13

Composite Procedures, the Violation of Fundamental Rights, and the Availability of Sufficient Remedies in the Multi-level EU Judicial Architecture

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13.1 INTRODUCTION

In contemporary European law, it has become increasingly evident that EU law is not implemented according to the traditional distinction between direct and indirect administration but through various systems and patterns of cooperation between national and EU authorities, as well as between national authorities themselves. These cooperative mechanisms generate so-called composite procedures, that is, administrative decision-making processes that involve administrative authorities belonging to more than one legal system for the implementation of EU law.[1] While this form of procedural cooperation is now a prevalent mechanism in EU administrative governance, composite procedures lack both an 'official' definition and a clear conceptualisation.

This phenomenon has generated increasing scholarly attention and attempts at providing taxonomies, labels, and detailed analyses of composite procedures in ever-growing EU policy fields.[2] At the same time, because of the separation of jurisdictions both horizontally and vertically (excluding – at least in principle – the possibility for EU courts to review national administrative measures and for national courts to review measures stemming from either

[1] The term was famously coined by Herwig Hofmann. See Herwig C Hofmann, 'Composite decision-making procedures in EU administrative law' in Herwig C Hofmann and Alexander H Türk (eds), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration* (Edward Elgar 2009) 136.

[2] The literature has grown so much in recent years that providing a full account of the scholarly debate would exceed the remit of this chapter. For an up-to-date overview of the phenomenon of composite procedures and an account of the strands of literature examining it, see Mariolina Eliantonio 'Access to Justice in Composite Procedures for the Implementation of EU Law: The Story so Far' (2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4373333>.

another national legal system or the EU legal order), the literature has specifically discussed the question of access to justice in the framework of these composite procedures.[3] This question has also been tackled by the Court of Justice of the European Union (CJEU) on several occasions, and a body of case law is increasingly emerging on the question of the competent court and the reviewable acts adopted in the context of the composite procedures.[4]

A less explored angle in this debate, however, is the question of the remedies available to redress possible fundamental rights violations occurring in the context of the composite procedures. In light of the above-mentioned separation of jurisdictions between national and EU courts and the partial gap-filling case law of the CJEU, is the current system of remedies sufficient to ensure that, if national or European authorities violate fundamental rights in the context of composite procedures, there is access to a court to control such alleged violations? In turn, this question is linked to the need for the EU multi-level system of protection to ensure respect for the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights ('the Charter') whenever rights guaranteed by EU law are allegedly violated.[5]

In order to tackle this question, this chapter proceeds as follows. In Section 13.2, a categorisation of composite procedures is provided together with an examination of possible fundamental rights that might be violated in their context. Far from providing an exhaustive taxonomy of these procedures, the categories discussed in this section have been selected because they give rise to different problems in terms of possible violations of fundamental rights. In this regard, it should also be noted that, for the purposes of this chapter (and in line with the focus of this volume on the *EU* system of remedies), only those procedures entailing cooperation between EU and national authorities will be examined (so-called vertical composite procedures), to the exclusion of 'purely' horizontal procedures, that is, scenarios in which only national authorities cooperate with each other for the implementation of EU law

[3] See, in general, Mariolina Eliantonio, 'Judicial Review in an Integrated Administration: The Case of "Composite Procedures"' (2014) 7 Review of European Administrative Law 65; Filipe Brito Bastos, 'Derivative Illegality in the European Composite Administrative Procedures' (2018) 55 Common Market Law Review 101.

[4] See, e.g., Case C-97/91 *Oleificio Borelli SpA v Commission* [1992] ECLI:EU:C:1992:491; Case C-219/17 *Berlusconi and Fininvest* [2018] ECLI:EU:C:2018:1023; Case C-785/18 *GAEC Jeanningros v Institut national de l'origine et de la qualité (INAO) and Others* [2020] ECLI:EU:C:2020:46.

[5] Charter of Fundamental Rights of the European Union [2016] OJ C202/389.

without the involvement of the EU level of administration.[6] Finally, it is important to note that the focus of the chapter is on situations in which (EU or national) administrative authorities infringe EU fundamental rights, to the exclusion of situations in which these authorities correctly execute laws that, in turn, violate those fundamental rights. This question relates to the review of EU or national legislation against higher parameters and falls outside the scope of this chapter, which is centred around the control of administrative action.

After providing a categorisation of composite procedures and the fundamental rights possibly engaged therein, in Section 13.3, the available remedies in the scenarios outlined in the earlier section will be presented and their possible gaps will be examined. Section 13.4 concludes. The chapter will show that, while composite procedures are capable of violating both substantive and procedural EU fundamental rights, the current system of remedies seems to be ill-suited to provide effective remedies in multi-jurisdictional decision-making processes.

13.2 VERTICAL COMPOSITE PROCEDURES AND THE VIOLATION OF FUNDAMENTAL RIGHTS

13.2.1 *The Universe of Vertical Composite Procedures: A Proposed Division*

The universe of composite procedures (and, within it, the galaxy of vertical procedures entailing the cooperation of EU and Member State authorities) is extremely varied and in continuous evolution and, as a consequence, multiple categorisations are possible.[7] For the purposes of this chapter and in light of the focus of this volume on remedies for fundamental rights violations, in the following, it is submitted that the more or less 'formalised' and decisional

[6] On this distinction, as well as the peculiar problems of access to justice in horizontal composite procedures, see Paolo Mazzotti and Mariolina Eliantonio, 'Transnational Judicial Review in Horizontal Composite Procedures: *Berlioz*, *Donnellan*, and the Constitutional Law of the Union' (2020) 5 European Papers 41; and Paolo Mazzotti and Mariolina Eliantonio, 'Towards a Theory of Transnational Judicial Review in European Administrative Law' (2021) 13 Italian Journal of Public Law 350 <www.ijpl.eu/wp-content/uploads/2022/10/3.Eliantonio_Mazzotti.pdf>.

[7] See, for earlier attempts at categorisations, Sergio Alonso de León, 'Composite Administrative Procedures in the European Union' (Doctoral thesis, Universidad Carlos III de Madrid, 2016); Brito Bastos, 'Derivative Illegality in the European Composite Administrative Procedures' (n 3); Giacinto Della Cananea, 'The European Union's Mixed Administrative Proceedings' (2005) 68 Law and Contemporary Problems 197; Eliantonio, 'Judicial Review in an Integrated Administration' (n 3). The most recent one is in Eliantonio, 'Access to Justice in Composite Procedures for the Implementation of EU Law: The Story so Far' (n 2).

nature of an administrative action represents a suitable criterion to distinguish different types of composite procedures. From this perspective, one can draw a distinction between procedures that entail various types of factual acts and procedures that instead comprise measures that are not factual in nature (whether binding or not). This distinction is relevant for the purposes of this chapter for two reasons. First, because of the different types of fundamental rights that may be at stake in the course of the decision-making process. In particular, factual conduct is capable of infringing specific fundamental rights regarding domicile and correspondence. Second, because, as will be shown below, the more or less formal nature of the administrative action at stake has implications for the identification of the appropriate judicial forum.

In Section 13.2.2, possible factual conduct scenarios identifiable in the framework of vertical composite procedures will be considered, with a discussion of the fundamental rights that might come into play in those situations. In Section 13.2.3, within the very diverse universe of composite procedures that do not entail factual conduct on the part of the authorities, examples will be provided of different fundamental rights that might be relevant in these procedures. They are not specifically linked to the 'type' of procedure (e.g., whether they culminate in limiting the legal sphere of an individual, such as the ban on the import of a product or an order of repatriation, or entail the expansion of the individual's legal sphere, such as the granting of an authorisation to carry out a certain activity) but on the subject matter of the procedure. Furthermore, fundamental rights that might be relevant in all types of composite procedure (whether decisional or not in nature, or entailing more or less 'formalised' administrative measures) are 'procedural' in nature (e.g., the right to be heard). These will be examined in Section 13.2.4. As will be shown, these rights display peculiar features in the context of composite procedures and have been subject to fairly extensive scrutiny by the CJEU.

13.2.2 *Factual Action, Composite Procedures, and the Infringement of Fundamental Rights*

The notion of 'factual action' is not a dogmatic category known at the EU level, unlike several national systems.[8] Yet it is beyond doubt that both national and EU authorities carry out factual actions in the framework of

[8] For a comparative overview, see Chris Backes and Mariolina Eliantonio (eds), *Cases, Materials and Text on Judicial Review of Administrative Action* (Hart 2019), ch 4; for an examination of factual conduct at the EU level in general, see Timo Rademacher, 'Factual Administrative Conduct and Judicial Review in EU Law' (2017) 29 European Review of Public Law 399.

composite procedures for the implementation of EU law and that these actions can have a severe impact on individuals' fundamental rights (see also Chapter 12).[9]

This can happen, for example, in the framework of inspection procedures: in increasingly more policy fields, composite procedures entail enforcement actions, including inspections.[10] For example, in the fields of competition law, fisheries, and aviation safety, EU authorities (be it the Commission or the competent European agencies) can carry out inspection activities, including, for example, seizure of documents, confiscation of computer systems, and interrogation of witnesses.[11] These inspection activities may be part of composite procedures when a subsequent act of the enforcement process, such as the imposition of a sanction, is adopted at the national level. Cooperation in enforcement tasks may also take place at the inspection step itself, when national and EU authorities cooperate in various ways in carrying out an inspection.[12] Inspections and the actions they entail may be in conflict with Article 7 of the Charter, protecting the right to private life, home, and communications, which corresponds to the first paragraph of Article 8 of the ECHR. That these fundamental rights might be at stake in such cases has also been confirmed by the case law of the CJEU.[13]

Factual action can also go beyond inspection activities and includes the performance of other types of acts. For example, Frontex has been carrying out factual activities (such as the detention or transfer of individuals from one location to another) in support of search and rescue activities performed by national authorities at the EU borders, which may conflict (and indeed have been considered as conflicting) with, amongst others, the fundamental right to asylum and the prohibition of refoulement contained in Articles 18 and 19 of the Charter.[14] Other fundamental rights contained in the Charter, such as the prohibition of torture contained in Article 4 or the right to liberty enshrined in

[9] Napoleon Xanthoulis, 'Administrative factual conduct: Legal effects and judicial control in EU law' (2019) 12 Review of European Administrative Law 39.

[10] For an examination of shared enforcement activities between national and EU authorities, see Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar 2017).

[11] Maurizia De Bellis, 'Multi-level Administration, Inspections and Fundamental Rights: Is Judicial Protection Full and Effective?' (2021) 22 German Law Journal 416; and extensively Maurizia De Bellis, *I poteri ispettivi dell'amministrazione europea* (Giappichelli 2021).

[12] See further with examples and references to legislation, Eliantonio, 'Access to Justice in Composite Procedures for the Implementation of EU Law: The Story so Far' (n 2).

[13] In the pre-Charter times, see Case C-94/00 *Roquette Frères* [2002] ECLI:EU:C:2002:603.

[14] See the EP Briefing 'Addressing pushbacks at the EU's external borders' <www.europarl.europa.eu/RegData/etudes/BRIE/2022/738191/EPRS_BRI(2022)738191_EN.pdf>.

Article 6, can also be of relevance in this context. The same fundamental rights can be violated in the framework of the cooperation between the national competent authorities and the European Union Agency for Asylum, in the context of which the Agency is tasked with, amongst others, conducting admissibility interviews with migrants.[15]

13.2.3 *Other Composite Procedures and 'Substantive' Fundamental Rights*

Composite procedures of a decisional nature, and which do not involve factual conduct, are present in very diverse policy fields, ranging from competition law to the Common Agricultural Policy, asylum, risk regulation, environmental policy, and data protection. It is therefore fairly straightforward to conclude that a large range of possible fundamental rights can come into play in these very diverse situations. Without any attempt at completeness, in this section, examples of types of composite procedure will be provided to show how and why EU fundamental rights might be violated.

An increasingly common type of composite procedure entails the sharing of data between EU and national authorities.[16] At the outset, it should be mentioned, with respect to these procedures and the proposed categorisation based on the presence of factual conduct in a vertical composite procedure, that these acts of information, as has been appropriately argued, 'sit uneasily within [the] legal/factual dichotomy'.[17]

These data sharing procedures often take place through various databases, in which national authorities enter information that, in turn, may be used by other national authorities. In some cases, the role of the EU level of

[15] See EASO Special Operating Plan To Greece <https://euaa.europa.eu/sites/default/files/easo%20special%20operating%20plan%20to%20greece%202017_%2014122016.pdf>; for the framing of the phenomenon as a composite procedure, see Evangelia L Tsourdi, 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2016) 3 European Papers 997; Gaia Lisi and Mariolina Eliantonio, 'The Gaps in Judicial Accountability of EASO in the processing of asylum requests in Hotspots' (2019) 4 European Papers 589.

[16] On these types of procedure, see, amongst others, Deidre M Curtin and Filipe Brito Bastos, 'Interoperable Information Sharing and the Five Novel Frontiers of EU Governance: A Special Issue' (2020) 26 European Public Law 59; Diana-Urania Galetta, Herwig C H Hofmann, and Jens-Peter Schneider, 'Information Exchange in the European Administrative Union: An Introduction' (2014) 20 European Public Law 65; Mariolina Eliantonio, 'Information Exchange in European Administrative Law: A Threat to Effective Judicial Protection?' (2016) 23 Maastricht Journal of European and Comparative Law 531.

[17] Simona Demková, *Automated Decision-Making and Effective Remedies: The New Dynamics in the Protection of EU Fundamental Rights in the Area of Freedom, Security and Justice* (Edward Elgar 2023) 23.

administration can materialise in the facilitation of the sharing of information between authorities of different legal systems. This is the case for the Rapid Exchange of Information System (RAPEX). This is an alert system for unsafe consumer products, established by the General Product Safety Directive.[18] In this system, Member States share information concerning dangerous products with the Commission. After validation by the Commission, the information is made available to the competent authorities throughout the EU, which can take measures to prevent the circulation of the product, such as a ban on sales or withdrawal from the market. Potentially, in such cases, the composite procedure thereby generated might come into conflict with the freedom to conduct a business protected by Article 16 of the Charter.

In other cases, the EU presence can relate to the creation and management of a database, such as the Schengen Information System (SIS), through which competent national authorities, such as the police and border guards, are able to enter alerts on people and objects in the database, which can be consulted by the competent authorities of all Member States, and which can form the basis of restrictive measures such as removal from the national territory. The involvement of the EU legal system is, however, 'silent' in that it is limited, through the EU Agency for large-scale IT systems (eu-LISA), to the operational management of the central IT system and the network on which the system operates. This has implications for the accountability of the EU administrative authorities, and hence for access to justice, since their participation in the decision-making process is unclear.[19] Regardless of the more or less 'explicit' role of the Agency in the procedure, like in the cases of Frontex and the European Union Agency for Asylum examined above, the fundamental right to asylum and the prohibition of refoulement contained in Articles 18 and 19 of the Charter might be violated as a consequence of the actions of public authorities taken on the basis of alerts entered in the SIS system, as well

[18] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2002] OJ L11/4.

[19] See further on this Niovi Vavoula, 'Information Sharing in the Dublin System: Remedies for Asylum Seekers In-Between Gaps in Judicial Protection and Interstate Trust' (2021) 22 German Law Journal 391; Jens-Peter Schneider, 'Basic Structures of Information Management in the European Administrative Union' (2014) 20(1) European Public Law 89; Morgane Tidghi and Herwig C H Hofmann, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks' (2014) 20 European Public Law 147; Ferdinand Wollenschläger, 'Informationssysteme als Herausforderung für den Rechtsschutz im Europäischen Verwaltungsverbund: Das EU-Schnellwarnsystem für Lebens- und Futtermittel (RASFF)' (2019) 52 Die Verwaltung 1.

as the right to respect for family life and the rights of the child, as enshrined in Articles 7 and 24 of the Charter.[20]

At the same time, in the examples of both the RAPEX- and the SIS-generated procedures, it is clear that, as certain personal data are shared, the right to data protection contained in Article 8 of the Charter might also come into play.[21]

Other sets of composite procedures entail the authorisation or denial thereof to place on the market a product or a substance. Various types of composite procedures are indeed foreseen for the authorisation to place on the market genetically modified organisms, medicines, pesticides, and so on, entailing the cooperation in various forms and at various stages between national and EU authorities.[22] In such cases, one could imagine that the freedom to conduct a business protected by Article 16 of the Charter as well as the prohibition of discrimination contained in Article 21 might come into play.

13.2.4 *Composite Procedures and Fundamental 'Procedural' Rights*

All composite procedures, whether entailing enforcement measures or leading to an authorisation or the drafting of a plan or the ban of a product or person from the European administrative space, whether taken in economic or non-economic fields, whether comprising only two or multiple cooperative steps, need to respect several procedural fundamental rights. The starting point here

[20] See, on this point, Case C-193/19 *A v Migrationsverket* [2021] ECLI:EU:C:2021:168; and Opinion of AG De La Tour [2020] ECLI:EU:C:2020:594.

[21] Indeed, in Recital 56, Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) 1987/2006 [2018] OJ L312/56 makes explicit reference to Article 8.

[22] See on these procedures, on medical authorisations, Mariolina Eliantonio and Sabrina Röttger-Wirtz, 'From Integration to Exclusion: EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals' (2019) 10 European Journal of Risk Regulation 393; on GMOs, Rui Lanceiro and Mariolina Eliantonio, 'The Genetically Modified Organisms' Regime: A Playground for Multi-Level Administration and a Nightmare for Effective Judicial Protection?' (2021) 22 German Law Journal 371; in general on product authorisations: Luca De Lucia, 'Autorizzazioni transnazionali e cooperazione amministrativa nell'ordinamento europeo' (2010) 3 Rivista Italiana di Diritto Pubblico Comunitario 759. For a comparison covering composite procedures in the field of chemicals, pesticides, medicines, and food safety, see Emilie Chevalier, 'Administrative Cooperation in the field of Risk Regulation', in Emilie Chevalier, Mariolina Eliantonio, and Rui Lanceiro (eds), *Administrative Cooperation in the European Union* (Bruylant, forthcoming 2024).

is Article 41 of the Charter, referring to the right to good administration, including the right to be heard and the duty to give reasons. Article 41 is closely linked to the right to an effective remedy under Article 47 of the Charter, because judicial protection cannot be considered effective if the person concerned is unable to ascertain the reasons upon which the decision relating to them is taken.[23] The obligation to give reasons aims to enable the person concerned to 'defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction'.[24]

Early in the case law, it was established that the right to be heard applies to individual decisions, which is a typical outcome of composite procedures (e.g., in the case of authorisation to place a product on the market or the imposition of a sanction).[25] However, the exercise of this right can be particularly arduous in the case of composite procedures: *Quid iuris* indeed if the right to be heard was not exercised in one step of the procedure? Can this omission be 'compensated' down the line of the decision-making chain, although the following decisional steps might be taken by authorities pertaining to a different legal system from that of the authority that violated the right to be heard in the first place? Can the omission of the authority of one legal system 'contaminate' the actions of the authorities belonging to a different legal system? What is the relevant level of administration before which the right to be heard can or must be exercised?[26]

These issues came to the attention of the CJEU in the context of the structural funds in the *Lisrestal* case, in which the Court considered a cooperative mechanism between the national authorities and the Commission leading to the reduction of the financial assistance received by the applicant.[27] The right to be heard was considered violated by the Court, and this circumstance led to the invalidity of the final Commission decision. However, interestingly, in the absence of a clear indication in the underlying legislation, the Court did not specify whether the right to be heard had to be afforded by the national or EU authorities, although the national authorities

[23] Case C-300/11 *ZZ v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:363, para 53.

[24] Ibid para 53 and the case law cited.

[25] Case C-17/74 *Transocean Marine Paint v Commission* [1974] ECLI:EU:C:1974:106; Case C-86/76 *Hoffmann-La Roche v Commission* [1979] ECLI:EU:C:1979:36.

[26] Alonso de León (n 7); Filipe Brito Bastos, 'Beyond executive federalism: the judicial crafting of the law of composite administrative decision-making' (PhD thesis, European University Institute 2018).

[27] Case C-32/95 P *Commission v Lisrestal* [1996] ECLI:EU:C:1996:402.

had no discretion to decide on the recovery of the funds. In a later case, *Mediocurso*, the applicants had been heard by the national authorities but there were indications that the right to be heard could have been infringed as the applicants had been given too little time to submit their observations. The Court of Justice on appeal, reversing the decision of the (then) Court of First Instance, invalidated the final Commission decision.[28]

Also the later case law[29] confirms that, while the right to be heard needs to be respected regardless of whether it is specifically mentioned in the applicable rules, it is not required that it be granted before the authority making the 'real' determination in the composite procedure.[30] This line of case law, however, seems to stand in contradiction with another strand of decisions that the CJEU handed down in the field of the repayment of import duties. After confirming the earlier position in *France-Aviation*,[31] in a long line of subsequent case law, it held that a person vis-à-vis whom an unfavourable decision is to be adopted must be heard by the authority who has the discretion to take the decision (in the cases at stake, the Commission).[32]

This contradiction in case law of the CJEU did not go unnoticed, with Alonso de León stating that the European courts 'fail to see the connection between some of the cases', possibly because they do not recognise composite procedures as a category of their own.[33] While he proposes that the right to be heard in composite procedures must be afforded before the authority 'in the driving seat' of the procedure (i.e., holding the discretionary power with respect to the final decision), he acknowledges that this very solution might present additional complexities in procedures with more complex collaborative structures, such as in the case of authorisation of pesticides or genetically modified organisms, where national and EU authorities intervene at several

[28] Case C-462/98 P *Mediocurso v Commission* [2000] ECLI:EU:C:2000:480.

[29] Case T-189/02 *Ente per le Ville vesuviane v Commission* [2009] ECLI:EU:C:2009:529; Case T-102/00 *Vlaams Fonds v Commission* [2003] ECLI:EU:T:2003:192; Case T-158/07 *Cofac v Commission* [2009] ECLI:EU:T:2009:489.

[30] Alonso de León (n 7) 271.

[31] Case T-346/94 *France-Aviation v Commission* [1995] ECLI:EU:T:1995:187.

[32] Case T-42/96 *Eyckeler & Malt AG v Commission* [1998] ECLI:EU:T:1998:40; Case T-50/96 *Primex Produkte Import-Export GmbH & Co. KG, Gebr. Kruse GmbH, Interporc Im- und Export GmbH v Commission* [1998] ECLI:EU:T:1998:223; Case T-290/97 *Mehibas Dordtselaan BV v Commission* [2000] ECLI:EU:T:2000:8. As noted by Alonso de Leon (n 7), this line of case law culminated in the *Wilson Holland* case, in which the CJEU stated that the right to be heard had to be guaranteed before the Commission even if the applicants 'made a declaration that the file which the national authorities transmitted to the Commission was complete and they had nothing to add'. Case T-186/97 *Wilson Holland and Others v Commission* [2001] ECLI:EU:T:2001:133, para 160.

[33] Alonso de León (n 7) 267.

points of the procedure.[34] What is however clear from this case law is that, whenever a composite procedure is concluded with an EU measure on which the 'main' decision-making power is held by an EU administrative authority, the violation of the right to be heard at the national level is able to 'contaminate' the validity of the final EU law. This finding is in line with the division of jurisdictions between the national and EU courts, which will be discussed in Section 13.3.

The duty to give reasons, which undoubtedly also applies to acts of individual scope, resembles to some extent the broader *problématique* discussed with respect to the challenges of the right to be heard in composite procedures: Which governance level must discharge the duty to give reasons in composite procedures? Can the shortcomings of one authority be compensated by an authority belonging to a different legal system?

While the duty to give reasons, like the right to be heard, is sometimes enshrined in the legislation creating a composite procedure,[35] the case law has revolved around situations in which this duty is not precisely stated. In particular, as highlighted by Brito Bastos, two situations have been brought to the attention of the Court, both relating to composite procedures where a national preparatory measure is followed by a final EU measure: first, whether EU authorities must include the reasons contained in the relevant national preparatory acts in their statements of reasons; second, whether EU authorities may discharge their duty to give reasons simply by *per relationem* (i.e., merely by referring back to the national preparatory measures).[36]

With respect to the first point, the ruling in *Sweden v Commission* (which was confirmed in later case law)[37] allows the conclusion that if the statement of reasons contained in the preparatory measure contains facts and

[34] Alonso de León (n 7) 290–291. For a way to read more coherence in the case law, and the idea that it shows a departure from the notion of 'executive federalism' towards a more unitary vision of the European administrative space, see Filipe Brito Bastos, 'Beyond executive federalism' (n 26) ch 4.

[35] See, for example, Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed [2003] OJ L268/1, art 6 (6), which binds the European Food Safety Authority to a duty to substantiate the opinions it issues in the procedures for the authorisation of genetically modified food or feed. The European Medicines Agency is under the same duty when issuing opinions concerning the approval of pharmaceuticals (see Parliament and Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L311/67, art 32 (5)).

[36] Filipe Brito Bastos, 'Beyond executive federalism' (n 26) 174–175.

[37] Case T-344/15 *France v Commission* [2017] ECLI:EU:T:2017:250; Case T-653/16 R *Malta v Commission* [2018] ECLI:EU:T:2018:241; Case C-135/11 P, *Internationaler Tierschutz-Fonds gGmbH* [2012] ECLI:EU:C:2012:376.

circumstances that are decisive for the final decision then the EU authority issuing the final measure should include them in its own statement of reasons.[38]

Regarding the possibility for EU authorities to refer to the statement of reasons of the national preparatory measure, the CJEU has been consistent since the *Branco* ruling that this is possible, provided that the EU measure confirms the preparatory measure adopted by national authorities, which should themselves have issued a sufficiently clear statement of reasons, and that the addressee has been able to take cognisance of the measure.[39]

While this case law solves some of the issues connected to the extent of the duty to give reasons in composite procedures, as with respect for the right to be heard, several doubts still remain: What is the extent of the duty to give reasons if the procedure is reversed and it is the EU authority taking the preparatory measure? To what extent should national preparatory measures be subject to a duty to give reasons? What about composite procedures involving more than two steps or two legal systems?

These questions are not only relevant with respect to the decision-making process itself but also for the question of the competent judicial instance when any of those (procedural or substantive) fundamental rights are violated. It is to this question that the chapter now turns.

13.3 FINDING THE COMPETENT COURT IN COMPOSITE PROCEDURES: MISSION IMPOSSIBLE?[40]

13.3.1 *The Separation of Jurisdiction as the Cornerstone of the European Judicial Architecture*

As the examples presented above have shown, the variegated universe of composite procedures, as the regulatory manifestation of the increasingly intense cooperation between national and European authorities for the implementation of EU law, are present in virtually all EU policy fields. Despite their capacity to violate fundamental rights protected by the EU legal order, the

[38] Case C-64/05 P *Sweden v Commission*, [2007] ECLI:EU:C:2007:802.

[39] Case T-85/94 *Branco I* [1995] ECLI:EU:T:1995:4. See, for later case law, e.g., Case T-199/99 *Sgaravatti v Commission* [2002] ECLI:EU:T:2002:228; Case T-241/00 *Azienda Agricola "Le Canne" Srl v Commission* [2002] ECLI:EU:T:2002:57; Case T-182/96 *Partex v Commission* [1999] ECLI:EU:T:1999:171.

[40] The arguments made in this section draw from the author's earlier work, and in particular Eliantonio, 'Access to Justice in Composite Procedures for the Implementation of EU Law: The Story so Far' (n 2).

current judicial framework seems ill-suited to cater for their comprehensive judicial control.

This is because of the traditional approach to the judicial review of administrative action, which is based on the principle of territoriality. On this basis, the jurisdiction of courts is limited to the review of the administrative action stemming from the authorities belonging to the domestic legal system. This approach would make judicial review of a national court on an EU measure, or vice versa of the CJEU on a measure adopted by a national authority, in principle, impossible.

This strict separation of judicial control of administrative action (with the only avenue of procedural integration represented by the preliminary question of validity under Article 267 TFEU,[41] see Chapter 4) creates difficulties in access to justice. These are likely to arise for two main reasons. First, because the actions of the several national and EU authorities participating in a composite procedure might be so intertwined that it could be difficult to trace the contribution of each authority in the process and, consequently, the attributability of a conduct to a specific level of administrative governance. Second, because, even if an action could be 'isolated' and attributed to a specific administrative authority, the several preliminary steps leading to a final decision within a composite procedure might not be reviewable in any legal system. They might not constitute a reviewable act in the legal system to which these steps, acts, or actions belong (in light of their preparatory nature), and, at the same time, they might not be subject to judicial control in the court of the legal system adopting the final decision because of the limitations generated by the principle of territoriality. In Section 13.3.2, the access to justice issues arising from composite procedures entailing factual conduct will be examined. As Section 13.3.2 will show, these issues mostly revolve around the question of attributability of a conduct to a specific level of governance. Section 13.3.3 will then consider the case law of the Court of Justice concerning procedures of a decisional nature. This division mirrors the distinction made in Section 13.2 and is warranted by the different problems arising from these two types of vertical composite procedure. Section 13.3.3 will show that the CJEU has been asked on a number of occasions to determine the extent of its own jurisdiction as well of that of the national courts in composite procedures. However, many questions are still left unanswered and possible gaps in judicial protection might persist.

[41] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47.

13.3.2 *Factual Action in Composite Procedures and the Problem of Attributability*

As introduced in Section 13.2, composite procedures can entail a variety of actions of a factual nature, such as the removal of individuals from the EU territory, the carrying out of interviews, the seizing of documents, and the like. When these acts are carried out in the context of composite procedures, and in particular when the factual action is itself cooperative in nature, it is very difficult to attribute a specific conduct to one or other administrative authority. If, for example, a national inspector and an inspector of the European Central Bank, working together in the so-called Joint Inspection Teams, perform a number of actions on the premises of a financial institution, the actions will be so intertwined as to render attributability of conduct to the national or European level of governance next to impossible.[42]

If this problem is solved and disentangling the EU action from the national action is somehow possible, access to justice will nevertheless not be fully ensured per se in cases of fundamental rights violations.

Where the procedure is concluded with a national measure, the national competent court will be able to send a question concerning the validity of the EU conduct to the CJEU. The latter is, according to its *Foto-Frost* ruling,[43] the sole judicial authority in the case of doubt on the validity of acts or actions stemming from an EU authority, able to control it. Furthermore, according to the *Grimaldi* ruling, preliminary questions of validity are admitted with respect to all measures of EU law.[44] Hence, for a factual action of an EU authority, the preliminary question of validity seems to be available.[45]

However, even in this – seemingly easy – case, the fact that the use of the preliminary question of validity presupposes the capacity of the national court to 'discern' the EU contribution to the national measure might place the

[42] On this, see Laura Vissink, *Effective Legal Protection in Banking Supervision* (Europa Law 2021), esp. ch 5. For similar problems raised by the 'hotspots', see Agostina Pirrello, 'The European Union Agency for Asylum: legal remedies and national articulations in composite border procedures' (forthcoming 2024) European Law Journal; similar considerations are expressed in Salvo Nicolosi, 'Frontex and Migrants' Access to Justice: Drifting Effective Judicial Protection?' (Verfassungsblog, 7 September 2022) <https://verfassungsblog.de/frontex-and-migrants-access-to-justice/>; see also Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018) 97–141, 232–274.

[43] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452.

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

[45] For the same conclusion, see De Bellis, 'Multi-level Administration, Inspections and Fundamental Rights: Is Judicial Protection Full and Effective?' (n 11) 436.

national court in a conundrum: Should it – in doubt concerning the attributability of conduct to the EU authority – send a preliminary question of validity, even though the contribution of the EU administrative authority might not be discernible (incurring a risk of the preliminary question being declared inadmissible), or should it accept the indiscernibility of EU and national action and review the measure, possibly in breach of its *Foto-Frost* obligation?

Furthermore, if the procedure concludes with an EU measure, the competent EU court will be faced with the lack of a 'reverse' preliminary ruling, whereby the CJEU could ask a national court to review the validity of the factual conduct of a national authority.[46] In this situation, the applicant might need to access a national court to have the conduct of the national authorities reviewed. However, whether this claim will be admissible remains to be seen, and it is equally not clear whether the case law concerning composite procedures concluded with an EU measure and entailing 'formalised' preliminary national measures (i.e., the *Borelli/Berlusconi* line of case law examined in Section 13.3.3) can also be applied when factual conduct is at stake.

13.3.3 *Composite Procedures, Discretion, and the Quest for the Competent Court*

For the myriads of composite procedures where no factual conduct is involved, and the preliminary measures adopted by the competent national and EU authorities materialise in more 'formalised' measures (such as an opinion, a plan, an objection, etc.), it is again helpful to differentiate the situations in which the final measure of the decision-making process is adopted by the national or the EU level of administration.

As in the scenarios discussed above with respect to factual conduct, in the case of a composite procedure concluded by a national measure, the preliminary measures of the EU authorities can be challenged through a preliminary question of validity under Article 267 TFEU. For the opposite situation, when a composite procedure ends with an EU measure, the hurdle to access to justice arises from the combined absence of a 'reverse' preliminary ruling and the preliminary nature of national measures, which would, in most legal systems, lead to the inadmissibility of a claim against these measures.

[46] For a thorough discussion on how the introduction of such a mechanism would solve the gaps in judicial protection in such situations, see Torben Ellerbrok, 'Das umgekehrte Vorabentscheidungsverfahren als Schlussstein im europäischen Rechtsschutzverbund' (2022) 113 Verwaltungsarchiv 202.

In order to ensure access to justice in these situations, the Court has intervened with two landmark rulings that require national preliminary measures to be either autonomously reviewed before the national courts or to be reviewed by the CJEU in the context of a claim against the final EU measure. The first solution was proposed in the *Borelli* ruling, in which the Court held first that it was not entitled to review acts of national authorities but also, second, that national courts had to admit claims against national preparatory measures, regardless of the limitation posed to that review by the applicable national procedural rules.[47] After *Borelli*, the same approach was repeated in a number of cases relating to the field of protected denomination of origins and geographical indications under the applicable EU legislation. In these cases, the Court confirmed, on the basis of *Borelli*, that national preparatory measures should be reviewed by national courts but only when such a measure 'constitutes a necessary step in the procedure for the adoption of a[n] [EU] measure, [and in regard to which] the [EU] institutions have only a limited or non-existent discretion'.[48]

The solution envisaged in *Borelli* therefore only applies if the EU authorities adopting the final measure retain little or no margin of discretion vis-à-vis the preparatory national measure. If, instead, the EU authority retains a margin of discretion in respect of the final measure to be issued vis-à-vis the preparatory measure of the national authorities, the system of judicial protection afforded in such cases is the one proposed by the *Berlusconi* ruling. In this case, the Court ruled that, for composite procedures where the final decision-making power lies with the EU authorities, the CJEU has jurisdiction to review the entirety of the decision-making chain, including its national component.[49] Advocating a form of 'integrated' judicial review, the CJEU has, at the same time, and in an established line of case law (though limited to date to the banking sector), stripped national courts of their jurisdiction to review certain national preparatory measures that are part of composite procedures.[50]

[47] See, for an extensive discussion of this case law and its implication for EU administrative law, Filipe Brito Bastos, 'The *Borelli* Doctrine revisited: three issues of coherence in a landmark ruling for EU administrative justice' (2015) 8 Review of European Administrative law 269.

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

[49] *Berlusconi and Fininvest* (n 4).

[50] E.g., Case T-698/16 *Trasta Komercbanka and Others v ECB* [2022] ECLI:EU:T:2022:737; Case T-330/19 *PNB Banka AS* [2022] ECLI:EU:T:2022:775; Cases T-351/18 and T-584/18 *Ukrselhosprom PCF LLC and Versobank AS, established in Tallinn (Estonia) v European Central Bank (ECB)* [2021] ECLI:EU:T:2021:669. See also the Opinion of AG Kokott in Cases C-750/21 P and C-256/22 P *Pilatus Bank plc v ECB* [2023] ECLI:EU:C:2023:431, in

The combined reading of *Borelli* and *Berlusconi* entails that the determining criterion to vest national courts with the jurisdiction (and the duty) to review national preparatory measures is that of the margin of discretion afforded to the final EU decision-maker.[51]

However, the criterion established by the CJEU, based on the margin of discretion afforded to the final EU decision-maker is not without difficulties for those who need to apply it. In *Berlusconi*, the CJEU uses the notion of 'discretion' to refer to the margin of manoeuvre of the EU authorities to decide on the *content* of a decision (as opposed to a situation in which this content is pre-determined by the content of the national preparatory measure). However, the notion of discretion can also relate, for example, to the question of *whether* to exercise a power or to *which form* a decision can take. Furthermore, discretion can relate to policy choices but also the assessment of facts.[52] This somewhat oversimplified view of discretion is not realistic in light of the variety of legislative scenarios through which composite procedures can be generated. It is also liable to generate further preliminary references and legal uncertainty: Who is to assess whether the legal framework is such to grant 'exclusive jurisdiction' to the CJEU or conversely whether a national court must be seized of the review of a preliminary measure? *Quid iuris* of time limits if the CJEU eventually decides that the preliminary measure needs to be reviewed by the national courts?

The *Borelli* and *Berlusconi* rulings also leave a number of further questions unanswered. In particular, the solution proposed by the *Borelli* ruling still remains unclear from a practical point of view and has only been partially clarified by the *Jeanningros* ruling.[53] Indeed, while the obligation for national

which the AG reiterates this point in connection with the infringement of the right to be heard by a national preparatory measure.

[51] For a discussion of the coherence between Borelli and Berlusconi, see Brito Bastos 'Derivative Illegality in the European Composite Administrative Procedures' (n 3) 110–113, who argues that in *Borelli* a number of constitutional arguments speak against the possibility of derivative illegality (i.e., the capacity of national measures to contaminate final EU measures), which in turn limits the possibility to 'centralise' judicial control in the hands of the CJEU over the entirety of the process. See also Paul Dermine and Mariolina Eliantonio, 'Case Note: CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)' (2019) 12 Review of European Administrative Law 237.

[52] Herwig C H Hofmann, 'Multi-Jurisdictional Composite Procedures. The Backbone to the EU's Single Regulatory Space' (2019) 3 University of Luxembourg Law Working Paper Series 12.

[53] *Jeanningros* (n 4).

courts to review national preparatory measures binding on the EU authority taking the final decision was clear after *Borelli*, the question remained open as to what would happen if a final decision is taken by the Union administration before the national court has had the opportunity to review the binding national preparatory act upon which it is based.

In *Jeanningros*, the Court clarified that, on the one hand, any pending proceedings against the national preparatory act should continue and, on the other, a national ruling holding that act invalid should lead the EU authority to revoke a decision taken on that basis (upon the assumption that the time limits under Article 263 would be long expired). While this confirms for potential applicants that the national route must remain open even when the EU authority has taken a final decision, it still does not clarify the remedies at their disposal if the Commission were to refuse to or simply does not revoke its final measure after the national proceedings are concluded. Is an action for failure to act under Article 265 TFEU then open to applicants? Given the lack of formalised communication channels between national courts and the Commission, what if the Commission is simply unaware of the fact that the relevant national proceedings are concluded?[54]

If one considers specifically the *Berlusconi* scenario, the review of the national measure permitted by the CJEU seems to be limited to errors of EU law, to the exclusion, therefore, of flaws in the national preparatory act based on domestic procedural law.[55] A different solution would entail the CJEU applying national law and would make the determination of the validity of an EU measure indirectly dependent on varying national procedural arrangements. However, the exclusion from the scope of judicial control of these national preparatory measures of errors stemming from national law inevitably creates what has been referred to as an 'administrative crack in the EU's rule of law'.[56]

Furthermore, it is unclear how the combined reading of *Borelli* and *Berlusconi* can be applied in composite procedures that entail more than two steps. This difficulty is exemplified in the *Association Greenpeace France* ruling, which concerned the authorisation scheme in the field of

[54] See, on these points, Filipe Brito Bastos 'Judicial Annulment of National Preparatory Acts and the Effects on Final Union Administrative Decisions: Comments on the Judgment of 29 January 2020, Case C-785/18 Jeanningros, EU:C:2020:46' (2021) 14(2) Review of European Administrative Law 109, 115 et seq.

[55] Dermine and Eliantonio, 'Case Note: CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17' (n 51) 249–250.

[56] Filipe Brito Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law' (2020) 16 European Constitutional Law Review 63.

GMOs.[57] In this case, the applicant complained that the actions of the national authority where the procedure had started were irregular and therefore rendered the final Commission decision irregular. The Court could thus still implicitly rely on the *Borelli* ruling and find that national courts are competent for the review of that preliminary national measure.[58] However, it is not clear which would be the competent court to review the input of *another* national authority in the process (e.g., in the form of an objection to the assessment made by the first authority).

A separate and final reflection should be dedicated to the emerging case law concerning a special type of composite procedure that is based on information sharing between the EU and national authorities, such as in the above-mentioned cases of the SIS and RAPEX databases.[59] The *Borelli* and *Berlusconi* cases do not seem to fit the schemes of composite procedures in these scenarios as the final decision-making process does not lie with the EU level, and the existence of the preliminary question of validity does not solve the problem of access to justice. This is because these procedures involve the EU authorities and more than one national authority: they are thus 'triangular' in nature in that they are started at one national level, with an intermediate participation of the EU authorities, and concluded at another national level.

The case law in this framework is rather limited and leaves many questions unanswered. Two cases, *Malagutti*[60] and *Bowland*,[61] dismissing an action for damages against the EU for sharing allegedly incorrect information (on the basis of which national measures had been adopted), seem to indicate that, according to the CJEU, the EU action within these systems is limited to 'passing on' the information, which remains within the full responsibility of the Member State that shared the information in the first place. The 'triangularity' in these procedures seems therefore, according to this case law, merely formal.

[57] Case C-6/99 *Association Greenpeace France and Others v Ministère de l'Agriculture et de la Pêche and Others* [1999] ECLI:EU:C:1999:587.

[58] On the point of the coherence between *Borelli* and *Greenpeace*, see Filipe Brito Bastos, 'The *Borelli* Doctrine revisited: three issues of coherence in a landmark ruling for EU administrative justice' (2015) 8 Review of European Administrative law 269, 277 et seq.

[59] See further on this point, Demková, *Automated Decision-Making and Effective Remedies* (n 17); Benjamin Jan, 'Safeguarding the Right to an Effective Remedy in Algorithmic Multi-Governance Systems: An Inquiry in Artificial Intelligence-Powered Informational Cooperation in the EU Administrative Space' (2023) 16 Review of European Administrative Law 9; Niovi Vavoula 'Information Sharing in the Dublin System: Remedies for Asylum Seekers In-Between Gaps in Judicial Protection and Interstate Trust' (n 19).

[60] Case T-177/02 *Malagutti-Vezinhet v Commission* [2004] ECLI:EU:T:2004:72.

[61] Case T-212/06 *Bowland Dairy Products v Commission* [2009] ECLI:EU:T:2009:419.

If these procedures are then to be considered horizontal *in substance*, where can or should national preparatory measures in these cases be reviewed? The recent *Funke* ruling seems to indicate that preparatory measures in which the information is shared (in this case, within the RAPEX system) must at least be open to judicial control in the legal system where the measure was taken.[62] However, in this case, there had not yet been any national measure taken after the alert was shared by the Commission to the Member States. If a subsequent national measure (e.g., determining that a product be banned from the market) is taken by the authority of another Member State, should an applicant initiate two separate proceedings in the course of both legal systems involved in the procedure?[63]

13.4 CONCLUSIONS

This contribution has sought to examine the question of the availability of a sufficient system of remedies against fundamental rights violations possibly occurring in the context of the so-called vertical composite procedures, that is, administrative decision-making processes in which national and EU authorities collaborate in the implementation of EU law.

The chapter has shown, first, that the complex web of interactions between national and EU administrative levels, intervening at different moments of administrative procedures, taking a variety of – more or less formalised – forms is capable of affecting a number of EU fundamental rights, both substantive and procedural in nature. In this context, further research should examine the universe of composite procedures, by discovering possible common patterns and notable differences.[64]

Second, the contribution has demonstrated that procedural integration at the level of the decision-making sits uncomfortably with the traditional approach to the judicial review of administrative action, which is based on the principle of territoriality and on the separation of jurisdictions between national and EU courts. As a consequence, there may well be situations in which private parties might be denied the right to challenge acts emanating from composite procedures.

This is notably the case in composite procedures including factual conduct for which it might be extremely difficult to attribute conduct to a specific level

[62] Case C-626/21 *Funke Sp. z o.o. v Landespolizeidirektion Wien* [2023] ECLI:EU:C:2023:412.

[63] Further on this, see Eliantonio, 'Information Exchange in European Administrative Law: A Threat to Effective Judicial Protection?' (n 16).

[64] For an attempt, see Emilie Chevalier, Mariolina Eliantonio, and Rui Lanceiro, *Administrative Cooperation in the European Space* (Bruylant, forthcoming 2024).

of governance. However, even where the contribution of national and EU authorities materialises in more 'formalised' measure, the patchwork solution currently in place through the preliminary question of validity, on the one hand, and the combined reading of *Borelli* and *Berlusconi*, on the other hand, leaves many questions unanswered and possible gaps in judicial protection open. Even more questions seem to arise in the increasingly more frequent composite procedures entailing the sharing of data between national and EU authorities.

Already since the *Les Verts* ruling, the CJEU has held that the EU is 'based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.[65] This statement is embodied in Article 47 of the Charter guaranteeing the right to an effective remedy. The picture described above with respect to access to justice in composite procedures shows that this right does not seem currently to be fully ensured. Further research should be devoted to a comparative analysis of national case law where composite procedures have been at stake, to assess whether and to what extent the *Borelli* and *Berlusconi* rulings have been correctly understood and applied at the national level.

While several gaps in access to justice within composite procedures seem to persist, and the CJEU has failed to clarify a number of essential aspects of judicial review in this respect, there are also structural shortcomings that ought to be mentioned. In the absence of a 'reverse' preliminary question, which admittedly is not for the CJEU to create, the Court was unable to tackle some of the fundamental shortcomings of access to justice in composite procedures. It is therefore to be hoped that a fundamental reconsideration of how to ensure access to justice in an increasingly 'integrated' administration will soon be placed on the agenda of the EU legislator. This reconsideration would not only require that sufficient multi-level procedural mechanisms are in place, such as the creation of the above-mentioned system of 'reverse' preliminary questions, but also ideally a truly integrated system of judicial control whereby one judicial instance (in a straightforward fashion the one currently controlling the act which concludes a composite procedure) would be empowered to review the entirety of the decisional chain.[66]

[65] Case C-294/83 *Les Verts v Parliament* [1986] ECLI:EU:C:1986:166, para 23.
[66] Mariolina Eliantonio, 'Judicial Review in an Integrated Administration' (n 3).