based on a substantive test. More than whether a measure formally concludes the procedure, what matters is that it *intends* to produce binding legal effects.[1] Whether it actually *does* produce binding legal effects – whether it is *valid* –[2] is a different matter.

As any EU measure, an act adopted in the EU stage of a composite procedure may be invalid due to a defectiveness of its own. Put differently, it may be vitiated by illegalities committed by the EU authority itself, even if the national phase of a composite procedure is carried out in scrupulous observance of all applicable law.

In composite procedures, however, the competent courts for the review *of a measure* may not always be competent to review all *the irregularities* in the procedure leading up to its adoption. An action for annulment brought against the final decision "may not be able to cover errors which occurred at other levels than the one which took the final decision, while, at the same time, access to court is barred for all the steps which took place before the final measure was issued".[3]

This is not necessarily problematic in top-down composite procedures. It is incontrovertible that a preparatory measure adopted in an EU stage may 'contaminate' a subsequent final decision at national level.[4] In such cases, judicial review is even facilitated by the fact that Article 267 TFEU straightforwardly allows national courts to refer to the ECJ for a preliminary ruling on the validity of the EU-level preparatory measure.

This Chapter considers the opposite, and far more complex issue of whether, in composite procedures, irregularities occurring at national level may provoke the illegality of the final decision taken at EU level. The topic has been explored under the heading of

---

[1] See the introduction to section 4 of Chapter 6.

[2] Validity is taken here to mean that a norm can or must be used in legal reasoning for the justification of solutions to legal problems. This this sense of the term is taken from Giovanni Sartor, 'Validity as Bindingness: the Normativity of Legality', EUI WP LAW 2006/18, 4-5.

[3] Mariolina Eliantonio, 'Judicial Review in an Integrated Administration: the Case of 'Composite Procedures', in: *Review of European Administrative Law*, 7:2, (2014), 65-102, 78.

[4] For just an example, see Case 314/85, *Foto-Frost*, EU:C:1987:452. See also Case C-6/99, *Association Greenpeace France*, EU:C:2000:148, para. 56.

'imputation' of national irregularities to EU legal acts, within the framework of composite procedures.[5] Reconstructing the case law, one can conclude that, provided a number of key conditions are met, EU courts routinely accept arguments from 'derivative illegality', or 'contamination effects' in composite decision-making.

The Chapter argues that EU courts have developed an implicit *principle of imputation* of national irregularities to the EU's own administration. In a nutshell, it means that the EU administration may be judicially answerable for the illegalities committed by national authorities.[6]

The guiding thread of the case law concerns the structure of the composite procedures at stake. What matters is not the policy field to which the procedure belongs, but the concrete allocation of decisional powers within it.

The Chapter's second claim concerns the justification for the nuances in the case law. The claim is that *whether* and *to what extent* imputation is accepted in composite procedures greatly depends on concrete needs posed by key constitutional principles. Those principles are the autonomy and uniformity of EU law, the division of competences between national and EU courts, and the rule of law.

The argument will unfold as follows. Section 2 begins by clarifying why the development of the principle of imputation constitutes a major shift away from the doctrine of EU executive federalism. Section 3 explains why the imputation of national irregularities to the EU level would be problematic from the perspective of a series of key EU constitutional principles. In section 4, the Chapter will suggest that the primary issue in determining derivative illegality is locating of administration that enjoys the power to define the procedure's final decisional outcome. The Chapter explains why principles of EU constitutional law entirely oppose derivative illegality in composite procedures where EU authorities do not enjoy any discretion (section 5), and impose far-reaching restrictions to derivative illegality where they do (section 6). Section 7 draws attention to the fact that the conditions of the principle of imputation are unable to account for all irregularities in composite decision-making, which leads to a rule of law 'blind spot'. Finally, section 8 summarizes the Chapter's findings. The crafting of an implicit principle of imputation in composite decision-making represents a shift away from the old conception of European administration that underpinned the doctrine of EU executive federalism. National and EU

[5] Hanns Peter Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung „mehrstufiger" Verwaltungsverfahren*, (Duncker & Humblot, 2002).

[6] The present Chapter draws heavily on Filipe Brito Bastos, 'Derivative Illegality in European Composite Administrative Procedures', in: *Common Market Law Review*, 55, (2018), 101-134.

authorities are not conceived of as strictly separate spheres of power. They are conceived of as an integrated administration, with national bureaucracies co-opted into their role as the EU's ancillary administration.

2. The discrete erosion of a constitutional doctrine: the imputation principle and executive federalism

The notion of imputation of national irregularities to the decisions adopted by EU authorities can be paraphrased by reference to a more common legal-technical concept. It is an issue of what is known as *derivative illegality*.

Derivative illegality is a term sometimes employed in national administrative laws to designate the specific kind of illegality that results from the final decision in an administrative procedure being based on another, illegal, measure.[7] Metaphorically, one could refer to this phenomenon as a 'contamination' of illegality from one measure to another – often, from a preparatory act to a final decision.[8] Derivative illegality is widely accepted in national laws, and often occurs in procedures unfolding at national level only.[9] Likewise, EU courts regularly admit derivative illegality within decision-making processes of EU authorities.

It should be noted from the onset that the fact that derivative illegality is accepted at all in composite procedures reveals a significant departure from the doctrine of EU executive federalism. It cannot be reconciled with the early rigid logic of strict separation of administrative and judicial power.

One of the earliest uses that EU courts found for the separation principle was the notion that neither level of administration should be held accountable for the misdoings of the other. In particular, past case law tended to emphasise that the EU administration cannot be held responsible for the illegalities practiced by national administrative bodies.[10] Moreover, as was highlighted in Chapter 6, EU courts traditionally endorsed a rather strict reading of the limits of their jurisdiction in what concerns the review of national measures. These notions of strict administrative and judicial separateness would have opposed the

---

[7] Cfr. Pietro Virga, *Diritto Amministrativo*, II, 4th ed., (Giuffrè, 1997), 92-93 and Marcelo Rebelo de Sousa/André Salgado de Matos, *Direito Administrativo Geral*, III, 2nd ed., (D. Quixote, 2009), 175.

[8] See Aldo Sandulli, 'Il Procedimento', in: Sabino Cassese, *Trattato di Diritto Amministrativo – Diritto Amministrativo Generale*, II, (Giuffrè, 2000), 927-1215, 990.

[9] Besides the references already made to Italian and Portuguese Administrative law, see for instance Article 145, para. 1 8) of the Polish Code of Administrative Procedure and Article 49 (1) of the Spanish Law of Common Administrative Procedure of Public Administration.

[10] Cases 23/59, *FERAM*, EU:C:1959:33 and T-193/04, *Tillack*, EU:T:2006:292.

judicial review of a final EU decision based on the illegality of the preparatory measures that led to its adoption.

Nevertheless, EU courts succeeded in developing a body of case law framing derivative illegality in composite decision-making. They have done so by abandoning the separation principle and the old conception of administration with a strict dualistic divide between national and EU administrative power.

The case law offers a solution that allows the limits of jurisdiction of EU courts to be respected, while avoiding the more radical interpretation of those limits which would simply disregard any irregularity committed at national level. However, even if key constitutional tenets of EU executive federalism are abandoned, that still does not mean that the principle of imputation fits easily into the EU's constitutional order. Indeed, key principles such as those of the autonomy and uniformity of EU law, could also be imperilled if derivative illegality were to be accepted without any limitation in composite procedures.

3. Derivative illegality in composite procedures: a four-dimensional constitutional dilemma

Whether derivative illegality is accepted in a given legal system involves a preliminary choice about the appropriate moment to review the illegality of preparatory measures. The reasoning of derivative illegality implies that such review may be conducted *indirectly*, upon the challenge of the final decision of an administrative procedure. However, some legal systems also allow the *autonomous* judicial review of preparatory measures. In other words, those measures may form the object of judicial control as such, even *before* the procedure is formally concluded with the final decision.

Therefore, in a first approach to derivative illegality in composite decision-making, it is important to recapitulate how EU law generally handles the review of preparatory measures. More specifically, it is important to determine whether they can form the object of an autonomous review, or must instead be relied upon indirectly in the review of the final decision.

One important rule of the EU's dualistic system of judicial review is that the competent courts and applicable remedies are determined by the level that acts. This results from the 'double exclusivity' of national and EU judicial jurisdiction that was explained

previously.[11] An EU measure is reviewable only by EU courts, with the tools of judicial review they have at their disposal. A national measure is reviewable only by national courts, using national remedies – occasionally with the adaptations imposed by EU law.

This observation, banal as it may seem, actually provides us with two valuable starting points to analyse derivative illegality in composite decision-making. First, to the extent that the final decision is an EU decision, it is worth examining how EU courts generally review preparatory measures in EU-level decision-making procedures. Second, to the extent that the preparatory measures at stake are national, it is worth examining whether EU case law requires or allows national preparatory measures to be autonomously reviewed.

On the review of EU decision-making, EU case law establishes that "any unlawful features vitiating (…) a preparatory act must be relied on in an action directed against the definitive act for which it represents a preparatory step".[12] Thus, merely preparatory "acts or decisions drawn up in a procedure involving several stages" cannot generally form the object of an autonomous review of legality.[13] While the literature is divided on this issue, the case law suggests that such an autonomous review is sometimes possible. This seems to be the case when the preparatory EU measures at stake express the definitive position of the deciding authority, even before the procedure is formally concluded.[14] Otherwise, if EU preparatory measures merely 'pave the way' for that definitive position to be taken at a later stage, their legality is checked indirectly, upon the challenge of the final act.[15] The main rationale for this case law appears to be a logic of separation of powers. As the Court stated in the *IBM* ruling, the result of a review of merely preparatory acts by the EU judicature would "anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial", which would "be incompatible with the

[11] Chapter 6, section 2.
[12] See Cases 60/81, *IBM*, EU:C:1981:264, para 12 and T-404/08, *Fluorsid*, EU:T:2013:321 para 133.
[13] Joined Cases T-10/92 to T-12/92 and T-15/92, *Cimenteries CBR*, EU:T:1992:123, para 28.
[14] See Alexander Türk, *Judicial Review in EU Law*, (Elgar, 2009), 91; Hans-Christian Röhl, 'Die Anfechtbare Entscheidung nach Art. 230 Abs. 4 EGV', in: Eberhard Schmidt-Aßmann/Bettina Schöndorf-Haubold (Eds.), *Der Europäische Verwaltungsverbund*, (C. H. Beck, 2005), 319-351, 330; and Jürgen Schwarze, 'Judicial Review of European Administrative Procedure', in: *Law and Contemporary Problems*, 68, (2004-2005), 85-105, 89-90. The view has also been supported by Advocates General. See the Opinion of AG Slynn in *IBM* (fn 29) and the Opinion of AG Ruiz-Jarabo Colomer in C-249/02, *Portuguese Republic v Commission*, EU:C:2004:704, para 44. Ruiz-Jarabo Colomer explains the issue as follows: "actions brought against the measures which are prior or subsequent to a final decision in a complex procedure have been ruled inadmissible. Defects in the preparatory measures for an act adopted subsequently, which contains the institution's decision, must be pointed out when the action is brought against the latter act, *subject always to the fact that preparatory acts may be contested separately in so far as, by producing legal effects, they have a decisive influence on an issue in the main procedure*" (emphasis added).
[15] Cases T-498/07 P, *Krcova*, EU:T:2009:178, paras. 55-56 and T-532/08, *Norilsk*, EU:T:2010:353, para 94.

system of the division of powers between the Commission and the Court (…) as well as the requirements of the sound administration of justice".[16]

In examining the review of derivative illegality in composite decision-making, it is also necessary to see what EU law generally states on the reviewability of national preparatory measures. The CJEU's case law on *purely national decision-making* has stated that EU law does not require preparatory measures to be autonomously reviewable.[17]

From the case law of EU courts on purely European and national preparatory measures, it would follow that the review of derivative illegality would have to be admissible in composite decision-making. The final EU decision fits the description of an EU act resulting from a "procedure involving several stages", where preparatory measures would normally only be reviewable upon the conclusion of the decision-making process. Moreover, since preparatory national measures are not required to be autonomously reviewable, their judicial control would have to be at least possible upon the challenge of the final EU decision. Lastly, it would appear that, in some circumstances, the autonomous review of national preparatory measures would have to be deemed inadmissible. Indeed, that autonomous review would run counter to the logic of separation of powers in the *IBM* case law, at least whenever it would lead national courts to anticipate the exercise of administrative discretion at EU level.

However, the unlimited review of derivative illegality in composite procedures would raise significant constitutional problems. Hypothetically, such a review could overstep the limits of the CJEU's jurisdiction, or breach the principles of autonomy and uniformity of EU law.

The constitutional dilemma can be illustrated with a simple example of a composite procedure. Under EU law,[18] the establishment of fish farms requires an administrative authorisation if they are intended to grow non-native species. Whenever the installation of those fish farms is likely to have cross-border environmental effects, the authorisation procedure is composite. A national authority receives the application for the permit and, following a positive assessment, forwards a non-binding draft decision to the Commission for a final decision. Supposing that the national draft decision was adopted illegally, why

[16] Cases T-64/89, *Automec*, EU:T:1990:42, para 46 and T-41/16, *Cyprus Turkish Chamber of Industry*, EU:T:2016:613, para 42.
[17] This had already been implicit in the landmark ruling in Case 222/86, *Heylens*, EU:C:1987:442 but was explicitly confirmed in later judgments (see Case C-69/10, *Diouf*, EU:C:2011:524, paras 55-56).
[18] Council Regulation No 708/2007 of 11 June 2007, concerning use of alien and locally absent species in aquaculture.

would EU constitutional law oppose its indirect review upon the review of the Commission's decision?

The first reason concerns the boundaries of the jurisdiction of EU courts. One could argue that even an indirect review the national authority's draft aquaculture permit violates the CJEU's prohibition to adjudicate on national measures. In other words, accepting derivative illegality in composite decision-making could lead EU courts to review the exercise of national decisional powers under the guise of judicial review against the final EU decision. Under the conventional understanding of the divide between national and EU judicial power – the principle of 'double exclusivity' – that would be unimaginable. Despite all *praeter* and even *contra legem* interpretations of the Treaty's system of remedies,[19] the prohibition to quash measures of state authorities is one of the few sacred cows the CJEU has yet to slaughter.[20]

The second and third constitutional arguments against derivative illegality in composite decision-making concern illegalities on grounds of national law. Returning to the example from aquaculture, let us suppose that the final Commission decision is based on a draft permit which contradicts provisions of national administrative law. Under such circumstances, what would oppose an indirect review of national preparatory measures by the CJEU?

On the one hand, the principle of the autonomy of the EU legal order. Derivative illegality would open the door to judging the final EU decision against norms of national law breached during national procedural phases. Doing so would be irreconcilable with the notion that the validity of EU legal acts is independent from national law.[21]

On the other hand, the derivative illegality of final EU decisions on grounds of national law poses a risk to the principle of uniformity of EU law. EU courts could consider final EU measures resulting from the same procedure as legal or illegal, depending

---

[19] See Cases *Foto-Frost* (fn 4); 294/83, *Les Verts*, EU:C:1986:166; and T-411/06, *Sogelma*, EU:T:2008:419.

[20] See Cases 46/81, *Benvenuto*, EU:C:1981:64; 142/83, *Nevas*, EU:C:1983:267; and 285/90, *Tsitouras*, EU:C:1991:84.

[21] On the principle of autonomy of the EU legal order, see the early Cases 26/62, *Van Gend en Loos*, EU:C:1963:1; 6/64, *Costa v Enel*, EU:C:1964:66; and 14/68, *Walt Wilhelm*, EU:C:1969:4. See also Cases C-416/10, *Križan*, EU:C:2013:8, para. 70 and C-28/12, *Commission v Council*, EU:C:2015:282, para. 39.
As Barents explains, the notion of autonomy of EU law means that the EU legal order constitutes a self-referential legal system (René Barents, *The Autonomy of Community Law*, (Kluwer Law International, 2004), 239 ff). In turn, this means that only EU law can stipulate the rules governing its own application, relations with other legal orders and interpretation (on the latter two, see Kaarlo Tuori, *European Constitutionalism*, (Cambridge, 2015) 31 ff and 53; and Loïc Azoulai, 'The Europeanisation of legal concepts', in: Ulla Neergard/Ruth Nielsen (Eds.), *European legal method: in a multi-layered EU legal order*, (DJØF Publishing, 2012), 165-182, 170. Another crucial dimension of autonomy of EU law, the most important for the present article, is that it is to be considered as being grounded in an "independent source of law", the Treaties. Consequently, the validity of EU measures can only be judged in the light of EU law of higher rank, and not national law. For a classical example of this notion, see Case 11-70, *Internationale Handelsgesellschaft*, EU:C:1970:114, para 3.

on whether national authorities comply with their own administrative laws. This would not only manifestly disregard the prohibition of EU courts to apply national law.[22] This would make the validity of the final EU measure conditional upon the standards of the national legal order that governed the composite procedure's earlier stage. The invariability of EU law throughout the Member States is held to represent a crucial precondition for the very "authority of Community law",[23] as well as for the unity of the EU's legal order.[24] For this reason, it would be difficult to accept that a Commission decision to grant an aquaculture permit could be legal if based on a Portuguese draft decision, yet illegal if based on a draft decision made under the same factual circumstances in Spain.[25]

From the above, a simple conclusion should follow: under EU constitutional law, no derivative illegality whatsoever should ever be accepted in composite procedures. However, that conclusion would also be at odds with another crucial EU constitutional principle – the rule of law.

As was explained before, the autonomous judicial review of national preparatory measures is generally not required by EU law. If they are adopted within composite procedures and leave discretion to the EU level, there is also a strong case to argue that EU law opposes that review. The only alternative would be an indirect review of national preparatory measures via the derivative illegality of the final EU decision. However, if one rejects derivative illegality in composite procedures, on the grounds highlighted above, the illegality of such measures is not reviewable by EU courts either. Ultimately, their unreviewability at either level of judiciary might mean that the legal limitations of the national stage of the procedure cease to be enforceable and lose their bindingness.[26] In other words, the complete rejection of derivative illegality in composite decision-making could mean in practice the exemption of national authorities from a judicial check of legality. Such would undoubtedly weaken the very rule of law in EU administrative law.

In short, there are strong constitutional arguments both in favour and against derivative illegality in composite decision-making. While the EU's commitment to the rule of law should encourage EU courts to accept the indirect review of national preparatory

---

[22] On that prohibition, see Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462, para 43.
[23] Case 55-77, *Maris*, EU:C:1977:203, para 27.
[24] Case 44/79, *Hauer*, EU:C:1979:290, para 14.
[25] For just one example of how this could be possible, consider the regimes on impediments of the two countries. The Spanish *Legal Regime of the Public Sector* (*Ley* 40/2015) establishes that a member of an administrative body cannot be part of the deliberation if she offered professional services of any kind to the interested party in the two preceding years (Art. 23 (1) e)). Decisions adopted in contravention of the rule are illegal. Portuguese administrative law, by contrast, does not foresee this particular situation as a case of impediment (see Art. 69 of the Code of Administrative Procedure).
[26] Cfr. fn 2.

measures, the limits of their jurisdiction and the autonomy and uniformity of EU law recommend otherwise.

This tension has remained largely implicit in the case law. The only argument that is textually referred to with some frequency by Advocate Generals and EU courts concerns the CJEU's prohibition to review national acts. However, and probably not by accident, the case law on the principle of imputation has developed a series of conditions which make it possible to address the competing constitutional demands.

4. Reconstructing the Court's case law on derivative illegality in composite administrative procedures

The constitutional dilemma explained above is reflected in the variations found in the case law of EU courts on derivative illegality in composite procedures. EU courts have produced nuanced solutions in order to respond to the variable demands that EU constitutional principles place on composite procedures of different decisional structures.

The case-law examined below derives from completely unrelated policy fields, from agriculture to GMO governance and from animal feed to customs law. However, the solutions offered by EU courts to 'contamination effects' in composite procedures are applied transversally.

EU courts tend to obscure what makes the 'contamination argument' acceptable in some cases, but not in others. EU courts also tend not to follow a transparent line of reasoning when considering arguments of imputation; nor do they make explicit the choices that are made between the conflicting constitutional values.[27]

An analysis limited to the comparison between individual rulings will lead to the impression that the imputation of national irregularities to final EU measures occurs in an erratic fashion. On the contrary. Once the various ruling are read in the broader scheme of the derivative illegality case law, a pattern emerges showing that the solutions found by EU courts display remarkable stability. Whether those solutions can be grounded in any credible constitutional justification is an entirely different issue.

The test used by EU courts relates to the structure of each composite procedure, regardless of the policy field in which it is situated. More specifically, the key criterion is the concrete allocation of decisional powers within the procedure.

[27] This is an issue that is well known in the case law of EU courts. See Gerard Conway, *The limits of legal reasoning and the European Court of Justice*, (Cambridge, 2012), 75 and Miguel Poiares Maduro, *We the Court*, (Hart, 1999), 20.

The rule is that, under certain conditions, composite procedures are subject to an implicit principle of imputation, according to which final EU acts can be judged invalid based on the illegality of preceding preparatory measures. The conditions for derivative illegality to be accepted under that principle will be explored in section 6.

As an exception to that rule, derivative illegality is rejected whenever national measures, according to the legal framework of the procedure, predetermine the procedure's final outcome by binding EU bodies to adopt a measure with a certain content. To put it simply, 'contamination effects' within a composite procedure

(i) can *never* occur when national authorities have the exclusive power to decide the definitive content of the EU act adopted at the end of the procedure; *but*

(ii) may generally occur, under a set of conditions, when it is an EU authority deciding in the procedure's final stages that has the power to define that content.

5. The *Borelli* doctrine: no EU discretion, no imputation

The solution of non-imputation became most visible and most controversial in the *Borelli* ruling. The facts of the case and the main issues it raised were already explained in Chapter 6. For current purposes, it is nonetheless important to emphasise that Borelli's argument was one of derivative illegality. It held that judicial control had to be directed at the Commission's "final act in the procedure which encapsulates all the decisions of the institutions and bodies involved in the procedure", and that "any illegality affecting intermediate acts is reflected in the final act".[28]

Chapter 6 already highlighted that the *Borelli* case law enshrined two principles. The first, which was already examined, is a *jurisdictional* principle – the Court refuses jurisdiction to review, even indirectly, the intermediate measures adopted by national authorities in the course of procedures of this kind, which must be reviewed by national courts. However, it is the second principle, the *substantive Borelli* principle, which is of greater interest here. It entails the comprehensive and unconditional exclusion of any derivative illegality.[29] This is expressed in the repeated formula that "[an] irregularity that might affect the [national]

[28] Report for Hearing, I-6318.
[29] Case C-97/91, *Borelli*, EU:C:1992:491, para. 12.

opinion cannot affect the validity of the decision by which the Commission refused the aid applied for".[30]

As the development of the case law shows, the applicability of the *Borelli* doctrine depends on the fulfilment of two requirements.[31] The two *Borelli* principles apply whenever

(iii) a national authority adopts a measures which, according to the relevant EU legislation, "*form*s *part* of a Community decision-making procedure"; and

(iv) that measure "*is binding* on the Community decision-taking authority *and therefore determines the terms* of the Community decision to be adopted".[32]

That the *Borelli* doctrine only applies when both conditions are met is confirmed by rulings where the application of the two principles was denied. In *Association Greenpeace France*, Advocate General Mischo correctly held that the *Borelli* doctrine could not be applied whenever the issue of national intermediate measures merely *makes possible* the continuation of the procedure to the EU level, instead of actually predetermining the content of the final act.[33]

The complete denial of the 'contamination argument' in composite procedures falling under the scope of the *Borelli* doctrine at first appears as a counterintuitive solution. One would expect that the more decisive an illegal measure is for a final decision, the more the legal order would facilitate that measure's review. It is therefore understandable that the rejection of derivative illegality in *Borelli* was received with some perplexity and much criticism by EU administrative legal scholarship.[34] Many have argued that, in *Borelli*, the Court should have accepted derivative illegality[35] – and some have even described its

---

[30] *Borelli* (fn 29), para. 12.

[31] For an analysis of the *Borelli* case law in greater depth, see Filipe Brito Bastos, 'The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice', in: *Review of European Administrative Law*, 8:2, (2015), 269-298.

[32] *Borelli* (fn 29), at para. 10. The Court returned to the issue of derivative illegality in the entirely unrelated field of the procedure for the registration of protected designations of origin and geographical indications (PDOs and PGIs. As the procedure follows the same decisional structure, the EU courts followed the same line of reasoning in *Borelli* and held that "the Community judicature has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority even if the measure in question forms part of a Community decisionmaking procedure" (see T-114/99, *Pampryl*, EU:T:1999:281, para. 57). See also Case C-269/99, *Carl Kühne*, EU:C:2001:659, para. 57 and C-343/07, *Bavaria NV*, EU:C:2009:415, at paras. 55-7 and 64-67.

[33] See para. 100 of his Opinion in the judgment.

[34] Roberto Caranta, 'Sull'impugnabilità degli atti endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione', in: *Foro Amministrativo*, (1994), I, 752-765, 760 and Hanns Peter Nehl, 'Legal Protection in the Field of EU Funds', in: *European State Aid Law Quarterly*, (2011), 629-652, 650.

[35] See for instance Manuela Veronelli, 'Procedimenti composti e problemi di tutela giurisdizionale', in: Giacinto della Cananea/Matteo Gnes (Eds.), *I Procedimenti Amministrativi dell'Unione Europea. Un'Indagine*, (Giappichelli 2004), 59-84.

refusal to do so as "embarrassing".[36] Gaja, for instance, argued that the reasoning of the Court was "less persuasive", and that it should "in principle" be entitled "to examine all the questions that are relevant for ascertaining the validity of the Community act – whether these questions relate to facts, EC law or national law".[37] Yet, in the light of EU constitutional law, it is difficult to see how the Court could have decided differently.

Accepting derivative illegality in procedures of this structure risks rendering final EU measures invalid simply because a preceding national act breaches strictly national legal rules. Thus, such rules become the standard against which the legality of EU acts is measured. The constitutional obstacles to this have already been highlighted above. The principle of the autonomy of the EU legal order is all in all adverse to the notion that EU legal measures need to respect any national legal norms in order to be valid. The concern for the autonomy of the EU legal system vis-à-vis national law seems to have been present, though admittedly implicitly, in the case. In its pleading, the Commission emphasized that the final measure of the procedure had been "drawn up in the context of two distinct legal systems".[38] Furthermore, the invariability of EU law, which is a postulate of its autonomy, would be threatened if national idiosyncrasies in administrative law could determine the illegality of final EU measures.

However, it could be countered that domestic intermediate measures may not necessarily be illegal on grounds of national law. Owing to the ever more extensive Europeanization of national administrative laws, or to the EU legal rules framing national stages of the procedure, such intermediate measures may also breach a rule of EU law. If that is the case, some authors hold, then there should be no reason for EU courts not to review the derivative illegality of final EU acts.[39]

However, admitting judicial control of 'contamination effects' in composite procedures of the same structure as that in *Borelli* will *always* implicate the subjection of the action of national authorities to the scrutiny of EU courts. An annulment claim brought against the final EU measure will represent a ruse, employed to review the exercise of power by national administrations under the guise of an action against an EU body. This

---

[36] Roberto Caranta, 'Coordinamento e divisione dei compiti tra Corte di giustizia delle comunità europee e giudizi nazionali nelle ipotesi di coamministrazione: il caso dei prodotti modificati geneticamente', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2000), 1133-1152, 1141.

[37] Giorgio Gaja, 'Case C-6/99, Association Greenpeace France and Others v. Ministère de l'Agriculture et de la Pêche and Others. Judgment of the Full Court of 21 March 2000', in: *Common Market Law Review*, 37, (2000), 1427-1432, 1431.

[38] *Borelli* (fn 29), Report for Hearing, I-6321.

[39] Herwig Hofmann/Alexander Türk, 'Legal challenges in EU administrative law by the move to an integrated administration', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, (Elgar, 2009), 355-379, 375.

would be no less problematic in the light of the EU constitutional principle according to which the power of national authorities is independent from the jurisdiction of the Court. Such constitutional concerns are evident not only in the *Borelli* ruling itself, but in subsequent interpretations of the case made by Advocate General Mischo. In his words, following a solution different from the one found in *Borelli* would "call into question the division of powers between the national court and the Court", which would be "be most unwise and (…) do nothing to promote the cause of respect for the rule of law within the Community legal order".[40] Mischo nevertheless recognized that the solutions entailed in *Borelli* are "harsh" for individuals,[41] as access to the EU judiciary is denied.

While sensitive to the safeguard of the independence of the EU legal order and of the jurisdictional limits of EU and national courts, the *Borelli* ruling does raise doubts concerning how the rule of law is to be preserved. Indeed, the rule of law is *prima facie* threatened both in its objective dimension – the effective limitation of public power by the law – and its subjective dimensions – the possibility for individuals to challenge the excesses of public power. As EU courts cannot review the final EU measure based on derivative illegality, and national courts are usually not empowered to review preparatory measures separately, there is a risk that a kind of "catch 22" situation arises in which no judiciary will ever be competent to review the entirety of the composite procedure.[42] On the other hand, individuals that are affected in their rights by the illegal behaviour of authorities cease to have legal claims they can bring to court against those authorities.

It is in order to counterbalance this potential gap in judicial review, and the protection of individuals, that the jurisdictional *Borelli* principle entails an explicit positive obligation for national courts. They must provide judicial protection to parties adversely affected by national preparatory measures "on the same terms on which they review any definitive measure adopted by the same national authority".[43]

Borelli must be understood as an attempt to adequately balance different EU constitutional principles. The Court's answer to that conflict is, on the one hand, to deny derivative illegality and, on the other, to completely leave to national courts the task of reviewing the legality of the national stage of the procedure.

---

[40] Opinion of AG Mischo in C-6/99, *Association Greenpeace France*, EU:C:1999:587, para. 99.
[41] *Idem*, para. 98.
[42] Roberto Caranta, 'Judicial Protection Against Member States: a New *Jus Commune* Takes Shape', in: *Common Market Law Review*, 32, (1995), 703-726, 716.
[43] *Borelli* (fn 29), paras. 10 and 13.

6. Restricted derivative illegality: the principle of imputation

In composite procedures where EU decisional powers predominate, EU courts preserve, with adaptations, the rule according to which final measures may be invalid because of the illegality of preparatory measures. However, it is important to stress that the fact that irregularities occur during national stages never means that the final EU measures are automatically illegal themselves. This clearly results from a number of judgments, such as *Pfizer*.[44]

In light of new information, Danish authorities concluded that an antibiotic, produced by Pfizer for use in animal feed, posed risks to public health. The competent Danish authority enacted a safeguard measure – a ban on the use of the antibiotic in Danish national territory – and forwarded it to the Council. The latter confirmed the necessity of the measure by adopting a Regulation, which removed the additive from the EU list of substances permitted in animal feed. Pfizer contended before the General Court that "the fact that the safeguard measure is unlawful means that the contested regulation is also unlawful, given that it was adopted on the basis of that measure".[45] Stressing that the EU administration enjoyed a power of risk assessment that was not conditioned by the assessments carried out at national level, the General Court held that

> "Only the lawfulness of the Community-level risk assessment is subject to judicial review by the Court in this case. It follows that, *even if the safeguard measure taken by the Danish authorities were unlawful*, because the scientific evidence provided by the authorities was inadequate, *that would still not prove that the contested regulation was unlawful*" (emphasis added).[46]

In other words, the General Court held that, since the EU authority in the relevant composite procedure enjoyed the discretion to diverge from the acts adopted by national authorities, the irregularities the latter did not make the final EU measure illegal *ipso facto*.

EU courts only accept derivative illegality in composite procedures under certain conditions. Reconstructing the case law, one may conclude that a final EU legal act may in principle be vitiated by derivative illegality when:

(i) it is based on preceding preparatory national measures that are illegal; and

(ii) the EU authority was *not* obliged to follow those measures.

---

[44] T-13/99, *Pfizer*, EU:T:2002:209.
[45] *Pfizer*, (fn 44), para. 175.
[46] *Pfizer*, (fn 44), para. 184.

At first sight, this solution does not seem to raise the same challenges to the rule of law as the *Borelli* doctrine's straightforward exclusion of derivative illegality. It should be recalled that it was the *Borelli* exclusion that led the Court to deem it appropriate to find a way to compensate the risk of vulnerability of the rule of law. The approach to counter that risk was found by crafting the jurisdictional *Borelli* principle not as a mere denial of jurisdiction of the EU judicature, but as a positive obligation for national courts to accept the autonomous review of national intermediate measures.

In fact, and again at first sight, the admissibility of derivative illegality under the imputation principle seems to be a solution that actively seeks to promote the rule of law. From the perspective of the subjective functions of judicial control, individuals affected by the composite procedure's outcome can turn to a single judiciary to obtain judicial protection. They can turn to EU courts for judicial protection against an illegal EU measure, even if that illegality originates from the national stages of the procedure that led to the measure's adoption. The objective function of judicial control also seems to be well preserved, as under this approach it would seem that irregularities that affect merely preparatory measures are made justiciable before EU courts.

Derivative illegality also poses constitutional concerns in composite procedures where the final EU stage enjoys discretion. However, it does so in different ways than in the composite procedures falling under the scope of the *Borelli* doctrine. Those concerns are linked to the same principles behind the judicial shaping of the *Borelli* doctrine – the immunity of national authorities from the jurisdiction of EU courts, and the autonomy and uniformity of EU law. It is with these principles that the fullest possible extent of rule of law needs to be balanced. Such balancing implies that some concessions on the side of the rule of law may need to be made – and indeed, *are* made – to the benefit of other EU constitutional principles. This is why, in composite procedures where the argument from contamination is accepted in principle, some conditions are introduced into the standard of derivative illegality that EU courts generally use. Those conditions are fundamentally three in number, and constitute the presuppositions for the principle of imputation to apply.

First, irregularities committed at national level must indeed be imputable to the EU authority. Second, the irregularity must result from the violation of a rule of EU law. Third, the violation of procedural rules is only relevant for the annulment of the final EU measure inasmuch as it qualifies as a breach of an 'essential procedural requirement' under Article 263 TFEU. While the first condition aims to ensure that the prohibition for EU courts to

review national measures is observed, the latter two guarantee that the autonomy and uniformity of EU law are maintained.

6.1. Condition 1: imputability

While it may sound tautological, the first condition of imputation in composite procedures is that of *imputability*. It concerns *what* EU authorities do when they receive irregular national preparatory measures, and enjoy the discretion to diverge from them. This first condition aims to respect the limits of the jurisdiction of EU courts defined in the Treaties, and in particular the prohibition for them to review the action of national authorities. It ensures that the review made by EU courts is actually directed against an illegal action that *can be attributed* to an EU authority, even though the illegality originates from the national level.

While this notion may seem contradictory at first sight, it is in fact quite simple to explain. In order for EU courts to have jurisdiction over illegalities committed during national procedural stages, an EU authority must adopt a behaviour that *prolongs* those illegalities into the final EU measure. In other words, there must be an act of volition, or an omission, on the part of the EU authority that makes it possible to *impute* the perpetuation of national irregularities to the EU level. This condition ensures that EU courts do not just use final EU measures as a pretext to review the action of national authorities but, instead concentrate their review on what is an EU-level error.

The case law shows that the use of the principle of imputation can be roughly grouped into two types of situations, which are neither exhaustive, nor mutually exclusive. Instances of derivative illegality have been accepted wherever an EU authority

(i) voluntarily incorporates the illegal preparatory national acts into the final measure; or
(ii) adopts that final measure without correcting an illegality practiced at national level when it has the power to do so.

6.1.1. Voluntary incorporation of illegal national measures

The imputation of illegalities of the first category – when the EU administration willingly follows defective national preparatory measures – was visible in cases as early as *Toepfer*. The case concerned the long-defunct regime of safeguard measures in the

organisation for the common market in cereals.[47] Fearing that an impending excess in imports could threaten price stability in the German cereals market, German authorities adopted one such safeguard measure, ordering the distribution of import licences for maize to cease. The measure that Toepfer challenged was the Commission decision authorising that safeguard measure, arguing that the German authorities had ordered a halt to import licences without the legal requirements for that measure being met. Namely, since the disturbances in the cereals market "would have been of too temporary a nature to be capable of jeopardizing the stability of the market in maize and barley" and thereby also "the fair standard of living for the agricultural community", the issue of the German measures was unwarranted, and the Commission decision that authorised them had to be annulled.

In recent years, perhaps the most illustrative examples of this line of thought have emerged in the case law on the procedure governing access to documents in the possession of EU bodies, but which originate from a Member State. The structure of the procedure was already explained in Chapter 5, in regard to what was described as the rule of replicability of reasons.

Article 4 (5) of Regulation No 1049/2001 states, confusingly, that the Member State may "*request*" that a document is not released without its "*prior agreement*". Due to its equivocal formulation, the provision is subject to different readings. One reading favours the control of the Member States over the information they pass onto the EU institutions; the other favours the democratic value of transparency. The first reading – initially endorsed by the General Court – accords the opposition of the Member States the legal effect of an absolute and discretionary veto, an "instruction" to the EU authority not to disclose a document.[48] The second reading holds that it is ultimately for the EU body in possession of the document to decide whether the legal conditions to withhold information are satisfied and, as the case may be, reconsider the position taken by the national authorities. Originally supported by Advocate General Poiares Maduro, this second reading of the provision came to be adopted by the Court itself.[49]

Based on this reading of the composite procedure, EU courts have concluded that the responsibility for the final decision, and therefore for the lawfulness of the decision-

[47] See Joined Cases 106 and 107-63, *Toepfer*, EU:C:1965:65.
[48] Case T-168/02, *IFAW Internationaler Tierschutz-Fonds* (*IFAW I*), EU:T:2004:346, para. 58.
[49] See the Opinion of AG Poiares Maduro in Case C-64/05 P, *Sweden v Commission*, EU:C:2007:433 and Case C-64/05 P, *Sweden v Commission*, EU:C:2007:802. See also Cases T-250/08, *Batchelor*, EU:T:2011:236, para. 45; C-135/11 P, *IFAW Internationaler Tierschutz-Fonds* (*IFAW III*), EU:C:2012:376, paras. 57-58; T-603/11, *Ecologistas en Acción*, EU:T:2014:182; para. 36; T-669/11, *Spirlea*, EU:T:2014:814, para. 53.

making process as a whole, falls to the EU authority.[50] As a consequence, the case law stresses that, in adopting a final decision, the EU authority cannot accept a national measure of objection that is not justified by reference to the substantive exceptions or lacks a statement of reasons.[51] Nor can it accept a measure of objection that does not offer prima facie plausible reasons for non-disclosure.[52] Therefore, if the EU authority decides to deny a request for disclosure of a document by merely following such a measure, that final decision must be declared invalid.[53] Given its responsibility for the overall lawfulness of the procedure, an EU authority's decision to refuse access to a document may be reviewed by EU courts, even if that refusal results from the assessment of the substantive exceptions made by the Member State concerned.[54]

6.2.2. Non-correction of irregularities practiced at national level: the test of identical subject-matters.

The second category of imputable national irregularities corresponds to those which the EU administration had a duty to correct before adopting the final decision. The question that follows is when does the EU administration have that duty in a composite procedure.

The answer may be inferred from a number of rulings. In all the cases examined in this Chapter where derivative illegality was accepted, the legislation accorded to EU and national authorities powers of appraisal relating to the *same* subject-matter: for instance, on whether ESF expenditure had been made regularly, on whether a given product was safe for public health or the environment, or on whether the conditions were met for the remission or repayment of customs debts. By contrast, EU courts have denied a duty of correction when the national and the EU administrative authorities acting in a composite procedure decide on *separate* issues. In a more or less explicit fashion, this test has been used in a variety of composite procedures in order to determine whether the EU administration has a duty to correct illegalities originating at national level. The test of the identical subject-matter applies both in respect of national preparatory measures which are

[50] See Cases T-362/08, *IFAW Internationaler Tierschutz-Fonds* (*IFAW II*), EU:T:2011:6, para. 79, *Ecologistas en Acción*, (fn 49), para. 40, and *Spirlea*, (fn 49), para. 52.
[51] See *Sweden v Commision*, (fn 49), para. 88, *Spirlea*, (fn 49), para. 52, and T-344/15, *French Republic v Commission*, EU:T:2017:250, para. 40.
[52] *French Republic v Commission* (fn 51), para. 58.
[53] See *Sweden v Commission* (fn 49).
[54] *Batchelor*, (fn 49), para. 67.

illegal due to their content, and of those which are illegal due to flaws in the procedure leading up to their adoption.

The reasoning described above has been explicitly deployed in justifying a duty of the EU administration to correct substantive illegalities in fields as different as access to documents and customs law. In the context of the composite procedure for access to documents originating from Member States, national and EU authorities enjoy a power of appraisal on the same issue: on whether the substantive exceptions to disclosure apply to a given document. However, the final word on the matter falls to the EU level. The Court has held that the procedure should escape the logic of cases like *Borelli* and *Carl Kühne*, where the imputation of national irregularities to the EU level was denied.[55] In those cases, it could not have been said that national and EU authorities enjoyed powers of appraisal on the same subject-matter, due to the simple fact that the EU level enjoyed no power of appraisal at all and was bound to the position taken by national authorities.

The application of this line of thought in practice was already illustrated in the older *Emerald Meats* judgment. The case related to the procedure for the allocation of import licences pursuant to an import quota. According to the relevant composite procedure, national authorities decided on whether to grant such licences, and the Commission was "confined to checking that a given applicant does not appear on more than one list and to determining, having regard to the quantities indicated in the various national lists and to the total quota to be allocated, in what proportion the national authorities can accept the applications admitted by them". The Court held that

> "under the Community legislation, the Commission is *neither under a duty nor indeed empowered to check the correctness of the lists* or information notified to it by the Member States' authorities and that, since it is responsible only for determining the extent to which applications admitted by the national authorities may be accepted, *the Commission* itself does not allocate or reallocate the quantities thus determined to the persons entitled and, in particular*, does not have the power to substitute itself for the national authorities* for the purposes of the issue of import licences" (emphasis added).[56]

[55] *Sweden v Commission*, (fn 49), paras. 92-94.

[56] For a case in which the Court refused derivative illegality in a composite procedure because the Commission *was not* empowered to correct an irregularity caused by national authorities, see Joined Cases C-106/90, C-317/90 and C-129/91, *Emerald Meats*, EU:C:1993:19, paras. 36 and 38.

In a recent case, this requirement of imputability is reiterated. In the field of customs law, importers are faced with decisions requiring them to pay customs debt. Under some conditions, debtors may apply for the remission or repayment of the debt. If the national customs authority considers there to be evidence that those conditions may be met, it sends the Commission the case file and requests a decision on the matter.

The case law of the EU courts has clarified that individuals cannot challenge a Commission decision with "arguments designed to demonstrate that the decisions of the competent national authorities requiring it to pay the contested duties are unlawful", since "in the procedure laid down in Article 905 of the Implementing Regulation [of the Customs Code], the Commission *has no power* to review the lawfulness of decisions taken by national customs authorities".[57] Previous rulings had phrased this same idea differently by instead emphasizing the "division of powers between national and Community authorities".[58] The only pleas in law that the Court accepts relate to whether the Commission correctly applied the conditions upon which the remission or repayment of the customs debt depend.[59] This is because the powers of assessment of national customs authorities and the Commission overlap in determining whether those conditions are met. After all, it is only after a *preliminary* assessment by the national administration, on whether the conditions for remission or repayment might be met, that the second stage of the procedure is initiated so that the Commission adopts a *definitive* decision on the matter. For this reason, it is unsurprising that the principle of imputation has been applied in customs debt relief procedures, while not accepted in the procedure for the payment of customs duty itself. For instance, in *France-Aviation* the Commission's decision was held to be illegal on the grounds that it was based on a national preparatory measure that was, itself, defective. The national authority had forwarded the Commission a proposal for the granting of repayment of a customs debt, which was justified with an incomplete case file. Given that the Commission did not ensure that the applicant had the opportunity to provide additional information, it failed to correct the national illegality, and its decision was declared void.[60]

The test of identical subject-matter has also been deployed to examine, and sometimes declare, the illegality of final EU decisions based on procedurally defective

[57] Case T-576/11, *Schenker*, EU:T:2015:206, paras. 50-51. The procedure set out in Article 905 of the Implementing Regulation of the Community Customs Code (Commission Regulation No 2454/93) currently corresponds to Article 116(3) of the Union Customs Code, in joint application with Articles 98 ff of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015.
[58] See Case T-205/99, *Hyper*, EU:T:2002:189, para. 100.
[59] *Schenker* (fn 57), para. 50.
[60] Case T-346/94, *France-Aviation*, EU:T:1995:187, para. 35-36.

national preparatory measures. The breach of procedural rights at national level has been of particular relevance in the case law.[61] As was explained in Chapters 4 and 5, if the EU administration enjoys the power to determine the final decisional outcome, it is responsible for ensuring that the procedural rights of affected parties were observed throughout the composite procedure. It will have the obligation to ensure that those parties are afforded an opportunity to be heard and that the decisions concerning them are duly reasoned. In doing so, the EU administration may rely on the assistance of national authorities. Pursuant to the rules of confirmation and delegability, national administrations may even fulfil an EU authority's procedural obligations by anticipating the hearings that it is obliged to offer to affected parties, or by offering a hearing on its behalf.[62] The reverse side of the coin, however, is that the failures of national authorities in fulfilling the EU administration's procedural rights obligations become imputable to it. If national administrations offer a defective hearing, or no hearing at all, the EU authority deciding in the subsequent stage of a composite procedure must rectify that procedural irregularity. If it does not, the EU judicature will annul the final EU-level decision. This is what has resulted from the case law since rulings such as *Lisrestal*. A Portuguese authority had proposed the withdrawal of ESF financial assistance to the Commission without first offering a hearing to the beneficiary, Lisrestal.[63] Since the Commission had the ultimate responsibility for the decision on the matter, it was bound to ensure that the affected party had had the opportunity to make its views known before the end of the composite procedure. Since it failed to compensate the lack of a hearing in the national stage, the Commission's final decision was declared illegal.

Likewise, if the EU administration resorts to a composite statement of reasons – if it gives reasons by referring back to a national preparatory measure – the validity of its final decisions may be compromised if the national measure is unclear in its reasoning or provides no reasons at all. A good example of this is found in the *Branco I* ruling, relating to the older regime of the European Social Fund.[64] A Commission decision withdrawing ESF financial assistance was ruled illegal because it relied on a national preparatory measure, which contained to reasons at all. The case law also seems to imply that a final decision at EU level relying on a composite statement of reasons may be invalid if the affected party

[61] This is not to say that the violation of rules of procedure that do not relate to procedural rights has not been relevant as well. See the discussion on the *Association Greenpeace France* judgment in section 5.2. below.
[62] See Chapter 4, subsections 4.2 to 4.4..
[63] T-450/93, *Lisrestal*, EU:T:1994:290, paras. 40 and 49-51. See also the ECJ's ruling on appeal from the latter judgment, C-32/95 P, *Lisrestal*, EU:C:1996:402.
[64] Case T-85/94, *Branco I*, EU:T:1995:4.

was not given the opportunity to comment on the national preparatory measure.[65] The principle of imputation thus provides the technical tool for to enforce the conditions for what was called the rule of referral.[66]

6.2. Condition 2: breach of EU rules

The second condition of the principle of imputation is that the national preparatory measure incorporated into the EU act is irregular *on grounds of EU law*. The purpose of this condition is twofold. First, to ensure that the assessment of the legality of final EU measures is based exclusively on rules of EU law, as the principle of the autonomy of the EU legal order dictates. Second, the condition responds to the need to preserve the limits of the jurisdiction of EU courts, which are only competent to interpret and apply EU law.

EU courts have long resisted to admitting that EU-level decisions may be illegal on the grounds that they are based on national preparatory measures which are vitiated by irregularities of national law. An early sign of this was visible in the *Toepfer* case, which was already alluded to previously.[67] As a part of the challenge it mounted to the final Commission decision, *Toepfer* argued it was adopted in breach of essential procedural requirements. This was so because, at the national procedural stage that preceded the Commission's decision, the national authority had disregarded *Toepfer*'s procedural rights under German administrative procedural law. However, while Advocate General Roemer considered this to be a matter for national courts, the Court simply avoided responding to the question – and it was not necessary to do so because there were other causes of illegality of the final decision.

Since *Toepfer*, the condition that derivative illegality must refer to the violation of EU rules has usually remained implicit in the case law. One rare instance of it being explicitly discussed is found in Advocate General Mischo's Opinion in *Association Greenpeace France*. Mischo argued that it was "impossible to see how the Community Court, which has sole jurisdiction to declare a Community act invalid, could form an opinion as to the existence of an irregularity with respect to national law".[68] While Mischo's Opinion frames the issue as one of jurisdictional limits of the CJEU, it is striking how the *procedural* rules on those limits are invoked to make what is in fact a *substantive* claim: that only the Court can

[65] There have been cases where EU courts analyse in detail whether affected parties were allowed to take cognisance of the national preparatory measures referred to in the final EU decision. See T-182/96, *Partex*, EU:T:1999:171, para. 78.
[66] See Chapter 5, section 3.2.
[67] See fn 47.
[68] See the Opinion in the Case, para. 98.

review EU measures, but those measures cannot be illegal on grounds of national law. It is also striking that the Advocate General saw the need to emphasise this, when in the case the question whether national law had been breached had not in fact been raised by any of the parties. This is revealing that the Court correctly identifies the risks posed to the autonomy of EU law if derivative illegality is accepted in composite procedures.

EU courts show little reluctance in accepting derivative illegality if EU authorities uncritically follow preparatory national measures vitiated on grounds of EU law. Perhaps the most well-known examples are found in the many cases in which EU courts accept the review of EU final measures due to breaches of administrative procedural rights. This is so where those breaches are committed by national authorities, but not compensated at the EU stage.[69]

In the domain of the European Social Fund, EU courts have produced a considerable number of rulings resorting to the reasoning of imputation.[70] Consider the *Branco I* ruling, which was mentioned earlier. The competent Portuguese authority considered that a number of Branco's expenditure claims, made in the framework of a vocational training programme, were ineligible for funding. It therefore took the decision to forward to the Commission a final payment claim proposing the reduction of ESF assistance, without providing Branco with the reasons for that measure. The Commission confirmed the national authority's proposal, but the failure of the duty to give reasons became the justification for the General Court to declare the final EU measure invalid.[71] Though delivered in the 1990s, EU courts have reaffirmed the reasoning in *Branco* to this day. It is common to see illegalities committed by national authorities being accepted as a reason for the illegality of the final Commission decisions withdrawing or suspending EU funds.[72]

Cases linked to the breach of procedural rights at national level in the management of EU funds, like *Branco* and *Lisrestal*, have tended to be the almost exclusive focus of those who have studied imputation in composite procedures. In fact, some argue that the notion is a "technical device" to make the infringement of procedural guarantees at national level

[69] See Herwig Hofmann/Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences', in: *European Law Journal*, 13:2 (2007), 253-271, 268. The two authors highlight that disrespect in national stages for procedural rights such as the right to be heard tends to be accepted as cause of derivative illegality.
[70] See the references for many of such cases in Hanns Peter Nehl (fn 34), but in particular *Branco I*, para. 36.
[71] *Branco*, paras. 36-37.
[72] Case T-53/11, *AECOPS I*, EU:T:2013:205, para. 80.

justiciable before EU courts.[73] This claim arguably needs to be nuanced in two different ways.

The first is that one can only imagine that EU courts accept the imputation of infringements of administrative procedural rights to EU acts when those procedural rights are recognized in EU law. For instance, in *Pampryl* the applicants were unsuccessful in claiming that the final Commission regulation was illegal.[74] The applicants claimed that they had not been given an appropriate opportunity to present their views at national level, and therefore were effectively barred from exercising their right to be heard. One of the key reasons why that argument was rejected was that, according to the historical jurisprudence of EU courts, there is generally no right of participation in procedures ending with acts of general application.[75]

The second nuance is that the imputation of irregularities originating from national procedural stages also extends to other procedural formalities which are *not* related to procedural rights. This is clearly demonstrated in a number of cases,[76] the most prominent of which is *Association Greenpeace France*.

In *Association Greenpeace France*, a group of organisations challenged before French courts an administrative decree authorising the placing on the market of a type of herbicide-resistant GMO maize.[77] The relevant procedure begins with a notification submitted by the person interested in marketing the GMO product to the national authorities of the Member State in which the product is to be first introduced. The competent authority then carries out an examination to assess eventual public health and environmental risks posed by the GMO. If the authority approves the notification, the positive assessment report will be distributed to the Commission and other national authorities. If, as was the case in *Greenpeace France*, an authority raises an objection, a European dispute settlement stage will be triggered in which the Commission adopts a

---

[73] Hanns Peter Nehl (fn 5), 644.

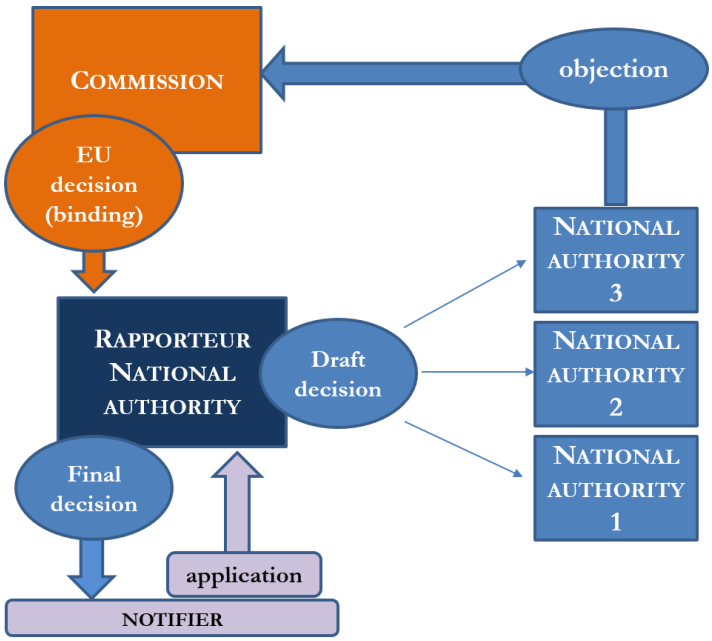
[74] *Pampryl*, (fn 32), paras. 50-51.

[75] For the most developed analysis of the constitutional and administrative implications of this case law, see Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach*, (Oxford, 2011).

[76] See Case T-33/01, *Infront*, EU:T:2005:461, para. 109. The case related to a composite procedure regulating the granting of exclusive broadcasting rights of events of major importance for society. In the procedure, the Commission is vested in a duty to check if national measures granting those rights are in conformity with the EU's legal requirements. The General Court found that the review it was invited to carry out "concern[ed] solely the legality of the Commission's finding that [national] measures are compatible with Community law". This reasoning implies that the correct assessment by the Commission of whether national measures are compatible with EU law is a prerequisite for the validity of the final decision. Thus, the General Court admitted it was entitled to review the legality of the Commission's decision to maintain allegedly illegal national preparatory measures.

[77] At the time, the administrative procedure in force was found in Directive 90/220, which was repealed by Directive 2001/18. The latter has, in the meantime, lost part of its scope of application to Regulation 1829/2003, on the authorisation procedures for GMO food and feed.

decision. If the Commission then agrees to the authorisation, the notified national authority gives its 'consent in writing' for the GMO to be placed on the market.



The authorisation procedure for GMOs under Directive 2001/18

In *Greenpeace France*, it was that 'consent in writing', embodied in the decree, that the applicants challenged. They claimed that the first stage of the procedure was irregular because the administration failed to consider that the dossier it was provided by the notifier did not include sufficient data to assess the risks of the GMO maize to public health. Therefore, the Commission had allegedly authorised the placing on the market of the GMO product based on an irregular assessment by the French authority. On the issue of whether the final decree was invalid due to eventual derivative illegality in the preceding national and EU stages, the Court held that

> "where the where the national court finds that, owing to *irregularities in the conduct of* the examination of the notification by the *competent national authority* (…) it was not proper for that authority to forward the dossier with a favourable opinion to the Commission (…) that court must refer the matter to the Court of Justice for a preliminary ruling *if it considers that those irregularities are such as to affect the validity of the Commission's favourable decision*, setting out the reasons for which it believes that the decision must be held to be invalid and, if

necessary, ordering suspension of application of the measures for implementing that decision *until the Court of Justice has ruled on the question of validity*" (emphasis added).[78]

The framing of the answer leaves no doubts. The Court expressed its willingness to review the derivative illegality of the Commission's measure, provided that the French court would submit a request for a preliminary ruling on the EU measure's validity. Most importantly, the Court's response made clear that illegalities in the first national stage could eventually contaminate the EU stage.

6.3. Condition 3: evaluation of procedural irregularities in the light of EU standards of review.

The *Association Greenpeace France* ruling also illustrates with particular clarity what the case law reveals as the third condition of the imputation principle. As already explained, the second condition relates to the norms the violation of which may result in the invalidity of the final EU decision, which may only be norms of EU law. The third condition specifically applies to the violation of norms *on administrative procedure*, either enshrined in the specific legislation governing a given composite procedure, or general principles of EU law such as the right to be heard. The condition is that the relevance of procedural irregularities occurring in national stages for the validity of the final EU decision can only be measured in view of the EU's own standards. They must constitute an infringement of an essential procedural requirement, in the sense required of Article 263 (2) TFEU.

What results from the case law is that derivative illegality in composite procedures is subject to the condition that the defectiveness of their preceding national preparatory measures is *decisive* for the content of the final EU measure. Such decisiveness can consist either in an irregularity in the national stage that is deliberately maintained or not corrected at the EU level, or one that induces the EU authority in error as it decides. In *Association Greenpeace France*, the Court saw itself confronted with the latter situation.

Advocate General Mischo acknowledged that if a preparatory national measure is irregular due to deficient fact-finding, and is of a kind that does not enable the EU authority to detect that irregularity, then the final EU decision based on the flawed measure would be invalid. In *Association Greenpeace France*, Mischo admitted that the incompleteness of the French authority's risk assessment report could eventually have led the Commission

[78] *Association Greenpeace France*, (fn 4), para. 55.

to overlook risks to the environment or human health posed by the GMO under consideration, and therefore prompt a decision which breached the principle of precaution.

It has rightly been noted that the way in which EU courts establish the relevance of irregularities committed at the national stage replicates the concept of infringement of essential procedural requirements in Article 263 (2) TFEU.[79] According to the interpretation of the concept by EU courts, an EU measure is invalid on procedural grounds "where, if the rule had not been breached, the outcome of the procedure or the content of the adopted act could have been substantially different".[80] What matters, in general, is whether the breach of the procedural requirement is of a nature that can influence the substance of the challenged EU act by leading to a final decisional outcome that is different from the one which would otherwise have been attained.[81] This is usually recognized to be the case when EU bodies adopt legal acts at the conclusion of a decision-making process that omitted legally required procedural steps.[82] In addition, there is an infringement of essential procedural requirements when, in the course of the decision-making procedure, EU bodies disregard procedural rights such as the right to be heard or the right to a reasoned decision.[83]

The extension of this standard of review of procedural defects to the national stages of composite procedures would explain why EU courts show little reluctance in reviewing disregard for procedural rights at national level.[84] It would also explain the reasoning underpinning *Association Greenpeace France*, according to which the criterion of relevance of national irregularities for the legality of the final EU measures is whether those irregularities misled the EU level in the subsequent decisional stage. Indeed, in later case law, notably the *Cheminova* Case, the General Court explicitly used this same reasoning to examine whether a breach of the right to be heard and the duty of care by national authorities had any impact on the final EU measure.[85]

It has been argued that the extension of the EU conception of essential procedural requirements to national stages may lead to the irrelevance of procedural rules that are

---

[79] Roberto Caranta (fn 36), 1133 ff.
[80] Case 30/78, *Distillers Company*, EU:C:1980:186, para. 26; Joined Cases 209/78 to 215/78 and 218/78, *Landewyck*, EU:C:1978:194, para. 47; Cases 150/84, *Bernardi*, EU:C:1986:167, para. 28; and T-240/10, *Hungary* v *Commission*, EU:T:2013:645, para. 84.
[81] Jürgen Schwarze, (fn 14), 97 ff.
[82] Cfr. Carlo Curti Gialdino, *I vizi dell'atto nel giudizio davanti alla Corte di Giustizia dell'Unione Europea*, (Giuffrè, 2008), 86-88 and 91 ff.
[83] See Case C-466/93, *Atlanta*, EU:C:1995:370, para. 16.
[84] See for instance *Partex*, (fn 65), para. 48 and Joined Cases T-251/05 and T-425/05, *Mediocurso II*, EU:T:2007:162, paras. 35 ff.
[85] See Case T-326/07, *Cheminova*, EU:T:2009:299, para. 249.

considered in national law to be valuable in themselves.[86] However, in the light of the principle of uniformity of EU law, an alternative solution would have been difficult to imagine. The only alternative to imposing the EU test of relevant procedural irregularities as a unitary standard of review would be to allow the Court use the standards used by the different national legal orders where composite procedures begin. National legal orders evaluate the infringement of procedural requirements differently amongst themselves.[87] Such an alternative would not only imply the application in EU courts of national norms establishing those criteria, which is unambiguously barred by the Treaties.[88] Rather, if this alternative would to be followed, the validity of final EU measures resulting from the same composite procedure would vary depending on the different Member States' stricter or laxer criteria of relevance of procedural irregularities. This would be an outcome which would jeopardize the invariable validity of EU law across the Member States that is required by the principles of uniformity and autonomy of EU law.

7. A rule of law blindspot?

The case law on derivative illegality illustrates the efforts of EU courts in ensuring the rule of law in composite decision-making. However, *a contrario sensu* from of the three conditions explained above, it follows that not all irregularities may be reviewed.

Indeed, the principle of imputation leaves out many irregularities committed at national level. More specifically, it has a 'blind spot' for irregularities that either result from a breach of national law, or have little influence upon the final decision at EU level.

EU law does not require the review of national preparatory measures which, unlike those falling under the scope of *Borelli*, do not in themselves decide the final outcome of the administrative procedure.[89] In fact, given the case law on purely preparatory measures adopted at EU level, such review would simply be untenable. As was explained before, the autonomous judicial review of such measures is considered to be incompatible "with the system of the division of powers between the Commission and the Court" and with the "requirements of the sound administration of justice".[90]

---

[86] Roberto Caranta (fn 36), 1145, 1148 and 1151.
[87] The Court of Justice has long been sensitive to the differences in how the legal orders of the various Member States handle the issue of procedural irregularities. See the Opinion of AG Warner in Case 90/74, *Deboeck*, EU:C:1975:109.
[88] Cfr. Case C-618/10, *Banco Español de Crédito*, EU:C:2012:349 para. 76.
[89] See Case *Diouf* (fn 17).
[90] See fn 16 above.

It is difficult to imagine that a more lenient treatment could be given to purely preparatory measures adopted by national authorities in composite procedures. The review of such measures would likewise lead to allowing courts – and, more worryingly, *national* courts – to intrude into the powers of the EU administration even before they have been exercised.

In short, the case law of EU courts on derivative illegality leads to the unreviewability of certain illegal measures adopted by national authorities: those which can neither be challenged under the *Borelli* case law, nor fit into the three conditions of the principle of imputation.

8. Conclusion: making the EU administration accountable for the misdoings of its ancillary national bureaucracies

The case law of EU courts has established an implicit principle, according to which the illegal measures taken by national authorities may result in the illegality of the decisions adopted by the EU administration. The principle was referred to as the principle of imputation. Pursuant to that principle, however, derivative illegality is subject to three conditions in composite procedures.

First, in order to be admissible at all, it must relate to a composite procedure where the EU level enjoys the power to define the final decisional outcome. Wherever an EU authority enjoys that power, it is responsible for the lawfulness of the composite procedure as a whole. Therefore, if the EU authority prolongs an irregularity committed at national level into its final decision, that decision will be illegal. This is the case, for instance, if the EU authority's decision incorporates an illegal national preparatory act, or if that authority fails to correct an irregularity committed in a prior procedural state at national level. The first requirement makes national irregularities attributable to the EU administration. It therefore allows EU courts to respect the limits of their jurisdiction, since they will focus their review on the behaviour of an EU authority once it receives an illegal national preparatory act.

The second condition of the principle of imputation is that the national preparatory measure contradicts a rule of EU law. This again makes it possible for EU courts to respect their mandate to only apply EU law as they review the legality of composite decision-making processes. It also ensures that the principles of uniformity and autonomy of EU law are observed, since the decision taken at EU level will not be reviewed against the legal standards of the Member States.

The third condition is that the breach of rules of procedure by national authorities is assessed in the light of the EU test of what counts as an infringement of an essential procedural requirement. The condition ensures again that the principle of uniformity is respected, since EU courts will apply a unitary test to all procedural irregularities, regardless of the Member State from which they originated. It is also a condition that respects the limits of the jurisdiction of EU courts, since they cannot apply national criteria of what constitutes an essential procedural requirement.

The three conditions of the imputation principle can only apply to composite procedures where the EU level enjoys the power to diverge from the (illegal) preparatory acts adopted by national authorities. By contrast, the irregularities committed at national level cannot invalidate the final decision adopted by an EU authority if the relevant legislation accords it no discretion vis-à-vis the position taken by national administrative bodies. Indeed, when decision-making in national stages predetermines the procedure's outcome, reviewing the legality of final EU measures necessarily implies that EU courts will need to focus their scrutiny on the behaviour of national authorities – possibly, even on the infringement of national law. As the *Borelli* line of case law shows, derivative illegality is, under those circumstances, categorically excluded.

In their case law on derivative illegality in composite procedures, EU courts have gone to great lengths to ensure basic requirements of the rule of law, such as the enforceability of the legal constraints placed on national and EU administrative authorities. EU courts have done so with noticeable and particular concern for observing the limits of their own jurisdiction.

Indeed, one of the most remarkable overarching features of the case law examined in this Chapter is that the EU judicature, in a more or less explicit manner, invokes the limits of its jurisdiction to justify claims on the validity of the final EU measures. This is seen not just in what was termed as the substantive *Borelli* principle, but also in the three conditions under which derivative illegality is accepted whenever the EU administration enjoys the power to define the outcome of a composite procedure. Put bluntly, EU courts draw *substantive* conclusions on the validity of EU measures from the *procedural* primary law rules that establish the limits of their competence.

However, the reasons why the case law examined in this Chapter is remarkable go well beyond its merits. Crucially, the case law establishing the conditions for derivative illegality show how the way in which EU courts conceive of composite decision-making is

worlds away from the old dogmas of EU executive federalism. The departure from EU executive federalism is visible in at least three ways.

First, the case law ascribes to the EU administration the responsibility for the lawfulness of the composite procedure as a whole. Whenever it enjoys the power to define the final decisional outcome – and therefore escapes the scope of the *Borelli* doctrine – the EU administration is vested with an overarching responsibility to preserve the legality of composite procedures both at EU and national stages. If the three conditions of the imputation principle are met, the EU authority is judicially accountable for the failures of the national authorities that assisted it in the adoption of the final decision. This flatly contradicts one of the oldest implications drawn by EU courts from the separation principle: the rule according to which the EU administration answers solely for the legality of its own decision-making processes, and cannot be held responsible for the illegalities of national authorities.[91]

Second, the imputation principle represents a subtle change in how EU courts understand the divide between national and EU judicial power. The early *Humblet* case qualified the separation of competences of national and EU courts as 'strict'. The fact that the imputation principle's conditions allow the EU administration to answer in court for the mistakes of national authorities reflects a far less rigid understanding of that divide.

Third, the case law on derivative illegality again contradicts the conception of European administration on which the doctrine of EU executive federalism was built. EU executive federalism conceived of national and EU authorities as enjoying mutually independent and separate spheres of decisional power. By contrast, the case law defining the conditions of the imputation principle is based on the assumption that there is full continuity between decision-making at national and EU level. The notion that flawed decision-making at national level may contaminate the entirety of a composite procedure and its final decisional outcome implies that the labour of national authorities counts as but a moment in a single process of administrative will formation.

In turn, the contribution of national authorities to composite procedures is conceived of as merely instrumental for the exercise of decision-making power at EU level. Indeed, irregularities at national level are only relevant for purposes of judicial review if they find their way to the definitive position of the EU administration. The principle of imputation also makes clear that the EU administration may rely on the assistance of national authorities – but is also liable for their errors whenever it does so.

---

[91] See Chapter 2, Section 5.1. and, in the case law, Case 23/59, *FERAM*, EU:C:1959:33 and Joined Cases 46 and 47/59, *Meroni*, EU:C:1962:44.

Given their instrumental function, one can say that the case law considers national authorities to fulfil an auxiliary role in respect of the EU administration. Given that the overall lawfulness of the composite procedure is seen as the responsibility of the EU administration, one can also say that the case law considers it to be an EU-led process. Much as in the case law on the principle of unitary protection, the jurisprudence of EU courts on the principle of imputation reflects a conception of an *integrated* European administration. National authorities, in turn, are conceived of as but a component of that integrated administrative apparatus – as the EU administration's ancillary bureaucracy.

CONCLUSION:
BEYOND EXECUTIVE FEDERALISM

The European Union is a polity unlike any other. It is not a state. While few would dispute either assertion, the implication may have not yet been fully comprehended in EU administrative law scholarship. The implication is that we cannot place the same expectations on the concretized constitutional law of the EU as we would if it were the constitutional law of a state. The doctrines of EU administrative law, and the values they intend to ensure, are as unique as the EU constitutional experiment itself.

This dissertation's focus was on a particular form of administration that showcases the most striking features of Europe's administrative order. Complex administrative procedures exist in many legal orders; but what is unique about European composite procedures is that they join in a single decisional process a variety of authorities, which belong to distinct jurisdictions, and which are subject to different legal orders.

The core argument of the dissertation is as follows. EU courts have crafted implicit rules and principles, which are specifically designed to accommodate composite procedures into EU law. The judge-made law of composite decision-making aims to ensure the constitutional principle of the rule of law, in spite of the division of levels of administrations, judiciaries, and legal orders. In developing that law, EU courts have abandoned – at least in the realm of composite procedures – the most basic postulates of EU executive federalism. Once perceived as immediately resulting from the Treaties – as a *constitutional doctrine* –, EU executive federalism was constructed by the Court in tandem with the broader constitutionalisation process. Its emergence reflected the widely shared conception among the first 'Eurolawyers' that the Treaties had founded a polity of a federal structure, marked by a strict dualistic divide of power between the Union and the States. The principles of composite decision-making do not reflect a conception of an administration of strictly divided powers. They reflect a conception of a single, *integrated* European administration. Within that administration, national authorities are conceived of as the *ancillary bureaucracies* of the EU's own administration, of which they constitute an extension, and which may be held accountable for their mistakes.

The conception of European administration that underlies the law of composite procedures evades the traditional categories of administrative law on relations between administrations. The case law defies conventional wisdoms about hierarchical relations,

internal relations of a centralised administration, or relations between federal and state administrations. The conception can best be defined as that of an 'integrated' administration. Integration broadly means that different parts are combined into a single whole – which may range from "mere cooperation to ultimately almost complete unification".[1] The notion is generally used to refer to the process by which the Member States, horizontally or through the intermediary of the EU institutions, form an ever closer Union among the peoples of Europe. The crafting of the principles of composite decision-making is premised on an assumption of an ever closer Union among national and EU administrations.

The CJEU's principles of composite decision-making are thus based on a conception of European administration that largely finds support in the writings of both jurists and political scientists. Hofmann and Türk describe the emergence of composite procedures as a key development of European integrated administration.[2] Curtin and Egeberg point out that the "distinction of direct and indirect administration has become blurred, with the levels being interwoven to form a more *unitary pattern of 'integrated administration'*".[3] The judicial crafting of the law of composite decision-making shows that this change did not go unnoticed by EU courts.

The most polemical aspect of the integrated conception of administration is perhaps that national authorities are conceived of as an extension of the EU's own administration – the EU's ancillary bureaucracy. In a way, this would be ironic. Composite procedures, as Chapter 3 suggested, aim to reconcile the primacy of state-level implementation with the need to accommodate EU-wide interests. They usually result from the insertion of EU stages into what would otherwise be processes of implementation at national level only. The hybrid structure of composite procedures reflects the unwillingness of the Member States to entrust all authority over implementation to the EU administration. Yet, in creating composite decision-making, the Member States have eroded the separation between the power of their own authorities and that of the EU's administration. They have created a form of administrative decision-making that is based on decisional interdependence; and which is understood by EU courts to recast and fuse national power with EU administrative power. Indeed, one could well say that composite

---

[1] Deirdre Curtin, *Executive Power in the European Union: Law, Practices, and the Living Constitution*, (Oxford, 2009), 34.

[2] Herwig Hofmann/Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences', in: *European Law Journal*, 13:2, (2007), 253-271.

[3] Deirdre Curtin/Morten Egeberg, 'Tradition and innovation: Europe's accumulated executive order', in: *West European Politics*, 31:4, (2008), 639-661, 649.

procedures are seen as a phenomenon of co-option, or takeover, of national bureaucracies into the EU's own administration.

This would be inadmissible in many federal constitutional systems, such as that of the United States. The US Supreme Court holds that any attempt of Congress to "conscript state [agencies] into the national bureaucratic army" would be "fundamentally incompatible with our constitutional system of dual sovereignty".[4] The 'merger and acquisition' of national bureaucracies into the EU's own administration would have however been allowed by European Political Community Treaty – had it not been rejected for being too great a leap in the integration process.

Controversial as this may be politically, it might actually not be as entirely detached from reality as one might assume. The treatment of national authorities as an extension of the EU's own administration in the case law seems to match the developments that political scientists have mapped in Europe's administrative space. That space, Genschel and Jachtenfuchs write, "absorbs parts of the national administrations of the member states into an integrated European framework, and puts them at the disposal of EU institutions"; so that "the EU's administrative power is larger than the low numbers of Commission staff suggest".[5] Egeberg and Trondal argue that national authorities already are "becoming parts of a multilevel Union administration in which the Commission in particular forms the new executive centre".[6] Wessels has put forward a theory which, though referring to practices of comitology rather than composite decision-making, considers national and EU administration to be undergoing a process of *fusion*.[7] Describing the administrative integration in some policy sectors, Heidbreder holds that "national public administrations take the role of executing bodies under the authority of the European Commission".[8]

Since the Lisbon Treaty, Article 298 TFEU contains a legal basis for legislation governing the EU's own administration. It states that "in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration". Post-Lisbon, one of the most hotly

---

[4] See Printz v. United States, 521 U.S. 898, 935 (1997). This is the realm of the Anti-Commandeering doctrine in US constitutional law. On that doctrine, see for many Anthony Johnstone, 'Commandeering Information – and Informing the Commandeered', in: *University of Pennsylvania Law Review*, 161, (2012), 205-220 and Wesley Campbell, 'Commandeering and Constitutional Change', in: *Yale Law Journal*, 122, (2012-2013), 1104-1181.

[5] Philipp Genschel/Markus Jachtenfuchs, 'Introduction: Beyond Market Regulation. Analysing the European Integration of Core State Powers', in: Philipp Genschel/Markus Jachtenfuchs (Eds.), *Beyond the Regulatory Polity? The European Integration of Core State Powers*, (Oxford, 2014), 1-23, 7.

[6] Morten Egeberg/Jarle Trondal, 'National Agencies in the European Administrative Space: Government Driven, Commission Driven, or Networked?', in: *Public Administration*, 87:4, (2009), 779–790, 781.

[7] Wolfgang Wessels, 'Comitology: fusion in action. Politico-administrative trends in the EU system', in: *Journal of European Public Policy*, 5:2, (1998), 209-234.

[8] Eva Heidbreder, 'Structuring the European administrative space: policy instruments of multi-level administration', in: *Journal of European Public Policy*, 18:5, (2011), 709-727, 713.

debated conundrums in EU administrative law has concerned the scope of the provision. The question is whether the 'European administration' referred to – which the wording itself suggests to be distinct from the EU's own administration – includes national authorities involved in composite decision-making.[9] Considering the case law examined in this dissertation, the answer would have to be a resounding yes – the CJEU *already treats* national auuthorities as an extension of the EU's own administration. Considering the findings from political science mentioned above, one would argue that, at least in some areas, they already act as such.

However, the judicial development of the principles of composite decision-making, and of the conception of an integrated administration which animates them, was not a frictionless process. It was, and continues to be, a process that is not always consistent, and in some domains has remained incomplete.

Some solutions, such as the rule of referral, have remained within the confines of the substantive field where they emerged. Even though that rule was crafted based on arguments that only concern the structure of the composite procedure, the fact that it was not extended other policy areas suggests that EU courts are not always confident in the generalizability of their own solutions. Moreover, EU courts were initially reluctant to abandon the doctrine of EU executive federalism. In some policy areas, they still are. In state aid review and cohesion policy, the purely 'inter-administrative' reading of composite procedures has lingered. That reading resorts to the dated commonplaces of EU executive federalism. The inter-administrative reading regards composite decision-making as an internal matter between bureaucracies, and as a conjunction of procedures for the exercise of strictly separate administrative powers. More often than not, this reading leads to a lack of judicial or procedural protection of individuals, who are treated as mere third parties in respect of the legal relations between EU and national authorities.

Why the doctrine of EU executive federalism was read so rigidly by EU courts, is an enigma to which the Chapter 2 sought to offer an explanation. The rigidity is most likely due to the fact that it was historically perceived to be constitutionally embedded in the Treaties.

The understanding that EU executive federalism immediately resulted from the Treaties begged a number of questions. The Treaties hardly contained any references to administration before 2009. In an exploratory exercise of historical sources that had not

[9] See for instance Giacinto della Cananea, 'The European Administration: *Imperium* and *Dominium*', in: Carol Harlow/Päivi Leino/Giacinto della Cananea (Eds.), *Research Handbook on EU administrative Law*, (Elgar, 2017), 44-68, 62.

been attempted before, the thesis argues that the supposed constitutional status of EU executive federalism must be understood in the same broader political context as the process of constitutionalisation of EU law. Many Treaty drafters became officials and judges, and shared a federal conception of the EU and its administration. Accordingly, the ECJ gradually developed the principles of EU executive federalism based on a federalist interpretation of the Treaties. In so doing, it fashioned a doctrine on the relations between national and EU administration under the emerging EU constitution. Premised on notions of overlapping independent powers, that doctrine went hand in glove with better-known rulings such as *Costa/ENEL* and *Van Gend en Loos*.

Nevertheless, the doctrine of EU executive federalism could not account for composite procedures, which became ever more pervasive. EU executive federalism is meant for an administration where the two levels factually enjoy mutually independent power; composite procedures are based on joint – or *interdependent* – power.

Whenever EU courts ignore this mismatch, and apply a reasoning from EU executive federalism to composite decision-making, they cause serious harm to important rule of law requirements in European administrative law. Such requirements include, crucially, the right to be heard, the right to a reasoned decision, and judicial control.

The judicial development of implicit principles of composite decision-making since the 1990s reflects the recognition, and a response to, that mismatch. The guiding rationale of those principles is that the distribution of decisional power along national and EU administration should not obstruct the preservation of the rule of law.

For want of similar phenomena in national laws, the principles of composite decision-making have remained nameless. The thesis proposes a vocabulary to describe them: the principle of unitary protection requires procedural rights to be protected, regardless of the division of tasks between the national and the EU level. The principle of imputation means that the EU administration may answer in court for illegalities committed by national bureaucracies. The *Borelli* principles ensure that the EU administration *must not* answer for those illegalities when the relevant composite procedure *obliges* it to follow the preparatory acts taken by national authorities. In such cases, judicial control is deferred to national courts.

The case law examined in Part II shows the development of a series of rules on the observance of the rights of the defence. They are unified by the rationale that the involvement of multiple levels of administration in a composite procedure should not harm

the exercise of those rights. It was argued that the case law now establishes an implicit principle of *unitary protection* in composite decision-making.

As Joana Mendes rightly pointed out, EU courts generally conceive of administrative procedures as establishing a *bilateral* relationship – a link between the deciding body and the party concerned by its decision.[10] In many composite procedures, the EU administration only addresses its decisions to national authorities. Based on the assumption that the powers of national and EU authorities are strictly separate; and that EU administration is generally only intended to relate to national authorities, EU executive federalism leads to a misguided 'inter-administrative' reading of those procedures. In some cases, the Commission expressed this idea as a principle of strict separation of the legal relations between itself and national authorities, on the one hand, and between national authorities and individuals, on the other.[11] In an early period of the case law, this line of reasoning meant that individuals enjoyed no right to be heard by the Commission, regardless of how affected they were by its decisions.

The principle of unitary protection represents a shift away from this way of reading composite procedures. It abandons the traditional conception of EU authorities as a 'second-order' administration, relating generally only to national authorities and rarely to individuals. Instead, the unitary protection principle requires *direct links* to be established between individuals and the EU administration, even where that is not foreseen in the relevant legislation. Such 'direct links' oblige EU administration to observe the rights of the defence of individuals. Nevertheless, the case law allows it to 'outsource' or delegate the fulfilment of that obligation to national bureaucracies. The EU administration is no longer understood to have strictly bilateral legal relations to national bureaucracies – rather, national and EU authorities are jointly treated as a single administrative entity, where the tasks for the observance of procedural rights are shared.

National authorities are under a duty to provide a hearing if they enjoy a power of appraisal in the early stages of a composite procedure (rule of primary contact). If the EU administration also enjoys such a power, it is bound by a 'direct link' to the individuals affected by its decisions, which means that it will have to a duty to hear them as well. If it chooses not to provide hearings directly, the EU administration may rely on the assistance of national authorities to fulfil that duty. It may either confirm hearings already given by them (rule of confirmation), or request that national bureaucracies offer a hearing on its behalf (rule of delegability).

---

[10] Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach*, (Oxford, 2011), 142 ff.
[11] See Chapter 6, section 5.2.

The EU administration may also rely on the assistance of national authorities in fulfilling its duty to give reasons for its decisions. If it is convinced by the reasons contained in national preparatory acts, the EU administration may adopt a statement of reasons that reproduces those reasons (rule of replicability) or merely alludes to them (rule of referral).

Nevertheless, even if national authorities may be entrusted with the fulfilment of its procedural obligations, it is the EU administration "which alone assumes the legal liability".[12] Put differently, the EU administration bears the responsibility for the respect of the rights of the defence throughout the various stages of a composite procedure[13]. For that reason, even when it intends to confirm or delegate hearings at national level, the EU administration has the burden of checking whether those hearings were effectively provided in an adequate manner.[14] The EU administration is also liable for the lack of clarity of the reasons contained in national preparatory acts, if it decides to incorporate them or refer to them in its statements of reasons.

Through the unitary protection principle, EU courts might have done to composite procedures what they have historically done to the Treaties since *Van Gend en Loos*. They *subjectified*, as it were, an instrument originally intended to be about the articulation of different jurisdictions.[15] By emphasising 'direct links' – the only explicit legal concept they developed on composite decision-making – EU courts have endeavoured to keep a place for individuals at a table made for bureaucracies. The unitary protection principle's concern with dignifying the 'direct links' between EU authorities and citizens with rights of the defence is almost a definition of how *concretized EU constitutional law* should look like in composite procedures.

---

[12] See Cases T-450/93, *Lisrestal*, EU:T:1994:290, para. 49; C-413/98, *Frota Azul*, EU:C:2001:55, para. 30; C-462/98 P, *Mediocurso I*, EU:C:2000:480, para. 22; and T-102/00, *Vlaams Fonds*, EU:T:2003:192, para. 61.

[13] See Hanns Peter Nehl, *Principles of Administrative Procedure in EC law*, (Hart, 1999), 86, who makes this remark in respect of *Lisrestal*. Sometimes, applicants before EU courts are explicit about their expectation that, by virtue of its decisional power, the EU administration has an obligation to supervise the overall respect for procedural rights in composite procedures. See Case T-75/06, *Bayer CropScience*, EU:T:2008:317, para. 249, a ruling on the composite authorisation procedure for plant protection products. The applicant pleaded that, during the first, national stage of the procedure, Spanish authorities had breached its right to be heard and the duty of care while examining its application. Bayer therefore claimed that, "[when] confronted with such manifest errors and infringements, *the Commission should have intervened by virtue of its duty to ensure due process* to make sure, first, that the assessment was made in a scientifically and legally sound fashion and, second, that the applicants were given sufficient time and opportunities effectively to defend their position" (emphasis added).

[14] Similarly, Takis Tridimas, *The General Principles of EU law*, 2nd ed., (Oxford, 2006), 388 and Christina Eckes/Joana Mendes, 'The right to be heard in composite administrative procedures: lost in between protection?', in: *European Law Review*, 36:5, (2011) 651-670, 65. See also Giacinto della Cananea, *Diritto amministrativo europeo: principi ed istituti*, 3rd ed., (Giuffrè, 2011), 242, who accurately deduces from the *France-Aviation* ruling that the Commission is under a duty to provide hearings if national authorities failed to provide one themselves.

[15] On the subjectivation of the Treaties, see Miguel Poiares Maduro, *We the Court*, (Hart, 1999), 9.

Part III of the thesis discussed judicial control of composite decision-making. It analysed three issues in the case law.

The first was how to determine which measures adopted by composite decision-making may form the object of an autonomous judicial review. In this regard, it was argued that EU courts did not need to be inventive with regard to measures adopted by the EU administration. They apply the same substantive test that is generally used to scrutinize acts of EU bodies – whether those acts intend to entail binding legal effects of their own. However, the continued use of the normal substantive test of *IBM* to review the acts of EU authorities has one important implication. In composite decision-making, the measures adopted by national authorities are treated as if they are merely "internal to the administration", [16] or result from an "internal procedure".[17] The EU administration's decision, by contrast, expresses the 'definitive position' of the authorities involved. This reflects an implicit understanding in the case law that composite procedures are unitary, and aim at the exercise of joint power of national and EU administration.

The sole actual innovation in the case law on reviewable measures relates to the national stages of composite procedures. Generally speaking, EU law and the principle of effective judicial protection in particular do not require the review of national preparatory measures. An exception is made in composite procedures, and specifically in those composite procedures where national authorities adopt preparatory measures from which the EU administration is not allowed to diverge. The *jurisdictional Borelli principle*, as it was termed, both forbids EU courts from reviewing such preparatory measures even in an action against the final decision at EU level; and requires national courts to accept their review as if they were final acts. In essence, national courts are required to use the same substantive test as EU courts would. This reflects a broader trend in the case law on composite procedures to subject national authorities to the same procedural and judicial protection standards as EU authorities.

The second issue concerned *locus standi*. The conception of an integrated administration did not permeate all aspects of the case law. EU courts still rely on inter-administrative readings of composite procedures in cases about direct concern in structural funds litigation. Resorting to commonplaces of EU executive federalism, EU courts make a formalistic reading of the provisions on financial corrections. They still treat the Commission as a second-order administration, which is supposed to interact only with national bureaucracies. It is consequently also held not to be bound by legal relations, or to

[16] Case T-320/09, *Planet AE*, EU:T:2011:172, paras. 37-39.
[17] Case T-29/15, *International Management Group*, EU:T:2017:56, para. 35.

be answerable to private parties. Judicial protection continues to be needlessly sacrificed at the altar of EU executive federalism.

The third issue was examined in Chapter 7. It concerns whether illegalities in national preparatory acts can contaminate final decisions at EU level. The case law shows that EU courts consider that, under some circumstances, the irregularities caused by national authorities can be imputed to the EU administration. The principle of imputation, as it was referred to, renders the EU administration responsible for the mistakes of national authorities. It reflects a view of composite procedures as a single decisional continuum from the national to the EU level. Since it makes it possible for the EU administration to answer in court for the wrongdoings of national bureaucracies, the principle of imputation also reflects a conception of a single, integrated European administration.

In the introduction, the dissertation delimited the object of analysis. Its research question concerned whether the case law developed specific principles for composite decision-making, and if so, what their underlying conception of European administration was. The aim of posing that question was not just that of proposing a clearer reconstruction of the fragmented case law on composite procedures (which, it is hoped, will be of practical use for practitioners and will contribute to ongoing academic debates). The aim was also to determine whether the case law on composite procedures significantly demonstrates a shift of paradigm, both in principle and in conception, from the traditional conceptual framework of EU executive federalism. There are many other questions that merit being asked, and to which the analysis carried out here could not – cannot – provide an answer.

First of all, while a transition is indeed detectable in the case law, it is less discernible why it occurred at all. Nehl, Nolte, and Tridimas suggest that the change of course in the case law on the right to be heard resulted from the opposition of some national courts to what had hitherto been the approach of the Court of Justice to the review of administrative discretion.[18] However, this explanation would not account for the fact that the shift in the case law covered issues that are unrelated to the right to be heard, or with the review of discretion.

[18] Hanns Peter Nehl, (fn 13), 134-135 suggests that the shift in the case law occurred because the referring court in *TUM*, the Bundesfinanzhof, suggested that it could involve the German Constitutional Court if the CJEU followed its traditional approach to the judicial control of discretion. Indeed, such an approach was quite restrictive, and arguably incompatible with the weight of the right to an effective judicial protection under German constitutional law. See Takis Tridimas, (fn 14) 407-409 and Georg Nolte, 'General Principles of German and European Administrative Law: a Historical Perspective', in: *Modern Law Review*, 57:2 (1994), 191-212, 206 ff.

Moreover, the principles of composite decision-making crafted by the case law arguably assume a far greater degree of integration between national and EU administration than actually exists. Despite the views from political science discussed above, which even refer to instances of less integrated administration than one finds in composite procedures, one may doubt whether it is plausible that the Commission in practice delegates hearings to national bodies. It does not seem certain either that officials at either level of administration perceive of themselves as a single, integrated administration, or of composite procedures as more than inter-administrative coordination schemes. One sometimes hears of anecdotal evidence that national officials involved in composite decision-making in some fields, such as banking supervision, feel that they work for the EU administration. Nevertheless, empirical research is necessary to test the extent to which the principles are even realistic.

One further loose end of the analysis concerns legal theory. One is struck by the apparent absence of any theory of authority or plurality of authorities that can account for composite decision-making. When considering plurality of authorities, legal theorists such as Roughlan tend to consider the conflictual or cooperative dynamics between different loci of independent authority.[19] In composite decision-making, there is certainly a plurality of authorities in an organisational sense – there are distinct public *bodies*, or *entities*, which are creatures of different legal orders. Yet, it could be argued that their ensemble forms a single *authority* in a legal-theoretical sense – the ability to issue directives that must be obeyed by the addressee without consideration for their merits.[20] In composite decision-making, those directives by definition require the involvement of national and EU administration.

It cannot have escaped the eye of the reader that this dissertation refrained from making any prescriptive point about the case law. At no point was it discussed whether, quite aside their conformity with EU constitutional law, the principles of composite decision-making are normatively desirable.

The reason is that doing so would require a self-standing effort of developing a normative theory of EU administrative law that could do justice to the unique nature of the

[19] Nicole Roughlan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*, (Oxford, 2014), 43 ff.
[20] This is naturally a very simplified version of the concept of authority, which is particularly contested. The concept is sometimes used interchangeably with the concept of legal power, and sometimes held to be distinct from it. See for developments Joseph Raz, *The Authority of Law*, (Oxford, 1979), 18, Joseph Raz, 'Authority, Law and Morality', in: *The Monist*, 68:3 (1985), 295-234, 299; Andrew Halpin, 'The Concept of a Legal Power', in: *Oxford Journal of Legal Studies*, 16:1, (1996), 129-152, 140-147. See also Andrei Marmor, *Interpretation and Legal Theory*, 2nd ed., (Hart, 2005), 87 and Leslie Green, "Legal Obligation and Authority", *The Stanford Encyclopedia of Philosophy* (Winter 2012 Ed.), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2012/entries/legal-obligation/).

European Union as a polity. Since the subjects of the EU's power are both states and individuals, it is likely that the value judgments made in national administrative laws – whose sole subjects are usually individuals – could not be extended to the EU. It is possible that the position of the Member States' authorities is in itself worthy of protection. If so, any claim that that position deserves more or less protection than citizens' would beg the question. Such a claim would require a delicate interpretive exercise to determine whether, under EU constitutional law, the protection of individuals is more, less, or equally important as the respect for the Member States' powers. Depending on the answer, different normative assessments can be made of the principles of composite decision-making, and of the treatment of national bureaucracies as an ancillary administration.

One might argue that EU case law carries out a necessary sacrifice of the autonomy of national powers to the benefit of rule of law values. Or one might argue that it illegitimately dismantles the rights of the Member States: that the law of composite decision-making unifies the power of the two administrations in ways that do not just go far beyond executive federalism – but beyond federalism itself.

TABLE OF CASES

COURT OF JUSTICE OF THE EUROPEAN UNION

DECISIONS OF THE EUROPEAN COURT OF JUSTICE

Joined Cases 7/56, 3/57 to 7/57, *Algera*, EU:C:1957:7

Case 1/58, *Stork*, EU:C:1959:4

Case 23/59, *FERAM*, EU:C:1959:33

Joined Cases 46 and 47/59, *Meroni*, EU:C:1962:44

Case 6/60, *Humblet*, EU:C:1960:48

Case 13-61, *Bosch*, EU:C:1962:11

Case 26/62, *Van Gend en Loos*, EU:C:1963:1

Case 32/62, *Alvis*, EU:C:1963:15

Joined Cases 106 and 107-63, *Toepfer*, EU:C:1965:65

Case 6/64, *Costa v Enel*, EU:C:1964:66

Joined Cases 8 to 11/66, *Cimenteries*, EU:C:1967:7

Case 28-67, *Molkerei-Zentrale*, EU:C:1968:3

Case 33-67, *Kurrer*, EU:C:1968:16

Case 34/67, *Lück*, EU:C:1968:24

Case 13-68, *Salgoil*, EU:C:1968:54

Case 14/68, *Walt Wilhelm*, EU:C:1969:4

Case 11-70, *Internationale Handelsgesellschaft*, EU:C:1970:114

Case 39-70, *Norddeutsches Vieh- und Fleischkontor*, EU:C:1971:16

Case 76-70, *Wünsche*, EU:C:1971:51

Case 78-70, *Deutsche Grammophon*, EU:C:1971:59

Joined Cases 51 to 54/71, *International Fruit Company*, EU:C:1971:128

Case 77-71, *Gervais-Danone*, EU:C:1971:129

Case 94-71, *Schlüter & Maack*, EU:C:1972:45

Case 96/71, *Haegeman*, EU:C:1972:88

Case 57-72, *Westzucker*, EU:C:1973:30

Case 70/72, *Commission v Germany*, EU:C:1973:87

Case 3/73, *Karl Schöttler*, EU:C:1973:81

Case 9-74, *Casagrande*, EU:C:1974:74

Case 17-74, *Transocean Marine Paint*, EU:C:1974:91

Case 26/74, *Roquette*, EU:C:1974:108

Case 33-76, *Rewe-Zentralfinanz*, EU:C:1976:188

Case 85/76, *Hoffmann-La Roche*, EU:C:1979:36

Case 118-76, *Balkan*, EU:C:1977:111

Joined Cases 12, 18 and 21/77, *Debayser*, EU:C:1978:42

Case 55-77, *Maris*, EU:C:1977:203

Case 30/78, *Distillers Company*, EU:C:1980:186

Case 101/78, *Granaria*, EU:C:1979:38

Joined Cases 209/78 to 215/78 and 218/78, *Landewyck*, EU:C:1978:194

Case 44/79, *Hauer*, EU:C:1979:290

Case 133/79, *Sucrimex*, EU:C:1980:104

Case 136/79, *National Panasonic*, EU:C:1980:169

Case 158/80, *Rewe-Handelsgesellschaft Nord*, EU:C:1981:163

Case 182/80, *Gauff*, EU:C:1982:78

Case 17/81, *Pabst*, EU:C:1982:129

Case 45/81, *Moksel*, EU:C:1982:110

Case 46/81, *Benvenuto*, EU:C:1981:64

Case 54/81, *Fromme*, EU:C:1982:142

Case 60/81, *IBM*, EU:C:1981:264

Joined Cases 146, 192 and 193/81, *BayWa*, EU:C:1982:146

Case 217/81, *Interagra*, EU:C:1982:222

Case 294/81, *Control Data*, EU:C:1983:84

Case 310/81, *EISS*, EU:C:1984:105

Case 322/81, *NV Nederlandsche Banden Industrie Michelin*, EU:C:1983:313

Joined Cases 205 to 215/82, *Deutsche Milchkontor*, EU:C:1983:233

Case 323/82, *Intermills*, EU:C:1984:345

Case 98/83 and 230/83, *Van Gend en Loos & Bosman*, EU:C:1984:342

Case 109/83, *Eurico* EU:C:1984:321

Case 142/83, *Nevas*, EU:C:1983:267

Case 185/83, *Universiteit Groningen*, EU:C:1984:331

Case 294/83, *Les Verts*, EU:C:1986:166

Case 42/84, *Remia*, EU:C:1985:327

Case 150/84, *Bernardi*, EU:C:1986:167

Case 222/84, *Johnston*, EU:C:1986:206

Case 234/84, *Belgium v Commission*, EU:C:1986:302

Case 40/85, *Kingdom of Belgium v Commission*, EU:C:1986:305

Case 53/85 *Akzo*, EU:C:1986:256

Case 203/85, *Nicolet I*, EU:C:1986:269

Case 259/85, *French Republic v Commission*, EU:C:1987:478

Case 314/85, *Foto-Frost*, EU:C:1987:452

Case 66/86, *Saeed*, EU:C:1989:140

Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431

Joined Cases 89 and 91/86, *L'Etoile Commerciale*, EU:C:1987:337

Case 222/86, *Heylens*, EU:C:1987:442

Case 85/87, *Dow Benelux*, EU:C:1989:379

Case 43/87 *Nicolet II* EU:C:1988:130

Case 148/87, *Frydendahl Pedersen*, EU:C:1988:438

Case 262/87, *Kingdom of the Netherlands v Commission*, EU:C:1989:50

Joined Cases 46/87 and 227/88, *Hoechst*, EU:C:1989:337

C-301/87, *French Republic v Commission*, EU:C:1990:67

Case 103/88, *Costanzo*, EU:C:1989:256

Case 285/90, *Tsitouras*, EU:C:1991:84

C-2/88, *Zwartveld*, EU:C:1990:315

C-49/88, *Al-Jubail Fertilizer Company*, EU:C:1991:276

C-251/89, *Athanasopoulos*, EU:C:1991:242

C-291/89, *Interhotel*, EU:C:1991:189

C-304/89, *Oliveira*, EU:C:1991:191

Joined Cases C-6/90 and C-9/90, *Francovich*, EU:C:1991:428

Joined Cases C-106/90, C-317/90 and C-129/91, *Emerald Meats*, EU:C:1993:19

C-157/90, *Infortec*, EU:C:1992:243

C-181/90, *Consorgan*, EU:C:1992:244

C-269/90, *Technische Universität München*, EU:C:1991:438

C-97/91, *Borelli*, EU:C:1992:491

Joined Cases C-121/91 and C-122/91, *CT Control & JCT Benelux*, EU:C:1993:285

C-198/91, *Cook*, EU:C:1993:197

C-225/91, *Matra*, EU:C:1993:239

C-290/91, *Peter*, EU:C:1993:220

C-314/91, *Weber*, EU:C:1993:109

C-334/91, *Innovation et Reconversion Industrielle*, EU:C:1993:211

C-135/92, *Fiskano*, EU:C:1994:267

C-188/92, *TWD Textilwerke Deggendorf*, EU:C:1994:90

C-285/93, *Dominikanerinnen-Kloster Altenhohenau*, EU:C:1995:398

C-466/93, *Atlanta*, EU:C:1995:370

C-476/93 P, *Nutral*, EU:C:1995:401

C-32/95 P, *Lisrestal*, EU:C:1996:402

C-70/95, *Sodemare*, EU:C:1997:301

C-127/95, *Norbrook Laboratories*, EU:C:1998:151

C-286/95 P, *Imperial Chemical Industries*, EU:C:2000:188

C-367/95 P, *Sytraval*, EU:C:1998:154

C-375/96, *Zaninotto*, EU:C:1998:517

C-119/97 P, *Ufex*, EU:C:1999:116

C-292/97, *Karlsson*, EU:C:2000:202

C-413/98, *Frota Azul*, EU:C:2001:55

C-462/98 P, *Mediocurso I*, EU:C:2000:480

C-6/99, *Association Greenpeace France*, EU:C:2000:148

C-239/99, *Nachi Europe*, EU:C:2001:101

C-269/99, *Carl Kühne*, EU:C:2001:659

C-424/99, *Commission v Republic of Austria*, EU:C:2001:642

C-459/99, *MRAX*, EU:C:2002:461

Opinion 1/00, EU:C:2002:231

C-41/00 P, *Interporc*, EU:C:2003:125

C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462

Joined Cases C-74/00 P and C-75/00 P, *Falck*, EU:C:2002:524

Joined Cases C-204–5/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland*, EU:C:2004:6

C-275/00, *First NV*, EU:C:2002:711

C-495/00, *Visentin*, EU:C:2004:180

C-76/01 P, *Eurocoton*, EU:C:2003:511

C-467/01, *Eribrand*, EU:C:2003:364

C-276/03 P, *Scott*, EU:C:2005:590

C-417/04 P, *Regione Siciliana* (*Regione Siciliana I*), EU:C:2006:282

C-419/04, *Conseil Général de la Vienne*, EU:C:2006:419

C-506/04, *Wilson*, EU:C:2006:587

C-521/04 P(R), *Tillack*, EU:C:2005:240

C-6/05, *Medipac-Kazantzidis*, EU:C:2007:337

C-28/05, *Dokter*, EU:C:2006:408

C-64/05 P, *Sweden v Commission*, EU:C:2007:802

Joined Cases C-75/05 P and C-80/05 P, *Kronofrance*, EU:C:2008:482

C-119/05, *Lucchini*, EU:C:2007:434

C-220/05, *Auroux*, EU:C:2007:31

C-326/05 P, *Industrias Químicas del Vallés*, EU:C:2007:443

Joined Cases C-402/05 P and C-415/05 P *Kadi*, EU:C:2008:11

C-432/05, *Unibet*, EU:C:2007:163

C-341/05, *Laval*, EU:C:2007:809

C-441/05, *Roquette Frères*, EU:C:2007:150

C-15/06 P, *Regione Siciliana* (*Regione Siciliana II*), EU:C:2007:183

Joined Cases C-165/09 to C-167/09, *Stichting Natuur en Milieu*, EU:C:2011:348

C-521/06 P, *Athinaïki Techniki*, EU:C:2008:422

C-11/07, *Eckelkamp*, EU:C:2008:489

Joined Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes*, EU:C:2009:316

C-343/07, *Bavaria NV*, EU:C:2009:415

C-349/07, *Sopropé*, EU:C:2008:746

C-445/07 P and C-455/07 P, *Ente per le Ville vesuviane*, EU:C:2009:529

C-373/08, *Hoesch Metals and Alloy*, EU:C:2010:68

C-279/09, *DEB*, EU:C:2010:811

C-335/09 P, *Republic of Poland v Commission*, EU:C:2012:385

C-494/09, *Bolton*, EU:C:2011:87

C-69/10, *Diouf*, EU:C:2011:524

C-416/10, *Križan*, EU:C:2013:8

C-482/10, *Cicala*, EU:C:2011:868

C-618/10, *Banco Español de Crédito*, EU:C:2012:349

C-135/11 P, *IFAW Internationaler Tierschutz-Fonds* (*IFAW III*), EU:C:2012:376

C-277/11, *M. M.*, EU:C:2012:744

C-300/11, *ZZ*, EU:C:2013:363

C-417/11 P, *Bamba*, EU:C:2012:718

C-583/11 P, *Inuit Tapiriit Kanatami*, EU:C:2013:625

C-28/12, *Commission v Council*, EU:C:2015:282

C-31/13 P, *Hungary v Commission*, EU:C:2014:70

C-146/13, *Kingdom of Spain v European Parliament and Council*, EU:C:2015:298

C-147/13, *Kingdom of Spain v Council*, EU:C:2015:299

C-166/13, *Mukarubega*, EU:C:2014:2336

C-249/13, *Boudjlida*, EU:C:2014:2431

C-269/13 P, *Acino*, EU:C:2014:255

C-562/12, *Liivimaa Lihaveis*, EU:C:2014:2229

C-402/13, *Cypra*, EU:C:2014:2333

C-596/13 P, *Moravia Gas Storage*, EU:C:2015:203

C-61/14, *Orizzonte Salute*, EU:C:2015:655

C-62/14, *Gauweiler* EU:C:2015:400

C-158/14, *A and Others*, EU:C:2017:202

C-361/14 P, *McBride*, EU:C:2016:434

C-362/14, *Schrems*, EU:C:2015:650

C-72/15, *Rosneft*, EU:C:2017:236

C-243/15, *LZ*, EU:C:2016:838

C-685/15, *Online Games Handels*, EU:C:2017:452

OPINIONS OF ADVOCATES GENERAL

Opinion of AG Lagrange in Case 8-55, *Fédération Charbonnière de Belgique*, EU:C:1956:6.

Opinion of AG Dutheillet de Lamothe in Case 39-70, *Norddeutsches Vieh- und Fleischkontor*, EU:C:1971:16

Opinion of AG Warner in Case 90/74, *Deboeck*, EU:C:1975:109

Opinion of AG Reischl in Case 133/79, *Sucrimex*, EU:C:1980:104

Opinion of AG VerLoren van Themaat in Case 323/82, *Intermills*, EU:C:1984:260

Opinion of AG Verloren van Themaat in Joined Cases 205 to 215/82, *Deutsche Milchkontor*, EU:C:1983:163

Opinion of AG Lenz in Case 62/83, *Eximo*, EU:C:1984:148

Opinion of AG Cruz Vilaça in Joined cases 89 and 91/86, *Étoile Commerciale*, EU:C:1987:337.

Opinion of AG Mancini in Case 222/86, *Heylens*, EU:C:1987:442

Opinion of AG Darmon in Case C-97/91, *Borelli*, EU:C:1992:254

Opinion of AG Léger in Case C-5/94, *Hedley Lomas*, EU:C:1995:193

Opinion of AG La Pergola in Case C-32/95 P, *Lisrestal*, EU:C:1996:226

Opinion of AG La Pergola in Case C-119/97 P, *Ufex*, EU:C:1999:116

Opinion of AG Mischo in Case C-6/99, *Association Greenpeace France*, EU:C:1999:587

Opinion of AG Alber in Case C-336/00, *Huber*, EU:C:2002:175

Opinion of AG Ruiz-Jarabo Colomer in Case C-249/02, *Portuguese Republic v Commission*, EU:C:2004:704

Opinion of AG Jacobs in Case C-276/03 P, *Scott*, EU:C:2005:229

Opinion of AG Ruiz-Jarabo Colomer in Case C-417/04 P, *Regione Siciliana* (*Regione Siciliana I*), EU:C:2006:282

Opinion of AG Trstenjak in Case C-19/05, *Commission v Kingdom of Denmark*, EU:C:2007:418

Opinion of AG Poiares Maduro in Case C-64/05 P, *Sweden v Commission*, EU:C:2007:433

Opinion of AG Poiares Maduro in Joined Cases C-402/05 P and C-415/05 P, *Kadi*, EU:C:2008:11

Opinion of AG Kokott in Case C-413/06 P, *Bertelsmann*, EU:C:2008:392

GENERAL COURT

T-64/89, *Automec*, EU:T:1990:42

T-30/91 *Solvay*, EU:T:1995:115

Joined Cases T-10/92 to T-12/92 and T-15/92, *Cimenteries CBR*, EU:T:1992:123

T-37/92, *BEUC*, EU:T:1994:54

T-450/93, *Lisrestal*, EU:T:1994:290

Joined Cases T-492/93 and T-492/93 R, *Nutral*, EU:T:1993:85

Joined Cases T-551/93 and T-231/94 to T-234/94, *Industrias Pesqueras Campos*, EU:T:1996:54

T-85/94, *Branco I*, EU:T:1995:4

T-89/94 (122), *Branco II*, EU:T:1998:156

T-260/94, *Air Inter*, EU:T:1997:89

T-266/94, *Skibsværftsforeningen*, EU:T:1996:153

T-277/94, *AITEC*, EU:T:1996:66

T-346/94, *France-Aviation*, EU:T:1995:187

Joined Cases T-371/94 and T-394/94, *British Airways*, EU:T:1998:140

T-93/95, *Laga*, EU:T:1998:22

T-94/95, *Landuyt*, EU:T:1998:23

T-42/96, *Eyckeler*, EU:T:1998:40

T-50/96, *Primex*, EU:T:1998:223

T-54/96, *Oleifici Italiani*, EU:T:1998:204

Joined Cases T-180/96 and T-181/96, *Mediocurso I*, EU:T:1998:208

T-182/96, *Partex*, EU:T:1999:171

T-72/97, *Proderec*, EU:T:1998:179

T-126/97, *Sonasa*, EU:T:1999:239

Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97, T-217/97, T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, *Kaufring*, EU:T:2001:133

Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line*, EU:T:2003:245

Joined Cases T-194/97 and T-83/98, *Branco III*, EU:T:2000:20

T-290/97, *Mehibas*, EU:T:2000:8

T-160/98, *Van Parys*, EU:T:2002:18

T-166/98, *Cantina sociale di Dolianova*, EU:T:2004:337

T-186/98, *Inpesca*, EU:T:2001:42

T-13/99, *Pfizer*, EU:T:2002:209

T-114/99, *Pampryl*, EU:T:1999:281

T-199/99, *Sgaravatti*, EU:T:2002:228

T-205/99, *Hyper*, EU:T:2002:189

Joined Cases T-222/99, T-327/99 and T-329/99, *Martínez*, EU:T:2001:242

Joined Cases T-228/99 and T-233/99, *Westdeutsche Landesbank*, EU:T:2003:57

T-80/00, *Associação Comercial de Aveiro*, EU:T:2002:117

T-102/00, *Vlaams Fonds*, EU:T:2003:192

T-189/00 R, *'Invest' Import und Export*, EU:T:2000:203

T-215/00, *La Conqueste*, EU:T:2001:23

T-236/00, *Stauner*, EU:T:2002:8

T-239/00, *SCI UK*, EU:T:2002:175

T-241/00, *Le Canne*, EU:T:2002:57

T-244/00, *Coillte Teoranta*, EU:T:2001:124

T-305/00, *Conserve Italia*, EU:T:2003:338

T-329/00, *Bonn Fleisch*, EU:T:2003:48

T-33/01, *Infront*, EU:T:2005:461

Joined Cases T-44/01, T-119/01 and T-126/01, *Vieira*, EU:T:2003:98

T-105/01, *SLIM Sicilia*, EU:T:2002:147

T-109/01, *Fleuren Compost*, EU:T:2004:4

T-141/01, *Entorn*, EU:T:2005:10

T-196/01, *Aristoteleio Panepistimio Thessalonikis*, EU:T:2003:249

T-198/01, *Technische Glaswerke Ilmenau* (*TGI*), EU:T:2004:222

Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse*, EU:T:2006:151

T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, *Territorio Histórico de Álava*, EU:T:2009:315

T-315/01, *Kadi*, EU:T:2005:332

T-168/02, *IFAW Internationaler Tierschutz-Fonds* (*IFAW I*), EU:T:2004:346

T-189/02, *Ente per le Ville vesuviane*, EU:T:2007:233

T-218/02, *Napoli Buzzanca*, EU:T:2005:343

T-225/02, *Cámara de Comercio e Industria de Zaragoza*, EU:T:2006:357

T-228/02, *OMPI I*, EU:T:2006:384

T-341/02, *Regione Siciliana* (*Regione Siciliana I*), EU:T:2004:228

T-370/02, *Alpenhain-Camembert-Werk*, EU:T:2004:209

T-381/02, *Confédération générale des producteurs de lait de brebis et des industriels de Roquefort*, EU:T:2005:445

T-23/03, *CAS*, EU:T:2007:32

T-60/03, *Regione Siciliana* (*Regione Siciliana II*), EU:T:2005:360

T-68/03, *Olympiaki Aeroporia Ypiresies*, EU:T:2007:253

T-107/03, *Regione Marche*, EU:T:2006:20.

Joined Cases T-125/03 and T-253/03, *Akzo*, EU:T:2007:28

Joined Cases T-134/03 and T-135/03, *Common Market Fertilisers*, EU:T:2005:339

T-193/04 R, *Tillack*, EU:T:2004:311

T-193/04, *Tillack*, EU:T:2006:292

Joined Cases T-427/04 and T-17/05, *France Télecom*, EU:T:2009:474

T-24/05, *Alliance One International*, EU:T:2010:453

T-70/05, *Evropaïki Dynamiki*, EU:T:2010:55

Joined Cases T-251/05 and T-425/05, *Mediocurso II*, EU:T:2007:162

T-354/05, *Télévision française*, EU:T:2009:66

T-35/06, *Honig-Verband*, EU:T:2007:250

T-75/06, *Bayer CropScience*, EU:T:2008:317

T-102/06, *Investire Partecipazioni*, EU:T:2007:355

T-185/06, *L'Air liquide*, EU:T:2011:275

T-324/06, *Município de Gondomar*, EU:T:2008:337

T-410/06, *Foshan City Nanhai Golden Step Industrial*, EU:T:2010:70

T-411/06, *Sogelma*, EU:T:2008:419

T-24/07, *ThyssenKrupp Stainless*, EU:T:2009:236

T-25/07, *Iride*, EU:T:2009:33

T-26/07, *Lipor*, EU:T:2008:339

T-89/07, *VIP Car Solutions*, EU:T:2009:163

T-158/07, *Cofac I*, EU:T:2009:489

T-159/07, *Cofac II*, EU:T:2009:490

T-256/07, *OMPI II*, EU:T:2008:461

T-326/07, *Cheminova*, EU:T:2009:299

T-401/07, *Caixa Geral de Depósitos*, EU:T:2011:72

T-498/07 P, *Krcova*, EU:T:2009:178

T-62/08, *ThyssenKrupp*, EU:T:2010:268

T-181/08, *Pye Phyo Tay Za*, EU:T:2010:209

T-250/08, *Batchelor*, EU:T:2011:236

T-362/08, *IFAW Internationaler Tierschutz-Fonds* (*IFAW II*), EU:T:2011:6

T-390/08, *Bank Melli Iran*, EU:T:2009:401

T-404/08, *Fluorsid*, EU:T:2013:321

T-461/08, *Evropaïki Dynamiki*, EU:T:2011:494

T-468/08 *Tisza Erőmű*, EU:T:2014:235

T-532/08, *Norilsk*, EU:T:2010:353

T-565/08, *Corsica Ferries France*, EU:T:2012:415

T-69/09, *Provincie Groningen*, EU:T:2010:423

T-88/09, *Idromacchine*, EU:T:2011:641

T-123/09, *Ryanair*, EU:T:2012:164

T-159/09, *Biofrescos*, EU:T:2012:307

T-320/09, *Planet AE*, EU:T:2011:172

T-84/10, *Regione Puglia*, EU:T:2011:468

T-95/10, *Cindu Chemicals*, EU:T:2013:108

T-177/10, *Alcoa Trasformazioni*, EU:T:2014:897

T-240/10, *Hungary* v *Commission*, EU:T:2013:645

T-309/10, *Klein*, EU:T:2014:19

T-346/10, *Borax*, EU:T:2011:510

T-362/10, *Vtesse Networks*, EU:T:2014:928

T-509/10, *Kala Naft*, EU:T:2012:201

T-51/11, *AECOPS I*, EU:T:2013:203

T-52/11, *AECOPS II*, EU:T:2013:204

T-53/11, *AECOPS III*, EU:T:2013:205

T-260/11, *Kingdom of Spain v Commission*, EU:T:2014:555

T-297/11, *Buzzi Unicem*, EU:T:2014:122

T-383/11, *Makhlouf*, EU:T:2013:431

T-465/11, *Globula*, EU:T:2013:406

T-576/11, *Schenker*, EU:T:2015:206

T-593/11, *Al-Chihabi*, EU:T:2015:249

T-603/11, *Ecologistas en Acción*, EU:T:2014:182

T-669/11, *Spirlea*, EU:T:2014:814

T-17/12, *Hagenmeyer* EU:T:2014:234

T-23/12, *MAF*, EU:T:2013:632

Joined Cases T-91/12 and T-280/12, *Flying Holding*, EU:T:2014:832

T-165/12, *European Dynamics Luxembourg*, EU:T:2013:646

Joined Cases T-174/12 and T-80/13, *Syrian Lebanese Commercial Bank*, EU:T:2014:52

T-202/12, *Al-Assad*, EU:T:2014:113

T-296/12, *Health Food Manufacturers' Association*, EU:T:2015:375

T-403/13, *APRAM*, EU:T:2015:317

T-433/13, *Petropars Iran*, EU:T:2015:255

T-673/13, *European Coalition to End Animal Experiments*, EU:T:2015:167

T-384/14, *Italian Republic v European Commission*, EU:T:2016:298

T-138/14, *Randa Chart*, EU:T:2015:981

T-386/14, *FIH Holding*, EU:T:2016:474

T-512/14, *Green Source Poland*, EU:T:2017:299

T-676/14, *Spain v Commission*, EU:T:2015:602

T-825/14, *IREPA*, EU:T:2016:345

T-29/15, *International Management Group*, EU:T:2017:56

T-145/15, *Romania v Commission*, EU:T:2017:86

T-344/15, *French Republic v Commission*, EU:T:2017:250

T-403/15, *JYSK*, EU:T:2017:300

T-584/15, *POA*, EU:T:2016:510

T-41/16, *Cyprus Turkish Chamber of Industry*, EU:T:2016:613

CIVIL SERVICE TRIBUNAL

F-73/13, *AX*, EU:F:2015:9

CASE LAW – OTHER JURISDICTIONS

SPANISH SUPREME COURT

Judgment of 09-07-2010

SUPREME COURT OF THE UNITED STATES OF AMERICA

Printz v. United States, 521 U.S. 898, 935 (1997)

Abbot Laboratories v. Gardner, 387 U.S. 136, 148 (1967)

Port of Boston Marine Term. v. Rederiaktiebolaget, 400 U. S. 62, 71 (1970)

PORTUGUESE SUPREME ADMINISTRATIVE COURT

STA 26-09-2002 (Rapporteur: Isabel Jovita)

STA 07-05-2003 (Rapporteur: Isabel Jovita)

STA 29-06-2004 (Rapporteur: António Madureira)

STA 06-02-2007 (Rapporteur: Adérito Santos)

STA 12-03-2009 (Rapporteur: Pais Borges)

STA 10-02-2010 (Rapporteur: Jorge de Sousa)

STA 02-12-2010 (Rapporteur: Pais Borges)

GERMAN FEDERAL CONSTITUTIONAL COURT

BVerfGE 11, 105 (124)

BVerfGE 32, 145 (156)

BVerfGE 39, 96 (119)

BVerfGE 41, 291 (311)

BVerfGE 63, 1 (38)

BVerfGE 106, 1 (26)

ITALIAN COUNCIL OF STATE

Consiglio di Stato, IV, 22 March 2013, Number 1632

LITERATURE

Aarnio, Aulis, *Essays on the Doctrinal Study of Law*, (Springer, 2011)

Adinolfi, Adelina, 'The "Procedural Autonomy" of Member States and the Constraints Stemming from the ECJ's Case Law: Is Judicial Activism Still Necessary?", in: Hans-Wolfgang Micklitz/Bruno de Witte, *The European Court of Justice and the Autonomy of the Member States*, (Intersentia, 2012), 281-304

Albers, Michael/ Williams, Karen, 'Oral Hearings – Neither a Trial Nor a State of Play Meeting', in: *Competition Policy International Antitrust Journal*, (March 2010)

Alexy, Robert, 'On the Structure of Legal Principles', in: *Ratio Juris*, 13:3, (2000), 294-304

Andersson, Helene, 'Dawn Raids under Challenge', in: *European Competition Law Review*, 35:3, (2014), 135-140

Arnull, Anthony, 'The Americanization of EU Law Scholarship', in: *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, (Oxford, 2008), 415-432

Arnull, Anthony, *The European Union and its Court of Justice*, 2nd ed., (Oxford, 2006)

Aroso de Almeida, Mário, *Teoria Geral do Direito Administrativo*, 3rd ed., (Almedina, 2015)

Auby, Jean-Bernard, 'About Europeanization of Domestic Judicial Review', in: *Review of European Administrative Law*, 7:2, (2014), 19-34

Azoulai, Loïc, 'La protection juridique en matière d'exécution nationale du droit communautaire', in: Jürgen Schwarze (Ed.), *L'état actuel et les perspectives du droit administratif européen*, (Bruylant, 2010), 323-336

Azoulai, Loïc, 'Pour un Droit de l'Exécution de l'Union Européenne', in: Jacqueline Dutheil de la Rochère (Ed.)*, L'Exécution du Droit de l'Union, entre mécanismes communautaires et droits nationaux*, (Bruylant, 2009), 1-26

Azoulai, Loïc, 'The Court of Justice and the Administrative Governance', in: *European Law Journal*, 7:4, (2001), 425-44

Azoulai, Loïc, 'The Europeanisation of legal concepts', in: Ulla Neergard/Ruth Nielsen (Eds.), *European legal method: in a multi-layered EU legal order*, (DJØF Publishing, 2012), 165-182

Azoulai, Loïc, 'The Judge and the Community's Administrative Governance', in: Christian Joerges/Renaud Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, (Oxford, 2002), 109-137

Azoulai, Loïc, *Les garanties procédurales en droit communautaire: recherches sur la procédure et le bon gouvernement*, EUI thesis, unpublished, (2000)

Bachof, Otto, 'Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung', in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 30, (de Gruyter, 1972), 194-364

Barbier de la Serre, Eric, 'Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends', in: *European Public Law*, 12:2, (2006), 225-250

Barents, René, 'EU Procedural Law and Effective Judicial Protection', in: *Common Market Law Review*, 51, (2014), 1437-1462

Barents, René, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism', in: *European Constitutional Law Review*, 5: 3, (2009), 421-446

Barents, René, *Remedies and Procedures before the EU Courts*, (Wolters Kluwer, 2016)

Barents, René, *The Autonomy of Community Law*, (Kluwer Law International, 2004)

Baroni, Leonardo, 'I modelli di amministrazione: diretta, indiretta e altre forme "intrecciate"', in: Diana-Urania Galetta, *Diritto amministrativo nell'Unione europea: argomenti e materiali*, (Giappichelli, 2014), 231-256

Bartosch, Andreas, 'Procedural Rights Denied for Too Long: Is Legal Conservativism Finally Heading for Its "Götterdämmerung"?', in: *European State Aid Law Quarterly*, (2011), 579-580

Bassi, Nicola, *Mutuo Riconoscimento e Tutela Giurisdizionale: La circolazione degli effeti del provvedimento amministrativo straniero fra diritto europeo e protezione degli interessi del terzo*, (Giuffrè 2008)

Beck, Gunnar, *The Legal Reasoning of the Court of Justice of the EU*, (Hart, 2012)

Beljin, Saša, 'Rights in EU Law', in: Sacha Prechal/Bert van Roermund, *The Coherence of EU Law: The Search for Unity in Divergent Concepts*, (Oxford, 2008), 91-122

Bergström, Carl Fredrik, *Comitology: Delegation of Powers in the European Union and the Committee System*, (Oxford, 2005)

Bergström, Johanna, 'The Principle of Effective Judicial Protection After the Lisbon Treaty', in: *Review of European Administrative Law*, 4:2, (2011), 53-68

Berman, George, 'A Restatement of European Administrative Law: Problems and Prospects', in: Susan Rose-Ackermann/Peter Lindseth (Eds.), *Comparative Administrative Law*, (Elgar, 2010), 595-605

Bernard, Nick, *Multilevel Governance in the European Union*, (Kluwer, 2002)

Beseler, Johannes Friedrich / Williams, Neville, *Anti-Dumping and Anti-Subsidy Law: The European Communities*, (Sweet & Maxwell, 1986)

Bierwagen, Rainer, 'Review of Judgment in Case T-198/01 Technische Glaswerke Ilmenau v. European Commission', in: *European State Aid Law Quarterly*, (2004), 671-703

Bignami, Francesca, 'Three Generations of Participation Rights before the European Commission', in: *Law and Contemporary Problems*, 68, (2004-2005), 61-83

Birkinshaw, Patrick, *European Public Law*, 2nd ed., (Wolters Kluwer, 2014)

Bobek, Michal, 'Thou shalt have two Masters: The Application of European Law by Administrative Authorities in the New Member States', in: *Review of European Administrative Law*, 1:1, (2008), 51-63

Bobek, Michal, 'Why There is No Principle of "Procedural Autonomy" of the Member States', in: Hans-Wolfgang Micklitz/Bruno de Witte, *The European Court of Justice and the Autonomy of the Member States*, (Intersentia, 2011), 305-324

Boehm, Franziska, *Information Systems and Data Protection in the Area of Freedom, Security and Justice*, (Springer, 2011)

Boerger, Anne/ Rasmussen, Morten, 'Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993', in: *European Constitutional Law Review*, 10:2, (2014), 199-225

Brito Bastos, Filipe, 'Derivative Illegality in European Composite Administrative Procedures', in: *Common Market Law Review*, 55, (2018), 101-134

Brito Bastos, Filipe, 'The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice', in: *Review of European Administrative Law*, 8:2, (2015), 269-298

Britz, Gabriele, 'Vom Europäischen Verwaltungsverbund zum Regulierungsverbund? Europäische Verwaltungsentwicklung am Beispiel der Netzzugangsregulierung bei Telekommunikation, Energie und Bahn', in: *Europarecht*, (2006), 46-77

Brosset, Estelle, 'The Prior Authorisation Procedure Adopted for the Deliberate Release into the Environment of Genetically Modified Organisms: the Complexities of Balancing Community and National Competences', in: *European Law Journal*, 10:5, (2004), 555-579

Brouwer, Onno/ Curtin, Deirdre, 'Why? The Giving Reasons Requirement of EU Administration', in: *Views of European Law from the Mountain – Liber Amicorum Piet Jan Slot*, (Kluwer Law International, 2009), 133-142

Burgess, Michael, *Federalism and the European Union: the Building of Europe 1950-2000*, (Routledge, 2000)

Campbell, Wesley, 'Commandeering and Constitutional Change', in: *Yale Law Journal*, 122, (2012-2013), 1104-1181

Caranta, Roberto, 'Coordinamento e divisione dei compiti tra Corte di giustizia delle comunità europee e giudizi nazionali nelle ipotesi di coamministrazione: il caso dei prodotti modificati geneticamente', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2000), 1133-1152

Caranta, Roberto, 'Judicial Protection Against Member States: a New *Jus Commune* Takes Shape', in: *Common Market Law Review*, 32, (1995), 703-726

Caranta, Roberto, 'Sull'impugnabilità degli atti endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione', in: *Foro Amministrativo*, (1994), I, 752-765

Caruso, Daniela, 'Direct Concern in Regional Policy: The European Court of Justice and the Southern Question', in: *European Law Journal*, 17:6, (2011), 804-827

Caspar, Johannes, 'Zur Vergemeinschaftung von Verwaltungsverfahren am Beispiel von Gentechnik- und reformiertem Lebensmittelrecht', *Deutsches Verwaltungsblatt*, (2002), 1437-1446

Cassese, Sabino, 'Divided Powers: European administration and national bureaucracies', in Sabino Cassese (Ed.), *The European Administration/L'Administration Européenne*, (International Institute of Administrative Sciences/European Institute of Public Administration, 1987), 5-21

Cassese, Sabino, 'European Administrative Proceedings', in: *Law and Contemporary Problems*, 68, (2004-2005), 21-36

Cassese, Sabino, 'La signoria comunitaria del diritto amministrativo', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2002), 291-301

Cassese, Sabino, 'New Paths for Administrative Law', in: International Journal of Constitutional Law, 10:3, (2012), 603-613

Cassese, Sabino, *Cultura e Politica del Diritto Amministrativo*, (Il Mulino, 1972)

Cassese, Sabino/ della Cananea, Giacinto, 'The Commission of the European Economic Community: the administrative ramification of its political development', in: *Jahrbuch für europäische Verwaltungsgeschichte*, 4, (1992), 75-94

Chalmers, Damian, 'Risk, anxiety and the European mediation of the politics of life', in: *European Law Review*, 30:5, (2005), 649-674

Chalmers, Damian/ Tomkins, Adam, *EU Public Law*, (Cambridge, 2007)

Chamon, Merijn, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty', in: *Common Market Law Review*, 53, (2016), 1501-1544

Chirulli, Paola, 'Amministrazioni nazionali ed esecuzione del diritto europeo', in: Luca de Lucia/Barbara Marchetti (Eds.), *L'amministrazione europea e le sue regole*, (Il Mulino, 2015), 145-170

Chiti, Edoardo, 'An important part of the EU's institutional machinery: features, problems and perspectives of European agencies', in: *Common Market Law Review*, 46, (2009), 1395-1442

Chiti, Edoardo, 'La Costruzione del Sistema Amministrativo Europeo', in: Mario Chiti (Ed.), *Diritto Amministrativo Europeo*, (Giuffrè, 2013), 45-88

Chiti, Edoardo, 'The administrative implementation of European Union law: a taxonomy and its implications', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law*, (Elgar, 2009), 9-34

Chiti, Edoardo, 'The Governance of Compliance', in: Marise Cremona (Ed.), *Compliance and the Enforcement of EU Law*, (Oxford, 2012), 31-56

Chiti, Edoardo, 'The relationship between National Administrative Law and European Administrative Law in Administrative Procedures', in: Jacques Ziller (Ed.), *What's New in European Administrative Law/Quoi de Neuf en Droit Administratif Européen*, EUI Working Paper Law 2005/10, (2005) 7-10

Chiti, Mario, 'I procedimenti composti nel diritto comunitario e nel diritto interno', in: *Quaterni del Consiglio di Stato: Attività amministrativa e tutela degli interessati. L'influenza del diritto comunitario*, (Centro studi e documentazione del Consiglio di Stato, 1997), 55-70

Chiti, Mario, 'La tutela giurisdizionale', in: Mario Chiti (Ed.), *Diritto Amministrativo Europeo*, (Giuffrè, 2013), 380-551

Cianferotti, Giulio, *Il Pensiero di V. E. Orlando e la Giuspubblicistica Italiana fra Ottocento e Novecento*, (Giuffrè, 1980)

Cini, Michelle, *The European Commission: leadership, organisation, and culture in the EU administration*, (Manchester, 2000)

Classen, Kai-Dieter, *Gute Verwaltung im Recht der Europäischen Union*, (Duncker & Humblot, 2006)

Constantinesco, Vlad, 'The ECJ as a Law-Maker: *Praeter aut Contra Legem?*', in: *Liber Amicorum in Honour of Lord Slynn of Hadley*, I, (Kluwer Law International, 2000), 73-79

Conway, Gerard, *The Limits of Legal Reasoning and the European Court of Justice*, (Cambridge, 2012)

Craig, Paul, 'Shared administration, disbursement of community funds and the regulatory state', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law*, (Elgar, 2009) 34-62

Craig, Paul, *EU Administrative Law*, 2nd ed., (Oxford, 2012)

Craig, Paul, *UK, EU and Global Administrative Law: Foundations and Challenges*, (Cambridge, 2015)

Cruz Vilaça, José Luís, 'Effective Judicial Protection with Regard to Community Funds – May One be Directly Concerned by a Decision Addressed to a Member State?', in: José Luís Cruz Vilaça, *EU Law and Integration: Twenty Years of Judicial Application of EU Law*, (Hart, 2014), 166-180

Curti Gialdino, Carlo, *I vizi dell'atto nel giudizio davanti alla Corte di Giustizia dell'Unione Europea*, (Giuffrè, 2008)

Curtin, Deirdre, 'Constitutionalism in the European Community. The Right to Fair Procedures in Administrative Law', in: *Human Rights and Constitutional Law. Essays in Honour of Brian Walsh*, (Round Hall Press, 1992), 293-317

Curtin, Deirdre, *Executive Power in the European Union: Law, Practices, and the Living Constitution*, (Oxford, 2009)

Curtin, Deirdre/ Dehousse, Renaud, 'European Union agencies: tipping the balance?', in: Jarle Trondal/Madalina Busuioc/Martijn Groenleer (Eds.), *The agency phenomenon in the European Union: emergence, institutionalisation and everyday decision-making,* (Manchester, 2012), 193-206

Curtin, Deirdre/ Dekker, Ige, 'The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity', in: Paul Beaumont/Carole Lyons/Neil Walker (Eds.), *Convergence and Divergence in European Public Law*, (Hart, 2002), 59-78

Curtin, Deirdre/ Egeberg, Morten, 'Tradition and innovation: Europe's accumulated executive order', in: *West European Politics*, 31:4, (2008), 639-661

de Lucia, Luca, 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris)', in: *Review of European Administrative Law*, 5:1, (2012), 49-88

de Lucia, Luca, 'Strumenti di cooperazione per l'esecuzione del diritto europeo', in: Luca de Lucia/Barbara Marchetti (Eds.), *L'amministrazione europea e le sue regole*, (Il Mulino, 2015), 171-196

de Lucia, Luca, *Amministrazione Transnazionale e Ordinamento Europeo: saggio sul pluralismo amministrativo*, (Giappichelli, 2009)

de Quadros, Fausto/ Guerra Martins, Ana Maria, *Contencioso da União Europeia*, 2nd ed., (Almedina, 2006)

de Witte, Bruno, 'European Union Law: A Unified Academic Discipline?', in: Antoine Vauchez/Bruno de Witte (Eds.), *Lawyering Europe: European Law as a Transnational Social Field*, (Hart, 2013), 101-116

de Witte, Bruno, 'The European Union as an International Legal Experiment', in: Gráinne de Búrca/Joseph Weiler (Eds.)*, The Worlds of European Constitutionalism*, (Cambridge, 2011), 19-56

della Cananea, Giacinto, 'Return to the due process of law: the European Union and the fight against terrorism', in: *European Law Review*, 32:6, (2007), 986-907

della Cananea, Giacinto, 'The European Administration: *Imperium* and *Dominium*', in: Carol Harlow/Päivi Leino/Giacinto della Cananea (Eds.), *Research Handbook on EU administrative Law*, (Elgar, 2017), 44-68

della Cananea, Giacinto, 'The European Union's Mixed Administrative Proceedings', in: *Law and Contemporary Problems*, 68, (2004-2005), 197-217

della Cananea, Giacinto, *Diritto amministrativo europeo: principi e istituti*, 3rd ed, (Giuffrè, 2011)

della Cananea, Giacinto, *Due Process of Law beyond the State: Requirements of Administrative Procedure*, (Oxford, 2016)

della Cananea, Giacinto/Franchini, Claudio, *I principi dell'amministrazione europea*, (Giappichelli, 2013)

di Pretis, Daria, 'Procedimenti amministrativi nazionali e procedimenti amministrativi europei', in: Giandomenico Falcon (Ed.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario*, (CEDAM, 2008), 49-72

Donner, Andreas, 'National Law and the Case Law of the Court of Justice of the European Communities', in: *Common Market Law Review*, 1, (1963), 8-16

Donner, Andreas, *The Role of the Lawyer in the European Communities*, (Northwestern University Press, 1968)

Dougan, Michael, 'Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts', in: Paul Craig/Gráinne de Búrca (Eds.), *The Evolution of EU Law*, (Oxford, 2011), 407-438

Duarte, David, *A Norma de Legalidade Procedimental Administrativa*, (Almedina, 2006), 133-135

Dubois, Louis, 'A propos de deux principes généraux du droit communautaire (droit au contrôle juridictionnel effectif et motivation des décisions des autorités nationales qui portent atteinte à un droit conféré par la règle communautaire)', in: *Revue Française de Droit Administratif*, (1988), 691-700

Due, Ole, 'Article 5 du traité CEE. Une disposition de caractère fédéral?', in: Frank Emmert (Ed.), *Collected Courses of the Academy of European Law*, 2:1, (Nijhoff, 1991), 15-35

Due, Ole, 'Le respect des droits de la défense dans le droit administratif communautaire', in: *Cahiers de Droit Européen*, (1987), 383-396

Duijkersloot, Ton, 'Consequences of the Violation by Administrative Authorities of the Right to be heard under EU Law: the Case M.G. and N.R.', in: *Review of European Administrative Law*, 7:1, (2014), 81-96

Eckes, Christina, 'Case T-228/02, *Organisation des Modjahedines du people d'Iran* v. *Council and the UK (OMPI)*, Judgment of the Court of First Instance (Second Chamber) of 12 December 2006', in: *Common Market Law Review*, 44, (2007), 1117-1129

Eckes, Christina, 'Test Case for the Resilience of the EU's Constitutional Foundations', in: *European Public Law*, 15:3 (2009), 351-378

Eckes, Christina, *EU Counter-Terrorist Policies and Fundamental Rights*, (Oxford, 2009)

Eckes, Christina/Mendes, Joana, 'The right to be heard in composite administrative procedures: lost in between protection?', in: *European Law Review*, 36:5, (2011) 651-670

Egeberg, Morten/ Trondal, Jarle, 'National Agencies in the European Administrative Space: Government Driven, Commission Driven or Networked?', in: *Public Administration*, 87:4, (2009), 779–790

Ehlers, Dirk, 'Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat', in: Hans-Uwe Erichsen/Dirk Ehlers (Eds.), *Allgemeines Verwaltungsrecht*, 14th ed., (De Gruyter, 2010), 1-252

Eifert, Martin, 'Conceptualizing Administrative Law – Legal Protection versus Regulatory Approach', in: Hermann Pünder/Christian Waldhoff (Eds.), *Debates in German Public Law*, (Hart, 2014), 203-218

Eliantonio, Mariolina, 'Information Exchange in European Administrative Law: a Threat to Effective Judicial Protection?', in: *Maastricht Journal of European and Comparative Law*, 23:3, 531-549

Eliantonio, Mariolina, 'Judicial Review in an Integrated Administration: the Case of 'Composite Procedures', in: *Review of European Administrative Law*, 7:2, (2014), 65-102

Eliantonio, Mariolina, *Europeanisation of administrative justice? the influence of the ECJ's case law in Italy, Germany and England*, (Europa Law Publishing, 2009)

Ellinas, Antonis/Suleiman, Ezra, *The European Commission and Bureaucratic Autonomy: Europe's custodians*, (Cambridge, 2012), 29-35

Esser, Josef, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis*, (Athenaeum, 1970)

Evans, Andrew, *The EU Structural Funds*, (Oxford, 1999)

Evans, Bucura Mihaescu, *The Right to Good administration at the Crossroads of the Various Sources of Fundamental Rights in the EU Integrated Administrative System*, (Nomos, 2015)

Everling, Ulrich, 'Die Europäische Union als föderaler Zusammenschluss von Staaten und Bürgern' in: Armin von Bogdandy/Jürgen Bast, *Europäisches Verfassungsrecht: theoretische und dogmatische Grundzüge*, (Springer, 2009), 961-1007

Everling, Ulrich, 'Zur föderalen Struktur der Europäischen Gemeinschaft', in: *FS Karl Doehring*, (Springer, 1989), 179-198

Ferri, Delia, 'Il requisito dell'"interesse diretto": un'altra occasione persa per rendere veramente accessibile ai singoli il sistema di protezione giurisdizionale comunitario?', in: *Diritto Pubblico Comparato ed Europeo*, (2010), 191-197

Franchini, Claudio, 'I principi applicabili ai procedimenti amministrativi europei', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2003), 1037-1059

Franchini, Claudio, 'Les Notions d'Administration Indirecte et de Coadministration', in: Jean-Bernard Auby/Jacqueline Dutheil de la Rochère (Eds.), *Droit Administratif Européen*, (Bruylant, 2007), 245-645

Franchini, Claudio, *Amministrazione Italiana e Amministrazione Comunitaria*, 2nd ed., (CEDAM, 1993)

Freitas do Amaral, Diogo, *Curso de Direito Administrativo*, II, 3rd ed. (Almedina, 2017)

Friant-Perrot, Marine, 'The European Union Regulatory Regime for Genetically Modified Organisms and its Integration into Community Food Law and Policy', in Luc Bodiguel/Michael Cardwell (Eds.), *The Regulation of Genetically Modified Organisms: Comparative Approaches*, (Oxford, 2010), 79-100

Gaja, Giorgio, 'Case C-6/99, Association Greenpeace France and Others v. Ministère de l'Agriculture et de la Pêche and Others. Judgment of the Full Court of 21 March 2000', in: *Common Market Law Review*, 37, (2000), 1427-1432

Galetta, Diana-Urania, 'Coamministrazione, reti di amministrazioni, *Verwaltungsverbund*: modelli organizzativi nuovi o alternative semantiche alla nozione di «cooperazione amministrativa» dell'art 10 TCE, per definire il fenomeno dell'amministrazione intrecciata?', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2009), 1689-1868

Galetta, Diana-Urania, 'Informal Information Processing in Dispute Resolution Networks: Informality Versus the Protection of Individual's Rights?', in: *European Public Law*, 20:1 (2014), 71-88

Galetta, Diana-Urania, *Procedural Autonomy of EU Member States: Paradise Lost?*, (Springer, 2010)

Galetta, Diana-Urania/Hofmann, Herwig/Schneider, Jens-Peter, 'Information Exchange in the European Administrative Union: An Introduction', in: *European Public Law*, 20:1 (2014), 65-69

Gambardella, Maurizio/Rovetta, Davide/van Cutsem, Simon, *Remission and Repayment of customs duties in the EU*, (Wolters Kluwer, 2014)

García de Enterría, Eduardo, 'La ampliación de la competencia de las jurisdicciones contencioso-administrativas nacionales por obra del Derecho Comunitario. Sentencia Borelli de 3 de

diciembre de 1992 del Tribunal de Justicia y el artículo 5 CEE', in: *Revista Española de Derecho Administrativo*, (1993), 297-314

Geertz, Clifford, *Local Knowledge: further essays on interpretive anthropology*, (Basic Books, 1983)

Geismann, Maria, 'Artikel 296', in: Hans von der Groeben/Jürgen Schwarze/Armin Hatje (Eds.), *Europäisches Unionsrecht*, 7th ed., (Nomos, 2015)

Genschel, Philipp/ Jachtenfuchs, Markus, 'Introduction: Beyond Market Regulation. Analysing the European Integration of Core State Powers', in: Philipp Genschel/Markus Jachtenfuchs (Eds.), *Beyond the Regulatory Polity? The European Integration of Core State Powers*, (Oxford, 2014), 1-23

Giannini, Massimo Severo, 'Profili di un diritto amministrativo delle Communità europee' (1967), published posthumously in 2003 in *Rivista Trimestrale di Diritto Pubblico*, foreword by Stefano Battini, 979-988

Giovanna, *Procedimenti amministrativi composti nel diritto comunitario*, (Cacucci, 2008)

Green, Leslie, "Legal Obligation and Authority", *The Stanford Encyclopedia of Philosophy* (Winter 2012 Ed.), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2012/entries/legal-obligation/).

Griffiths, Richard/ Milward, Alan, *The Beyen Plan and the European Political Community*, EUI Working Paper 85/199, (1985)

Häberle, Peter, 'Die offene Gesellschaft der Verfassungsinterpreten', in: *Juristenzeitung*, 30:10, (1975), 297-305

Habermas, Jürgen, *Zur Verfassung Europas: ein Essay*, (Suhrkamp, 2011)

Hallstein, Walter, 'Déclaration du 12 octobre 1960, devant l'Assemblée parlementaire européenne en réponse à la question orale avec débat posée par MM. Birkelbach, Poher et Pleven'

Hallstein, Walter, 'L'Évolution des Communautés Européennes', in: *Annuaire Européen*, 6, (1959), 1-28

Hallstein, Walter, 'Zu den Grundlagen und Verfassungsprinzipien der Europäischen Gemeinschaften', in: *FS Ophüls*, (Müller, 1965), 1-18

Hallstein, Walter, *Die echten Probleme der europäischen Integration*, (Kieler Vorträge, 1965)

Hallstein, Walter, Speech at the World Fair in Seattle in 1962, available at http://www.cvce.eu/en/obj/statement_by_walter_hallstein_on_the_eec_seattle_1962-en-4f85477a-cf46-4a3e-9d18-933cc564745b.html

Halpin, Andrew, 'The Concept of a Legal Power', in: *Oxford Journal of Legal Studies*, 16:1, (1996), 129-152

Haltern, Ulrich, *Europa und das Politische*, (Siebeck, 2005)

Hamilton, Alexander, 'The Same Subject Continued: The Insufficiency of the Present Confederation to Preserve the Union', in: *The Independent Journal* (Federalist Papers, No 17) (available at https://www.congress.gov/resources/display/content/The+Federalist+Papers)

Hancher, Leigh, 'The European pharmaceutical market: problems of partial harmonisation', in: *European Law Review*, 15, (1990), 9-33

Harlow, Carol, *Composite Decision-Making and Accountability Networks: Some Deductions from a Saga*, Jean Monnet Working Paper No. 04/12

Harlow, Carol, 'Three Phases in the Evolution of EU Administrative Law', in: Paul Craig/Gráinne de Búrca (Eds.), *The Evolution of EU Law*, (Oxford, 2011), 439-464

Harlow, Carol, *Accountability in the European Union*, (Oxford, 2002)

Harlow, Carol/ Rawlings, Richard, *Law and Administration*, 3rd ed., (Cambridge, 2009)

Heidbreder, Eva, 'Structuring the European administrative space: policy instruments of multi-level administration', in: *Journal of European Public Policy*, 18:5, (2011), 709-727

Heussner, Kristina, *Informationssysteme im Europäischen Verwaltungsverbund*, (Mohr Siebeck, 2007)

Hofmann, Herwig, 'Composite decision making procedures in EU administrative law', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: towards an integrated administration*, (Elgar, 2009), 136-167

Hofmann, Herwig, 'Decisionmaking in EU Administrative Law – The Problem of Composite Procedures', in: *Administrative Law Review*, 61, (2009), 199-221

Hofmann, Herwig, 'Seven Challenges for EU administrative law', in: Kars de Graaf/Jan Jans/Alexandra Prechal/Rob Widdershoven (Eds.), *European Administrative Law: Top-Down and Bottom-up*, (Europa Law Publishing, 2009), 37-59

Hofmann, Herwig, 'The Right to an 'Effective Judicial Remedy' and the Changing Conditions of Implementing EU Law', Faculty of Law, Economics and Finance of the University of Luxembourg – Law Working Paper 2013-2

Hofmann, Herwig/Micheau, Claire, *State Aid Law of the European Union*, (Oxford, 2016), 345-347

Hofmann, Herwig/ Mihaescu, Bucura, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case', in: *European Constitutional Law Review*, 9:1, (2013), 73-101

Hofmann, Herwig/ Rowe, Gerard/ Türk, Alexander, *Administrative Law and Policy of the European Union*, (Oxford, 2011)

Hofmann, Herwig/ Tidghi, Morgane, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks', in: *European Public Law*, 20:1, (2014), 147–164

Hofmann, Herwig/ Türk, Alexander, 'Legal challenges in EU administrative law by the move to an integrated administration', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, (Elgar, 2009), 355-379

Hofmann, Herwig/ Türk, Alexander, 'The Development of Integrated Administration in the EU and its Consequences', in: *European Law Journal*, 13:2 (2007), 253-271

Hofmann, Jens, 'Legal Protection and Liability in the European Composite Administration', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 441-466

Hooghe, Liesbet/ Marks, Gary, *Multi-Level Governance and European Integration*, (Rowman & Littlefield, 2002)

Hoskins, Mark, 'Case C-188/92, TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland, Judgment of 9 March 1994, [I994] ECR 1-833', in: *Common Market Law Review*, 31, (1994), 1399-1408

Ipsen, Hans Peter, 'Deutsche Verwaltung und europäische Wirtschaftsintegration', in: *Die Öffentliche Verwaltung*, (1968), 441-445

Ipsen, Hans Peter, 'The Relationship between the Law of the European Communities and National Law', in: *Common Market Law Review*, 3, (1966), 379-402

Isensee, Josef, 'Idee und Gestalt des Föderalismus im Grundgesetz', in: Josef Isensee/Paul Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VI, (Müller, 2008), 3-200

Jääskinen, Niilo, 'Back to the Begriffshimmel? A plea for an Analytical Perspective in European Law', in: Sacha Prechal/Bert van Roermund (Eds.), *The Coherence of EU law: The Search for Unity in Divergent Concepts*, (Oxford, 2008), 451-462

Jacob, Marc, *Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business*, (Cambridge, 2014)

Jansen, Nils, 'Making Doctrine for European Law', in: Rob van Gestel/Hans-Wolfgang Micklitz/Edward Rubin (Eds.), *Rethinking Legal Scholarship: a Transatlantic Dialogue*, (Cambridge, 2017), 224-261

Joerges, Christian, 'The Law's Problems with the Governance of the European Market', in: Christian Joerges/Renaud Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, (Oxford, 2002), 3-31

Johnstone, Anthony, 'Commandeering Information – and Informing the Commandeered', in: *University of Pennsylvania Law Review*, 161, (2012), 205-220

Kadelbach, Stefan, 'Artikel 5 EUV', in: Hans von der Groeben/Jürgen Schwarze/Armin Hatje, *Europäisches Unionsrecht*, 7th ed., (Nomos, 2015), 102-126

Kadelbach, Stefan, 'European Administrative Law and the Law of a Europeanized Administration', in: Christian Joerges/Renaud Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, (Oxford, 2002), 167-206

Kadelbach, Stefan, *Allgemeines Verwaltungsrecht unter europäischem Einfluss*, (Siebeck, 1999)

Kahn, Paul, *The Cultural Study of Law: Reconstructing Legal Scholarship*, (University of Chicago Press, 1999)

Kańska, Klara, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', in: *European Law Journal*, 10:3, (2004), 296-326

Keessen, Andrea, *European Administrative Decisions: how the EU regulates products on the internal market*, (Europa Law Publishings, 2009)

Keppene, Jean Paul/ Caviedes, Carlos Urraca, 'General Questions on Procedure. Controls of State Aid Compatibility. Council's Decision-Making Power', in: Luis Ortiz Blanco (Ed.), *EU Competition Procedure*, (Oxford, 2013)

Komárek, Jan, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent', in: *American Journal of Comparative Law*, 61, (2013), 149-172

Kopp, Ferdinand/ Ramsauer, Ulrich, *Verwaltungsverfahrensgesetz*, 9th ed., (C. H. Beck, 2005)

Korah, Valentine, 'The Rights of the Defence in Administrative Proceedings under Community Law', in: *Law and Contemporary Problems*, 33, (1980), 73-97

Krebs, Walter, 'Subjektiver Rechtsschutz und objective Rechtskontrolle', in: *FS Chritian-Friedrich Menger zum 70. Geburtstag*, (Carl Heymanns, 1985), 191-210

Küchenhoff, Benjamin, *Die verfassungsrechtlichen Grenzen der Mischverwaltung*, (Nomos, 2010)

Künnecke, Martina, *Tradition and Change in Administrative Law: An Anglo-German Comparison*, (Springer, 2007)

Lacroix, Justine/ Nicolaïdis, Kalypso, 'European Stories: An Introduction', in: Justine Lacroix/Kalypso Nicolaïdis (Eds.), *European Stories: Intellectual Debates on Europe in National Contexts*, (Oxford, 2010), 1-29

Laprévote, François-Charles, 'A Missed Opportunity? State aid Modernization and Effective Third Parties Rights in State aid Proceedings', in: *European State Aid Law Quarterly*, (2014), 426-439

Lauwaars, Richard, 'Rights of Defence in Competition Cases', in: *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, II, (Nijhoff, 1994), 497-509

Lenaerts, Koen, 'Constitutionalism and the Many Faces of Federalism', in: *American Journal of Comparative Law*, 38: 2, (1990), 205-263

Lenaerts, Koen, 'The Basic Constitutional Charter of a Community Based on the Rule of Law', in: Miguel Poiares Maduro/Loïc Azoulai (Eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Hart, 2010), 295-315

Lenaerts, Koen, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice', in: Maurice Adams/Henri de Waele/Johan Meeusen/Gert Straetmans (Eds.), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice*, (Hart, 2013), 13-60

Lenaerts, Koen, 'The Rule of Law and the Coherence of the Judicial System of the European Union', in: *Common Market Law Review*, 44, (2007), 1625-1656

Lenaerts, Koen/ Maselis, Ignace/ Gutman, Kathleen, *EU Procedural Law*, (Oxford, 2014)

Lenaerts, Koen/ Vanhamme, Jan, 'Procedural Rights of Private Parties in the Community Administrative Process', in: *Common Market Law Review*, 34, (1997), 531-569

Lignani, Per Giorgio, 'Silenzio (diritto amministrativo)', in: *Enciclopedia del Diritto*, XLII, (Giuffrè, 1990), 559-575

Limbach, Kathrin, *Uniformity of Customs Administration in the European Union*, (Hart, 2015)

Loth, Wilfried, 'Walter Hallstein, a committed European', in: Michel Dumoulin (Ed.), *The European Commission 1958-1972: History and Memories*, (Office for Official Publications of the European Communities, 2007), 79-90

Loth, Wilfried/ Bitsch, Marie-Thérèse, 'The Hallstein Commission 1958–67', in: Michel Dumoulin (Ed.), *The European Commission 1958-1972: History and Memories*, (Office for Official Publications of the European Communities, 2007), 51-78

Lottini, Micaela, 'From 'Administrative Cooperation' in the Application of European Union Law to 'Administrative Cooperation' in the Protection of European Rights and Liberties', in: *European Public Law*, 18:1 (2012), 127–147

Louis, Jean-Victor, 'Compétences des Etats dans la mise en œuvre du règlement', in: *Cahiers de Droit Européen*, (1971), 627-640

Lyons, Timothy, *EC Customs Law*, 2nd ed., (Oxford, 2008)

MacCormick, Neil, 'Reconstruction after Deconstruction: a Response to CLS', in: *Oxford Journal of Legal Studies*, 10:4, (1990), 539-558

MacCormick, Neil, *Rhetoric and the Rule of Law: a Theory of Legal Reasoning*, (Oxford, 2005)

Maeso Seco, Luis, 'I Procedimenti Composti Comunitari: Riflessioni Intorno alla Problematica della Impossibilità a Difendersi ed Eventuali Alternative', in: Giacinto della Cananea/Matteo Gnes (Eds.), *I Procedimenti Amministrativi dell'Unione Europea. Un'Indagine*, (Giappichelli, 2004), 11-32

Maier, Martina/ Werner, Philipp, 'Judgment of 30 November 2009 in Cases T-427/04 and T-1 7/05, France and France Telecom SA v Commission: Comments on Cases T-427/04 and T-1 7/05', in: *European State Aid Law Quarterly*, (2011), 713-722

Majone, Giandomenico, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance', in: *Journal of Public Policy*, 17:2, (1997), 139-167

Mancini, Federico, 'The Making of a Constitution for Europe', in: *Common Market Law Review*, 26:4, (1989), 595-614

Marchetti, Barbara, 'Fondi Strutturali e tutela giurisdizionale: Variazione degli schemi regolatori e conseguenze sull'architettura giudiziaria dell'UE', in: *Rivista Italiana di Diritto Pubblico Comunitario*, (2012), 1105-1128

Marchetti, Barbara, 'Il Sistema Integrato di Tutela', in: Luca de Lucia/Barbara Marchetti (Eds.), *L'amministrazione europea e le sue regole*, (Il Mulino, 2015), 197-228

Marmor, Andrei, *Interpretation and Legal Theory*, 2nd ed., (Hart, 2005)

Martinière, Jean Martin, 'La collaboration entre l'ordre juridique communautaire et les ordres juridiques nationaux dans le secteur de l'agriculture', *Rapport Français présenté à la Commission I (Agriculture) du Vème Congrès International de Droit Européen*, (FIDE, 1970)

Mashaw, Jerry, 'Reasoned Administration: the European Union, the United States and the Project of Democratic Governance', in: *George Washington Law Review*, 99, (2007), 99-124

Mastrodonato, Giovanni Sartor, *Validity as Bindingness: the Normativity of Legality*, EUI Working Paper LAW 2006/18

Mastromatteo, Andrea, 'A Lost Opportunity for European Regulation of Genetically Modified Organisms', in: *European Law Review*, 25:4, (2000), 425-432

Mattarella, Bernardo Giorgio, 'Procedimenti e Atti Amministrativi', in: Mario Chiti (Ed.), *Diritto Amministrativo Europeo*, (Giuffrè, 2013), 327-377

Maurer, Hartmut, *Allgemeines Verwaltungsrecht*, 18th ed., (C. H. Beck, 2011)

Mautner, Menachem, 'Three Approaches to Law and Culture', in: *Cornell Law Review*, 96, (2010-2011), 839-867

Mayer, Otto, *Deutsches Verwaltungsrecht*, I, 3rd ed., (Duncker & Humblot, 1924)

Mehdi, Rostane, 'L'Autonomie Institutionnelle et Procédurale et le Droit Administratif', in: Jean-Bernard Auby/ Jacqueline Dutheil de la Rochère (Eds.), *Droit Administratif Européen*, (Bruylant, 2007), 685-726

Melchior, Michel, 'La collaboration entre l'ordre juridique communautaire et les ordres juridiques nationaux dans le secteur de l'agriculture', *Rapport Belge présenté à la Commission I (Agriculture) du Vème Congrès International de Droit Européen*, (FIDE, 1970)

Mendes, Joana, *Participation in EU Rule-Making: A Rights-Based Approach*, (Oxford, 2011)

Mendes, Joana, *Rule of Law and Participation: a Normative Analysis of Internationalised Rulemaking as Composite Procedures*, JMWP NYU 13/13

Mento, Sandro, 'I poteri amministrativi della Commissione europea in materia di fondi strutturali', in: *Rivista Trimestrale di Diritto Pubblico*, (2007), 135-172

Meuwese, Anne/ Schuurmans, Ymre/ Voermans, Wim, 'Towards a European Administrative Procedure Act', in: *European Administrative Law: Top-Down and Bottom-up*, (Europa Law Publishing, 2009), 3-35

Micklitz, Hans-Wolfgang/ van Gestel, Rob, 'Why Methods Matter in European Legal Scholarship', in: *European Law Journal*, (2014), 20:3, 292-316

Molinier, Joël, 'La notion de «pouvoir public commun» et la nature des communautés Européennes', in: *Mélanges Guy Isaac: 50 ans de droit communautaire*, I, (Presses de l'Université des sciences sociales de Toulouse, 2004), 191-210

Möllers, Christoph, 'Methoden', in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, I, (C. H. Beck, 2012), 123-178

Monnet, Jean, *Mémoires*, (Fayard, 1976)

Morgan, Roger, 'Jean Monnet and the ECSC Administration: Challenges, Functions and the Inheritance of Ideas', in: *Jahrbuch für Verwaltungsgeschichte*, 4, (1992), 1-9

Nebbia, Paolisa, 'The Double Life of Effectiveness', in: *Cambridge Yearbook of European Legal Studies*, 10, (2007-2008), 287-302

Nehl, Hanns Peter, '2013 Reform of EU State Aid Procedures: How to Exacerbate the Imbalance between Efficiency and Individual Protection', in: *European State Aid Law Quarterly*, (2014), 235-249

Nehl, Hanns Peter, 'Legal Protection in the Field of EU Funds', in: *European State Aid Law Quarterly* (2011), 629-652

Nehl, Hanns Peter, 'The Imperfect Procedural Status of Beneficiaries of Aid in EC State Aid Proceedings: Note on Case C-276/03 P, Scott SA v. Commission', in: *European State Aid Law Quarterly*, (2006), 57-63

Nehl, Hanns Peter, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung „mehrstufiger" Verwaltungsverfahren*, (Duncker & Humblot, 2002)

Nehl, Hanns Peter, *Principles of Administrative Procedure in EC Law*, (Hart, 1999)

Nicolaïdis, Kalypso, 'The Idea of European Demoicracy', in: Julie Dickson/Pavlos Eleftheriadis (Eds.), *The Philosophical Foundations of European Union Law*, (Oxford, 2012), 247-274

Nieto Garrido, Eva/ Martín Delgado, Isaac, *European Administrative Law in the Constitutional Treaty*, (Hart, 2007)

Noël, Emile, 'Comment fonctionnent les Institutions de la Communauté Économique Européenne', in: *Revue du Marché Commun*, 5:4, (1963), 14-21

Noël, Emile, 'Témoignage: l'administration de la Communauté européenne dans le rétrospective d'un ancien haut fonctionnaire', in: *Jahrbuch für europäische Verwaltungsgeschichte*, 4, (1992), 145-158

Nolte, Georg, 'General Principles of German and European Administrative Law: a Historical Perspective', in: *Modern Law Review*, 57:2 (1994), 191-212

Oebbecke, Janbernd, 'Verwaltungszuständigkeit', in: Josef Isensee/Paul Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VI, (Müller, 2008), 743-810

Ophüls, Carl Friedrich, 'La Relance Européenne'', in: *Annuaire Européen*, 4, (1958), 3-19

Ophüls, Carl-Friedrich, 'Zur ideengeschichtlichen Herkunft der Gemeinschaftsverfassung', in: *Festschrift Walter Hallstein*, (Klostermann, 1966), 387-413

Pag, Sabine, 'The Relations between the Commission and National Bureaucracies', in: Sabino Cassese (Ed.), *Divided Powers: European administration and national bureaucracies: the European Administration/L'Administration Européenne*, (International Institute of Administrative Sciences/European Institute of Public Administration, 1987), 443-493

Pagoulatos, George/ Tsoukalis, Loukas, 'Multilevel Governance', in: Erik Jones/Anand Menon/Stephen Weatherill (Eds.), *The Oxford Handbook of the European Union*, (Oxford, 2012), 62-73

Parada, Ramón, *Derecho Administrativo*, I, 12th ed., (Marcial Pons, 2007)

Pech, Laurent, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', in: *European Constitutional Law Review*, 6:3, (2010), 359-396

Peczenik, Aleksander, 'A Theory of Legal Doctrine', in: *Ratio Juris*, 14:1, (2001), 75-105

Peczenik, Aleksander, *On Law and Reason*, (Springer, 2008)

Pescatore, Pierre, 'Das Zusammenwirken der Gemeinschaftsrechtsordnung mit den nationalen Rechtsordnungen', in: *Europarecht*, (1970), 307-323

Pescatore, Pierre, 'Distribución de competencias y de poderes entre los estados miembros y las comunidades europeas', in: *Derecho de la Integración*, 1, (1967), 108-152

Pescatore, Pierre, 'Les Travaux du «groupe juridique» dans la négociation des traités de Rome', in*: Studia Diplomatica*, 34, (1981), 159-178

Pescatore, Pierre, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', in: *European Law Review*, 8, (1983), 155-177

Pescatore, Pierre, *The Law of Integration*: *emergence of a new phenomenon in international relations, based on the experience of the European Communities*, (Sijthoff, 1974)

Pietzcker, Jost, 'Zuständigkeitsordnug und Kollisionsrecht im Bundesstaat', in: Josef Isensee/Paul Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VI, (Müller, 2008), 515-566

Poiares Maduro, Miguel, *We the Court*, (Hart, 1999)

Posner, Richard, *How Judges Think*, (Harvard, 2008)

Preda, Daniela, 'Hallstein e l'amministrazione pubblica europea (1958-1967)', in: *Storia Amministrazione Costituzione: Annale dell'Instituto per la Scienza dell'Amministrazione Pubblica*, 8, (2000), 79-104

Pünder, Hermann, 'Administrative procedure - mere facilitator of material law versus cooperative realization of common welfare', in: Hermann Pünder/Christian Waldhoff (Eds.), *Debates in German Public Law*, (Hart, 2014), 239-260

Rabinovici, Itai, 'The Right to Be Heard in the Charter of Fundamental Rights of the European Union', in: *European Public Law*, 18:1, (2012), 149-173

Rasmussen, Hjalte, *On Law and Policy in the European Court of Justice*, (Nijhoff, 1986)

Rasmussen, Morten, 'Revolutionizing European law: A history of the *Van Gend en Loos* judgment', in: *International Journal of Constitutional Law*, 12, (2014), 136-163

Rasmussen, Morten, 'The Origins of a Legal Revolution: The Early History of the European Court of Justice', in: *Journal of European Integration History*, 14:2, (2008), 77-98

Raz, Joseph, 'Authority, Law and Morality', in: *The Monist*, 68:3 (1985), 295-234

Raz, Joseph, 'The Rule of Law and its Virtue', in: *The Authority of Law: Essays on Law and Morality*, (Clarendon, 1979)

Raz, Joseph, *The Authority of Law*, (Oxford, 1979)

Rebelo de Sousa, Marcelo /Salgado de Matos, André, *Direito Administrativo Geral*, III, 2nd ed., (D. Quixote, 2009)

Rebelo de Sousa, Marcelo/Salgado de Matos, André, *Direito Administrativo Geral*, I, 3rd ed., (D. Quixote, 2008)

Reichel, Jane, 'Communicating with the European Composite Administration', in: *German Law Journal*, 15:5, (2014), 883-906

Rengeling, Hans-Werner, 'Nationaler Verwaltungsvollzug von Gemeinschaftsrecht: Die Gemeinschaftskompetenzen', in: *Europarecht*, (1974), 216-237

Reuter, Étienne, 'L'engagement général de coopération des Etats Membres avec la Haute Autorité et les nécessités de contrôle dans le domaine des prix', in: *Cahiers de Droit Européen*, (1966), 52-58

Rideau, Joël, 'Le rôle des États membres dans l'application du droit communautaire', in: *Annuaire Français de Droit International*, 18, (1972), 864-903

Röhl, Hans-Christian, 'Die Anfechtbare Entscheidung nach Art. 230 Abs. 4 EGV', in: Eberhard Schmidt-Aßmann/Bettina Schöndorf-Haubold (Eds.), *Der Europäische Verwaltungsverbund*, (C. H. Beck, 2005), 319-351

Röhl, Hans-Christian, 'Procedures in the European Composite Administration', in: Javier Barnes, *Transforming Administrative Procedure*, (Global Law Press, 2008), 77-96

Roughlan, Nicole, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*, (Oxford, 2014)

Ruffert, Matthias, 'The Transformation of Administrative Law as a Transnational Methodological Project', in: Mathias Ruffert (Ed.), *The Transformation of Administrative Law in Europe = La mutation du droit administratif en Europe*, (Sellier, 2007)

Sacchi Morsiani, Gianguido, *Il potere amministrativo delle Comunità europee e le posizioni giuridiche dei privati* (Giuffrè, 1965)

Safjan, Marek/ Düsterhaus, Dominik, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU', in: *Yearbook of European Law*, 33:1, (2014), 3-40

Salgado de Matos, André, *A Fiscalização Administrativa da Constitucionalidade*, (Almedina, 2004)

Sandulli, Aldo, 'Il Procedimento', in: Sabino Cassese, *Trattato di Diritto Amministrativo – Diritto Amministrativo Generale*, II, (Giuffrè, 2000), 927-1215

Sandulli, Aldo, 'Il Ruolo della Scienza Giuridica nella Costruzione del Diritto Amministrativo Europeo', in: Luca de Lucia/Barbara Marchetti (Eds.), *L'Amministrazione Europea e le sue Regole*, (Il Mulino, 2015), 273-294

Savino, Mario, 'Autorità e Libertà nell'Unione Europea: La Sicurezza Alimentare', in: *Rivista Trimestrale di Diritto Pubblico*, (2007), 413-442

Scheuner, Ulrich, 'Der Einfluß des französischen Verwaltungsrechs auf die deutsche Rechtsentwicklung', in: *Die öffentliche Verwaltung*, 19, (1963), 714-719

Schmidt-Aßmann, Eberhard, 'Cuestiones fundamentales sobre la reforma de la Teoría General del Derecho Administrativo. Necesidad de la innovación y presupuestos metodológicos', in:

Javier Barnes (Ed.), *Innovación y Reforma en el Derecho Administrativo*, (Global Law Press, 2006), 15-132

Schmidt-Aßmann, Eberhard, 'El Método de la Ciencia del Derecho Administrativo', in: Javier Barnes (Ed.), *Innovación y Reforma en el Derecho Administrativo*, (Global Law Press, 2006), 133-175

Schmidt-Aßmann, Eberhard, 'Introduction: European Composite Administration and the Role of European Administrative Law', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 1-22

Schmidt-Aßmann, Eberhard, 'Verfassungsprinzipien für den Europäischen Verwaltungsverbund', in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle, *Grundlagen des Verwaltungsrechts*, I, 2nd ed., (C. H. Beck, 2012), 261-340

Schmidt-Aßmann, Eberhard, *Das Allgemeine Verwaltungsrecht als Ordnungsidee: Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung*, 2nd ed., (Springer, 2006)

Schneider, Jens-Peter, 'Basic Structures of Information Management in the European Administrative Union', in: *European Public Law*, 20: 1 (2014), 89-106

Schoch, Friedrich, 'Zur Europäisierung des Verwaltungsrechts', in: *Juridica International*, 21, (2014), 102-117

Schöndorf-Haubold, Bettina, 'Common European Administration: the European Structural Funds', in: Oswald Jansen/Bettina Schöndorf-Haubold (Eds.), *The European Composite Administration*, (Intersentia, 2011), 25-54

Schöndorf-Haubold, Bettina, *Die Strukturfonds der Europäischen Gemeinschaft: Rechtsformen und Verfahren europäischer Verbundverwaltung*, (C. H. Beck, 2005)

Schönwald, Matthias, 'Hallstein and the »Empty Chair« Crisis 1965/66', in: Wilfried Loth (Ed.), *Crises and Compromises: the European Project 1963-1969*, (Nomos, 2001), 157-171

Schütze, Robert, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union', in: *Common Market Law Review*, 47, (2010), 1385-1427

Schwartz, Bernard, *Administrative Law*, 2nd ed., (Little, Brown and Company, Boston), 1984

Schwarze, Jürgen, 'Artikel 263', in: Jürgen Schwarze (Ed.), *EU-Kommentar*, 3rd ed, (Nomos, 2012), 2176-2208

Schwarze, Jürgen, 'Developing principles of European administrative law', in: *Public Law*, (1993), 229-239

Schwarze, Jürgen, 'Judicial Review of European Administrative Procedure', in: *Law and Contemporary Problems*, 68, (2004-2005), 85-105

Schwarze, Jürgen, 'The Procedural Guarantees in the Recent Case-law of the European Court of Justice', in: *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, II, (Nijhoff, 1994), 487-496

Schwarze, Jürgen, *Europäisches Verwaltungsrecht*, 2nd ed., (Nomos, 2005)

Schwarze, Jürgen, *Europäisches Verwaltungsrecht*, 1st ed., (Nomos, 1992)

Schwarze, Jürgen, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, (Nomos, 1988)

Schwarze, Jürgen, *European Administrative Law*, 2nd ed., (Sweet & Maxwell, 2006)

Seidel, Katja, *The Process of Politics in Europe: the Rise of European Elites and Supranational Institutions*, (Tauris, 2010)

Shapiro, Martin, 'Comparative law and comparative politics', in: *Southern California Law Review*, 53, (1979-1980), 537-542

Shapiro, Martin, 'The Giving Reasons Requirements', in: *University of Chicago Legal Forum*, (1992), 179-220

Shapiro, Martin, 'The Institutionalization of European Administrative Space', in: Alec Stone Sweet/Wayne Sandholtz/Neil Fligstein (Eds.), *The Institutionalization of Europe*, (Oxford, 2001), 94-125

Shirvani, Faroud, 'Verfahrensgrundrechte in mehrstufigen, das EU-Recht vollziehenden Verwaltungsverfahren – Dargestellt am Beispiel des Arzneimittelzulassungs- und Gentechnikrechts –', in: *Deutsches Verwaltungsblatt*, (2011), 674-681

Siems, Matthias, 'The Taxonomy of Interdisciplinary Legal Research: finding the Way out of the Desert', in: *Journal of Commonwealth Law and Legal Education*, 7:1, (2009), 5-17

Silbey, Susan, 'Making Place for Cultural Analyses of Law', in: *Law & Social Inquiry*, (1992), 39-48

Sinnaeve, Adinda, 'General Principles', in: Martin Heidenhain (Ed.), *European State Aid law,* (C. H. Beck, 2010), 573-590

Snyder, Francis, *New Directions in European Community Law*, (Weidenfeld and Nicolson, 1990)

Sordi, Bernardo, 'Révolution, Rechtsstaat and the Rule of Law: historical reflections on the emergence of administrative law in Europe', in: Susan Rose-Ackerman/Peter Lindseth (Eds.), *Comparative Administrative Law*, (Elgar, 2010), 23-36

Stolleis, Michael, 'Die Entstehung des Allgemeinen Teils des Verwaltungsrechts (1850–1900)', in: *Juridica International*, 21, (2014), 21-28

Sydow, Gernot, *Verwaltungskooperation in der Europäischen Union: Zur horizontalen und vertikalen Zusammenarbeit der europäischen Verwaltungen am Beispiel des Produktzulassungsrechts*, (Mohr Siebeck, 2004)

Tamanaha, Brian, 'A Concise Guide to the Rule of Law', in: Gianluigi Palombella/Neil Walker (Eds.), *Relocating the Rule of Law*, (Hart, 2009), 3-16

Temple Lang, John, 'Community Constitutional Law: Article 5 EEC Treaty', in: *Common Market Law Review*, 27, (1990), 645-681

Temple Lang, John, 'The Duties of National Authorities under Community Constitutional Law', in: *European Law Review*, 23, (1998), 109-131

Tesauro, Giuseppe, *Diritto Comunitario*, 5th ed., (CEDAM, 2008)

Thomas, Robert, 'Reasons-giving in English and European Community Administrative Law', in*: European Public Law*, 3:2, (1997), 213-222

Tridimas, Takis, 'Precedent and the Court of Justice: a Jurisprudence of Doubt?', in: Julie Dickson/Pavlos Eleftheriadis (Eds.), *Philosophical Foundations of European Union Law*, (Oxford, 2012), 307-330

Tridimas, Takis, *The General Principles of EU law*, 2nd ed., (Oxford, 2006)

Trondal, Jarle/Bauer, Michael, 'Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system', in: *European Political Science Review*, 9:1, (2017), 73-94

Tuori, Kaarlo, 'Transnational Law: on Legal Hybrids and Perspectivism', in: Miguel Poiares Maduro/Kaarlo Tuori/Suvi Sankari (Eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, (Cambridge, 2014), 11-57

Tuori, Kaarlo, *Critical Legal Positivism*, (Ashgate, 2002)

Tuori, Kaarlo, *European Constitutionalism*, (Cambridge, 2015)

Tuori, Kaarlo, *Ratio and Voluntas*, (Ashgate, 2011)

Türk, Alexander, 'Judicial Review of Integrated Administration in the EU', in: Herwig Hofmann/Alexander Türk (Eds.), *Legal Challenges in EU Administrative Law: towards an integrated administration*, (Elgar, 2009), 218-256

Türk, Alexander, *Judicial Review in EU Law*, (Elgar, 2009)

van Bael, Ivo, 'The EEC Anti-dumping Rules – A practical approach', in: *International Lawyer*, 12:3, (1978), 523-545

van Middelaar, Luuk, *The Passage to Europe: how a Continent became a Union*, (Yale, 2013)

Vauchez, Antoine, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*, LSE Law, Society and Economy Working Papers 19/2013

Vauchez, Antoine, *Brokering Europe: Euro-lawyers and the Making of a Transnational Polity*, (Cambridge, 2015)

Verhoeven, Maartje, *The Costanzo obligation: the obligations of national administrative authorities in the case of incompatibility between national law and European law*, (Intersentia, 2011)

Veronelli, Manuela, 'Procedimenti composti e problemi di tutela giurisdizionale', in: Giacinto della Cananea/Matteo Gnes (Eds.), *I Procedimenti Amministrativi dell'Unione Europea. Un'Indagine*, (Giappichelli 2004), 59-84

Vick, Douglas W., 'Interdisciplinarity and the Discipline of Law', in: *Journal of Law and Society*, (2004), 163-193

Viehweg, Theodor, *Topik und Jurisprudenz*, 5th ed. (C. H. Beck, 1974)

Vieira de Andrade, José Carlos, *A Justiça Administrativa*, 11th ed., (Almedina, 2011)

Vieira de Andrade, José Carlos, *A Justiça Administrativa*, 12th ed., (Almedina, 2012)

Vieira de Andrade, José Carlos, *O Dever de Fundamentação Expressa de Actos Administrativos*, (Almedina, 1991)

Virga, Pietro, *Diritto Amministrativo*, II, 4th ed., (Giuffrè, 1997)

Virga, Pietro, *La Tutela Gurisdizionale nei confronti della Pubblica Amministrazione*, 3rd ed., (Giuffrè, 1982)

Vogenauer, Stefan, 'An Empire of Light?: II: Learning and Lawmaking in Germany Today' in: O*xford Journal of Legal Studies*, 26:4, (2006), 627–663

von Bogdandy, Armin, 'Founding Principles of EU Law: a Theoretical and Doctrinal Sketch', in: *European Law Journal*, 16:2 (2010), 95-111

von Bogdandy, Armin/Dann, Philipp, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority', in: *German Law Journal,* 9:11, (2008), 2013-2039

von Bogdandy, Armin/Huber, Peter, 'Evolution and *Gestalt* of the German State', in: Armin von Bogdandy/Peter Huber/Sabino Cassese (Eds.), *The Administrative State*, (Oxford, 2017), 196-236

von Danwitz, Thomas, *Europäisches Verwaltungsrecht*, (Springer, 2008)

von der Groeben, Hans, *The European Community: the formative years: the struggle to establish the Common Market and the Political Union (1958-66)*, (Office for Official Publications of the European Communities, 1987)

von der Pfordten, Dietmar, 'About Concepts in Law', in: Jaap Hage/Dietmar von der Pfordten (Eds.), *Concepts in Law,* (Springer, 2009), 17-33

von Hayek, Friedrich, *The Constitution of Liberty*, (University of Chicago Press, 1978)

Voßkuhle, Andreas, 'Die Reform des Verwaltungsrechts als Projekt der Wissenschaft', in: *Die Verwaltung*, 32, (1999) 545-554

Voßkuhle, Andreas, 'Neue Verwaltungsrechtswissenschaft', in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, I, 2nd ed., (C. H. Beck, 2012), 1-64

Wade, William / Forsyth, Christopher, *Administrative Law*, 9th ed., (Oxford, 2004)

Wade, William/ Forsyth, Christopher, *Administrative Law*, 10th ed., (Oxford, 2009)

Waldron, Jeremy, *The Rule of Law and the Importance of Procedure*, New York University Public Law and Legal Theory Working Papers. Paper 234, (2010)

Walker, Neil, *The Philosophy of European Union Law*, University of Edinburgh Research Paper Series, 2014/29

Ward, Angela, 'Locus Standi under Article 230 (4) of the EC Treaty: Crafting a Coherent Test for a 'Wobbly Polity'', in: *Yearbook of European Law*, 22:1, (2003), 45-77

Weiler, Joseph, 'The Court of Justice on Trial' (book review of Hjalte Rasmussen, *On Law and Policy in the European Court of Justice*), in: *Common Market Law Review*, 24, (1987), 555-589

Weiler, Joseph, 'The Transformation of Europe', in: *Yale Law Journal*, 100:1, (1991), 2403-2483

Weiler, Joseph, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, NYU Jean Monnet Working Paper No. 10/2014

Weimer, Maria, *Democratic Legitimacy through European Conflicts-law? The case of EU Administrative Governance of GMOs*, unpublished thesis, EUI, (2012)

Werner, Fritz, '»Verwaltungsrecht als konkretisiertes Verfassungsrecht«', in: *Recht und Gericht unserer Zeit*, (Carl Heymanns, 1971), 212-226.

Wessels, Wolfgang, 'Comitology: fusion in action. Politico-administrative trends in the EU system', in: *Journal of European Public Policy*, 5:2, (1998), 209-234

White, Jonathan, 'The Neofunctionalists and the Hallstein EEC Commission', in: *Journal of European Integration History*, 9:1, (2003), 111-131

Widdershoven, Rob, 'European Administrative Law', in: René Seerden (Ed.), *Administrative Law of the European Union, its Member States and the United States*, (Intersentia, 2012), 245-319

Wille, Anchrit, *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive*, (Oxford, 2013)

Wils, Wouter, 'The Oral Hearing in Competition Proceedings before the European Commission', in: *World Competition*, 35:3, (2012), 397-430

Wissink, Laura/ Duijkersloot, Ton/ Widdershoven, Rob, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', in: *Utrecht Law Review*, 10:5, (2014), 92-115

Wockelberg, Helena, 'Why 'Multi-Level' and 'Governance' are Concepts of Relevance for our Understanding of Member State Implementation of EU Law', in: Anna-Sara Lind/Jane Reichel (Eds.), *Administrative law beyond the state: Nordic perspectives* (Nijhoff, 2013), 32-46

Woehrling, Jean-Marie, 'Le contrôle juridictionnel de l'administration en Europe et la distinction entre droit objectif et droits subjectifs', in: Jürgen Schwarze (Ed.), *L'état actuel et les perspectives du droit administratif européen*, (Bruylant, 2010), 297-305

Wohlfahrt, Ernst, in: Ernst Wohlfahrt/Ulrich Everling/Hans Joachim Glaesner/Rudolf Sprung (Eds.), *Die Europäische Wirtschaftsgemeinschaft, Kommentar zum Vertrag*, (Vahlen, 1960)

Ziller, Jacques, 'Introduction: les concepts d'administration directe, d'administration indirecte et de co-administration et les fondements du droit administrative européen', in: Jean-Bernard Auby/Jacqueline Dutheil de la Rochère (Eds.), *Droit Administratif Européen*, (Bruylant, 2007), 235-244

Ziller, Jacques, 'Multilevel Governance and Executive Federalism: Comparing Germany and the European Union', in: Patrick Birkinshaw/Mike Varney (Eds.), *The European Union Legal Order after Lisbon*, (Wolters Kluwer, 2010), 257-275

Zuleeg, Manfred, 'Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten', in: *Jahrbuch des öffentlichen Rechts*, 20, (1971), 1-64

ARCHIVAL SOURCES

HAEU Document AH-153, AA/CC (2) PV 10

HAEU document BAC 026/1966_0028, *Conférence de Stresa du 3 au 12 juillet 1958 pour l'élaboration d'une politique agricole commune (PAC) : discours de M. Sicco MANSHOLT, président de la Conférence - 5 juillet 1958*

HAUE Document AH-154, *Session 2 - Onzième séance, le 6 décembre*, 1952AA/CC/SCP (2) PV 11