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Effective Judicial Protection in an Integrated Administration: the case of 'composite procedures'

1. Introduction

'[M]aintaining legality and effective supervision of composite procedures is a challenging task in the face of this ever-evolving network structure'[1]

The right to an effective judicial protection is a fundamental right recognised at international level as well as by many national legal orders, and an essential element of democratic accountability and a corollary to the rule of law. This right refers to a broad concept which generally encompasses various core elements, including access to justice, the right to an effective remedy and the principles of fair trial.

On EU level, the right to an effective judicial protection is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and has long been recognised by the Court of Justice as general principle of EU law, underlying the constitutional traditions common to the Member States and laid down in Articles 6 and 13 of the European Convention for the protection of human rights and fundamental freedoms.[2] Furthermore, because of the decentralised system of remedies, based on the complementary cooperation of the Court of Justice and the national courts, the Court of Justice,[3] and currently also Article 19 TEU, dictate the principle to be followed also by national courts, who have an obligation to construe national remedies so as to provide effective judicial protection to claims based under European law.

The respect of this principle, however, is being put under pressure by the emergence of what has been defined as an 'integrated administration' or 'administrative Union' ('*Verwaltungsverbund*'), a concept designating the progressive interlinkage of national and European administrations with the aim of putting European policies into effect. The aim of this paper is to show how the operation of the *Verwaltungsverbund* may pose a threat for the principle of effective judicial protection, because administrative decision-making procedures are organized in a non-hierarchical structure, with different actors, participating at different stages and with different intensities, and employing instruments of an informal nature, while

[1] Herwig C.H. Hofmann 'Decisionmaking in EU Administrative Law – The Problem of Composite Procedures', *Administrative Law Review* (2009), 221.
[2] Case 222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, ECR [1986] 1651. More recently, see Case C-432/05 Unibet [2007] ECR I-2271; case C-279/09 DEB [2010] ECR I-13849.
[3] The seminal judgements where this principle was first established are case 33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland [1976] ECR 1989 and case C-45/76 Comet BV v Produktschap voor Siergewassen [1976] ECR 2043.

the mechanisms of supervision and enforcement are still anchored to the traditional two-level (i.e. national and European) structure. The gaps in judicial protection will be examined using the case study of the 'composite procedures' i.e. decision-making processes with input from administrative actors from different jurisdictions and in which the final decision, issued by a Member State or an EU authority, is based on procedures involving the more or less formalized input of the various participating authorities.

First, the context of 'integrated administration' will be provided, together with an account of why this system may pose problems for the traditional notions of judicial accountability. Subsequently, after a categorization of the various composite procedures, the problems connected to the access to court in challenges against measures adopted in the course of the composite procedures will be analyzed. Finally, solutions will be brought forward as to how the identified gaps could be effectively filled in order to ensure respect of the principle of effective judicial protection.

2. From executive federalism to an 'integrated administration'

Traditionally, the schemes for the administrative implementation of European law have been categorized into direct and indirect administration, in accordance with the general framework of executive federalism.[4] Under this model, European law would mainly be implemented by the Member States through their national authorities, while in exceptional cases it would be the European institutions in charge of giving effect to European policies.

Examples of direct administration can be found in Article 105 TFEU which refers to the powers of the Commission in the application of Articles 101 and 102 TFEU concerning anti-trust provisions, Article 106 TFEU which grants the Commission powers concerning the application of this article to public undertakings and Article 108 TFEU concerning State aid cases. In all such cases, there is a Treaty-based guarantee for the prerogatives of the European institutions to implement EU law.[5]

[4] Jurgen Schwarze, European Administrative Law (Sweet and Maxwell, 1992), 25-47; Stefan Kadelbach, 'European Administrative Law and the Law of a Europeanised Administration' in Christian Joerges and Renaud Dehousse (Eds.) *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002), 167; Jacques Ziller, Introduction – Les concepts d'administration directe, d'administration indirecte et de coadministration et les fondements du droit administratif europeen' in Jean-Bernard Auby et Jacqueline Dutheil de la Rochere (Eds.) *Traité de Droit Administratif Europeen* (Bruylant, 2014), 327 ff.

[5] Edoardo Chiti, 'The Administrative Implementation of European Union Law: a Taxonomy and its Implications' in Herwig C.H. Hofmann and Alexander H. Türk (Eds), *Legal Challenges in EU Administrative Law* (Elgar, 2009), 26.

However, given the limited resources at the disposal of the EU, and also in light of the principle of attributed powers enshrined in Article 5 TEU, the instances of direct administration are the exception to the rule, namely the implementation of EU policies through the national administrative authorities.[6] The model of indirect administration originates, therefore, from a separation in terms of competence between abstract law-making, enacted at the European law, and execution taking place at national level. This model also assumes that all national administrations operate autonomously one from the other.[7] In cases of indirect administration, moreover, national administration operate within their already existing organizational and procedural forms, subject to the requirements set in EU sectorial secondary legislation[8] and the principles of equivalence, effectiveness and effective judicial protection.

Depicting in this way the current models of implementation of EU law, would, however, hardly do justice to its complexity and would, in particular, ignore the fact that increasingly more and more forms of cooperation have been set up across the different administrative levels.[9] As has been argued, 'it is difficult to identify an area of administrative activity in the EU which is purely either direct or indirect administration'.[10]

In particular, in the past years, several procedures have been set up in order to set in place mechanisms so as to enable cooperation in administering the different policy fields between EU institutions and Member States and amongst Member States themselves, to such an extent that it has been argued that nowadays a 'relatively homogenous organizational phenomenon has emerged'.[11] This system has been described as one of 'integrated administration', in order to convey the idea that supranational and national institutions cooperate and are linked

[6] Claudio Franchini, 'Le notions d'administration indirecte et de coadministration' in Jean-Bernard Auby et Jacqueline Dutheil de la Rochere (Eds.) *Traité de Droit Administratif Europeen*, 336.
[7] Edoardo Chiti, 'The Administrative Implementation of European Union Law: a Taxonomy and its Implications', 13.
[8] E.g. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23, Art. 17-19; Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17, Art. 10a.
[9] Hofmann claims that 'this model has always been a simplification of reality'. Herwig C.H. Hofmann, 'Composite decision making procedures in EU administrative law', in Herwig C.H. Hofmann and Alexander H. Türk (Eds), *Legal Challenges in EU Administrative Law* (Elgar, 2009), 137. The inadequacy of the dichotomy between direct and indirect administration had already been put in question in 2006 in Herwig C.H. Hofmann and Alexander H. Türk, 'An introduction to EU administrative governance' in Herwig C.H. Hofmann and Alexander H. Türk (eds.), *EU administrative governance* (Elgar, 2006), 3.
[10] Herwig C.H. Hofmann and Alexander H. Türk, 'Conclusions: Europe's integrated administration' in Herwig C.H. Hofmann and Alexander H. Türk (eds.), *EU administrative governance*, 582.
[11] Ibid., 580.

together in the process of implementation of European law.[12] In this sense, one could argue that the European integrated administration is neither a typical federal administration nor that of an international organization, 'it is a system of integrated levels'.[13] Because of its 'integrated nature', this system of administration has also been defined as the 'EU administrative network', which refers, borrowing the term of from political science' to a structure in which the elements are loosely linked to each other, but they remain autonomous from each other and they are not placed in a hierarchical structure.[14] Similarly, the term '*Verwaltungsverbund*', 'administrative Union, has been used, in order to emphasize its aspect of linkage of different, but coordinated levels.[15]

All of these novel structures have contributed to create what has been referred to an a 'European administrative space', defined as an 'area in which increasingly integrated administrations jointly exercise power delegated to the EU in a system of shared sovereignty'.[16] The legal basis for these new forms of cooperation is to be found in Article 4(3) TEU, which makes clear that the fulfillment of EU tasks is not entrusted to one centralized administration. Furthermore, as it has been convincingly argued, a correct interpretation of Article 4(3) TEU, through the express reference to the concept of 'cooperation', specifically hints at the fact that the EU administration is in fact an integrated one.[17]

These novel structures of EU administrative governance have not been created in a systematic way and are not the byproduct of a comprehensive plan for the implementation of EU law, but have rather been created out of specific needs in a rather evolutionary fashion.[18] Türk and Hofmann note that, as regards their legal basis, some of the new forms of governance have their basis in the Treaty or in secondary legislation, while others have an informal nature and are based on soft law, or they were born in an informal way and were later codified.[19] What they all have in common, however, is the departure from the traditional view of administrative implementation of EU law.

[12] Ibid., 583.
[13] Ibid., 583.
[14] Herwig C.H. Hofmann and Alexander H. Türk, 'An introduction to EU administrative governance' in Herwig C.H. Hofmann and Alexander H. Türk (eds.), *EU administrative governance*, 3.
[15] Eberhard Schmidt-Aßmann, 'Introduction' in Oswald Jansen and Bettina Schöndorf-Haubold (eds.), The European Composite Administration (Intersentia, 2011), 6-8.
[16] Herwig C.H. Hofmann, 'Mapping the European Administrative Space', *West European Politics* (2008) 671.
[17] Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union* (Oxford University Presss, 2011), 59.
[18] Herwig C.H. Hofmann and Alexander H. Türk, 'Conclusions: Europe's integrated administration' in Herwig C.H. Hofmann and Alexander H. Türk (eds.), *EU administrative governance*, 584.
[19] Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union*, 263.

3. Challenging accountability in the system of 'integrated administration'

While these developments have signified the departure from the tradition dichotomy between direct and indirect administration, these novel structures give rise to many legal problems with regard to 'questions of governance that are unique to the project of European integration'.[20] These questions concern mostly the supervision of administrative action.[21]

As is well known, one of the foundations of the rule of law is the possibility to challenge the actions of the administration before a court. However, since most of the activities in the system of integrated administration do not follow a clear hierarchical nature, the responsibility for a certain action may be shared between different actors and at different levels. As has been argued 'some of the central challenges for national and European administrative law now involve controlling heterarchical structures'[22] i.e. situations in which administrations take their final decisions on the basis of input from different administrative authorities operating in various national legal systems as well as the EU legal system.

Controlling the operation of the EU integrated administration poses a significant challenge because the system of legal protection is based on a strictly dualistic approach, in the sense that measures of the EU legal system fall under the jurisdiction of the CJEU solely, while measures of national authorities would fall under the jurisdiction of the courts competent according to the rules of the legal system from which the challenged measure originates. Seen from a traditional point view of executive federalism, this system would imply that, in cases of indirect execution, private parties should be able to challenge national implementation measures before national courts (and there also possibly challenge the validity of the enabling European measure under the preliminary ruling procedure contained in Article 267 TFEU). Where instead the execution of EU law would be entrusted to the Commission, private parties would be give access to the European courts following the procedure of the action for annulment contained in Article 263 TFEU.[23]

This division of tasks is being put under challenge by the system of integrated administration, because administrative decision-making procedures are more and more often organized in a non-hierarchical structure, with different actors, participating at different stages and with

[20] Herwig C.H. Hofmann and Alexander H. Türk 'An introduction to EU administrative governance', 4.
[21] See also on this point, concerning agencies and comitology committees Deirdre Curtin, 'Holding (Quasi-) Autonomous EU Administrative Actors to Public Account, European Law Journal', (2007) *European Law Review*, 523-541.
[22] Herwig C.H. Hofmann and Alexander H. Türk, 'Conclusions: Europe's integrated administration', 580.
[23] For a comprehensive introduction to both of these procedures and the system of judicial protection in the EU legal system, see Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (Fifth Edition, 2011, Oxford University Press).

different intensities, and employing instruments of an informal nature. This may pose problems of access to court and, consequently, endanger the principle of effective judicial protection. In the following, one of the manifestations of the systems of integrated administrative, namely the 'composite procedures', will be analysed and the gaps of judicial protection arising from their operation will be identified.

4. Composite procedures: definition and categorization

4.1. What are composite procedures?

As mentioned in the introduction, the focus of this paper will be on one specific structure operating according to the system of integrated administration, namely that of the composite procedures.[24] These have been defined as procedures entailing the input from administrative actors from different jurisdictions, and in which the final decision, issued by a Member State or a EU authority, is based on procedures involving the more or less formalized input of the various participating authorities.[25] While there is not one agreed or official definition of shared administration, the phenomenon boils down to the interdependence of national and EU authorities in the process of carrying out their administrative functions for the purposes of implementing EU law.

Therefore, the composite procedures should be distinguished from the systems of direct or indirect administration, since in the latter the administrative action is carried out either solely at national level (while the EU level limits itself to the abstract and general rule-making), or solely at EU level without involvement of national administrative authorities. In the composite procedures, instead, administrative decision-making is carried out at both national and European level.

This definition also serves to distinguish composite procedures from other types of similar procedures, such as linked and complex proceedings.[26]

While useful for the purposes of distinguishing the system of composite procedures from other related mechanisms, the definition provided above, because of its general nature, lacks comprehensive explanatory value. In order to understand the true operation of the composite procedures, in lack of an own legal framework, it is therefore necessary to look into the

[24] These procedures have also referred to as 'mixed administrative proceedings'. Giacinto Della Cananea, 'The European Union's Mixed Administrative Proceedings', *Law and Contemporary Problems* (2004), 197.
[25] Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union*, 406.
[26] Giacinto Della Cananea, 'The European Union's Mixed Administrative Proceedings', 210-211.

specific legal and administrative arrangements of the policy fields concerned and attempt at proceeding to a categorization of the different procedures.

4.2. Possible categorizations of the composite procedures

There are have been attempts to categorize these arrangements; as it has been suggested, however, this exercise is 'fraught with considerable complexity',[27] highlighted by the lack of a harmonized approach throughout the policy fields.[28] As of today, it can certainly be argued, as it has been by Türk and Hofmann, that '[t]he terminology used in the nascent field of EU administrative law is not yet established'.[29]

In very general terms, and from a functional point of view, it has been argued that composite procedures could be categorized from either the point of view of the *substance* of the procedure, or from that of the *level of authority* taking the final administrative decision.[30] To these two criteria, a third one concerning the *type of authorities* involved in the decision-making has been added by the doctrine. For the purposes of a comprehensive analysis, it is submitted that a fourth categorization based on the *steps* of the procedure would be useful.

4.2.1. The authority taking the final decision

A basic categorization of the composite procedures departs from the determining criterion of which authority takes the final decision in the administrative decision-making proceedings.[31] Composite procedures necessarily entail the participation of multiple authorities, belonging to the national or the European system of administration. At the end of the decision-making process, there are two possible options: either the final measure is taken by a national authority (and may have effect beyond its national territory) or a by European authority. From this perspective, all other activities, whether stemming from a national or a European authority, are of preparatory nature in the decision-making process.

4.2.2. The substance of the procedure

The second categorization criterion focuses on the activities which are preparatory to the decision-making process. These can be of various types, but can roughly be distinguished into

[27] Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union*, 15.
[28] Ibid,, 15.
[29] Herwig C.H. Hofmann and Alexander H. Türk, 'Legal Challenges in EU administrative law by the move to an integrated administration' in Herwig C.H. Hofmann and Alexander H. Türk (Eds), *Legal Challenges in EU Administrative Law* (Elgar, 2009), 358.
[30] Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union*, 16.
[31] Giacinto Della Cananea, 'The European Union's Mixed Administrative Proceedings', *Law and Contemporary Problems* (2004), 197-218; Edoardo Chiti, 'The Administrative Implementation of European Union Law: a Taxonomy and its Implications', 9-33.

two main forms: information and decision. The scholars who have set up the first type of categorization, by looking mostly at the type and forms of information sharing, have come to the conclusion that administrative cooperation in information sharing could range from an *ad hoc* single-case information exchange to structured procedures involving constant streams of information, both vertically – between the EU and the Member States – and horizontally – between the Member States themselves (with or without a role assigned to the European institutions).[32] The exchange can consist of the submission of information, the provision of a document or even the request of an inspection.[33]

Apart from the participation of national or European authorities in the decision-making process consisting in the (ad-hoc or continuous) submission of information, another type of cooperation between national and European authorities can take the form of a more 'institutionalised' decision. In other words, an administrative authority contributes in the decision-making not by sharing or providing information, but by adopting a measure in the form of e.g. an opinion, or also a binding measure such as Commission Regulation.

4.2.3. The types of authority involved

A third categorization is still based on the authorities relevant for the procedures, but looks and categorizes the procedures from the perspective of the type of authorities involved at all stages of the procedure, rather than at the level of authority taking the final decision.[34] This type of taxonomy shows that the different forms of cooperation may range from a stable cooperation between the Member States with no or very limited European coordination to a fully-fledged 'European common system coordinated by the Commission'.[35]

4.2.4. The steps of the procedure

A fourth categorization could be carried out on the basis of the steps in the decision-making procedure. The participation of the different authorities may take multiple shapes, depending on the applicable legislation. The simplest model of composite procedure involves only two steps, with a preparatory activity carried out by a national authority and a final measure being taken at the European level, or vice versa, as depicted below.

[32] Eberhard Schmidt-Aßmann, 'Verwaltungskooperation under Verwaltungskooperationsrecht in der Europäischen Gemeinschaft', *Europarecht* (1996), 270; Eberhard Schmidt-Aßmann, 'Introduction', 6 and ff. See also Jens-Peter Schneider, 'Basic Structures of Information Management in the European Administrative Union' *European Public Law* (2014) 89–106.
[33] Florian Wettner, 'The General Law of Procedure of EC Mutual Administrative Assistance' in Oswald Jansen and Bettina Schöndorf-Haubold (eds.), *The European Composite Administration*, 307-334.
[34] Edoardo Chiti, 'The Administrative Implementation of European Union Law: a Taxonomy and its Implications', 14 and ff.
[35] Ibid., 25.

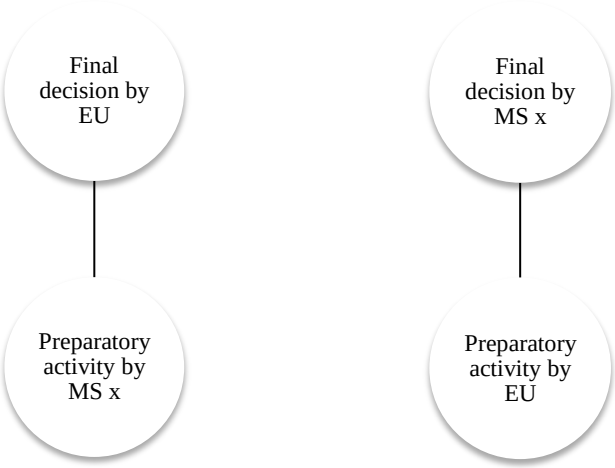

Figure 1: double-step composite procedures

An example of the first type of proceedings depicted in figure 1 is in the context of the management of certain types of subsidies in the agricultural sector. According to the applicable legislation,[36] the application for financing (e.g. for olive oil market) must be made to the national competent authorities, which conduct an initial examination of the application. They form an opinion, which is sent to the Commission, which adopts a decision containing a list of fundable projects.

An example of the proceedings with the final decision being taken at the national level can also be found in the area of awarding of funds. Typically, in such situations, there is a basic Regulation adopted by the Council, and the Commission is then empowered to implement these rules. The funds are awarded by the Commission to the Member States, who are made responsible for receiving applications, giving money to applicants where the conditions are met and possibly request reimbursement from the Commission.[37]

A second, more complex type of procedure, could be characterized as a 'back and forth' flow of activities, which start and end at national level and involve the participation of the European authorities only at the intermediate level.

[36] See e.g. Council Regulation No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2003] OJ L 270/1.
[37] See e.g. Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector [2001] OJ L 178/1–45.

Figure 2: 'back and forth' composite procedures

An example of this procedure is the designation of the protected areas in the context of the Habitats Directive,[38] according to which, first, each Member State is obliged to propose a list of ecological sites, which are, in the opinion of the Member State, of Community importance. That list has to be transmitted to the Commission, which adopt a list of sites selected as sites of Community importance. Finally, Member States are obliged to designate the sites in their territory as 'special areas of conservation'.

More complex than the procedures discussed above are a variety of 'hybrid' proceedings, which entail the participation of national and European authorities at the same time and at different moments of the decision-making, such in the schematic depictions provided and explained below.

[38] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L-206/7.

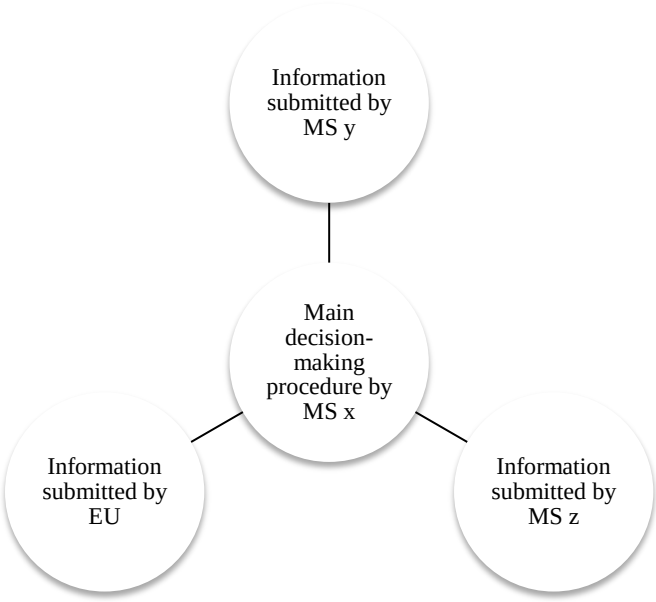

Figure 3: hybrid model 1

In the model depicted in figure 3, the administrative-decision making procedure is carried within one Member State and information is submitted by EU institutions or other Member States. This is the model followed in Council Directive 2001/18 on placing on the market of GMOs,[39] according to which the marketing application must be submitted to the national competent authorities. The decision-making leading to the authorization takes place at the national level, but the Commission and the other Member State may intervene in the process by submitting information.[40]

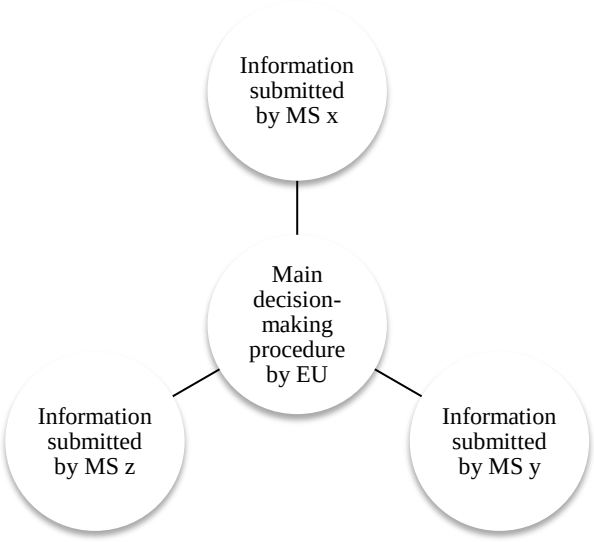

Figure 4: hybrid model 2

[39] Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms [2001] OJ L 106/1.
[40] Please note, however, that if reasoned objections to the marketing authorization are submitted (by either the Commission or another Member State), different procedures than the one examined above will apply.

Conversely with respect to the first hybrid model, in the procedure illustrated above in figure 4, the main decision-making procedure is carried out at the EU level and information is submitted by Member States. This model is used, for example, in the 'centralised procedure' provided in Regulation 726/2004 on the marketing authorization for medicines, where the final authorization decision is taken by the Commission, and the Member States have the chance to submit observations in the course of the decision-making process.[41]

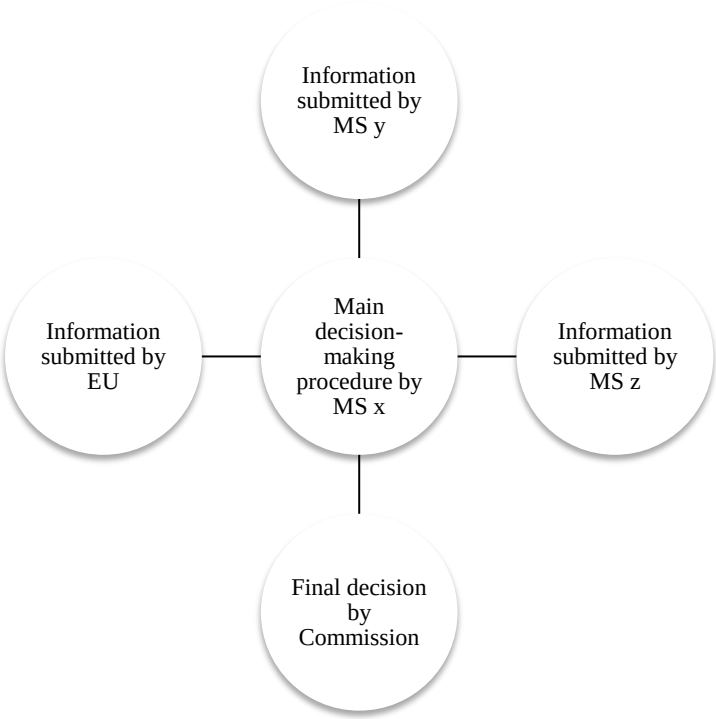

Figure 5: hybrid model 3

Finally, the most complex model is, as provided in figure 5, that in which the administrative decision-making procedure commences in one Member State, which is followed by an input from the EU level or another Member State, while the final decision is taken by the Commission. An example of this model is contained in the procedure arising out of Regulation 258/97 concerning novel foods and novel food ingredients.[42] To market a novel food or ingredient, companies must apply to a EU country authority, which must draw up a safety assessment report, which it has to forward to the Commission (which in turn forwards it to the other Member States), and in which it states whether the product requires an 'additional assessment' (to be carried out at EU level). The Commission and the national authorities have, at that point, the chance to present their objections on the marketing or proposed labeling of the product. Unless the so-called 'simplified procedure' applies (i.e.

[41] Regulation 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 [2004] OJ L 136/1.
[42] Regulation 258/97 concerning novel foods and novel food ingredients [1997] OJ L 43/1.

where no additional assessment was deemed necessary and no objections were submitted),[43] the final decision of approval is then taken by the Commission.

The categorization[44] issues sketched above, pointing to a significant conceptual difficulty, do not only have a theoretical nature, but are closely linked to more substantial issues, namely the transparency and participation issues linked to the proceedings, the efficiency and effectiveness of such multi-level decision-making structures and, finally, the accountability of the actors involved in the decision-making proceedings, which will be the subject matter of the remainder of this paper.

5. The gaps of judicial protection in the system of integrated administration

5.1. Introduction

As mentioned in the introduction, while EU administrative decision-making has abandoned the traditional dichotomy between direct and indirect administration, and is organized in a networked and multi-level system, supervision and accountability are still linked in a two-level system, with separate national and EU levels.

In order to identify the judicial level competent in shared administrative procedures, an orthodox application of the notion of executive federalism and the separation of labour between national and European courts would, therefore, imply that the judicial level responsible corresponds to the administrative level which has adopted the act under challenge. For as far as Member States' participation in the composite procedures are concerned, therefore, it will be national courts which will have jurisdiction, while European measures should be challenged before European courts subject to the applicable European procedural rules.

Once the competent level has been identified, the subsequent problem is understanding for which part of the process the identified judicial instance will have jurisdiction. With regard to this issue, a traditional understanding of the two-level system of judicial supervision of the implementation of EU law would lead to the conclusion that each instance is competent for only the acts emanating from the authorities falling within its jurisdiction, with the consequence that national courts would not be allowed to review the legality of measures

[43] In which case the decision on the placing on the market is taken by the Member State authority.
[44] Furthermore, Della Cananea notes other ways to categorize the procedures, e.g. those taking place on a yearly basis (e.g. in the agricultural field) and those instead taking place only after the individual files an application (e.g. placing medicines on the market), Giacinto Della Cananea, 'The European Union's Mixed Administrative Proceedings', 205.

issues by the European authorities or non-domestic national authorities, and similarly EU courts would not have jurisdiction to assess the legality of national administrative measures.

Thirdly, once the competent judicial instance has been identified, and the scope of its jurisdiction has been clarified, a subsequent question is on which kind of measures the competent courts can exercise their judicial review powers. The question of the reviewable acts is an important one in the context of the composite procedures: if measures can be challenged only before the courts having jurisdiction on the authority issuing the measure, and if national courts cannot assess the legality of measures linked to those under direct challenge which do not fall within their jurisdiction, it is inevitable that some challenges need to be directed against measures which are initial or intermediate in the decision-making process.

Furthermore, whichever the competent judicial authority, its scope of review and the nature of the act under challenge, it is necessary for applicant to obtain standing to challenge the specific measure at stake.

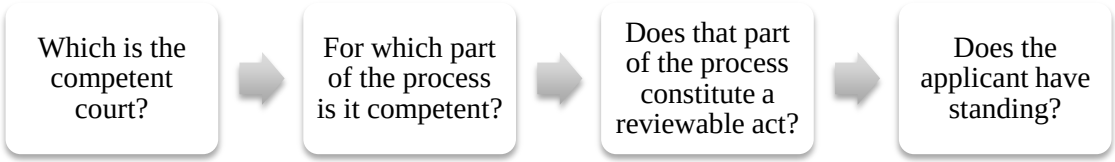

Figure 6: judicial protection questions in composite procedures

The figure above depicts the four subsequent sets of questions to be answered in order for a private party to be able to challenge measures taken within the system of composite procedures. This complex system of allocation of labor amongst the national and European jurisdiction may give rise to a range of problems: firstly, if the challenge is directed towards a preparatory step of the procedure, the measure at stake may not constitute a reviewable act or omission in the (national or European) legal system in which it occurred, or the applicant may not fulfill the requirement to have standing before the (national or European) competent court. Furthermore, if the challenge is directed towards the final measure of the decision-making process (and assuming that the applicant is challenging a reviewable act and has standing to bring this claim), the action 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.

It is therefore necessary to analyse the problems of standing and the existence of a reviewable act both at national and EU level, in order to identify the possible gaps of judicial protection in composite procedures. The two issues will be analysed in turn in the next two sections.

5.2. The existence of a reviewable act

5.2.1. Reviewable acts at EU level

As far as the EU contribution to a composite procedure is concerned, the action can consist is an act (having a positive or a negative content) or in an omission. Each action or inaction can be initial, intermediate or final in the administrative-decision making process. While the administrative action is challengeable in the EU legal system directly under Article 263 TFEU in an action for annulment or indirectly through a preliminary question of validity under Article 267 TFEU, the EU inaction can be the subject matter of an action for failure to act under Article 265 TFEU. Below the reviewability of the EU action and inaction in the composite procedures will be reviewed.

5.2.1.1. Action for annulment

Pursuant to Article 263 TFEU, the Court may review the legality of acts 'other than recommendations and opinions'. Under the case law developed before the Lisbon Treaty (and concerning the predecessor of Article 263 TFEU, i.e. Article 230 EC), the scope of reviewability of EU measures was extended to 'all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'.[45] As far as private parties are concerned, they also need to prove that 'the measure is binding on, and capable of affecting the interests of, the applicant by bringing a distinct change in his legal position'.[46] While this criterion does not seem to pose problems with respect to final measures of the decision-making process, because a final measure is certainly capable of affecting an individual's legal sphere, the criterion may pose a significant hurdle with regard to initial and intermediate measures. These cases will be analysed in turn by distinguishing between positive and negative measures.

I. Positive measures

EU positive measures which initiate a decision-making process are generally not considered reviewable by the European Courts. The authority for this statement is contained the *IBM* case in which the CJEU held that a measure is reviewable only if it is 'definitively laying

[45] Case 22/70, Commission v Council (ERTA) [1971] ECR 263, para 42.
[46] Case 60/81, IBM v Commission [1981] ECR 2639, para 9.

down the position of the Commission or the Council in the conclusion of that procedure, and not a provisional measure intended to pave the way for a final decision'.[47]

Similarly, and in application of the *IBM* case law, EU contributions to a composite procedure will generally not constitute reviewable acts because they are considered as provisional, preparatory measures.[48] This conclusion is equally applicable if the final decision is subsequently taken at EU[49] or national level.[50] However, if the final decision is taken at the European level, it possible to challenge the preparatory measure in a claim brought against the final measure.[51]

Initial or intermediate EU measures have, therefore, been considered as reviewable only where they are capable of affecting the applicant's legal sphere independently of the final decision. This was the case, for example, in *AKZO Nobel*, where the Court held that, in on-the-spot investigations in competition cases, the physical act of seizing the documents and placing them in the investigation file can constitute a reviewable decision under Art. 263 TFEU, because it may violate the applicant's right to confidentiality irrespective of the possible violation of competition rules.[52]

II. Negative measures

It is not entirely clear under which circumstances it is possible to challenge the EU institutions' refusal to initiate or contribute to a procedure. First of all, it is clear that silence is not to be equated to an implied refusal.[53] Also, the Courts have made clear that 'an act of the Commission which amounts to a rejection must be appraised in the light of the nature of the request to which it constituted a reply'.[54] In other words, a measure of rejection is not reviewable if the act, which the individual requested the EU institutions to adopt, is itself not reviewable. In application of the *IBM* case law discussed above, therefore, a rejection to issue an initial or intermediate measure in composite procedure would generally not be considered

[47] Ibid., para 10.
[48] Case C-521/04 P(R) Tillack v Commission [2005] ECR I-3103.
[49] See e.g. case T-123/03, Pfizer v Commission [2004] ECR II-1631, para 32, where the challenge concerned a measure of referral of the investigation by the Commission to the European Agency for the Evaluation of Medicinal Products.
[50] See e.g. case T-160/98, Van Parijs and Pacific Fruit Company v Commission [2002] ECR II-233.
[51] Case T-123/03, Pfizer v Commission [2004] ECR II-1631, para 23.
[52] Joined cases T-125 & 253/03 Akzo Nobel Chemicals and Akcros Chemicals v Commission [2007] ECR II-3523.
[53] Case C-123/03 P Commission v Greencore [2004] ECR I-11647, para 45.
[54] Case T-369/03 Arizona Chemical and others v Commission [2005] ECR II-5839, para 64.

as a reviewable act, unless it constitutes an act capable to produce effects on the applicant's legal sphere.[55]

Furthermore, the European courts have held that, even where the requested act would be reviewable, it does not necessarily mean that the rejection itself would be reviewable. In particular, in *DuPont*, the refusal to open an investigation was considered a reviewable act because the applicant had specific procedural guarantees in the decision-making process.[56] If there are no such procedural guarantees the refusal to initiate a procedure will in principle not constitute a reviewable act.

5.2.1.2. Preliminary question of validity

In the system of remedies created by Treaties, EU measures can, in principle, be challenged not only directly through an action for annulment provided under Article 263 TFEU but also indirectly, i.e. through a question of validity, by bringing an action against a national measure and in the national proceedings challenging the validity of the underlying EU measure. In cases, therefore, in which the final measure is one adopted by a national authority, initial or intermediate EU measures adopted in the context of composite procedures could be challenged indirectly through the use of Article 267 TFEU.

According to the case law of the CJEU, the range of measures which can be challenged indirectly through a question of validity is wider than those which are amenable to judicial review in direct actions since it is held to include 'all acts of the institutions without exceptions'.[57] This could imply that initial and intermediate (positive and negative) EU measures could be challenged in national proceedings directed at the challenge of the final national measure. This conclusion is supported by the *Tillack* case, in which the applicant tried to challenge at European level the transfer information from OLAF to the competent national authorities. While the Court of First Instance found that the transfer itself could not be considered a reviewable act, in response to the suggestion that this conclusion may deprive the applicant of effective judicial protection, it did state that the applicant had the opportunity to bring an action before the national court and ask it to send a preliminary question to the CJEU.[58]

[55] See case C-39/93 P Syndicat Francais de l'Express International (SFEI) v Commission [1994] ECR I-2681, concerning a Commission's letter of rejection of the applicant's request to pursue a competition infringement.
[56] See case T-113/00, DuPont Teijin Films Luxembourg and Others v Commission [2002] ECR II-03681.
[57] Case C-322/88 Grimaldi [1989] ECR 4407, para 8.
[58] Case T-193/04 Tillack v Commission [2006] ECR II-3995, para 80.

Finally, it should be pointed out that failures to act by a EU institution cannot be the subject matter of a question of validity.[59]

5.2.1.3. Action for failure to act

Pursuant to Article 265 TFEU, the European courts may review failures to address to the applicant any act other than a recommendation or an opinion. The interpretation followed by the European courts, in application of the unity principle between action for annulment and action for failure to act, is that reviewable omissions are those failures to adopt an act which produces legal effects for the purposes of an action for annulment.[60]

While the application of this criterion leads to the conclusion that omissions to adopt a final measure can, in principle, be challenged with an action for failure to act,[61] the same cannot be argued for initial and intermediate failures to issue a measure by the EU institutions. Indeed, the application of the *IBM* criterion would lead to the conclusion that failures to adopt initial or intermediate measures would generally not considered as reviewable under Article 265 TFEU. However, 'in some cases, the non-adoption of an act can produce legal effects, even though the act itself would not produce such effects'.[62] This is why, in exceptional cases, the European courts have considered failures to adopt initial or intermediate measures to be reviewable if the omission was in itself capable of affecting the applicant legal sphere.[63]

5.2.2. Reviewable acts at national level

What constitutes a reviewable act at Member States level is, in principle, determined by national procedural rules, in application of the principle of national procedural autonomy.[64] Prior research has, however, shown that preparatory measures, hence initial and intermediate measures in composite procedures are generally not considered reviewable, because they are considered incapable of directly affecting the applicant's legal sphere.[65]

However, in *Oleificio Borelli*, the CJEU held that a national measure which prevented legal action from being taken against a mere administrative preparatory act would be in violation of the right of access to justice.[66] In this case, an Italian firm, sought the annulment of a

[59] Case C-68/95 T. Port [1996] ECR I-833, para 53.
[60] Case C-170/02 P Schusselverlag and others v Commission [2003] ECR I-9889.
[61] Case C-282/95 P Guerin Automobiles v Commission [1997] ECR I-1503, para 38.
[62] Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union*, 853.
[63] See e.g. case T-28/90 Asia Motor France and others v Commission [1992] ECR II-2285.
[64] Case 33/76 Rewe, [1976] ECR 1989; case 45/76, Comet [1976] ECR 2043.
[65] Mariolina Eliantonio, *Europeanisation of Administrative Justice? The influence of the CJEU's case law in Italy, Germany and England* (Europa Law Publishing, 2008), Chapter 1, where this conclusion is reached for the German and Italian legal systems.
[66] Case C-97/91, Oleificio Borelli S.p.A. v. Commission of the European Communities [1992] ECR I-6313.

Commission measure, on the grounds that the underlying measure adopted by the competent national authority was void. The CJEU ruled that, while it had no jurisdiction to rule on the unlawfulness of a measure adopted by a national authority, the negative opinion issued by the national authorities should have been challenged before a national court and that the requirement of effective judicial protection obliges the Member States, 'to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case'.[67]

In the CJEU's view, therefore, in cases where the applicant would otherwise be deprived of all forms of judicial review, interlocutory measures, even though they are mere preparatory steps, must be susceptible to review by the national courts, notwithstanding the fact that the rules governing domestic administrative law do not provide for review of this type of measure.

5.2.3. Conclusion: reviewable acts and composite procedures

On the basis of the analysis carried out above, one can conclude that, because of the multiple steps involved in the decision-making process of the composite procedures, possible problems with regard to the respect of the principle of effective judicial protection may arise because of the preparatory nature of the actions and omissions occurring before the final decision is adopted, which do not always qualify as reviewable acts under national or EU law.

In cases in which the final measure of a composite procedure is adopted by a EU authority or a different national authority than the one initiating or participating in the process, there may be situations in which the applicant may question the lawfulness of the underlying national initial or intermediate measure (positive or negative, act or omission). In such situations, despite the principle of national procedural autonomy (which may consider such measure as not amenable to judicial review), the *Borelli* case examined above demands reviewability of national preparatory measures.

The reverse situation occurs in cases in which it is a national authority which is entrusted to take the final measure of the decision-making process and the applicant wishes to challenge an initial or intermediate EU measure. As shown above, in such cases, a direct challenge against the preparatory measure is only possible in case there is a measure (positive or negative, act or omission) capable of affecting the applicant's legal sphere. In cases of composite procedures this situation is not likely to occur. Therefore, the only avenue left for

[67] Oleificio Borelli S.p.A., para. 13.

the applicant is to pursue a national claim against the final measure and, before the national court, plea the illegality of the underlying EU measure.

5.3. Standing

5.3.1. Standing at EU level

Even assuming that the (initial, intermediate or final) EU, positive or negative action, or the EU omission constitutes a reviewable act, the second hurdle to overcome is that of gaining standing before the EU court in an action for annulment or an action for failure to act, according to whether the applicant wishes to challenge the EU action or inaction. The standing requirements for both actions will be examined below.

5.3.1.1. Action for annulment

Pursuant to Article 263 TFEU, a private party may be able to gain standing in an action for annulment in three situations, i.e. if he is the addressee of the measure, if the measure is of individual and direct concern to him or if he is challenging a regulatory act which does not entail implementing measures and which is of direct concern to him.

The concept of 'regulatory act' is not defined in the list of instruments contained in Article 288 TFEU. The European courts have defined it to be a non-legislative measure of general application,[68] i.e. a measure which is not adopted following the ordinary or special legislative procedures within the meaning of paragraphs 1 to 3 of Article 289 TFEU, whether adopted by the Commission or not.[69] Furthermore, in application of the recent European case law, an 'implementing measure' can very well be a final measure in a composite procedure.[70]

Considering that, in composite procedures, initial or intermediate measures are steps in the decision-making process, they will hardly be addressed to an individual, as they mostly consist in inter-institutional communications. Furthermore, even in case of a final measure by the EU, the applicant may wish to challenge a measure addressed to a third party. Hence, an applicant who wishes to challenge an EU measure would need to prove, very often, direct concern, and apart from cases of regulatory acts not entailing implementing measures (i.e. final EU measures adopted with a non-legislative procedure), also individual concern.

[68] See case C‑583/11 P Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union [2013] nyr. For a discussion of the case law leading up to this ruling, see Haakon Roer-Eide and Mariolina Eliantonio, The Meaning of Regulatory Act Explained: Are There Any Significant Improvements for the Standing of Non-Privileged Applicants in Annulment Actions?, *German Law Journal* (2013), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=1581

[69] Case T-93/10 Bilbaína de Alquitranes, SA, and others v. Commission [2013] nyr, para 55-59.

[70] Case C-274/12 P, Telefónica SA v European Commission [2013] nyr.

I. Direct concern

The CJEU has held consistently that a measure is of direct concern only if it affects the applicant's legal position directly and it leaves no discretion to the addressees of the measure who are entrusted with its implementation. In other words, a direct link between the challenged measure and the loss or damage that the applicant has suffered must be established.[71] Moreover, the implementation must be automatic and result from EU rules without the application of other intermediate rules. If the measure leaves national authorities of the Member States a degree of discretion as to how the measure should be implemented, the applicant will not be considered to be directly concerned.[72]

There are, however, some situations in which the final national measure does not entail any discretion on the part of the competent authorities. If the final national measure merely takes up the information provided by the European authorities, the CJEU has considered that there will be direct concern.[73]

The position of the European courts has found application in a specific type of composite procedure, which is that of the granting of funds to Member States. This group of cases concerns claims brought by thirds parties when the EU adopts decisions on the provisions of funds to Member States to finance certain projects. The question is therefore whether an individual, who is the recipient of the fund, but is not the addressee of the EU decision, can challenge the latter before the EU courts. The case law concerning the allocation of European funds shows clearly that, where the Member State has discretion in the follow-up of the decision-making process, no direct concern will be recognized by the European courts.[74]

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[71] Cases C-41-44/70 NV International Fruit Company and others v Commission of the European Communities [1971] ECR 411; case C-207/86 Asociación Profesional de Empresarios de Pesca Comunitarios (Apesco) v Commission of the European Communities [1988] ECR 2151, para. 12. Recently, C-417/04 P Regione Siciliana v Commission of the European Communities [2006] ECR I-03881.

[72] See, for example, case C-69/69 SA Alcan Aluminium Raeren and others v Commission of the European Communities [1970] ECR 385; case C-222/83 Municipality of Differdange and Others v Commission of the European Communities [1984] ECR 2889.

[73] Cases C-41-44/70 NV International Fruit Company and others v Commission of the European Communities [1971] ECR 411, para 25. In this case, the duty of national authorities was to collect information, which was submitted to the Commission. The latter took a decision, which then the national authorities had to carry out without any discretion. The same conclusion was reached in case C-354/87Weddel & Co. BV v Commission of the European Communities [1990] ECR I-03847, para 19.

[74] See case C-291/89, Interhotel, Sociedade Internacional de Hoteis SARL v Commission of the European Communities [1991] ECR I-02257. In this case, Portugal did not have any discretion in the management of the fund so the court found that the applicant has direct concern to challenge the EU measure granting the fund. In contrast, where the relationship is really between the Member States and the EU institutions in the challenged EU measure, there will not be direct concern. Member States have discretion on what to do with the funds, they can also decide not to claim money back and bear financial burden themselves so the European courts have considered that, in such cases, the European decisions do not directly affect the legal sphere of the third parties. See e.g. Joined cases 89 and 91/86, L'Étoile commerciale and Comptoir national technique agricole (CNTA) v Commission of the European Communities [1987] ECR 3005; case T-244/00, Coillte Teoranta v Commission of the European Communities [2001] ECR II-01275 para 44.

Under certain exceptional circumstances, the CJEU has considered the applicants to be directly concerned even where the challenged measure leaves those entrusted with its implementation with a degree of discretion. In particular, the CJEU has held that direct concern exists -even if there is discretion- in cases, at the time when the measure was adopted, there was no real doubt as to how the discretion would be exercised,[75] or where it is in theory possible for the addressees of the measure not to give effect to the EU measure and their intention to act in conformity with it is not in question.[76] This definition of direct concern has been considered applicable equally also to the cases of challenges against regulatory acts.[77]

The application of this case law entails that, apart from the cases in which national authorities have no discretion in the implementation of EU law, generally an initial or intermediate EU measure in a composite procedure will not be considered as having direct concern for the applicant because there is a further national or EU measure to be challenged. This position of the European court has found clear application in a group of cases concerning a specific composite procedure, namely that arising out of the Habitats Directive. In such cases, the European courts have consistently denied standing to applicants who tried to challenge a intermediate Commission in an action of annulment under Article 263 TFEU, on the grounds that it did not affect directly the applicant's legal sphere.[78]

The case law on direct concern implies also that, in principle, for final EU measures (whether they have the nature of regulatory acts or not), the requirements of direct concern would be met because a final measure is capable of directly affecting an individual's legal sphere. However, in composite procedures, it can often happen that the final EU measure merely confirms a decision taken by the national authorities. In such cases, direct concern will be found only when the European measure 'renders valid' the national measure.[79] For example, in the case *DSTV*,[80] the final EU measure contained a denial, addressed to the UK, to retain a

[75] Case 11/82 Piraiki-Patraiki v Commission of the European Communities [1985] 207; cases C-445/07 P and C-455/07 P Commission of the European Communities v Ente per le Ville Vesuviane and Ente per le Ville Vesuviane v Commission of the European Communities [2009] ECR I-07993.
[76] Case C-417/04 P Regione Siciliana v Commission of the European Communities [2006] ECR I-03881.
[77] Case T-94/10, Rütgers Germany GmbH and Others v European Chemicals Agency (ECHA) [2013] nyr, para 38 and 59.
78 Case T-136/04 Rasso Freiherr von Cramer-Klett and Rechtlerverband Pfronten v Commission of the European Communities [2006] ECR II-01805; Case T-137/04 Kurt Martin Mayer and Others v Commission of the European Communities [2006] ECR II-01825; Case T-122/05, Robert Benkö and Others v Commission of the European Communities [2006] II-02939; Case T-150/05 Markku Sahlstedt and Others v Commission of the European Communities [2006] ECR II-01851, confirmed in appeal in Case C-362/06 P Markku Sahlstedt and Others v Commission of the European Communities [2009] ECR I-02903.
[79] Joined cases 106 and 107-63, Alfred Toepfer and Getreide-Import Gesellschaft v Commission of the EEC [1965] ECR 00405.
[80] Case T-69/99, Danish Satellite TV (DSTV) A/S v Commission of the European Communities [2000] ECR II-04039.

national measure, and direct concern was denied. Final confirmatory EU measures are of direct concern only if they have retroactive effects; otherwise according, to the EU courts, the challenge should be directed against the national measure.

Furthermore, direct concern cannot be proven in cases of challenges brought by associations, since it will be hardly possible for this category of applicants to prove that there is a direct link between the measure at stake and a certain loss or damage they suffered, as it is required by the case law of the European courts. The consequence of this is that even final EU measures which result from composite procedures may, sometimes, be immune from judicial review because those who would be able to prove direct concern have no interest in bringing judicial proceedings, while associations protecting collective or diffuse interests may not be able to gain standing.

II. Individual concern

The new standing requirements introduced by the Lisbon Treaty have introduced the possibility for private parties to prove only direct concern in cases of challenges against regulatory acts not entailing implementing measures, thereby dispensing them with the need to prove individual concern. For some of the final EU measures which conclude a composite procedure, therefore, an applicant would not need to prove individual concern. This would be the case, if the composite procedure was concluded, for example, with a Commission delegated or implementing regulation or an act of the European Chemicals Agency.

However, if the composite procedure was concluded with a Commission regulation adopted with the ordinary or special legislative procedure, the requirements of 'regulatory act' would not be fulfilled and individual concern would have to proven. Similarly, individual concern would always need to proven in challenges against initial or intermediate EU measures, regardless of the legislative procedure which was used, because such acts would 'entail implementing measures' and thus not be able to benefit from the looser standing requirements introduced by the Lisbon Treaty.

The definition of individual concern was first given in the *Plaumann* case and is still the reference for determining "individual concern".[81] In this case, the CJEU established that private parties are able to seek judicial review of decisions not expressly addressed to them only if they can distinguish themselves from all other persons, not only actually but also potentially. In other words, the applicants must show that the decision "affects them by reason

[81] Case C-25/62 Plaumann & Co. v Commission of the European Economic Community [1963] ECR 95.

of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".[82] As a result, individual concern cannot be established when the applicant operates a trade which could be engaged in by any other person at any time. In particular, the applicant has to show, according to the case-law developed by the CJEU, that, at the time when the decision was adopted, it belonged to a so-called "closed class", which is differently affected by the EU measure than all other persons.[83]

The *Plaumann* test constitutes a very restrictive approach to individual standing, which has sparked a vast amount of academic debate and criticism,[84] and has been challenged even from within the EU courts.[85]

Concerning specifically claims brought by associations, these actions have only been considered admissible in three cases:[86] (a) when a legal provision grants procedural rights to these associations;[87] (b) where every single member of the association would be directly and

[82] Ibid, 107.
[83] E.g. joined cases C-106 and 107/63 Alfred Toepfer and Getreide-Import Gesellschaft v Commission of the European Economic Community [1965] 405.
[84] For criticism on the standing requirements of individual applicants, see, ex multis, Angela Ward, 'Locus Standi under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity' (2003) *Yearbook of European Law*, 45; Anthony Arnull, 'Private Applicants and the Action for Annulment since Codorniu' (2001) *Common Market Law Review*, 7; Jose Manuel Martin Cortés, 'Ubi ius, Ibi Remedium? Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads' (2004) *Maastricht Journal of European and Comparative Law*, 233; A Abaquense de Parfouru, 'Locus Standi of Private Applicants under the Article 230 EC Action for Annulment: Any Lessons to be Learnt from France?' (2007) *Maastricht Journal of European and Comparative Law*, 361; Adam Cygan, 'Protecting the Interests of Civil Society in Community Decision-making: The Limits of Article 230 EC' (2003) International and Comparative Law Quarterly, 995; Xavier Lewis, 'Standing of Private Claimants to Annul Generally Applicable European Community Measures: If the System is Broken, where Should it be Fixed?' (2006-2007) *Fordham International Law Journal*, 1496; Albertina Albors-Llorens, 'Sealing The Fate of Private Parties in Annulment Proceedings? The General Court and the New Standing Test In Article 263(4) TFEU', *Cambridge Law Journal*, 52.
[85] Opinion of Advocate General Jacobs in case C-50/00 P Unión de Pequeños Agricultores v Council of the European Union [2002] ECR I-6677; Case T-177/01 Jégo-Quéré & Cie SA v Commission of the European Communities [2002] ECR II-2365.
[86] Case C-321/95 P Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities [1998] ECR I-1651; T-122/96 Federazione nazionale del commercio oleario (Federolio) v Commission of the European Communities [1997] ECR II-1559.
[87] Case C-191/82 EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v Commission of the European Communities [1983] ECR 2913; T-12/93 Comité Central d'Entreprise de la Société Anonyme Vittel and Comité d'Etablissement de Pierval and Fédération Générale Agroalimentaire v Commission of the European Communities [1995] ECR II-1247.

individually concerned[88] and (c) where the association's interests, and especially its position as a negotiator, is affected by the measure.[89]

These requirements have made it almost impossible for associations to ever succeed in showing individual concern given that the cases under (a) are rare and the cases under (b) are as difficult (if not harder) to be successful as cases concerning individuals, given the strict interpretation of the *Plaumann* formula. Successful cases under (c) are also not very common since the CJEU has held that the test to be met is that the position of the association as negotiator is clearly defined and must be related to the subject matter of the contested act, and that that position must have been affected by the adoption of the contested act.[90] The fact that an association has communicated information to an EU institution or has tried to influence the position adopted by the national authorities in the EU legislative procedure has been regarded to not suffice in itself to show that the act adopted affects an association in its position as a negotiator.[91]

Furthermore, the application of the *Plaumann* doctrine to claims by associations purporting to protect the diffuse interests has meant that claims by, for example, environmental associations have consistently been rejected.[92]

5.3.1.2. Action for failure to act

The last paragraph of Article 265 TFEU grants standing to those individual and legal persons who can claim that the EU institutions, bodies, agencies or offices have failed to address them an act other than a recommendation or opinion.

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[88] Joined cases T-447/93, T-448/93 and T-449/93 Associazione Italiana Tecnico Economica del Cemento and British Cement Association and Blue Circle Industries plc and Castle Cement Ltd and The Rugby Goup plc and Titan Cement Company SA v Commission of the European Communities [1995] ECR II-1971; case T-380/94 Association internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle (AIUFFASS) and Apparel, Knitting & Textiles Alliance (AKT) v Commission of the European Communities [1996] ECR II-2169; T-229/02 Osman Ocalan acting on behalf of Kurdistan Workers' Party (PKK) v Council of the European Union [2008] ECR II-45.

[89] Joined cases 67/85 R, 68/85 R and 70/85 R Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities [1985] ECR 1315; case T-84/01 Association contre l'horaire d'été (ACHE) v Council of the European Union and European Parliament [2002] II-99.

[90] Case C-106/98 P Comité d'entreprise de la Société française de production, Syndicat national de radiodiffusion et de télévision CGT (SNRT-CGT), Syndicat unifié de radio et de télévision CFDT (SURT-CFDT), Syndicat national Force ouvrière de radiodiffusion et de télévision and Syndicat national de l'encadrement audiovisuel CFE-CGC (SNEA-CFE-CGC) v Commission of the European Communities [2000] ECR I-3659, para. 45.

[91] Case T-391/02 Bundesverband der Nahrungsmittel- und Speiseresteverwertung eV and Josef Kloh v European Parliament and Council of the European Union [2004] II-1447; T-264/03 Jürgen Schmoldt and Others v Commission of the European Communities [2004] II-1515.

[92] Case T-236/04 and T-241/04, European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission [2005] ECR II-04945; Case T-91/07, WWF-UK Ltd. V. Council [2008] ECR II-81, confirmed in appeal in case C-355/08 P, WWF-UK v. Council [2009] ECR I-73; Case T-37/04, Regiao autónoma dos Acores v. Council [2008] ECR II-103, confirmed in appeal in case C-444/08, Regiao autónoma dos Acores v. Council [2009] ECR I-200. For a closer examination of this case law, see M. Eliantonio, 'Towards an ever dirtier Europe?: the restrictive standing of environmental NGOs before the European Courts and the Aarhus Convention, *Croatian Yearbook of European Law* (2011), 69.

However, in spite of the more stringent wording of Article 265(3) TFEU in comparison with Article 263(4), the CJEU has held that the two provisions prescribe one and the same method of recourse. Consequently, according to the CJEU, the scope of the action for failure to act is not confined to the defendant institution's failure to adopt a particular measure addressed to the applicant: this means that it is, in principle, possible to challenge a failure to adopt a measure of general application, but the requirements of individual and direct concern will have to be met.[93]

Hence, mutatis mutandis, all considerations made above concerning the standing for individuals in annulment actions may be applied with regard to actions for failure to act.

5.3.2. Standing at national level

As far as national measures are concerned, prior research has revealed a wide variety of systems of standing at national level. However, what has also been made clear is that, in the vast majority of the Member States, the minimum threshold required to achieve standing is that of interest, which has to be qualified as direct, personal and certain, with special rules applying to organisations defending collective or diffuse interests.[94] Without being able, in the context of this paper, to carry out a closer examination of the standing rules at national level, it can be safely argued that, in general, the requirement of a direct interest is hard to meet when the measure at stake is of a mere preparatory nature.

However, it could be argued, in application of the *Borelli* case law discussed in Section 5.2.2, that this case law demands not only reviewability of national preparatory measures, but also the disapplication of national standing rules that would preclude the admissibility of the claim. Indeed, looking at the case law from a teleological point of view, it would hardly solve the judicial protection gap to admit that a preparatory measure is reviewable in principle, but to reject the claim on grounds of lack of direct interest. Hence, it can be concluded that national initial or intermediate measures should be subject to judicial review in national courts because of the requirements set by the European courts.

5.3.3. Conclusion: standing and the gaps of judicial protection

[93] Case C-68/95 T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung [1996] ECR I-6065, para. 59; case T-17/96 Télévision française 1 SA (TF1) v Commission of the European Communities [1999] ECR II-1757, para. 27; case T-103/99 Associazione delle cantine sociali venete v European Ombudsman and European Parliament [2000] ECR II-4165.

[94] Mariolina Eliantonio, Chris Backes, C.H. van Rhee, Taru Spronken, Anna Berlee, *Standing up for Your Right(s) in Europe - A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States' Courts* (Intersentia, 2013). See in particular the chapter on standing before national administrative courts.

The analysis carried out above has shown that, even where the hurdle of reviewable act has been overcome, individuals may be denied standing by the European or national courts because of the lack of standing.

At EU level, individuals may have a hard time gaining standing in case of EU initial or intermediate measures (whether acts or omissions) because these measures are hardly addressed to individuals, hence the need to prove, firstly, direct concern. This requirement, however, is difficult to meet in such situations, because of the necessity to show a change in the applicant's legal sphere, which is generally considered to occur only when a final decision has been issued. Furthermore, even where direct concern could be proven (because, for example, the final national measure does not entail any discretion on the part of the national authorities), since the challenge would necessarily be directed against a measure entailing implementing measures, individuals may be denied standing because of the lack of individual concern, in application of the traditional *Plaumann* doctrine. In such cases, as with for cases in which the EU measure is considered not reviewable, individuals are obliged to bring an action against the final national measure and challenge the validity of the underlying EU measure with a question of validity.

Furthermore, as far as final EU measures are concerned, when the challenge is directed against a regulatory act not entailing implementing measures, standing may be gained by individuals, but associations will hardly be able to prove direct concern. Furthermore, individual concern may be denied in cases of challenges brought by individuals or associations even against final EU measures which do not qualify as regulatory acts, effectively rendering certain EU acts immune from judicial review altogether.

Similarly, at national level, challenges against initial or intermediate measures may in principle not be admissible. However, the application of the *Borelli* case law to such situations would seem to imply that standing in such cases must be granted in order for Member States to comply with the principle of effective judicial protection.

6. Judicial review and composite procedures: potential gaps, existing solutions, and possible alternatives

The analysis carried out above has shown that, while composite procedures have become increasingly important in the system 'integrated administration' of the EU,[95] the system of

[95] Turk and Hofmann argue that 'integrated administration is at the core of the EU's legal and political system.

judicial review has remained anchored to a traditional view of executive federalism. This implies a strict separation between national and European courts, which remain each exclusively competent for the acts and omissions imputable to the authorities falling under their jurisdiction.

This system is no longer capable to react adequately to those decision-making processes, which entail the contribution of national and EU authorities, participating with various intensities and with measures of a more or less formalized nature. If the EU is to uphold its qualification of a 'Community based on the rule of law',[96] and to ensure respect of the principle of effective judicial protection, therefore, it has to face the challenge to adapt judicial supervision to the emerging reality of an integrated administration.

As has been shown above, the CJEU has tried to provide solutions to the lack of judicial protection occurring in the case of composite procedures. First of all, when a challenge is direct against a national initial or intermediate measure, the *Borelli* case law demands reviewability of such measures before the national courts even where, according to the applicable national procedural rules, they may not have been reviewable. While this requirement imposed by the European courts seems to fill the possible gaps of judicial protection, it does leave some questions open. First of all, there is no assurance that national courts, disapplying the national procedural rules to the contrary, will admit claims against national preparatory measures. Individuals may forget to rely on this case law before the national courts and courts themselves may be unaware of or unwilling to apply the European requirements. Furthermore, reliance on national courts' willingness to set their own procedural rules aside may bring about a certain lack of legal certainty as well as the risk of unacceptable differential treatment if national courts would come to different conclusions in case of the same or similar preparatory measures taken in the context of composite procedures.

Furthermore, even admitting that, in application of their own procedural rules or of the *Borelli* case law, the national courts would allow a claim against an initial or intermediate measure, the ruling does not have, as such, any influence on the final measure, which may have been based on an unlawful preparatory measure. In such cases, given that, on the basis of the *Foto-*

Integrated administration is what renders the EU system of government and governance unique and distinct from models we know from the Member States' legal systems—be they more unitary or more federal in their internal structures. It is the substance behind the theoretical notion of shared sovereignty'. Herwig C. H. Hofmann and Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences' *European Law Journal* (2007), 271.

[96] Case 294/83 Les Verts v Parliament [1986] ECR 1339, para. 23.

Frost ruling[97] and the territoriality principle governing jurisdiction, national courts do not have the power to invalidate EU measures or measures issued in a different Member State, the applicant would need to bring a subsequent claim before the competent national or EU court in order to challenge the lawfulness of the final measure. Needless to say, this involves extra times and costs. Importantly, applicants may well find themselves time-barred because of the two-month time limit provided in Article 263 TFEU, unless they would be expected to bring two parallel proceedings before the national and European courts. Furthermore, because of the strict standing requirements applied by the European courts, final EU measures may not be challengeable because of lack of standing. This problem may be quite significant especially in claims brought by associations for the protection of collective or diffuse interests, since it may render certain EU measure immune from judicial review.

A solution to the extra costs and time (and possibly procedural limitations) involved in the necessity to bring a second challenge against the final EU or national measure would be the creation of a transfer from the national court to the competent EU court which would at least reduce the time and costs involved for the applicant in preparing an entirely new plea and render the claim admissible despite the expiry of the time limit. A better alternative, from the perspective of the applicant (involving less time and costs), would be the possibility to bring only one claim, against the final measure before the court of the legal system which took the final measure and introduce the possibility of a 'cross' (i.e. to another Member State) or 'reverse' (i.e. by the CJEU to the national level) preliminary ruling system, whereby the competent court could ask a question of validity to a competent court of the legal system where the preliminary measures were issued.

In the reverse scenario of a possible challenge against a preparatory EU measure, the analysis carried out above has shown that, while direct challenges would be hardly admissible, the indirect avenue of the preliminary question of validity could be pursued. As according to the CJEU's view in the *Tillack* case, triggering the preliminary question of validity should ensure the completeness of the system of judicial protection. In such situations, the problems are admittedly less acute than the scenario discussed above (because there is one single judicial procedure which the applicant needs to pursue, albeit involving multiple jurisdictions), but the system is in any case not free from shortcomings, many of which have been highlighted eminently by AG Jacobs in his opinion on the *UPA* case.[98] In particular, he recalled that access to the CJEU via the preliminary reference procedure is not available to applicants as a

[97] Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 04199.
[98] Opinion of Advocate General Jacobs in case C-50/00 P Unión de Pequeños Agricultores v Council of the European Union [2002] ECR I-6677.

matter of right, since national courts (with the exclusion of courts of last instance) may refuse to refer a question of validity of an EU measure to the CJEU or might err in their assessment of the validity of the measure and decline to refer a question to the CJEU on that basis.[99] In addition, even where a reference is made, the preliminary questions are formulated by the national courts, with the consequence that applicants' claims might be redefined or that the questions referred might limit the range of measures whose validity is being challenged before the national court.[100] Finally, the AG considered that proceedings brought before a national court are more disadvantageous for individuals compared to an action for annulment under Article 263 TFEU, since they involve delays and extra costs.[101]

An alternative solution could be to expand the scope of reviewable acts under Art. 263 TFEU to preparatory measures which currently, in application of the *IBM* case law, would not be considered a reviewable act, with the consequence that the applicant would be able to bring an action for annulment against the preparatory EU measure and another challenge against the final national measure before the competent national judicial instance.[102] Whether this solution is more favourable to the applicant than the 'single avenue' procedure (with an action before a national court in combination with the preliminary ruling of validity) is questionable, as it may be even more costly and time consuming than the latter option. Furthermore, in such scenario, the potential applicant may be harmed by the *TWD Deggendorf* case law,[103] because if a direct action against a preparatory measure would be open, the applicant, in line with this case law, would be obliged to bring an action against this measure and would be barred from asking a preliminary reference in an indirect action if he had had standing in a direct action.

Another general problem which may occur in any of these constellations is that an individual may not know that the measure he is challenging is the product of the elaboration of information which may have been collected and submitted by a different actor, perhaps acting at a different level. Even if he is aware that the decision is the by-product of a multi-level decision-making process, he may not be able to discern which part of the decision are imputable to one or the other participating authority. This may be especially relevant in those composite procedures in which the contribution of the participating authorities consists in the mere provision of information and not in a more formalized measure. In all such cases, all the proposals made above do not provide an effective solution.

[99] Ibid, para 42.
[100] Ibid.
[101] Ibid, para 44.
[102] This is also proposed by Morgane Tidghi and Herwig C.H. Hofmann, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks', *European Public Law* (2014), 155.
[103] Case C-188/92 TWD Textilwerke Deggendorf [1994] ECR I-833.

7. Conclusions and recommendations

'Existing approaches to judicial review of administrative activity […] exhibit shortcomings when faced with an increasingly integrated administration'[104]

The system of judicial review, as it currently works, seems not to be fully fit to operate in a system of integrated administration, in which not only various jurisdictions may be involved in the decision-making process, but also there are various forms of dialogue and cooperation amongst them, which may result in more or less formalized types of administrative action. Therefore, while the solutions provided above may seem to (at least partially) fills the gaps of judicial protection currently existing, a thorough re-thinking of the system of judicial review may, in the long term, be necessary, in order to adapt the system of control of the administrative action to the new system of administrative decision-making and ensure compliance with the principle of effective judicial protection.

From the perspective of the measures adopted, the system of composite procedures requires a re-thinking of the notion of reviewable act both at national and European level. Administrative cooperation takes often place in the form of exchange of information, which is generally not considered as a reviewable act and, as such, considered incapable of producing legal effects. However, because of the composite nature of the decision-making the information provided by an authority can have far-reaching consequences, because another authority may base a binding measure on it. Furthermore, preparatory measures, even if adopted in more formalized way, are generally considered not reviewable both at national and European law, with the *Borelli* and *Tillack* solutions only providing half-way good patches to fill the judicial protection gap. From this point of view, an expansion of the notion of reviewable act both at European and at national level would be necessary.

More in general, the system of 'integrated administration' requires the necessity to depart from the strict dualistic approach to judicial review. As has been observed, the current mechanism of preliminary ruling only works vertically (i.e. from national courts to EU and not between national courts) and only one way (never from EU to national courts).[105] As this paper has shown, the traditional two-level structure clashes with the reality of decision-making which is more and more organized in a network structure, and the existence of the preliminary ruling in its current form does not fully serve to fill the existing gaps. Hence the

[104] Herwig C.H. Hofmann and Alexander H. Türk, 'Legal Challenges in EU Administrative Law by the Move to an Integrated Administration' in Herwig C.H. Hofmann and Alexander H. Türk (eds.), *Legal Challenges in EU Administrative Law*, 373.

[105] Also observed by Herwig C.H. Hofmann 'Decisionmaking in EU Administrative Law – The Problem of Composite Procedures', *Administrative Law Review* (2009), 213-214.

necessity to use the same network structure for the judicial supervision of the administrative action. A possibility to adapt judicial review to the system of integrated administration would be by setting up a system whereby 'judicial review could be undertaken by one court with supervision of all participants in the administrative network',[106] possibly by the court competent according to the procedural rules of the legal system to which the authority which took the final decision belongs. This, would, however, imply a recognition of the intertwined nature of the systems of judicial review of national and European courts and a final farewell to, on the one hand, national sovereignty on the organization of the judiciary, and, on the other hand, to the current monopoly of the European courts on the interpretation and application of EU law.

Finally, it would also be necessary for the European courts to re-think their approach to standing: as was mentioned above, even with the more relaxed standing criteria introduced by the Lisbon Treaty, associational claims may not be admissible in some circumstances, immunizing certain measures de facto from judicial review. Despite the CJEU's assertions to the contrary,[107] the requirements of standing in their current interpretation are a creation of the Court, and it is for the Court to choose whether to broaden the door to private parties' challenges of EU measures.

[106] Ibid, 214.
[107] Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677, para 45: "While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force."