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INFORMATION EXCHANGE IN EUROPEAN ADMINISTRATIVE LAW

A Threat to Effective Judicial Protection?

Mariolina Eliantonio*

'European administration can (…) be seen as, first and foremost, the administration of information.'[1]

ABSTRACT

European policies are increasingly implemented through the joint production, gathering, management and exchange of information. These information exchange mechanisms may pose problems in the context of judicial protection because it may be difficult to identify the actor responsible for a piece of information which was the basis for a final measure, and the act of information sharing may not be challengeable before a court. The purpose of this article is to examine the gaps in judicial protection – if any – arising from the widespread use of information sharing activities in European administrative law. After an overview of the information exchange and management activities in European administrative law, the gaps in judicial protection are identified and discussed in the context of two case studies. The central argument is that although the system of administrative decision-making is becoming increasingly integrated, the disintegrated system of judicial protection poses a serious threat to the principle of effective judicial protection in information sharing activities that are aimed at implementing EU policies. The article ends with recommendations on how these judicial protection gaps could be filled.

Keywords: effective judicial protection; European administrative law; information exchange; shared administration

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1 H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford University Press, 2011), p. 411.

§1. INTRODUCTION

In European administrative law, that is, the set of rules governing the administration of the European Union and national administrations when they are acting within the scope of application of EU law, there are manifold examples of policy areas in which decisions are taken on the basis of a 'composite' procedure. These are procedures entailing the input of administrative actors from different jurisdictions, and in which the final decision issued by a Member State or an EU authority is based on the more or less formalized input of several participating authorities.[2]

Sometimes the input of a national or European authority may consist in the provision of advice or the enactment of a binding measure, but much more often the underlying procedure provides for cooperation mechanisms based on the sharing of information as the basis for the final decision. In fact, it has been argued that 'most forms of procedural cooperation in implementing EU policies are based on the joint production, gathering and management of information, and/or exchange of information'.[3] The forms of administrative cooperation in information exchange may vary from an ad hoc case to a constant and structured flow of information between one or more administrative authorities. The most advanced form of information management can be found in shared databases where the information is stored and is accessible to all relevant national and European authorities without the need to make a prior request for it.[4]

The purpose of this article is to examine the gaps in judicial protection – if any – arising from the widespread use of information sharing activities in European administrative law. The central argument is that although the system of administrative decision-making is becoming increasingly integrated, the disintegrated system of judicial protection poses a serious threat to the principle of effective judicial protection in information sharing activities that are aimed at implementing EU policies.

Information sharing networks exist in several fields of EU law, ranging from competition[5] to immigration,[6] customs[7] and product safety.[8] They are part of what

2 Ibid., p. 406.

3 Ibid., p. 16.

4 J.-P. Schneider, 'Basic Structures of Information Management in the European Administrative Union', 20 *European Public Law* (2014), p. 89.

5 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

6 Regulation 1987/2006/EC of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), [2006] OJ L 381/4.

7 Council Regulation 515/97/EC of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, [1997] OJ L 82/1.

8 Directive 2001/95/EC of the European Parliament and the Council of 3 December 2001 on general product safety, [2002] OJ L 11/4.

has been referred to as an 'integrated administration',[9] which conveys the idea that supranational and national institutions cooperate and are linked together in the process of implementation of European law.[10] These networks have mostly been created in the process of establishing a single market and are the core of the process of abolishing limitations to the free movement rights.[11] The creation of information sharing networks can be seen as a way to compensate for limitations to cross-border movement.[12] They have the clear advantage of ensuring swift communication between public authorities and prompt action where necessary. Information sharing may be related to virtually every administrative stage relating to the implementation of EU policies, including decision-making, enforcement and sanctioning.[13]

The exchange of information both horizontally and vertically between national and EU authorities for the purposes of adopting a final decision may at first sight seem a mere inter-administrative matter, but may in reality touch upon the fundamental rights of individuals: the cross-border sharing of personal and business data[14] may violate individuals' right to privacy or to property, or the protection of business secrets, as well as procedural rights, and an individual's right to a defence or access to documents. It is noteworthy that the exchange of information for the purposes of inter-administrative cooperation in the implementation of EU law (or more precisely, as will be shown below, the ill-equipped regulatory framework in which the exchange of information takes place) may violate data protection rules, especially on data quality. These are rules on the basis of which Member States shall provide that personal data must be collected for specified, explicit and legitimate purposes, that they are accurate, where necessary kept up to date, and that they are processed fairly and lawfully.[15]

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9 H.C.H. Hofmann and A.H. Türk, 'Conclusions: Europe's integrated administration', in H.C.H. Hofmann and A.H. Türk (eds.), *EU Administrative Governance* (Edward Elgar Publishing, 2006), p. 583.

10 Please note that for the purposes of this article the term 'European' is used to refer to the European Union and European Union law.

11 D.U. Galetta, H.C.H. Hofmann and J.-P. Schneider, 'Information Exchange in the European Administrative Union: An Introduction', 20 *European Public Law* (2014), p. 68.

12 Ibid., p. 68.

13 See M. Tidghi and H.C.H. Hofmann, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks', 20 *European Public Law* (2014), p. 149 (with examples).

14 Please note, with regard to the distinction between personal and business data, that only the former fall within the scope of application of the data protection framework set at the European level.

15 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1996] OJ L 281/31, Article 6. See the Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012) 10 final, Article 4.

When individuals' rights stemming from EU law are violated it should be possible for them to seek judicial protection.[16] The right of access to court, a corollary to the more general principle of effective judicial protection, is enshrined in Article 47 of the Charter of Fundamental Rights (the Charter) and has long been considered by the Court of Justice of the European Union (CJEU) as a general principle of EU law, binding both the EU as a whole and its Member States.[17] Information exchange mechanisms may pose problems of judicial protection because it may be difficult to identify the actor responsible for a piece of information that was the basis for a final measure, and the information sharing activity may not be challengeable before a court.

In the following sections, after an overview of the information exchange and management activities in European administrative law, the gaps in judicial protection are identified and discussed in the context of two case studies – *RAPEX* and *SIS II*. In particular, the relevance of the ReNEUAL Model Rules[18] is considered. To conclude, recommendations are provided on how these judicial protection gaps could be filled.

§2. INFORMATION EXCHANGE AND MANAGEMENT IN EUROPEAN ADMINISTRATIVE LAW: AN OVERVIEW

There is currently no general piece of legislation at the EU level which provides for a standard or default procedure for cross-border information exchanges. Instead, applicable rules are found in sector-specific legislation that determines how information is to be introduced into the network, shared and used. In this context, Schneider points to a terminological confusion, which renders a taxonomy of information management mechanisms difficult to achieve.[19] In order to understand the basic structures of information exchange, Schneider identifies four scenarios.

The first scenario comprises 'basic' forms of information exchange stemming from mutual assistance duties between national and EU administrative authorities. Mutual assistance comprises all mechanisms where a national or EU authority asks for support from another authority, provided that the one making the request cannot reasonably

16 Please note that the focus of this article will be on judicial control of information networks, while administrative supervision (conducted e.g. by the European Ombudsman or the European Data Protection Supervisor) will not be addressed.

17 See e.g. Case C-279/09 *DEB*, EU:C:2010:811; Case C-12/08 *Mono Car Styling*, EU:C:2009:466, para. 49 ('whilst it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, [EU] law nevertheless requires, in addition to observance of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection'). For more information on this principle and its implications, see S. Prechal and R. Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection', 4 *Review of European Administrative Law* (2011), p. 31–50.

18 See for an overview of the project the website of the organization, http://reneual.eu.

19 J.-P. Schneider, 'Basic Structures of Information Management in the European Administrative Union', 20 *European Public Law* (2014), p. 90.

carry out the task itself.[20] An example of information exchange stemming from mutual assistance can be seen in Regulation 904/2010 on administrative cooperation and combating fraud in the field of value added tax.[21]

In the second scenario one may find more 'structured' forms of information exchange, which are structured in a pre-defined workflow, allowing authorities to communicate and interact with one another.[22] The system enables quick identification of the competent authority in all Member States and deals with the language barrier through the use of standardized forms.[23] These mechanisms are established according to sector specific requirements. Examples of such mechanisms are SOLVIT, an informal problem solving network which does not have any formal legal basis,[24] and the Internal Market Information System (IMI), a network of national administrations and the Commission, aimed at facilitating the administrative cooperation obligations imposed by European regulations in specific areas of the internal market.[25]

In a third scenario, the information exchange may stem from a duty of authorities to inform other authorities without prior request in circumstances set out in the law, for example when there is a predefined danger or suspected risk. This is demonstrated by Regulation 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters,[26] and Commission Regulation 2729/2000 laying down detailed implementing rules on controls in the wine sector.[27]

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20 F. Wettner, 'The General Law of Procedure of EC Mutual Administrative Assistance', in O. Jansen and B. Schöndorf-Haubold (eds.), *The European Composite Administration* (Intersentia, 2011), p. 314. Please note that this definition excludes the information gathering and sharing activities of agencies which deal with the collection of information e.g. the EEA and the EMCDDA and of networks i.e. specific structures *created* for the exchange of information.

21 Council Regulation 904/2010/EU of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast), [2010] OJ L 268/1.

22 On these structures and the legal problems arising from their use, see D.U. Galetta, 'Informal Information Processing in Dispute Resolution Networks: Informality versus the Protection of Individual's Rights?', 20 *European Public Law* (2014), p. 71–88; M. Lottini, 'An Instrument of Intensified Informal Mutual Assistance: The Internal Market Information System (IMI) and the Protection of Personal Data', 20 *European Public Law* (2014), p. 107–125.

23 ReNEUAL Model Rules, Part C, Chapter 2.

24 As of today, there are no EU binding legal acts establishing or referring to SOLVIT. The only documents referring to SOLVIT are Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Effective Problem Solving in the Internal Market ('SOLVIT'), COM (2001) 702 final; Commission Recommendation of 7 December 2001 on principles for using 'SOLVIT' – the Internal Market Problem Solving Network, [2001] OJ L 331/79.

25 The legal framework for the IMI can be found in Regulation 1024/2012/EU of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation'), [2012] OJ L 316/1.

26 Regulation 515/97/EC, Title II.

27 Commission Regulation 2729/2000/EC of 14 December 2000 laying down detailed implementing rules on controls in the wine sector, [2000] OJ L 316/16, Article 8.

In the fourth and final scenario, information may be exchanged through shared databases with direct information access for all participating authorities,[28] not only without the requirement of prior request, but also without data transmission in each individual case. In this sense, 'a traditional characteristic of cooperation, that is, the communication between the parties involved, no longer exists and it has been replaced by a unilaterally initiated flow of information'.[29] In simple terms, the information is there and is available to all authorities that have authorized access. Typical examples of such databases are the Custom Information System[30] and the Schengen Information System.[31]

In the ReNEUAL Model Rules, the basic mutual assistance mechanisms are categorized under the overarching concept of 'mutual assistance' and are governed by Book V of the Model Rules.[32] When the information exchange takes place through a structured information mechanism, under a duty to inform without prior request or through the use of a database, Book VI of the ReNEUAL Model Rules is applicable.[33]

This concludes the introduction to the information exchange mechanisms in European administrative law, and the following section goes on to identify the gaps in judicial protection arising through the use of information sharing activities.

§3. JUDICIAL PROTECTION GAPS IN THE INFORMATION SHARING MECHANISMS

A. THE STRICT SEPARATION OF JURISDICTIONS AND THE CONSEQUENCES

The brief overview provided above has shown that EU administrative decision-making is often organized in a networked system in which information is exchanged horizontally and vertically before a final administrative decision is adopted. There is therefore a – at least partial – dissociation between the authority/ies providing information and the authority taking a final decision on the basis of that information.[34] The system of supervision and judicial accountability is however still linked in a two-level system, with separate national and EU levels. This strict separation implies that the judicial level responsible for a claim corresponds to the administrative level that has issued the act which is being challenged.

28 J.-P. Schneider, 20 *European Public Law* (2014), p. 91.
29 F. Wettner, in O. Jansen and B. Schöndorf-Haubold (eds.), *The European Composite Administration*, p. 315.
30 Regulation 515/97/EC.
31 Regulation 1987/2006/EC.
32 ReNEUAL Model Rules, Book V, Part A, Section I; Section II, para. 5; Article V-1(2).
33 ReNEUAL Model Rules, Book VI, Part C.
34 M. Tidghi and H.C.H. Hofmann, 20 *European Public Law* (2014), p. 154.

In an information exchange framework, if the challenge is directed against the action or inaction of Member States, national courts will have jurisdiction, while European action or inaction should be challenged before European courts subject to the applicable European procedural rules.

Another consequence of the separation of jurisdiction is that each judicial level is competent only for the acts emanating from the authorities falling within its jurisdiction,[35] meaning that national courts would not be allowed to review the legality of measures issued 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.

The strict separation of jurisdiction also implies that if acts can be challenged only before the courts with 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, although liable to affect individuals' rights. The situation is problematic because initial or intermediate measures may not be considered as reviewable before national or EU courts.[36]

B. THE GAPS IN JUDICIAL PROTECTION ARISING FROM THE NOTION OF 'REVIEWABLE ACT'

In order to identify the gaps in judicial protection arising from the information exchange mechanisms, it is necessary to isolate the acts which take place in such mechanisms. In a 'basic' or 'structured' information exchange, there are typically two actions that take place: the information request, and the provision of information (or the refusal to provide information). When information should be provided without prior request the only action is the provision of information by a national or European authority. In a database context, one could isolate the act of placing the information in the database, and the act of access and retrieval of the information from the database. It is likely that these sets of actions, at both national and EU level, are not considered to be reviewable.

At EU level, challenging a request for information from the European Commission, the provision of information, or the refusal to provide information will probably

35 Hence, the European courts are only able to review acts emanating from European authorities, and national courts may only review acts emanating from authorities of their domestic legal system.

36 For more detail on this point see M. Eliantonio, 'Judicial Review in an Integrated Administration: the Case of "Composite Procedures"', 7 *Review of European Administrative Law* (2015), p. 65–102. Please note that this setup is not altered by the ReNEUAL Model Rules, which explicitly state in the context of a proposed duty to indicate the available remedies (contained in Article III-30), that 'Article III-30 does not introduce any innovation with regard to existing judicial and non-judicial remedies at EU level'. See ReNEUAL Model Rules, Book V, Part C, para. 118.

result in an inadmissible claim. This is because these acts are often considered as merely preparatory procedural steps in connection with main proceedings that are already underway in the legal system of the requesting authority. The authority for this statement is the *IBM* case: the CJEU held that a measure is reviewable only if it is 'definitively laying 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'.[37] An exchange of information from the EU to the national authorities has indeed been held not to be reviewable by European courts because it was not considered capable of producing effects on the applicant's legal sphere.[38] Similarly, refusals will only be reviewable if they concern an act which in itself would have been reviewable.[39]

At the national level, the acts of requesting and of providing information are both not likely to be considered reviewable because of their preparatory nature, and as such incapable of directly affecting the applicant's legal sphere.[40]

§4. CASE STUDIES: SCHENGEN INFORMATION SYSTEM II AND RAPEX

Having established in theory that the current system of judicial control of information exchange mechanisms presents serious gaps, this section will discuss two case studies to demonstrate how these gaps might seriously jeopardize individuals' right to effective judicial protection. The cases of *RAPEX* and the *Schengen Information System II* have been chosen because they both exemplify data exchange mechanisms. However, these mechanisms are of a different nature to each other: one relates to mutual assistance and the other to a shared database. They take effect in different policy areas (internal market and consumer protection, and immigration) and are thus aimed at the protection of different interests. They also concern different actors and different exchange 'movements' (vertical or horizontal). Whereas in *SIS II* the EU level is not involved (even though the network is set up by European law), in *RAPEX* the Commission plays a key role in the information exchange. These differences allow discussion of the peculiarities of each information exchange structure but also lead to the conclusion that, despite these

37 Case C-60/81 *IBM v. Commission*,EU:C:1981:264, para. 10. In similar terms F. Wettner, in O. Jansen and B. Schöndorf-Haubold (eds.), *The European Composite Administration*, p. 313.

38 Case C-521/04 P(R) *Tillack v. Commission*, EU:C:2005:240. See, however, Joined Cases F-5/05 and F-7/05 *Violetti and Others v. Commission*, EU:F:2009:39, where a claim against the forwarding of information from OLAF to the Italian authorities was considered as a reviewable act by the Civil Service Tribunal. The ruling was, however, overturned on appeal by the General Court on the basis of the *IBM* case law. Case T-261/09 P [GC] *Commission v. Violetti and Others*, EU:T:2010:215.

39 Case T-369/03 *Arizona Chemical and others v. Commission*, EU:T:2005:458, para. 64.

40 Further on this point see M. Eliantonio, 7 *Review of European Administrative Law* (2015), p. 65–102, para. 5.2.2.

peculiarities, the judicial protection problems that the case studies highlight are equally shared by different kinds of information networks.

A. RAPEX

Directive 2001/95/EC on general product safety (GPS Directive)[41] has a double aim: to improve the functioning of the internal market, and to ensure a high level of consumer health and safety protection. It requires Member States to ensure that producers and distributors only place safe products on the market (Article 3). To this end, they must establish or appoint authorities that are competent to monitor the compliance of products with the general safety requirement and arrange for such authorities to have and use the necessary powers to take, inter alia, the appropriate investigative and corrective measures incumbent upon them under the Directive (Article 6). Competent authorities must organize inspections to check the safety of products placed on the market, they must demand all of the necessary information from the parties concerned, and they must take samples of products and submit them for safety checks. When products do not comply with the general safety requirements, competent authorities may, depending on the type of risk at stake, impose labelling requirements, require that products are made safe before they are put on the market, temporarily ban the supply of products, and order or organize the immediate withdrawal or recall of products and their destruction (Article 8).

For the purposes of this article, what is important to note is that the GPS Directive establishes an information exchange mechanism called RAPEX, the rapid alert system for dangerous non-food products. RAPEX is an application that aims to ensure a rapid exchange of information concerning consumer products that pose a serious risk (Article 10). Member States must notify the Commission of serious-risk products that they find on their territory ('RAPEX notifications') (Articles 11(1) and 12(1)). The Commission verifies that the information received through RAPEX complies with the relevant legal provisions (without making an assessment on the substance of the information provided) and distributes the notifications to the other Member States (Articles 11(2) and 12(2)). These Member States must then notify the Commission whether the product is present within their territory and the measures that they intend to adopt (Article 12(2)). The system depicted above entails the creation of a composite decision-making process, in which national authorities collect information and pass it on to the Commission to validate it. In the end national authorities make decisions on the basis of that information.

As a result of the examination of key provisions of the Directive and the information exchange process, a picture unfolds of how the RAPEX system falls within the category

41 Directive 2001/95/EC of the European Parliament and the Council of 3 December 2001 on general product safety, [2002] OJ L 11/4.

of information exchange without prior request. On the basis of the analysis carried out in the previous sections, one can see how the operation of the RAPEX system may pose a serious threat to the right of access to court and the principle of effective judicial protection. Indeed, while market operators may challenge the national authorities' decisions to take coercive measures against their products, they will have no recourse against the RAPEX notification as such, which will not be considered a reviewable act by the national courts. Neither will the market operator be able to challenge the act of forwarding the information from the Commission to the Member States, nor the actual information, as the General Court will not, following the *IBM* case, consider this measure reviewable. The market operator will therefore only have recourse against a final measure of another Member State, which may have taken measures against its products. However, with this challenge, the national court will not be able to review the lawfulness of either the RAPEX notification nor the sharing of the information by the European Commission. The challenge could thus be seen as pointless.

A case decided by the General Court on a system similar to RAPEX (the Community rapid alert system for food and feed, RASFF) shows the gaps in judicial protection discussed above.[42] In this case the applicant, an exporter of fruit and vegetables from France, had sold several hundred boxes of apples to a Dutch company. When the apples reached Iceland through the Netherlands, the Icelandic authorities issued an alert through RASFF to the Commission alleging that the apples contained an excessive quantity of a certain pesticide. The Commission checked the alert and decided to inform all the Member States. As a consequence, the British authorities decided to prohibit the import of the apples. However, when the competent French authorities carried out an investigation on the applicant's apples no high traces of pesticides were detected. The applicant subsequently brought a claim for non-contractual liability against the European Union for the damage suffered because of the circulation of the messages about excessive pesticide in the apples it had exported.

The General Court rejected the applicant's claim. It is interesting to point out for the purposes of this article that the Court clearly states that the both the Icelandic authorities and the Commission acted within the limits and the obligations set by EU law by sending the alert concerning a product which they considered dangerous and by extending the alert to the Member States. The Court does not seem to exclude the possibility that a claim for compensation can be brought before the Icelandic courts, but nor does it make that possibility explicit. In other words, the Court sticks to a strict separation of jurisdictions, examines the conduct of the only authority it could control (the Commission), considers its conduct lawful under EU law, and dismisses the claim.

Rather unfortunately, the claim did not concern annulment, but only non-contractual liability, which enabled the Court to easily avoid the question of whether the Commission's act of spreading information to a network created under EU law was

42 Case T-177/02 *Malagutti-Vezinhet v. Commission*, EU:T:2004:72.

a reviewable act under Article 263 TFEU. *IBM*, and the general lack of reviewability of preparatory measures is thus still good law with respect to information exchanges.

This ruling shows that while annulment actions concerning information exchange mechanisms seem doomed to fail under the current system, so do claims for compensation.

B. SCHENGEN INFORMATION SYSTEM II

A second example of an information exchange mechanism is the second generation of the Schengen Information System (SIS II) set up further to Regulation 1987/2006[43] and Decision 2007/533.[44] SIS II has the objective of contributing to maintaining a high level of security within the EU area of freedom, security and justice by supporting external border control and law enforcement cooperation among Schengen members. It is composed of a central system and a national system in each of the Member States, consisting of the national data systems which communicate with the central SIS II, and a communication infrastructure that provides an encrypted virtual network dedicated to SIS II data (Article 4 of Regulation 1987/2006 and Article 4 of Decision 2007/533). SIS II enables competent authorities such as police and border guards to add and view alerts on certain categories of persons that are considered a threat to public policy or public security or to national security (Article 24(2) of Regulation 1987/2006). Member States may use data from alerts to refuse entry into or a stay in their territories (Article 31(1) of Regulation 1987/2006).

Furthermore, in accordance with Decision 2007/533, SIS II alerts may be issued to those persons wanted for arrest or surrender purposes (Article 26), for missing persons (Article 32), persons sought to assist with a judicial procedure (Article 34), persons and objects for discreet or specific checks (Article 36), and objects sought for seizure or use as evidence in criminal proceedings (Article 38). Alerts contain personal information related to the identification of an individual and a specified course of action (such as 'refuse entry', 'arrest', 'discover their place of residence' because they are sought in connection with criminal proceedings, and so on).

As for RAPEX, administrative cooperation created through the SIS II system also entails the creation of a composite procedure: first national authorities collect information and enter data in the network; secondly, all other national competent authorities consult the information; thirdly, they issue national administrative measures based on the information collected in the SIS II database.

Article 43 of Regulation 1987/2006 and Article 59 of Decision 2007/533 require Member States to create remedies for the purposes of accessing, correcting, deleting

43 Regulation 1987/2006/EC of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), [2006] OJ L 381/4.

44 Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), [2007] OJ L 205/63.

or obtaining information in connection with an alert relating to a person. This shows there is a requirement to create a judicial review avenue for data protection violations. However, such provision does not cover the actual placing of the alert in the system and the threat assessment made in it.[45]

In such a situation, if a SIS II alert is issued concerning an individual, and a final measure is taken, such as expulsion on the basis of the information, it is not possible for the individual to challenge the alert directly before the national court that has jurisdiction on the issuing authority, as the alert will probably be considered not to be reviewable because of its preparatory nature.

Challenging the final measure on the basis of an alleged irregularity of the alert will only lead to the annulment of the alert if the court with jurisdiction to review the legality of the final measure agrees to review the alleged unlawfulness of the alert. For a national court this implies going beyond the traditional limits of horizontal separation of jurisdictions and essentially reviewing the legality of a foreign administrative measure. As noted by Tidghi, this seems to have happened at least once, when the French Council of State agreed to review a foreign alert issued in the context of the predecessor of SIS II.[46] However, this may well have remained an isolated case and it is certainly not a precedent that can provide sufficient legal certainty as to the reviewability of information provision measures issued in the context of SIS II. Furthermore, as Tidghi also noted,[47] even such an innovative approach would only cover the review of alleged irregularities of SIS II alerts stemming from the SIS II system itself, and not other irregularities stemming from the violation of for example the national procedural law of the Member State issuing the alert, as these are aspects which the courts looking at the final measure that is being challenged would certainly not be willing to review.

The only remedy provided in the system is a compensatory remedy, on the basis of which Member States are liable for damages caused through the use of the SIS II system, including where a Member State entered factually inaccurate data or stored data unlawfully (Article 48). The system thus allows claims against information sharing activities carried out by other Member States as well as before the court that issued the final measure. If, however, the Member State against which an action is brought is not the Member State issuing the alert, the latter shall be required to reimburse (on request) the sums paid out as compensation. This system has the merit to go beyond the traditional separation of judicial supervision mechanisms, in that it provides for at least some further protection than an action for annulment of unlawfully shared information.

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45 Incidentally, it should be added that no action for annulment could be brought before the European courts as SIS II cannot be considered as a body or organ of the EU, and this is required by Article 263 TFEU for an action for annulment to be admissible.

46 M. Tidghi, *Networks of Information in the European Union: multi-level administrative cooperation in composite decision-making procedures* (Dissertation, University of Luxembourg, 2013), p. 124, with reference to Conseil d'Etat, *Forabosco*, Judgment of 9 June 1999, No. 190384 (on file with the author).

47 Ibid., p. 124.

However, this mechanism is not immune to criticism. As Tidghi and Hofmann pointed out, the relevant provisions do not indicate the substantive and procedural conditions applicable to these liability claims, and there is no mechanism to ensure that the Member State required to pay compensation will in fact do so.[48] Nor is it clear on the basis of which rule, principle or standard of review a national court will be allowed or obliged to establish the unlawfulness of the information exchange activity of another administrative authority.

§5. IS THERE A SOLUTION FOR THE GAPS IN JUDICIAL PROTECTION … AND WILL IT WORK?

A. SOLUTIONS TO THE JUDICIAL PROTECTION GAPS IN THE CURRENT SYSTEM

In the current separated system of jurisdiction between the national and EU levels, there are at present two solutions to the gaps in judicial protection identified above, arising from the strict separation of jurisdictions between national and European courts and the understanding of the notion of 'reviewable act'.

At the EU level, the lack of reviewability of information requests and information provision by the European authorities in an action for annulment pursuant to Article 263 TFEU could be regarded as repaired by the possibility of indirect challenge of these acts in a preliminary question of validity pursuant to 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'.[49] This could imply that preliminary EU measures taken in the course of an information exchange procedure 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 the transfer of information from OLAF to the competent national authorities at the European level. 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 request a preliminary reference ruling from the CJEU.[50]

This means that an applicant whose products have been subject to restrictive measures because of a RAPEX notification could bring a claim before the competent

48 M. Tidghi and H.C.H. Hofmann, 20 *European Public Law* (2014), p. 159.
49 Case C-322/88 *Grimaldi*, EU:C:1989:646, para. 8.
50 Case T-193/04 *Tillack v. Commission*, para. 80.

national court in the country those measures were adopted, and plead the invalidity of the EU action of sharing the information received from the national level. The same option is not available where there is a restrictive measure taken under SIS II, as there is no EU action to be challenged.

At the national level, a bar to the possibility to challenge preparatory measures in the decision-making process has been considered by the CJEU to be in breach of EU law. While the EU courts are unable to send preliminary questions to national courts, 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.[51] In this case, an Italian firm sought the annulment of a 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. Therefore, according to the CJEU, 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'.[52] In application of this case law, therefore, in cases where the applicant would otherwise be deprived of all forms of judicial review, information exchange 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.

It is submitted that the principle established in *Borelli* would be equally applicable to horizontal composite decision-making procedures, in which the final measure is not taken by an EU authority but another national authority, as the principle established seems to be concerned with, in general, all intermediate steps in composite procedures aimed at implementing EU law, irrespective of the level of authority taking the final decision. This would imply, therefore, that an applicant subject to a restrictive measure taken because of an alert placed on SIS II, should be able to access the national court of the legal system of the authority sending the alert. The national court would have to, applying *Borelli*, allow the claim even though the national procedural rules would not provide for this possibility.

B. CRITICISM OF THE CURRENT SOLUTIONS AND ALTERNATIVE SOLUTIONS

As explained above, the CJEU has tried to provide solutions to the lack of judicial protection occurring in the case of information exchange mechanisms. First of all,

51 Case C-97/91 *Oleificio Borelli S.p.A. v. Commission*, EU:C:1992:491.

52 Ibid., para. 13. See also Case C-562/12 *Liivimaa Lihaveis*, EU:C:2014:2229.

when a challenge is directed against a national preparatory measure, the *Borelli* case law demands reviewability of such measures before the national courts. This is even when 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 in judicial protection it still leaves some questions unanswered. 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, relying on national courts' willingness to set their own procedural rules aside may result in a lack of legal certainty. It may also bring about 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 that the national courts would allow a claim against the request or the provision of information, 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-Frost* ruling[53] 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 time and costs. Importantly, applicants may well find themselves time-barred because of the two-month time limit provided in Article 263 TFEU or of the time limits provided in the national legislation, unless they would be expected to commence two parallel proceedings.

In order to avoid extra costs and time (and possible procedural limitations) of a second challenge against the final EU or national measure, one could imagine the creation of a transfer from the national court to the competent EU or national court. This mechanism 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. This claim would be brought before the court of the legal system of the authority which took the final measure and should be coupled with the possibility of a 'cross' (meaning to another Member State) or 'reverse' (by the CJEU to the national level) preliminary reference ruling system, whereby the competent court could put a question of validity to the 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

53 Case C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*, EU:C:1987:452.

admissible, the indirect avenue of the preliminary question of validity could be pursued. 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. This is because there is one single judicial procedure which the applicant needs to pursue, albeit involving multiple jurisdictions.

The system is, however, not free of shortcomings, many of which have been highlighted eminently by Advocate General Jacobs in his Opinion on the *UPA* case.[54] In particular, he recalled that access to the CJEU via the preliminary reference procedure is not available to applicants as a matter of right. National courts (with the exclusion of courts of last instance) may in fact 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.[55] In addition, even where a reference is made, preliminary questions are formulated by the national courts. As a consequence, applicants' claims might be redefined or the questions referred might limit the range of measures whose validity is being challenged before the national court.[56] Finally, the Advocate General 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.[57]

An alternative solution could be to expand the scope of reviewable acts under Article 263 TFEU to preparatory measures which currently, in application of the *IBM* case law, would not be considered a reviewable act. As a consequence, an 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 court.[58] Whether this solution is more favourable to the applicant than the 'single avenue' procedure (a claim 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 caused detriment by the *TWD Deggendorf* case law:[59] if a direct action against a preparatory measure would be available, the applicant, in line with this case law, would be obliged to commence a claim against this measure and would be barred from asking for a preliminary reference in an indirect action if he had standing in a direct action.

Apart from these difficulties there is another general problem which may be especially relevant in the composite procedures which are the subject matter of this

54 Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v. Council*, EU:C:2002:197.

55 Ibid., para. 42.

56 Ibid.

57 Ibid., para. 44.

58 This is also proposed by M. Tidghi and H.C.H. Hofmann, 20 *European Public Law* (2014), p. 155.

59 Case C-188/92 *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland*, EU:C:1994:90.

paper, namely those in which the contribution of the participating authorities consists in the mere provision of information and not in a more formalized measure. In particular, an individual may not know that a final 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 is imputable to one or the other participating authority. In all such cases, all the proposals made above do not provide an effective solution.

The ReNEUAL Model Rules do not provide general solutions to fill the existing gaps in judicial protection either, given that judicial procedural rules are explicitly excluded from the scope of application.[60] The only partial solution offered by the Model Rules is in Book VI concerning information exchanges excluding 'basic' mutual assistance. Under Article VI-40, any person suffering damage from an unlawful processing operation carried out in the context of an information management activity is entitled to receive compensation.[61] While this provision would certainly enhance the judicial protection of individuals – as it would at least provide a compensatory remedy against the unlawful action of the public authorities – it cannot be used to seek the annulment of the management activity as such, which remains governed by national law.

§6. CONCLUSION AND RECOMMENDATIONS

The article has argued that the regime of judicial review as it currently stands does not seem to be fully fit to operate in a system of integrated administration where authorities in different jurisdictions are involved in the decision-making process and where there are various forms of dialogue and cooperation amongst them which may result in more or less formalized types of administrative action. These structures have the clear advantage of allowing for swift exchanges between national and EU authorities, quick action in the presence of threats and ultimately a smoother implementation of EU law. The case studies presented above, however, have shown how the operation of information exchange mechanisms in European administrative law may pose a threat to the principle of effective judicial protection. The solutions currently in place may seem to (at least partially) fill the gaps in judicial protection. Yet a thorough rethinking of the system of judicial review may be necessary in the long term, in order to adapt the rules of judicial control of the administrative action to the new system of administrative decision-making.

Firstly, it is necessary to rethink the notion of a reviewable act both at national and European levels in the context of information networks. Administrative cooperation often

60 ReNEUAL Model Rules, Book I, Part C, para 5.

61 See further the explanations in ReNEUAL Model Rules, Book VI, Part C, Chapter 5.

takes place in the form of exchange of information, which is generally not considered to be a reviewable act and incapable of producing legal effects, with *Borelli* and *Tillack* only providing half-way solutions to fill the gaps in judicial protection. However, because of the composite nature of the decision-making the information provided by an authority can have far-reaching consequences and it is quite capable of producing adverse legal effects on an individual's legal sphere because another authority may base a binding measure on it.

More generally, the system of 'integrated administration' requires departure from the strict dualistic approach to judicial review. As has been observed, the current mechanism of preliminary rulings only works vertically (from national courts to the CJEU and not between national courts) and only one way (never from the CJEU to national courts).[62] As this article has attempted to demonstrate, the traditional two-level structure clashes with the reality of decision-making which is increasingly organized in a network structure, and the existence of the preliminary reference ruling in its current form does not fully plug the existing gaps. As a result, it is necessary to use the same network structure for the judicial supervision of the administrative action. The case studies discussed above show that it is in principle possible to foresee a system of 'integrated judicial protection': the liability system of SIS II is an example (albeit an imperfect one) of a setup whereby a claim for damages caused through the use of the SIS II system can be brought before the court that issued the final measure, and against information sharing activities carried out by other Member States.

A similar possibility could be imagined in order to adapt judicial review to the system of integrated administration. This would entail setting up a system whereby 'judicial review could be undertaken by one court with supervision of all participants in the administrative network',[63] possibly by the court competent under the procedural rules of the legal system of the authority that adopted the final decision. This solution would entail access to court and effective judicial protection. The participation of the judicial authorities belonging to the legal systems where network acts were taken would also ensure that acts are reviewed not just against the EU framework setting up the network but also against the procedural requirements and applicable rules of the legal system in which each act was adopted. One would, however, also need to foresee rules concerning the enforcement of such a ruling, as the latter would have extra-jurisdictional reach. Rules on the inclusion and exclusion of the 'participants' to the judicial proceedings would also have to be devised. More importantly, however, such a scenario would 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 concerning 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.

62 Also noted by H.C.H. Hofmann, 'Decisionmaking in EU Administrative Law – The Problem of Composite Procedures', 61 *Administrative Law Review* (2009), p. 213–214.

63 Ibid., p. 214.

At a time in which the debate on the possible codification of administrative decision-making procedures has just been ignited by the publication of the ReNEUAL Model Rules, it would be worth starting a parallel debate on whether common rules on decision-making should be coupled with rules on judicial protection.