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Martyna Wilbrandt-Gotowicz
Cardinal Stefan Wyszyński University in Warsaw, Poland
ORCID: 0000-0003-1527-0305
m.gotowicz@uksw.edu.pl

Judicial Control in Integrated Composite Administrative Proceedings – Monism or Duality of Protection of Individual Rights?

Sądowa kontrola zintegrowanych złożonych postępowań administracyjnych – monizm czy dualizm ochrony praw jednostki?

ABSTRACT

The article analyses and evaluates legal standards concerning administrative legal remedies in administrative matters dealt with in composite proceedings, i.e. proceedings in which Member State administrative bodies and the EU administration cooperate. The issue of judicial control in such procedures is particularly important from the point of view of the implementation of the principle of effective judicial protection expressed in Article 47 of the Charter of Fundamental Rights. The issue of an adequate system of legal remedies – monistic (based solely on national or EU remedies) or dualistic (assuming coexistence of national and EU remedies in cases of a given type) one – raises particular concerns. Considerations in this respect are based on the doctrinal concept of composite proceedings as a specific group of proceedings integrated into the EU law, as well as the current case law of the Court of Justice of the European Union. The conclusion presents *de lege lata* and *de lege ferenda* postulates to ensure effective judicial protection in this type of proceedings.

Keywords: judicial control; effective judicial protection; composite proceedings; administrative proceedings; legal remedies

CORRESPONDENCE ADDRESS: Martyna Wilbrandt-Gotowicz, PhD, Dr. Habil., Professor at the Cardinal Stefan Wyszyński University in Warsaw, Faculty of Law and Administration, Institute of Law, Chair of Administrative Procedure, Cardinal Stefan Wyszyński University in Warsaw, Wóycickiego 1/3 bud. 17, 01-938 Warsaw, Poland.

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INTRODUCTION

The deepening of European integration through the establishment of legislation to implement European policies and the freedoms of the EU market contributes to the creation of specific models of administrative procedures. They can be of a complex and composite nature, related to cooperation between different Member State bodies or national administrations and EU institutions, bodies, offices, or agencies. The formation of composite proceedings, based on multi-phase procedural sequences of various acts and actions aimed at deciding an administrative matter, is seen as an expression of the formation of integrated administration within the EU. At the same time, however, it should be noted that there is no consistency in the mechanisms of judicial review of decisions taken in this type of proceedings. Indeed, the judicial systems of the Member States and the Court of Justice of the European Union (the CJEU) remain strictly separated. This may cause practical problems in ensuring the judicial review of decisions and thus the exercise of the right to a court in cases where Member State and EU administrative bodies are involved.

Against this background, it is crucial to determine how the burden of implementing judicial control requirements at the EU level and in the Member States is distributed. In particular, the following issues should be borne in mind: whether the administrative procedure model has an impact on the monistic (based only on EU or national remedies) or dualistic (with co-existence of EU and national remedies) design of the system of remedies; whether the scope of potential remedies is adequate to the essence of composite proceedings; whether there are gaps in judicial protection of individuals and what features these remedies should have in order to fulfil the principle of effective judicial protection.

To achieve the above objectives, I first address the concept and legal nature of composite proceedings as a specific group of proceedings integrated into the EU law, as well as to the principle of effective judicial protection in proceedings involving different Member State bodies or EU administration. Next, I discuss (based on the existing legal regulations and the current CJEU case law) the use of national and EU legal remedies in composite proceedings. As a conclusion, I summarise the issues of judicial control in integrated composite administrative proceedings, formulating proposals for appropriate practice to ensure effective judicial protection.

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RESEARCH AND RESULTS

1. The concept and legal nature of composite procedures as proceedings integrated into the EU law

The concept of composite procedures appeared in the European doctrine at the turn of the 20th and 21st centuries in relation to procedures involving "mixed" decision-making powers of the EU and Member State bodies.[1] Due to the participation of different actors in the issuance of a decision, this type of procedure involves a multi-stage decision-making process (in German: *mehrstufige Entscheidungsprozesse*).[2] Hence, the terms, such as multistage proceedings (*mehrstufig*),[3] mixed administrative proceedings,[4] as well as multi-jurisdictional procedures[5] or multilevel processes were used in parallel.[6] Although the terminology is not uniform, these terms refer to the same making and application of law with the involvement of both national bodies and the Commission and EU agencies. The emergence of such procedures is seen as a result of powers' interaction,[7] or an expression of the emergence of integrated administration in Europe,[8] which is the result of the establishment of an increasingly numerous and comprehensive legal regulations for administrative procedures.[9]

The EU legislator, within the framework of the sectoral method of the Europeanisation of law, introduces a number of solutions appropriate for specific areas of the regulation related to the freedoms of the EU market. In the regulations and directives, in addition to strictly substantive rules, there is also an increasing number of procedural regulations, limiting to some extent the procedural autonomy

[1] C. Franchini, *European Principles Governing National Administrative Proceedings*, "Law and Contemporary Problems" 2004, vol. 1, p. 184; H. Nehl, *Principles of Administrative Procedure in EC Law*, Oxford 1999, p. 90.

[2] Cf. idem, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung ‚mehrstufiger' Verwaltungsverfahren*, Berlin 2002, p. 30.

[3] *Ibidem*, p. 29.

[4] G. della Cananea, *The European Union's Mixed Administrative Proceedings*, "Law and Contemporary Problems" 2004, vol. 1, p. 197 ff.

[5] H. Hofmann, *Multi-Jurisdictional Composite Procedures: The Backbone to the EU's Single Regulatory Space*, "University of Luxembourg Law Working Paper" 2019, vol. 3, pp. 1–25.

[6] J. Trondal, M. Bauer, *Conceptualizing the European Multilevel Administrative Order: Capturing Variation in the European Administrative System*, "European Political Science Review" 2017, vol. 1, p. 73 ff.

[7] G. della Cananea, *op. cit.*, p. 198.

[8] H. Hofmann, A. Türk, *Conclusions: Legal Challenges in EU Administrative Law by the Move to an Integrated Administration*, [in:] *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, eds. H. Hofmann, A. Türk, Cheltenham–Northampton 2009, p. 355.

[9] C. Franchini, *op. cit.*, p. 183.

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of Member States. This means that administrative proceedings determined by EU law are not uniform in nature. They do not have to be based solely on the classical linear scheme of the administrative and procedural relationship, in which one competent body decides on the rights or obligations of an individually determined entity. They may, however, constitute a procedural complex linked to the network structure of competences and activities of entities and bodies from different Member States and/or the EU. In this type of procedures, there is a network dependence of different types of opinions, reports, individual and general administrative acts, and sometimes also mediation and negotiation tools.[10] Therefore, the traditional approach to administrative procedures cannot be continued, as it requires flexibility by taking into account the impact of Europeanisation on procedural models.[11] The complexity of these procedural models also raises questions about the stage of the judicial review of acts and actions undertaken at the EU or national level at which legal remedies should be available.

I agree that the delimitation of composite procedures entails a definition *a contrario*. "Composite procedures must qualify as those which are neither purely national nor exclusively EU administrative proceedings".[12] The composite procedures include those in which the Commission and the national administrations work together in various forms, but exclude those in which states are involved only as recipients of EU action.[13] They are characterised by cooperation of both national and supranational administration (or the so-called mixed administration) and at least partial regulation in the European administrative law.[14] It is significant that the inclusion of another jurisdictional body in the decision-making process does not mean that a mixed act is issued, since it is always either an act of a body of a Member State or of the EU.[15] Therefore, "multi-jurisdictional composite procedures are procedures which have led to a final act either adopted by an EU body or a Member State body but with procedural steps leading to that act undertaken by actors within various jurisdictions".[16]

These proceedings aim at shaping the legal situation of an individual in view of multicentricity of legal systems, hence, when referring to them, I call them

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[10] M. Wilbrandt-Gotowicz, *Zintegrowane z prawem Unii Europejskiej postępowania administracyjne*, Warszawa 2017, pp. 96–97.

[11] Cf. H. Nehl, *Europäisches…*, p. 30.

[12] S. de Léon, *Composite Administrative Procedures in the European Union*, Madrid 2016 (doctoral thesis), p. 174.

[13] S. Cassese, *Il diritto amministrativo europeo presenta caratteri originali?*, "Rivista trimestrale di diritto pubblico" 2003, vol. 1, p. 43.

[14] E. Chiti, *The Relationship between National Administrative Law and European Administrative Law in Administrative Procedures?*, [in:] *What's the New in European Administrative Law?*, ed. J. Ziller, San Domenico 2005, pp. 7–8.

[15] Cf. H. Hofmann, *op. cit.*, p. 1.

[16] *Ibidem*, p. 2.

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collectively integrated (with the EU law) administrative proceedings. The impact of the EU law on administrative proceedings is not limited to the establishment of composite procedures. After all, Member State bodies, deciding on administrative matters governed by the EU law, should also take account of its formal requirements, even if they apply the law as part of procedures, in which neither other Member State bodies nor the EU administration participate. The key to determining the legal nature of administrative proceedings, shaped as a result of integration processes, is therefore taking into account that it is essentially a legal rule determined by the EU law that is applied in such proceedings, i.e., a directly applicable EU rule, or a rule incorporated into national law in order to implement a directive (and sometimes multicentric norms reconstructed from national and EU legislation). Therefore, I consider it justified to distinguish integrated proceedings based on the criterion of at least partial regulation in administrative procedural norms determined by the EU law.

I define integrated proceedings as a set of procedural actions, determined by the EU formal law, taken by administrative bodies (of Member States or the EU) and other entities (e.g. parties) in order to decide on a specific administrative matter (by determining the legal situation, as a rule, of an individually determined entity in respect of its rights or obligations) in the form of a binding, external administrative and legal action (usually an individual administrative decision or a general decision). More broadly, the concept of integrated administrative proceedings also includes procedural complexes of a hybrid nature determined by EU rules (mixed administrative proceedings), one of the elements of which may be jurisdictional proceedings, and an administrative decision is an alternative form with respect to a material and technical action or an administrative agreement.[17] Such proceedings cannot therefore be conducted solely on the basis of national law, the content of which is not subject to the EU law. Their specific character results from the will (and competence) of the EU legislator to set not only substantive law, but also procedural frameworks for resolving specific types of cases, including by national administrative bodies.

Given the number of administrative bodies participating in them, integrated proceedings may be simple (where a case is decided by one body without the participation of other bodies) or complex, composite, and multi-jurisdictional. The second criterion for the classification of integrated proceedings is a division based on the type of entity issuing a final binding judgment in an individual case: a Member State administrative body adjudicating at the decentralised level or an EU administrative body adjudicating at the centralised level.

In this respect, I distinguish four basic models of integrated proceedings:

[17] Cf. M. Wilbrandt-Gotowicz, *op. cit.*, pp. 258–259.

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- a simple decentralised model (where a matter is decided by a national body without the cooperation of the bodies of other states or EU administration),
- a complex decentralised model (where a matter is decided by a national body with the cooperation of the bodies of other states or EU administration),
- a simple centralised model (where a matter is decided by EU administration without the cooperation of national bodies), or
- a complex centralised model (where a matter is decided by EU administration with the cooperation of national bodies).[18]

Against this background, proceedings referred to in the literature as composite may take the form of complex centralised proceedings, where the final decision is taken at the EU level, or of complex decentralised proceedings, where the final decision is taken by a Member State body.

Complex centralised proceedings are characterised by that, although the decision on an administrative matter is left to the EU administration, some procedural steps are taken by national bodies in the course of the proceedings. The issuance of an administrative act is therefore preceded by a national proceeding with a different scope (from the acceptance of the application, through formal assessment and sometimes an investigation). Some procedural steps are therefore taken by a body of a given state, sometimes referred to as a reference body. This makes it possible to distinguish in a centralised proceeding a complex step (phase) of the proceeding before a national body, the essential element of which may be the issuance of a position (opinion, report) and the step (phase) of an EU proceeding aimed at binding resolution of the case, e.g. when using the assessment of the facts of the case presented by the national body. Complex centralised proceedings are characterised by a vertical arrangement of cooperating bodies: the EU institutions as central entities covering the whole of the EU and the national bodies as decentralised entities competent for cases covering the territory of a given Member State.

A contrario, in complex decentralised proceedings, decisions are taken at the national level, but there are bodies from different Member States which are involved in the handling of the matter. The administrative framework for complex decentralised proceedings extends beyond the territory of a single state. This means that the determination of an individual's legal position requires, in agreement with the bodies from different states, a decision covering more than one state (e.g. in the case of decisions on movement of waste or authorisations for international carriage of passengers by coach), or possibly related decisions of national bodies (like in the case of proceedings for the mutual recognition of authorisations).

The relationship between them may be regulated in different ways. A decision of a body of one Member State may be precedent to decisions of similar bodies of other Member States (e.g. in sequential recognition). In another case (e.g. in

[18] *Ibidem*, pp. 265–296.

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parallel recognition), a single application for initiation of proceedings may create a situation of administrative *lis pendens* before the bodies of different Member States and oblige them to issue decisions of a uniform or similar nature, although the scope of the proceedings may vary from one state to another (e.g. one state being the reference state to conduct a full investigation and the other using its findings).[19] These types of proceedings are therefore a manifestation of complex cooperation between competent bodies from states with different legal regimes, sometimes also involving the EU administration.[20]

In both complex decentralised and centralised proceedings, the final decision binding on its addressees is reached in a multi-stage process and the different steps preceding its delivery may have different legal qualification. These can be actions and acts that affect the adoption of the final decision to varying degrees, sometimes constituting separate administrative decisions under Member States' legislation. Hence, the problem of the judicial review of complex proceedings is more complex, going beyond the typology of proceedings shaped by the EU law. The division of integrated procedures I have presented, which is related to the reference of composite procedures to complex centralised or decentralised proceedings, clearly indicates the level at which the final decision is taken, which will determine whether the main decision taken will constitute an EU or a national act and therefore, in a sense (which will be further elaborated upon), whether the decision will be verified by the CJEU or the national court.

It should be noted that the terminology used in the literature is not uniform. In the doctrine, in comparison with composite proceedings, vertical and horizontal proceedings are most often mentioned. For example, according to H. Hofmann, vertical cooperation can lead to one single binding act or may lead to two separate but linked final decisions, one on the Member State and one on the EU level. Multi-jurisdictional vertical composite procedures may also arise when EU bodies are required to apply Member State law, or alternatively, given Member State decisions effects also on EU law.[21] Two general models of vertical procedures are distinguished: top-down proceedings and bottom-up proceedings. In a bottom-up approach, the initiation of the procedure is entrusted to national bodies, while the final decision is taken at the EU level. Although the national body formulates an assessment of the factual and legal situation of the case, the matter is dealt with following an act of the Commission. Under the top-down option, however, the proceeding starts at the EU level and ends with a national decision shaping the legal

[19] For example, see Articles 33, 34 and 53 of Regulation (EU) No. 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ L 167/1, 27.6.2012).

[20] Cf. M. Wilbrandt-Gotowicz, *op. cit.*, pp. 265–296.

[21] H. Hofmann, *op. cit.*, p. 6.

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situation of the individual.[22] Next to the "vertical" cooperation between EU and Member State bodies, also "horizontal" composite structures, where several Member State bodies act together in one procedure, as defined by the EU law, as well as diagonal procedures within put from several Member State bodies as well as EU bodies are distinguished.[23] Despite the significance of the above characteristics for the description of the diversity of composite procedures, it does not directly resolve the problem of the judicial review of the decisions taken in composite proceedings.

2. Principle of effective judicial protection in composite proceedings

The essence of composite proceedings, as has been demonstrated, is "the 'interdependence' of national and EU authorities in the process of carrying out their administrative functions for the purposes of implementing EU law."[24] The dualistic approach to the judicial review of administrative action, which is based on a strict separation between the EU and the national levels of jurisdiction remains in opposition to this interdependence.[25] The effectiveness of the EU law can be ensured by applying the principle of procedural autonomy of Member States. Accordingly, Member State bodies in integrated proceedings, including those of a complex, composite nature, should apply national procedural rules in a manner consistent with the principle of efficiency to the extent not covered by the EU law.

The limited principle of procedural autonomy also applies to the establishment of judicial protection measures for individuals. It allows, on the one hand, the coexistence of traditionally established systems of judicial protection in Member States, but on the other, it requires effective legal protection. It follows from the settled case law of the Court that, under the principle of sincere cooperation laid down in Article 4 (3) of the Treaty on European Union, it is for the courts of Member States to ensure judicial protection of a person's rights under the EU law; in addition, Article 19 (1) of the Treaty on European Union requires Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by the EU law.[26] This obligation imposed on Member States corresponds to the law set out in Article 47 of the Charter of Fundamental Rights providing for

[22] H. Hofmann, G. Rowe, A. Türk, *Administrative Law and Policy of the European Union*, New York 2011, p. 362. Cf. G. della Cananea, *op. cit.*, pp. 199–203; H. Hofmann, *op. cit.*, p. 7.

[23] H. Hofmann, *op. cit.*, pp. 18–23.

[24] M. Eliantonio, *Judicial Review in an Integrated Administration: The Case of "Composite Procedures"*, "Review of European Administrative Law" 2014, vol. 7(2), pp. 68–69.

[25] *Ibidem*, p. 67.

[26] *Puškár* (C-73/16), EU:C:2017:725 [57]. Cf. *Lesoochranárske zoskupenie VLK* (C-243/15), EU:C:2016:838 [50]; *Sacko* (C-348/16), EU:C:2017:591 [29].

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the principle of effective judicial protection, which has become a general principle, binding on both the EU and the Member States.[27]

The scope of application of this Charter provision to Member States' actions is defined in Article 51 (1) thereof, according to which the provisions of this Charter are addressed to the Member States only when they are implementing EU law. As confirmed by settled case law of the CJEU, "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations".[28]

The substantive requirements laid down in Article 47 of the Charter for an effective legal remedy and access to an impartial court apply equally to all integrated proceedings, including those of a complex, composite nature, although they are most often applied to decentralised proceedings. In the light of the CJEU case law, the requirement to ensure effective judicial protection under Article 47 of the Charter is a general principle to which the provisions of individual EU acts may refer, e.g., establishing the obligation for Member States to see to that the procedural conditions allowing to ensure respect for the rights, which individuals derive from those acts, or to ensure that certain court proceedings are non-discriminatory as regards costs, are met. Therefore, the analysis of this principle by the CJEU takes place in the context of specific sectoral acts. Nevertheless, it is possible to cite some general interpretative frameworks presented in the case law.

In particular, it is indicated that setting out detailed procedural rules for legal actions intended to ensure the protection of rights, Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection.[29] Judicial protection, "must be assured both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the definition of detailed procedural rules relating to such actions".[30] It therefore follows from the above that the standards of effective judicial protection cover both the systemic dimension, i.e. the establishment of appropriate independent courts, and the procedural dimension, related to defining procedural rules of court proceedings, which would meet the standards set out in Article 47 of the Charter.

It is for the domestic legal system of each Member State to regulate the procedural rules governing actions for the protection of the rights which individuals

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[27] Cf. *Berlioz Investment Fund* (C-682/15), EU:C:2017:373 [44]; *Sacko* (C-348/16) [30].

[28] *Online Games* (C-685/15), EU:C:2017:452 [55]. Cf. *Lesoochranárske zoskupenie VLK* (C-243/15) [51].

[29] *Puškár* (C-73/16) [59]. Cf. *Star Storage* (C-439/14 and C-488/14), EU:C:2016:688 [46]; *Sacko* (C-348/16) [31].

[30] *Sziber* (C-483/16), EU:C:2018:367 [49]. Cf. *Morcillo and García* (C-169/14), EU:C:2014:2099 [35 and the case law cited therein].

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derive from EU law. "In the absence of EU legislation, the Member States have the responsibility for ensuring that those rights are effectively protected in each case and, in particular, for ensuring compliance with the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter".[31]

Against this background, the problem of judicial independence is particularly pointed to. The concept of "independence", which is an integral part of the judgment, has two aspects. The first, which is external, entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The second, which is internal, is linked to "impartiality" and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings.[32]

Therefore, Article 47 of the Charter must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal. "That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law".[33]

The independence of national courts is so important since it is for the competent national court to assess in detail, taking into account the whole context of the case pending before it, whether the application of the rules in question in this particular case can affect the right to effective judicial protection of the parties concerned.[34]

The shaping of the right to bring an action before a court is also important in assessing respect for the principle of effective judicial protection. Against the background of environmental regulations and access to legal remedies for the parties interested, e.g., national regulations, which made it impossible to assess the legality of a decision refusing an NGO to participate in administrative proceedings, were found to be in breach of the EU law.[35]

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[31] *Online Games* (C-685/15) [59]. Cf. *Lesoochranárske zoskupenie VLK* (C-243/15) [65].

[32] *Online Games* (C-685/15) [60–62]. Cf. *TDC* (C-222/13), EU:C:2014:2265 [30–32 and the case law cited therein].

[33] *A K* (C-585/18, C-624/18 and C-625/18), EU:C:2019:982 [171].

[34] *Amt Azienda Trasporti* (C-328/17), EU:C:2018:958 [58].

[35] See *Lesoochranárske zoskupenie VLK* (C-243/15) [72].

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A number of judgments concern the characteristics of a legal remedy to be used at court which should meet the requirements of Article 47 of the Charter.[36] In the context of the obligation to exhaust the legal remedies available in administrative proceedings, as a condition to be met before using a legal remedy at court, it was considered, e.g., to be a restriction of the right to an effective remedy before a court within the meaning of Article 47 of the Charter. In accordance with Article 52 (1) of the Charter, it can therefore "be justified only if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others".[37] It is particularly important that the early exhaustion of the legal remedies available in administrative proceedings does not significantly delay the initiation of court proceedings, that it entails the suspension of the limitation period of the rights claimed and that it does not cause excessive costs.

The CJEU, in the context of Directive 2011/92,[38] also referred to the issue of non-discriminatory nature of legal proceedings on grounds of costs.[39] It was considered that a Member State cannot derogate from the requirement that certain judicial procedures not be prohibitively expensive, where a challenge is deemed frivolous or vexatious, or where there is no link between the alleged breach of national environmental law and damage to the environment.[40] The inadmissibility of the complaint, the abuse of rights by the applicant or its insignificance cannot therefore be grounds for a court to depart from the requirements of effective judicial protection.

As a side note, it should also be stressed that the obligations to ensure effective judicial protection also include the interpretation of national law by Member State courts in conformity with the EU law. "When national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive, and consequently comply with the third paragraph of Article 288 of the Treaty on the Functioning of the European Union (TFEU)".[41] If national law cannot be interpreted in conformity with the EU law, a national court cannot therefore

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[36] Cf. *Tall* (C-239/14), ECLI:EU:C:2015:824 [51]; *Sacko* (C-348/16) [31].

[37] *Puškár* (C-73/16) [62]. Cf. *Star Storage* (C-439/14 and C-488/14) [49].

[38] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ L 26/1, 28.1.2012).

[39] Cf. *North East Pylon* (C-470/16), EU:C:2018:185 [34].

[40] *Ibidem*, [65].

[41] *Bauer* (C-569/16 and C-570/16), EU:C:2018:871 [66–68]. Cf. *Dominguez* (C-282/10), EU:C:2012:33 [24 and the case law cited therein]. See *Egenberger* (C-414/16), EU:C:2018:257 [72–73 and the case law cited therein].

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apply the national rules which infringe the principle of primacy. "In the event that it is impossible to interpret the national legislation at issue in the main proceedings in a manner consistent with Article 31 (2) of the Charter, it will therefore be for the referring court (…) to ensure within its jurisdiction the judicial protection for individuals (…) and to guarantee the full effectiveness thereof by disapplying if need be that national legislation".[42]

Therefore, the requirement to ensure effective judicial protection against decisions of administrative bodies shaping the legal situation of an individual is not questionable. Everyone should have the right to bring an action against a decision concerning his rights or obligations in cases where the bodies are required to apply the EU law. In simple integrated proceedings, the designation of the legal regime responsible for ensuring the implementation of this principle is not particularly difficult. It is up to Member States to guarantee effective means of judicial review of decisions issued by national administrative bodies. However, it is different in composite proceedings, which consist of procedural phases carried out by national and EU administrative bodies of different levels. In such procedures, the legal nature of individual acts and actions leading to the shaping of the legal situation of an individual may be shaped differently. Hence, the question may arise as to at what stage of such a complex procedure the means of judicial review should be available, or whether it may concern preparatory acts and not only final decisions. Due to the duality of the judicial review of the administration by the CJEU and national courts, there arises the question of possible competitiveness of national and EU legal remedies in composite proceedings as well as the interdependence of these protection systems. The following is an attempt to provide some guidance on the application of national and EU legal remedies in composite proceedings respectively, based on the current CJEU case law.

3. National legal remedies in composite proceedings

In the case of complex decentralised proceedings, i.e. horizontal procedures, there are no grounds for an individual to bring an action before the CJEU against a decision of national bodies. It should be borne in mind that procedures of this kind, such as proceedings for mutual recognition of authorisations, pend within the framework of cooperation between different Member State bodies. Therefore, the absence of a decision at the EU level precludes judicial review before the CJEU (except for the preliminary ruling procedure). In this type of proceedings, however, it is also necessary to guarantee the right to effective judicial protection, as these are cases where national bodies apply the EU law and are therefore bound by the requirements of the Charter of Fundamental Rights, including Articles 41 and 47.

[42] *Max-Planck* (C-684/16), EU:C:2018:874 [80]. Cf. *Egenberger* (C-414/16) [79].

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Any individual decision refusing to recognise rights granted in another Member State should therefore be appealable before the court of the Member State of the body refusing, e.g., mutual recognition of an authorisation. The addressee of such a decision will be an entity with a legal right of appeal. Legal remedies in such cases should be provided for, even if national procedural rules do not provide for them in such a case. Otherwise, there would be a gap in the judicial protection of individuals required by Article 47 of the Charter.

It should be noted, however, that some of the horizontal procedures are of a particularly complex nature, related to the simultaneous conduct of proceedings by competent bodies from different, sometimes multiple, Member States. Where one of them is the reference body, conducting the main investigation, its assessment may directly affect the way the bodies from other states decide. It is therefore particularly important for an individual to review the act on the basis of which the bodies of other states also take decisions. This may lead to parallel court proceedings in different Member States in cases closely related with respect to merits.[43]

Against this background, it should be emphasized that sometimes the EU legislator provides for additional mechanisms to coordinate the outcome of complex decentralised proceedings. For example, specific consultation procedures have been established for objections raised by Member States and derogations from the mutual recognition of authorisations for biocidal products, as well as the possibility to transfer the decision to the Commission and consequently to submit it to the CJEU for review.[44] These solutions are intended as protection against arbitrariness of Member States' administrations, but they are based on fragmentary mechanisms specific to individual sectoral regulations.

In the case of doubts as to the interpretation or validity of the EU rules applicable to horizontal composite proceedings, any national court before which a dispute is pending may refer a question for a preliminary ruling in this regard under Article 267 TFEU. In this case, it is also possible to suspend individual proceedings pending in related cases before the courts of other Member States, whose bodies have participated in the same or related complex decentralised procedure. This depends on the assessment of the national court concerned. However, there is currently no practice of initiating the preliminary ruling procedure jointly by two or more national courts dealing with the legality of closely linked decisions of individual national bodies issued under the decentralised procedure. Nor is the exchange of legal questions between courts of different Member States provided for. The treaties do not yet contain the legal basis for such close cooperation between the judicial authorities of the Member States.

[43] For example, see Articles 33 and 34 of Regulation 528/2012.

[44] Cf. Articles 35–37 of Regulation 528/2012.

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In the CJEU case law to date, the problem of judicial control of the activities of administrative bodies in composite proceedings has been noticed mainly in vertical proceedings. In such proceedings, there is a potential possibility to entrust the review of the legality of administrative decisions to national courts or the CJEU. From the point of view of the principle of effective judicial protection, it is particularly important that there are no gaps in judicial protection due to the absence of effective legal remedies to be used against decisions issued in composite proceedings. On the other hand, however, the application of separate legal remedies to preparatory acts, which do not prejudge the final outcome, may make the judicial review illusory due to its prematurity or the competitive coincidence of different court proceedings. It is thus undesirable to have either no or too many legal remedies. As rightly indicated in the *Nanopoulos* case: "Admittedly, the case law has acknowledged, in a number of cases, that an applicant is not required, in a complex procedure consisting of a number of interdependent acts, to submit as many complaints as there are acts in the procedure which may have affected him adversely. On the contrary, in the light of the cohesion of the various acts making up that complex procedure, it has been accepted that the applicant may contest the legality of earlier acts in support of an action directed against the last of them".[45]

Therefore, the key issue is the separation of the judicial review of the administration by the CJEU in such composite proceedings from the administrative justice of individual Member States, and consequently an attempt to set the criteria according to which individual decisions can be qualified for national or EU jurisdiction. In general, it could be assumed that the decisions of the EU administration could only be subject to review by the CJEU and the decisions of Member State bodies by national courts, but this does not exhaust the modalities of complex procedures based on a patchwork of acts and actions of national bodies, EU agencies or the Commission, which are differently linked.

Following an analysis of the CJEU case law, the conclusion can be drawn that the admissibility of national appeals against the actions of the national bodies, within the framework of integrated proceedings involving the EU administration (and at the same time the requirement to guarantee them), is linked *de facto* with the implementation of two criteria related to the sovereign nature of the act or action challenged (governance criterion) and the limitation of the administrative recognition of the EU bodies (binding scope criterion) by the CJEU. Both are related to the EU's lack of exclusive competence to deal with an individual case, which should be shared with the Member States.

[45] *Nanopoulos* (F-30/08), EU:F:2010:43 [86]. Cf. *Ley v Commission of the EEC* (C-12/64 and C-29/64), EU:C:1965:28; *P Commission v Noonan* (C-448/93), EU:C:1995:264 [17]; *Marx Esser and Del Almo Martinez* (T-182/94), EU:T:1996:130 [37].

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First, a national legal remedy may be used to appeal against an act of a sovereign nature, that is an administrative act which determines the legal situation of an individual. However, this concerns not only administrative decisions. This criterion will be met by those acts or actions of the Member State body which will concern the rights or obligations of the addressee, e.g., which will refuse to grant a right, which will impose an obligation, or which will withdraw a right. Thus, national legal remedies in composite proceedings will not be used in relation to such actions of national bodies, which do not directly modify the legal situation of an individual, including e.g. notifications addressed to EU institutions, bodies, offices, or agencies, i.e. actions of a strictly informative nature, consisting in the provision of operational support (which may be described as ancillary administrative action). The exercise of the final decision-making power is therefore a crucial factor for determining whether the EU courts or the national courts must conduct a judicial review.[46]

In this respect, it is important to stress that national legal remedies should be available against all decisions of national bodies which are final and therefore binding on the rights or obligations of individuals in cases covered by the EU law (whether or not the EU bodies were involved in the proceedings).

Taking into account the second criterion, it may be initially determined how the CJEU views the question of appealability of acts and actions of national bodies undertaken in the course of composite proceedings, i.e., acts and actions which are preparatory, preliminary but do not constitute the final outcome of the proceedings. Given that, it was considered that acts/actions of national bodies taken in the course of composite proceedings (e.g. opinions, draft decisions), which are not binding on the EU administration, are also not subject to appeal using national legal remedies. This would be premature and illusory, since the resolution of the case, anyway, is left in the sectoral act to the EU administration. Only following such a final resolution of the case can a judicial review of the administration be launched at the EU level. *A contrario*, the requirement of judicial review must also be complied with as regards a measure which constitutes a necessary step in the procedure for adoption of a Community measure, where the Community institutions have only a limited or non-existent discretion with regard to that measure.[47]

The *Berlusconi* judgment confirms that "an act of a national authority that is part of a decision-making process of the European Union does not fall within the exclusive jurisdiction of the EU Courts where it is apparent from the division of powers in the field in question between the national authorities and the EU institutions that the act adopted by the national authority is a necessary stage of a proce-

[46] Cf. opinion of Advocate General Campos Sánchez Bordona, *Iccrea Banca* (C-414/18), EU:C:2019:574 [34].

[47] *Carl Kühne* (C-269/99), EU:C:2001:659 [57]. Cf. *Oleificio Borelli* (C-97/91), EU:C:1992:491 [9].

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dure for adopting an EU act in which the EU institutions have only a limited or no discretion, so that the national act is binding on the EU institution".[48] It then falls to the national courts to rule on any irregularities that may vitiate such a national act (making a reference to the Court for a preliminary ruling where appropriate) on the same terms as those on which they review any definitive act adopted by the same national body which is capable of adversely affecting third parties and moreover, in the light of the principle of effective judicial protection, to regard an action brought for that purpose as admissible even if the national rules of procedure do not so provide.[49]

The case law in question refers to the realities of the specific cases examined. However, there is a certain tendency towards a structured approach in the CJEU case law to the requirements of effective judicial protection in composite proceedings. Where an act or action of a sovereign nature is undertaken, which finally resolves a case at the national level, there are no doubts that Member States need to provide for legal remedies. It is the question of appealability of preparatory acts of national bodies, which bind the EU administration in respect of the future solution, which is more problematic. To guarantee an adequate level of protection for individuals, it may be necessary in such a case to provide for a legal remedy before a court of a Member State.

If the provision of national remedies is necessary for the implementation of the principle of effective judicial protection, this obligation is valid, "even if the domestic rules of procedure do not provide for this in such a case".[50] In the light of the principle of primacy, it may therefore be necessary for the national legislation concerning the subject-matter of an action before a court to be functionally interpreted or for the national court not to apply provisions of national law which are incompatible with the EU law and which could restrict access to a court in integrated proceedings of a complex nature.

The requirement that each act of a national body should be subject to judicial review, as a general principle of Community law, in the case law has been directly referred to individual opinions of national bodies as part of the procedure leading to a Community decision. In the *Borelli* case, in view of the opinion of the national bodies on applications for aid from the European Agricultural Guidance and Guarantee Fund, it was pointed out that "it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure at issue on the same terms on which they review

[48] *Berlusconi (Fininvest)* (C-219/17), EU:C:2018:1023 [45]. Cf. *Oleificio Borelli* (C-97/91) [9–10].

[49] *Berlusconi (Fininvest)* (C-219/17) [46]. Cf. *Oleificio Borelli* (C-97/91) [11–13]; *Carl Kühne* (C-269/99) [58]; *Bavaria* (C-343/07), EU:C:2009:415 [57].

[50] Cf. *Bavaria* (C-343/07) [57].

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any definitive measure adopted by the same national authority which is capable of adversely affecting third parties and, consequently, 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".[51]

The same criteria for challenge, using a national remedy, also apply *mutatis mutandis* to the unlawful silence of a national body in a composite procedure. In the event of inaction in issuing a sovereign decision by the national body (or of protracted conduct of the proceedings), an individual should have the right to lodge a complaint with the national court. Similarly, it seems that national legal remedies (regardless of the mechanisms of the Member State's liability towards the EU) should also be provided in the case of failure of national bodies to issue in due time acts, which, although not final in nature, constitute preparatory acts binding the EU administration to take a final decision.

The adoption of the admissibility, on the one hand, and the obligation for Member States to provide for a judicial review of acts and actions (respectively, inaction) of Member State bodies in composite procedures of a sovereign and binding nature for the EU administration, on the other, is understandable in view of the requirements of effective judicial protection. However, this does not solve a number of potential problems that may arise in practice. While national remedies may affect the verification of the activities of the national administration (e.g. by annulling, nullifying, or modifying the contested acts, the actions of national bodies), the binding force of national courts' decisions does not extend to the validity of EU acts taken following a procedure involving Member States. It seems that, in the absence of general regulations of administrative proceedings in the EU and the lack of regulations on this subject in sectoral acts, guarantees of the reliability of procedures with the participation of the EU administration should be consolidated and promoted in the CJEU's judicial activity. It should be mentioned that "where the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to the Commission decision, stay its proceedings pending final judgment in the action for annulment before the Courts of the European Union, unless it takes the view that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted".[52]

To a certain extent, the preliminary ruling procedure is therefore an instrument to coordinate separate judicial systems of the Member States and the EU. It may provide a remedy for combining a view of national bodies' preparatory acts by

[51] *Oleificio Borelli* (C-97/91) [13].

[52] *Georgsmarienhütte* (C-135/16), EU:C:2018:582 [24]. Cf. *Masterfoods and HB* (C-344/98), EU:C:2000:689 [57].

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a national court with an assessment of the validity of EU acts issued in identical composite procedures. Against this backdrop, the modernization of the preliminary ruling procedure, its adaptation to the realities of complex proceedings, introducing joint questions from courts of several Member States, allowing courts of other states to join already pending composite proceedings or enabling horizontal questions to be exchanged between courts of Member States may be postulated. M. Eliantonio proposes, e.g., the introduction of 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.[53] I agree with these postulates, although they require a careful analysis and treaty amendments. This also raises questions in regard to the competences of the CJEU.

4. EU legal remedies in composite proceedings

The conditions for the application of national legal remedies against decisions issued in composite proceedings, including those involving the EU administration, have been indicated above. At the vertical level, they cover situations related to the division of decision-making powers at the national and EU levels in such a way that the national body issues a final decision, or, if it is preliminary or preparatory, it has a binding effect on the EU administration's decision. Therefore, national courts, or national courts and the CJEU (which deals with EU appeals against decisions of the EU administration or with questions referred by national courts for a preliminary ruling) can participate in the review of legality.

However, in the *Berlusconi* judgment, the CJEU also pointed out cases where only EU appeals against decisions issued in complex proceedings are admissible. According to the arguments contained therein, in such a situation, where the EU law does not aim to establish a division between two powers – one national and the other of the EU – with separate purposes, but, on the contrary, lays down that an EU institution is to have an exclusive decision-making power, it falls to the EU courts, by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU, to rule on the legality of the final decision adopted by the EU institution at issue and, in order to ensure effective judicial protection of the persons concerned, to examine any defects vitiating the preparatory acts or the proposals of the national bodies that would be such as to affect the validity of that final decision.[54] This position was also confirmed in the *Iccrea Banca* judgment, where it was indicated that "any involvement of the national authorities in the course of the procedure leading to the adoption of such acts cannot affect their classification as EU acts, where

[53] Cf. M. Eliantonio, *op. cit.*, p. 98.

[54] *Berlusconi (Fininvest)* (C-219/17) [44]. Cf. *Foto-Frost* (C-314/85), EU:C:1987:452 [17].

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the acts of the national authorities constitute a stage of a procedure in which an EU body, office or agency exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities".[55]

This means that national courts should declare inadmissible complaints against acts or actions of national bodies issued in composite proceedings which are preliminary, not conclusive and not directly binding on the EU administration. Speaking for the exclusivity of EU legal remedies in such a case, the CJEU underlined that "where the EU legislature opts for an administrative procedure under which the national authorities adopt acts that are preparatory to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person, it seeks to establish between the EU institution and the national authorities a specific cooperation mechanism which is based on the exclusive decision-making power of the EU institution".[56] The CJEU's arguments that "in order for such a decision-making process to be effective, there must necessarily be a single judicial review, which is conducted, by the EU Courts alone, only once the decision of the EU institution bringing the administrative procedure to an end has been adopted, a decision which is, alone, capable of producing binding legal effects such as to affect the applicant's interests by bringing about a distinct change in his legal position" must be shared.[57] It should be added, however, that the effectiveness of the monistic system of judicial protection in this type of composite proceedings can only be discussed taking into account the need to increase the legal awareness of EU citizens as regards the possibilities and conditions for lodging complaints against decisions of the EU administration issued in composite proceedings.

In the *Berlusconi* judgment, it was further stated that "if national remedies against preparatory acts or proposals of Member State authorities in this type of procedure were to exist alongside the action provided for in Article 263 TFEU against the decision of the EU institution bringing the administrative procedure established by the EU legislature to an end, the risk of divergent assessments in one and the same procedure would not be ruled out and, therefore, the Court's exclusive jurisdiction to rule on the legality of that final decision could be compromised, in particular where the EU institution's decision follows the analysis and the proposal of those authorities".[58] However, it should be added that the risk in this respect to a certain extent also applies to cases where the CJEU in the same decision, in fact, allows duality of a judicial review (i.e. where preparatory acts of national bodies are binding on the EU administration).

[55] *Iccrea Banca* (C-414/18) [38].
[56] *Berlusconi (Fininvest)* (C-219/17) [48].
[57] *Ibidem*, [49]; *Iccrea Banca* (C-414/18) [42].
[58] *Berlusconi (Fininvest)* (C-219/17) [50].

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Complaints to the CJEU are based primarily on Article 263 TFEU which allows (any natural or legal person) to lodge a complaint against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. The CJEU's review initiated in this mode includes the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It will also review the legality of acts of bodies, offices or agencies of the EU intended to produce legal effects *vis-à-vis* third parties. However, in relation to regulatory acts, natural and legal persons may bring actions for the annulment of such acts, which do not require implementing measures and which directly concern the applicant, and the admissibility of such actions is not subject to the requirement that a given act concern the applicant.[59] As regards the concept of "regulatory acts", its scope is more restricted than that of the concept of "acts" used in the first and second limbs of paragraph 4 of Article 263 TFEU and refers to acts of general application other than legislative acts.[60] The concept of a "regulatory act" within the meaning of that provision therefore covers all non-legislative acts which are of general application.[61]

The condition that a natural or legal person must be directly concerned by the decision against which the action is brought, requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of the individual and, second, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules.[62]

The concept of regulatory acts not requiring implementing measures is to be interpreted in the light of the objective of that provision, which, as is apparent from its drafting history, is to ensure that individuals do not have to break the law in order to have access to a court. "Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he did not have a legal remedy before

[59] *Scuola Elementare Maria Montessori* (C-622/16 P and C-624/16 P), EU:C:2018:873 [22]. Cf. *Inuit Tapiriit Kanatami* (C-583/11 P), EU:C:2013:625 [57].

[60] *Scuola Elementare Maria Montessori* (C-622/16 P and C-624/16 P) [23]. Cf. *Inuit Tapiriit Kanatami* (C-583/11 P) [58–61].

[61] An act is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in a general and abstract manner. See *Scuola Elementare Maria Montessori* (C-622/16 P and C-624/16 P) [29]. Cf. *Zuckerfabrik Watenstedt* (C-6/68), EU:C:1968:43; *Libéros* (C-171/00 P), EU:C:2002:17 [28]; *AJD Tuna* (C-221/09), EU:C:2011:153 [51].

[62] *Scuola Elementare Maria Montessori* (C-622/16 P and C-624/16 P) [42]. Cf. *Glencore Grain* (C-404/96 P), EU:C:1998:196 [41]; *Deutsche Post* (C-463/10 P and C-475/10 P), EU:C:2011:656 [66]; *Lysoform and Ecolab* (C-666/16 P), EU:C:2017:569 [42].

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the EU judicature for the purpose of challenging the lawfulness of the regulatory act. In the absence of implementing measures, a natural or legal person, although directly concerned by the act in question, would be able to obtain judicial review of the act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national court".[63]

By contrast, where a regulatory act entails implementing measures, judicial review of compliance with the EU legal order is ensured irrespective of whether those measures were adopted by the EU or the Member States. Natural or legal persons who are unable, because of the conditions of admissibility in paragraph 4 of Article 263 TFEU, to challenge an EU regulatory act directly before the EU judicature are protected against the application of such an act to them by the ability to challenge the implementing measures which the act entails. Where responsibility for the implementation of such acts lies with the institutions, bodies, offices, or agencies of the EU, natural or legal persons are entitled to bring a direct action before the EU judicature against the implementing acts under the conditions stated in paragraph 4 of Article 263 TFEU, and to plead in support of that action, pursuant to Article 277 TFEU, the unlawfulness of the basic act concerned. Where that implementation is a matter for the Member States, those persons may plead the invalidity of the basic act concerned before the national courts and cause them to refer questions to the CJEU for a preliminary ruling under Article 267 TFEU.[64]

Complaints to the CJEU may be based on allegations of lack of competence, infringement of essential procedural requirements, infringement of the treaties, or of any rule of law relating to their application or misuse of powers. It should be borne in mind that acts setting up EU bodies, offices, and agencies may provide for specific requirements and conditions concerning complaints brought by natural or legal persons against acts of those bodies, offices, or agencies intended to produce legal effects *vis-à-vis* those persons. An important requirement of admissibility is also the time limit for lodging a complaint, which should be done within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

This term has a broader meaning since it has been accepted in the case law that it also provides for the possibility of raising charges before a national court in the context of initiating the preliminary ruling procedure. It is assumed that "in so far as the applicants in the main proceedings were undoubtedly entitled to bring an

[63] *Scuola Elementare Maria Montessori* (C-622/16 P and C-624/16 P) [58]. Cf. *Telefónica* (C-274/12 P), EU:C:2013:852 [27]; *European Union Copper Task Force* (C-384/16 P), EU:C:2018:176 [35 and the case law cited therein].

[64] *Scuola Elementare Maria Montessori* (C-622/16 P and C-624/16 P) [59–60]. Cf. *Telefónica* (C-274/12 P) [28–29]; *European Union Copper Task Force* (C-384/16 P) [36–37 and the case law cited therein].

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action for annulment under the fourth paragraph of Article 263 TFEU against the contested decision, but did not exercise that right, they cannot rely on the invalidity of that decision in support of their actions before the national court against the national measures implementing that decision".[65] This line of case law is based in particular on the consideration that the purpose of having time limits for bringing legal proceedings is to ensure legal certainty by preventing EU measures which produce legal effects from being called into question indefinitely, as well as on the requirements of good administration of justice and procedural economy.[66]

A natural or legal person with unquestionable legal standing to bring an action for annulment against a decision of an EU body loses therefore the right to call into question the validity of that decision before the national courts if he has allowed the 2-month period to lapse without bringing an action for annulment before the General Court. "This protects legal certainty and gives the action for annulment priority over a reference for a preliminary ruling on the issue of validity, as the appropriate procedural route for reviewing the legality of decisions of EU bodies".[67] In the present case, there is no competition between the national and EU legal remedies, since only the EU act can be challenged before the CJEU, whereas only the legality of the national implementing act can be challenged before a national court. A national court has no jurisdiction to assess the validity of an EU act, but it can at most initiate the preliminary ruling procedure in the case in question.

A national court cannot independently assess the validity of an EU act, whereas the CJEU, when examining a complaint lodged under Article 263 TFEU, cannot, in principle, rule on the legality of an act of a national body, even if it was taken in the course of a composite procedure. As held in the *Borelli* judgment, "the Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority. That position cannot be altered by the fact that the measure in question forms part of a Community decision-making procedure, since it clearly follows from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision-taking authority and therefore determines the terms of the Community decision to be adopted".[68] However, this possibility was allowed for preparatory acts of Member State bodies, which are not binding on the EU administration. "In such a situation, where EU law prescribes that an EU body, office or agency is to have an exclusive decision-making power, it falls to the EU Courts, by

[65] *Georgsmarienhütte* (C-135/16) [43].

[66] *British Airways* (C-122/16 P), EU:C:2017:861 [84]. Cf. *Commission v Assi Domän Kraft Products* (C-310/97 P), EU:C:1999:407 [61].

[67] Opinion of Advocate General Campos Sánchez Bordona, *Iccrea Banca* (C-414/18) [56]. Cf. *TWD Deggendorf* (C-188/92), EU:C:1994:90 [26].

[68] *Oleificio Borelli* (C-97/91) [9–10].

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virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU, to rule on the legality of the final decision adopted by the EU body, office or agency concerned and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision".[69] It seems that the above position is dictated by the implementation of the principle of effective judicial protection at the EU level, where the nature of acts taken by the Member State bodies (as preparatory acts not binding on the EU administration) makes their judicial review by a national court impossible.

The principle of effective judicial protection is linked to the admissibility of legal remedies affecting not only the legal situation of individuals in the EU administrative acts, but also of inaction by the EU administration pursuant to Article 265 TFEU. Any natural or legal person may complain to the CJEU that an institution, body, office, or agency of the Union has failed to address to that person any act other than a recommendation or an opinion. The action shall be admissible only if the institution, body, office, or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office, or agency concerned has not defined its position, the action may be brought within a further period of two months. It seems that this remedy will be admissible in the EU administration's failure to issue a final decision within the time prescribed also for composite procedures. However, against this backdrop, the assessment of the EU administration's inaction in issuing such an act may raise doubts when it is a consequence of the failure of Member State bodies to issue preparatory acts binding on the EU administration in due time. In such a case, it should also be allowed to bring a separate action before a national court concerning the inaction of the Member State administrative body, in order to fully satisfy the principle of effective judicial protection and to ensure the consistency of the CJEU case law on appeals in composite proceedings.

DISCUSSION AND CONCLUSIONS

The existence of administrative proceedings involving bodies of different Member States and/or EU administration is nowadays a challenge to ensure procedural guarantees for individuals and effective judicial protection in the light of, i.a., Article 47 of the Charter of Fundamental Rights. The requirements of judicial control call for a new approach to the system of a judicial review of decisions and the development of clear rules on the application of national, EU, or both, national and EU, legal remedies against acts or actions taken in such proceedings. Some

[69] *Iccrea Banca* (C-414/18) [39].

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interpretative guidelines, which have been presented in this article, can be derived from the CJEU case law to date. However, as they stand, they do not yet constitute a coherent doctrine that is clear and easily accessible to Member State bodies and courts, especially EU citizens. The idea of composite proceedings developed in the literature, distinguishing horizontal, vertical (and sometimes diagonal) procedures, despite its certain advantages, also does not provide a convincing answer as to the identification of an appropriate judicial protection regime.

The concept of integrated administrative proceedings and their division into simple decentralised, complex decentralised, simple centralised, and complex centralised models, which has been discussed above, is characterised by some usefulness for systematising the CJEU's approach to judicial remedies. Simple models are characterized by a monistic system of judicial remedies. In a simple decentralised system, an administrative decision is taken by a national body without the participation of bodies of other Member States or of the EU, so that their review is based solely on a system of national legal remedies (with the possibility, however, of launching a preliminary ruling procedure). The simple centralised model, on the other hand, is characterised by that the legal situation of an individual is decided at the EU level without the involvement of Member State bodies, which makes these decisions subject to review by the EU judiciary. It can be concluded from the CJEU case law that the monistic approach is also applied to such centralised proceedings where, while the Member States interact with the EU administration, the acts they draft are preparatory in nature and do not bind the EU administration (and are therefore not separately challenged before national courts). This is not the case, however, where preparatory acts of Member State bodies bind the EU administration issuing the final decision. In such a complex centralised model, the CJEU allows duality – the coexistence of national legal remedies (used against preparatory decisions of the national administration) and EU legal remedies (used against final decisions of the EU administration). The last model – the decentralised one – is the most diversified in terms of legal remedies, as it involves taking decisions at the national level, but with the participation of other Member State bodies (and sometimes the EU administration), which often makes it rely on a network of interdependent national proceedings, in which decisions are subject to challenge before different national courts (possibly using the preliminary ruling procedure).

It should be pointed out that the requirements of effective judicial protection under Article 47 of the Charter of Fundamental Rights do not prejudge which system of the means of appeal – monistic or dualistic one – allows the right to a court to be exercised. It is more important that these means are available, effective, and ensure fair and public examination of a case within a reasonable time by an independent and impartial court established by law. However, the complexity of administrative procedures involving Member State bodies and the EU administration is not conducive to transparency about admissible remedies, and may raise

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concerns about their availability, effectiveness, or uncompetitiveness in cases of a particular type. In view of the above, it is necessary to postulate further in-depth analysis of this issue in the literature, consistency and clarity of the CJEU case law and organizing actions to raise awareness among administrative staff, judges and EU citizens about the nature of integrated procedures, in particular complex and composite procedures, as well as the judicial remedies available for the decisions taken in such procedures. *De lege ferenda*, I consider it appropriate to modernise the preliminary ruling procedure in order to diversify it and make it more flexible which is dictated by the multi-stakeholder nature of complex procedures.

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ABSTRAKT

Przedmiotem artykułu jest analiza i ocena standardów prawnych dotyczących środków zaskarżenia w sprawach administracyjnych rozpatrywanych w postępowaniach złożonych, tj. w postępowaniach, w których organy administracji państw członkowskich i administracja unijna współpracują ze sobą. Problematyka kontroli sądowej w tego typu procedurach jest szczególnie istotna z punktu widzenia realizacji wyrażonej w art. 47 Karty Praw Podstawowych zasady efektywnej ochrony sądowej. Wątpliwości budzi zwłaszcza kwestia adekwatnego systemu środków zaskarżenia: monistycznego (opartego wyłącznie na krajowych lub unijnych środkach zaskarżenia) bądź dualistycznego (zakładającego współistnienie w sprawach danego rodzaju środków krajowych i unijnych). Rozważania w tym przedmiocie oparto na doktrynalnej koncepcji postępowań złożonych jako specyficznej grupy postępowań zintegrowanych z prawem unijnym, a także na aktualnym orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej. W zakończeniu przedstawiono postulaty *de lege lata* i *de lege ferenda* służące zapewnieniu efektywnej ochrony sądowej w tego typu postępowaniach.

Słowa kluczowe: kontrola sądowa; efektywna ochrona sądowa; postępowania złożone; postępowanie administracyjne; środki prawne