

DECISION-MAKING IN EU ADMINISTRATIVE LAW – THE PROBLEM OF COMPOSITE PROCEDURES

Herwig C. H. Hofmann

(Herwig Hofmann is professor of European law at the University of Luxembourg, Luxembourg and the Director of its Centre for European law. Herwig.hofmann@uni.lu)

I	Case Study	2
II	Background	4
III	Substance of Composite Procedures: Joint Gathering and Sharing Information	5
IV	Supervision and Remedies – The Situation and Possibilities of Improvement	10
	<i>A Judicial Supervision of Composite Procedures</i>	<i>12</i>
	<i>B Parliamentary and Administrative Supervision</i>	<i>17</i>
V	Summary and Outlook for EU Administrative Law	19

This article addresses legal issues arising from the fast-paced evolutionary development in the EU towards a highly integrated legal system without a real central administrative body. Implementation of EU policies is increasingly undertaken by networks of administrations from different Member States with input from European institutions and bodies. Such integration of European-level and Member State administrative structures and procedures has led to what this article describes as ‘composite procedures.’ Problems arising from composite procedures are thus simultaneously well known to federal systems like the US, whilst at the same time raising questions very different from traditional federal legal orders. The article presents the problematique of composite procedures and suggests various approaches to solve the difficulties arising there from within the EU legal order.

I Case Study

To illustrate some of the central problems arising from composite procedures, this article will use the case concerning the journalist *Tillack* as an example. The case has resonated through three levels of courts: the national level in Belgium, the European level at the European Court of Justice and the international level at the European Court of Human Rights. Hans-Martin *Tillack* is a journalist who investigated cases of alleged fraud in the European Commission in Brussels (Commission) and published articles about his findings in the news magazine ‘Stern’. The European Commission’s internal Anti-Fraud Office (OLAF)¹ publicly claimed that *Tillack* had obtained his information through bribery by paying a source within the Commission. *Tillack* complained against the public allegations of bribery to the European Ombudsman (EO). The EO submitted a recommendation to OLAF June 2003 in which he concluded OLAF’s accusations of bribery were made in absence of a reliable factual basis and constituted a case of maladministration.² Despite these findings, OLAF lodged a complaint with the Belgian and German prosecutorial authorities informing them of the original accusations relating to bribery and explicitly adding that these findings were liable to result in criminal proceedings.³ In response to this request by OLAF, the German authorities declined to enter into further investigations. The Belgian authorities on the other hand in March 2004 raided *Tillack*’s home and offices and confiscated documents and computers which could contain information related to the case. *Tillack* brought proceedings in the Belgian courts, claiming the illegality of the raid and confiscation. The Belgian Courts rejected his application on the basis of the understanding that the Belgian authorities

¹ OLAF is part of the European Commission, thus not an independent agency.

² In 2005 the European Ombudsman submitted a special report to the European Parliament with the recommendation that OLAF should acknowledge that it had made incorrect and misleading statements in its submissions to the Ombudsman.

³ This took place on the basis of Article 10 (2) of Regulation 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999 L 136/1.

were bound by European Community (EC) law to follow on information for investigations provided by OLAF. According to them, Belgian courts were not authorised to review the correctness of information provided by European institutions and bodies. On the EU level, *Tillack* was no more successful. The European Court of First Instance (CFI) rejected *Tillack's* action for annulment against the measure by which OLAF forwarded certain information to the Belgian and German prosecuting authorities. It held that the forwarding of information was not a reviewable act under EC law, since the final decision as to whether opening investigations remained with the national authorities.⁴ Also, the Court rejected the application for interim measures to order OLAF to refrain from reviewing the documents seized by the Belgian authorities and forwarded to OLAF under the action for damages. In the view of the CFI, there was no causal link between potential damages arising from OLAF reviewing and using the Belgian authorities' documents, on one hand, and OLAF's transfer of allegations against *Tillack* to the national authorities, on the other. The reason given was that the final decision whether or not to investigate the case and seize the documents had rested with the Belgian authorities, despite the fact that OLAF would not have obtained access to the documents unless it would have sent the information to the authorities.⁵ The principle of effective judicial protection, a general principle of Community law, the presidents of the European Court of First Instance (CFI) and the European Court of Justice (ECJ) held, was also not breached by the decline of judicial review in the European Courts. Despite the fact that national courts could not review the correctness of the information forwarded by OLAF to national authorities, it is for the national courts to provide judicial review of the measures potentially infringing individuals' rights in application of the general principles of Community law.⁶ Having unsuccessfully sought judicial protection against the seizure of his material both in the Belgian Courts as well as on the EU level before the CFI and ECJ, *Tillack* then turned to the European Court of Human Rights (ECtHR) in Strasbourg, which found unanimously that Belgium had violated the freedom of expression, protected under Article 10 of the European Convention of on Human Rights.⁷ In its judgement, the ECtHR, due to a lack of jurisdiction, did not directly review the legality of the European Commission or OLAF's activities. However, it relied on the fact that the European Ombudsman's reports were proof for maladministration by OLAF, on which the Belgian measures were based. Insofar, it was only the ECtHR, which indirectly acknowledged the close relationship between the European and the national levels' activities and the need to grant judicial protection in light of the results of this multiple-step procedure between OLAF and the Belgian authorities.

⁴ Order of the President of the Court of First Instance in Case T-193/04 *Tillack v Commission* [2004] ECR II-3575, paras 38-46; Order of the President of the Court in Case C-521/04 P(R) *Tillack v Commission* [2005] ECR I-3103, para 32.

⁵ Order of the President of the Court of First Instance T-193/04 *Tillack v Commission* [2004] ECR II-3575, para 53; Order of the President of the Court in Case C-521/04 P(R) *Tillack v Commission* [2005] ECR I-3103, para 46

⁶ Order of the President of the Court in Case C-521/04 P(R) *Tillack v Commission* [2005] ECR I-3103, paras 36-39.

II Background

The *Tillack* case is a good illustration for the phenomenon of administrative integration in the EU. Administrative procedures in the sphere of EU law are increasingly integrated. In many cases, both Member States' authorities as well as EU institutions and bodies contribute to a single procedure, irrespective of whether the final decision is taken on the national or the European level.⁸ Such procedures are often referred to as composite procedures.

Composite procedures are multiple-step procedures with input from administrative actors from different jurisdictions, cooperating either vertically between EU institutions and bodies and Member State institutions and bodies, or horizontally between various Member State institutions and bodies or in triangular procedures with different Member States and EU institutions and bodies involved. The final acts or decisions will then be issued by a Member State⁹ or an EU institution or body but are based on procedures with more or less formalised input from different levels.¹⁰ Procedural integration of administrations in the EU creates a network structure. These networks jointly generate and share information. Such joint generation and exchange of information¹¹ is the backbone of cooperation within integrated administration.¹²

These constellations of decision-making raise specific problems for supervision of administrative activity, especially for maintaining the rule of law through judicial review. The composite nature of many procedures and the often informal nature of information exchange make supervision difficult. This holds all the more true in the EU legal system, in which harmonisation of procedural law is undertaken not systematically but in bits and pieces throughout the regulation of various substantive

⁷ Cour Européenne des droits de l'homme, Affaire *Tillack v Belgique* No 20477/05 de 27 Novembre 2007.

⁸ This reality conflicts with a more traditional model of EU administration, often referred to as 'executive federalism', under which administration in the EU had traditionally been understood as a two-level system. In a simplified version of this model, the European level legislates and the Member States implement European policies national legislative and administrative means. Central to this conception was the distinction of procedures undertaken on the European level on one hand and those by EU Member States on the other hand. See for the description of the classic model of executive federalism e.g. K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', 28 *CMLRev* (1991), 11-35 at 11 *et seq.*; B. Dubey, Administration indirecte et fédéralisme d'exécution en Europe, *CDE* (2003) 87-133. For a view, which emphasises the co-operative nature of executive federalism. see e.g. P. Dann, 'European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliament Democracy', 11 *European Law Journal* (2003) 549-574.

⁹ Member State decisions, under EU law, will often be given effect beyond the territory of the issuing state (referred to in the following as trans-territorial acts). Trans-territorial acts are also often referred to as trans-national acts. The latter term is slightly misleading since it is not the nation which is the relevant point of reference but the fact that generally under public law, due to the principle of territoriality, the legal effect of a decision under public law is limited to the territory of the state which issues the decision and the reach of its law. EU law allows for certain acts to have an effect beyond this territorial reach within the entire territory of the EU, and in the case of extra-territorial effect of an act also beyond the EU.

¹⁰ See for a detailed debate of these distinctions, e.g. Kerstin Reinacher, *Die Vergemeinschaftung von Verwaltungsverfahren am Beispiel der Freisetzungsrichtlinie*, Tenea Verlag (Berlin 2005).

¹¹ Insofar there is a dichotomy of separation and cooperation. The organisational separation of administrations on the European and on the Member State level is balanced by intensive functional cooperation between the administrations on all levels. See also Eberhard Schmidt-Assmann, 'Der Europäische Verwaltungsverbund und die Rolle des Verwaltungsrechts' in: Eberhard Schmidt-Assmann, Bettina Schöndorf-Haubold (eds.) *Der Europäische Verwaltungsverbund* Mohr Siebeck (Tübingen 2005) 1-23, at page 2.

¹² See with further references and explanations Herwig C.H. Hofmann, Alexander Türk (eds.), *EU Administrative Governance*, Elgar Publishing (Cheltenham 2006).

law provisions. The legal problems arising from these rules and principles on composite procedures are important for understanding the development of EU administrative law, especially with respect to single-case decision making.¹³

The reality of integrated administration through composite procedures conflicts with a more traditional model of EU administration, often referred to as ‘executive federalism’,¹⁴ under which administration in the EU had traditionally been understood as a two-level system. In a simplified version of this model, the European level legislates and the Member States implement European policies national legislative and administrative means. Central to this conception was the distinction of procedures undertaken on the European level on one hand and those by EU Member States on the other hand. This paper therefore addresses some of the consequences for EU administrative law which arise from the necessary modifications to this simplistic two-level model. It is about the legal problems resulting from the development of integrated administrative procedures. The special focus of this paper will be procedures with multiple steps in which administrations from different jurisdictions contribute to one single procedure.

This article addresses these questions by, first, looking at joint generation and sharing of information as the substance of administrative cooperation procedures, before discussing challenges of supervision of administrative networks in the EU and proposing some possible approaches for solutions.

III Substantive of Composite Procedures: Joint Gathering and Sharing Information

In EU administrative law there are many examples for policy areas with procedures in which decisions and acts taken on the basis of a procedure with composite elements.¹⁵ The forms of cooperation between Member States’ and EU agencies leading to a final decision differ considerably from one policy area to another. It is usually some form of cooperation of establishment, generation and sharing

¹³ Single-case decision-making has not been on the agenda of European administrative law research. The reason may be that in the past decades the majority of legal scholars understood the EU in a schematic way as a two-level structure, in which the European level legislates and the Member States implement, a model often referred to as executive federalism. This model has always been a simplification. This simplification has however become increasingly distant from the reality of integrated administrative procedures in the EU.

¹⁴ See for the description of the classic model of executive federalism e.g. K. Lenaerts, ‘Some Reflections on the Separation of Powers in the European Community’, 28 *CMLRev* (1991), 11-35 at 11 *et seq.*; B. Dubey, *Administration indirecte et fédéralisme d’exécution en Europe*, *CDE* (2003) 87-133. This model is also the dominant one in the Treaty establishing a Constitution for Europe, [2004] OJ C 310/1. Article I-37 lays down the general principle that Member States “adopt all measures of national law necessary to implement legally binding Union acts”. Only in cases “where uniform conditions for implementing legally binding Union acts are needed”, does the Community retain the power to implement EU legislation. Article I-37 mentions forms of co-operative administration only indirectly in the third paragraph which repeats the hidden reference to comitology, known from Article 211 ECT. For a view, which emphasises the co-operative nature of executive federalism. see e.g. P. Dann, ‘European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliament Democracy’, 11 *European Law Journal* (2003) 549-574.

¹⁵ EU administrative law is understood as the body of law governing administration by EU institutions and bodies as well as Member States administrations acting within the sphere of EU law, i.e. when they act either to implement EU law or when they are bound in their activity by general principles of EU law.

of information. The *Tillack* case is an example for this. OLAF and the Belgian authorities cooperated in establishing information for the potential taking of a final decision either on the EU level or on the national level. Composite procedural elements however exist in a great variety of policy areas, for example in the area of technical safety, product safety,¹⁶ and standardisation and technical norms,¹⁷ the procedures leading to the admission of medical products¹⁸ and genetically modified organisms,¹⁹ regulation of telecommunication,²⁰ public procurement,²¹ asylum procedures,²² and the fight against money laundering²³ to name just a few.

In EU administrative law, rules and principles on the creation and distribution of information exist in several policy areas with differing degrees of detail.²⁴ These rules establishing composite procedures govern ‘who’ has to generate information by ‘which means’ and in ‘which quality’ from ‘which source’ and ‘how’ this information will be used prior to taking normative or single-case decisions. Several basic constellations exist. In some policy areas the procedures are straightforward insofar as they provide for an administrative procedure to take place basically within one Member State supported by information transferred to it from other Member States and European institutions and bodies. Other policy area provisions provide for a multiple-step composite procedure. An example is to require one Member States authority to act as reference authority taking the decision for the admission of certain hazardous products to the entire single market of the EU.²⁵ In some policy areas the composite nature of a procedure links different authorities. A procedure may begin in a Member State to then continue with input from an EU agency or other Member State agencies before the European Commission. Such is

¹⁶ See article 7 of Council Directive 92/59/EEC of 29 June 1992 on general product safety, OJ L 1992 228/24.

¹⁷ Directive 98/34/EC of 22 June 1998, OJ 1998 L 204/37 as amended.

¹⁸ Council Regulation No 2309/93 of 22 July 1993 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, OJ 1993 L 214/1 (with amendments).

¹⁹ Article 11, 15 and 18 of Directive 2001/18/EC of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, OJ 2001 L 106/1.

²⁰ Art. 13 Directive 97/13/EC of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services, OJ 1997 L 117/15.

²¹ Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114; Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134/1; Regulation 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council, OJ 2005 L 257/1.

²² Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin, OJ 2000 L 316/1.

²³ Council decision of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, OJ 2000 L 271/4.

²⁴ The legal basis of administrative obligations to establish, gather and distribute information arises from general principles of EU law, sometimes expressly established in norms of EU/EC Treaty provisions, as well as, occasionally, in EU/EC legislative acts. The latter are, with few exceptions, policy specific. The rules and principles are so far mainly established with respect to individual policy areas. However, certain standard structures to handle information gathering and exchange have been developed for example by cross-policy provisions on access to documents and data protection.

²⁵ See e.g. Article 18 of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (with amendments), OJ 1998 L 123/1.

for example the case in the procedure for the admission of genetically modified foods to the market.²⁶ Other procedures are continuously undertaken on the European level with the possibility of Member State procedural input, e.g. in the area of admission of medicines to the market.²⁷

Irrespective of the details of these different constellations, the various procedures have one thing in common. The composite nature of the procedure always consists of one form or another of cooperation either vertically between Member States and the European authorities or horizontally between different Member States authorities. Also the mix between vertical and horizontal cooperation is possible. However, all forms of cooperation are essentially based on procedures to jointly obtain and assess information necessary for a final decision. Information cooperation is therefore at the heart of rules and procedures governing EU administrative law. Understanding the legal challenges arising from composite procedures thus requires an understanding of vertical and horizontal cooperation for obtaining and computing information leading to final administrative decisions and acts.²⁸

Rules and principles of EU administrative law establishing the legal framework for the generation and sharing of information within the administrative networks are the substance of composite procedures. In a very brief and therefore necessarily limited overview, the procedures for generation and sharing information are the following:

Obligations to provide information to administrative actors within the EU arise, firstly, through the obligation to grant mutual assistance. Obligations to assist other administrations exist in the ‘vertical’ relation between Community bodies and the Member States authorities as well as in the ‘horizontal’ relation between Member States. They may consist of single-case exchanges of information or continuous provision of information or in the form of an obligation to enforce a decision taken by

²⁶ See: Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients, OJ 1997 L 43/1.

²⁷ See e.g. Commission Regulation 1085/2003 of 3 June 2003 concerning the examination of variations to the terms of a marketing authorisation for medicinal products for human use and veterinary medicinal products falling within the scope of Council Regulation (EEC) No 2309/93, OJ 2003 L 159/24.

²⁸ Rules and principles on the substance of information exist. They are either specified in specific policy area related legislation, or exist as general principles of law, applicable throughout the EU by EU institutions and bodies as well as by Member States acting within the sphere of EU law. For example, general principles of EU law such as the duty of care or the duty to diligent and impartial examination require that all relevant information be collected and assessed as to its potential influence on a final decision prior to a final administrative decision or act being taken. (See, in particular, Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305, paras 170-172; T-211/02 *Tieland Signal Ltd v Commission* [2002] ECR II-3781, para 37; T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313, paras 48-51; C-449/98 P *IECC v Commission* [2001] ECR I-3875, para 45; T-24/90 *Automec v Commission* [1992] ECR II-2223, para 79; T-95/96 *Gestión Telecinco v Commission* [1998] ECR II-3407, para 53; Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para 20. See with further detail also Paul Craig, *EU Administrative Law*, OUP, Oxford 2006, 374, 375). In the case law of the ECJ and the CFI the duty to care is closely linked to the *audi alteram partem* rule and is now regarded to be part of the general principles protected within the framework of the right to good administration. Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000, OJ 2000 C 364/1 (See e.g. Case T-7/92 *Asia Motor France SA v Commission* [1993] ECR II- 669, para 34). The principle of loyal cooperation between the EU institutions and the Member States arising from Article 10 EC, also requires both Member States and the EU institutions and bodies to contribute to the achievement of Community tasks.

another administrative body.²⁹ Mutual assistance generally is based on the concept of the territorial reach of public authority.³⁰

The rules on administrative mutual assistance have increasingly evolved towards rules establishing administrative networks with specific roles given to the different players therein,³¹ in which the single-case aspect of mutual assistance is less and less prevalent in many areas having been replaced with continuous information requirements. Also, in many policy areas the difference between rules on mutual assistance, on one hand, and the participation of administrations in composite procedures, on the other hand, is fluid. Both have in common that the administrations act upon an obligation under EU law or Europeanised national law to support another administration by providing information.

Additionally, the rules on mutual assistance in collecting data have been developed in many policy areas towards networks of information gathering, exchange and composition.³² The transfer from mutual assistance to information networks is gradual and evolutionary. The strongest development towards establishing information networks specifically designed for exchange of information can be identified in the area of risk-regulation.³³ Often information networks will be established or supported by European

²⁹ The main provision in primary law establishing the obligations for mutual assistance in the vertical relation between Member States and Community bodies is Article 10 EC, which includes the obligation to assist in administrative procedures by provision of existing information (But since most obligations on information sharing are established in specific secondary law, the possible obligations of the Community institutions vis-à-vis the Member States under Article 10 EC remain largely unexplored. See also: Alberto Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law*, Hart Publishing (Oxford, Portland 1999) 69-70). Additionally, under Article 284 EC and within the limits of primary and secondary law, the right to 'collect any information and carry out any checks required for the performance of tasks entrusted to it.' (See the directive on information about technical standards and regulations (now Directive 98/48/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 217/18 and others). Member States and their standardisation bodies are under the obligation to inform the Commission about any draft standardisation or technical regulation in areas which are not subject to harmonisation legislation (Articles 2 and 8 of Directive 98/34/EC of 22 June 1998, OJ 1998 L 204/37 as amended). Infringements of Member States' obligation to report to the Commission any draft of technical standards and regulations can lead to its inapplicability (Case C-194/94 *CLA Security International* [1996] ECR I-2201, paras 45-54; C-443/98 *Unilever Italia* [2000] ECR I-7535, paras 31-52; C-159/00 *Sapod Audic* [2002] ECR I-5031, paras 48-52). Specific rules developed in secondary law for mutual assistance in different policy areas differ considerably. Competition law, for example is a policy area with very specific obligations of information exchange between the Commission and Member State agencies (Articles 11, 20 (5) and (6), 22 of Regulation 1/2003; Article 19 Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2004 L 24/1).

³⁰ Therefore, the exercise of information gathering in a Member State is generally the prerogative of the local authorities, acting under their home procedural rules.

³¹ The rules on mutual assistance have developed 'in sink' with the general development of the EU legal system. Originally, the vertical relation was stressed with the obligations laid down in what is now Article 10 EC, the duty to loyal cooperation. Then, in the phase of the development of single market related case law by the ECJ in the nineteen-seventies the focus also turned to horizontal cooperation between administrations for exchange of information on the admission of certain products on the market (see e.g. Case 35/76 *Sinmmetal I* [1976] ECR 1871 and Case 251/78 *Denkavit I* [1979] ECR 3369). Finally, after cautious beginnings in the late nineteen-seventies with certain directives on mutual assistance obligations these obligations to mutual assistance in the network of administrations have been regulated to great detail in legal acts on different policy areas.

³² An example are the provisions in tax law. The Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336/15) had provided for vertical and horizontal mutual assistance but also had begun to develop the notion of mutual assistance without a prior request by the administration of another Member State and the sharing of information directly on the level of the involved agencies. Council Regulation 1798/2003 on administrative cooperation in the field of value added tax (OJ 2003 L 264/1), for example still contains rules on individual cases of information sharing through mutual assistance. Generally however, a network structure for information sharing is established in their Articles 5 and 17.

³³ Examples for information networks include the newer rules relating to ozone in ambient air. (Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air, OJ 2002 L 67/14 which in Article 8 contains an information obligation both in the vertical and the horizontal direction for joint planning networks for cases of trans-boundary ozone pollution). Also, in the area of veterinary and food safety law where the 'Rapid Alert System' is aimed at fast exchange of information on foodstuffs which do not comply with Community food safety standards between the national authorities, the European Food Safety Authority (EFSA) and the Commission (see Articles 150-152 of the Council Directive 89/608/EEC on mutual assistance between the

agencies.³⁴ The information within these networks will generally be provided by participants of the networks – both public and private from the European and the Member State levels. Generally, the ‘giving’ side of information into a network has no control over the information or any unilateral possibility to withhold information.³⁵ The latter characteristic poses specific problems with respect to rights of individuals whose information is supplied to a network.³⁶ The latter can be accessed by any agency participating in the network.

Information gathering and sharing further takes place through investigation procedures in the form of controls, inspections and auditing procedures.³⁷ Powers to request such investigations are conferred by EU law on the Commission or other EU institutions and bodies for investigations in Member States as well as on Member States to request an investigation in another EU Member State.³⁸ This was the situation in the *Tillack* case briefly outlined at the beginning of this contribution. Cooperation procedures for joint investigations include rights to request information and documentation from public or private bodies, the right to review documentation such as books and electronic databases of the subjects to the investigations, the right to access premises in on-spot investigations, the right to request on-spot information and explanations by employees, the confiscation of goods and documentation, the taking of samples, the sealing of premises and, finally, the use of enforcement

administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of legislation on veterinary and zootechnical matters, OJ 1989 L 351/34). See also with respect to rules on mutual assistance both horizontally and vertically Regulation 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ 2004 L 165/1 corrected in OJ 2004 L 191/1. The EFSA has the possibility to add scientific expertise helping the Member States assess the risk and the necessary measures to encounter that risk. Other risk-regulation related policy areas with information networks managed by European agencies include maritime safety (Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system, OJ 2002 L 208/10). The network is maintained essentially with the help of an agency, the European Maritime Safety Agency. Information exchange within this network importantly is established directly between coastal authorities of the Member States. See also the information networks established and maintained on drugs and drug addiction as well as xenophobia and racism (Article 4 Regulation 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia, OJ 1997 L 151/1).

³⁴ However, the existence and maintenance of information networks between different levels of administrations are not entirely dependent on a European agency. Examples for such networks based directly on horizontal cooperation between Member State on the basis of EU legal provisions are for example prominent in the area of areas in which Member States are highly protective of their rights such as tax law (In tax law, for example, the area of the joint administration of the so called ‘value added tax’ is subject to regulation. The relevant regulation creates a ‘common communication network (CCN) and common system interface (CSI),’ to ensure all transmissions by electronic means between competent authorities in the area of customs and taxation. Article 39 Council Regulation 1798/2003 on administrative cooperation in the field of value added tax, OJ 2003 L 264/1) and asylum and immigration provisions.

³⁵ Generally, secondary legislation establishing information networks also contain rules on mutual assistance as supply of information upon specific request. See for example Articles 5-8 of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92, OJ 2003 L 264/1.

³⁶ Information networks are either established as centralised databases administered on the Community level, e.g. by and agency. They can also be organised as networks of networks, *i.e.* structures on the European level, linking pre-existing or newly established databases on the Member States levels (E.g. the CCN/CSI network in the area of tax law, linking national databases under Article 39 Council Regulation 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92, OJ 2003 L 264/1). In many policy areas, information networks are established and coordinated by a European agency. Some of the most typical examples for these information networks arise in the area of European environmental law. The European Environment Information and Observation Network (Eionet), (Based on Council Regulation 1210/90 of 7 May 1990, OJ 1990 L 120/1 and Council Regulation 933/99 of 29 April 1999, OJ 1999 L 117/1, amending Regulation 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network), for example, is a partnership network of the European Environment Agency and its national partner agencies (of EU and non-EU states) as well as private actors in participating countries.

³⁷ Such powers differ from the obligation to provide for mutual assistance by the fact that mutual assistance is generally on an ad-hoc basis and is undertaken under the rules of procedure of the administrations ‘giving’ the information.

measures such as fines and force to enforce the rights of inspection. Far reaching powers for investigation are for example granted to the European anti-fraud unit of the Commission – OLAF.³⁹ The Commission or European agencies may,⁴⁰ in certain cases, also undertake an inspection in the Member States vis-à-vis individuals.⁴¹ Also, horizontal requests from one Member State agency for inspections to be undertaken by another Member State are possible in certain policy areas where secondary legislation so permits.⁴²

Many of these powers are exercised in the form of composite procedures. Generally, the law applicable to such investigation measures as well as to the protection of rights of the subjects of investigations is a mix of EU law and law of the Member States. Where Member States' authorities establish information, it will often be subject to specific procedural and institutional obligations on the form and procedure of such activity based in EU.⁴³ Procedurally, investigation powers are often enhanced by the power to request information through an 'injunction.'⁴⁴

IV Supervision and Remedies – The Situation and Possibilities of Improvement

³⁸ This is an exceptional arrangement for example in the area of supervision of banking and financial institutions, see Article 43 (1) of Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions, OJ 2006 L 177/1 (which replaced Directive 2000/12/EC).

³⁹ It may conduct internal investigations in Community institutions and bodies as well as 'external' investigations in Member States or, under certain circumstances, in non-EU Member States. Its powers are established in a regulation, detailing the procedural rights and obligations of European and Member State institutions in relation to OLAF investigations (See Regulation 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999 L 136/1). These rules include the obligation to exchange relevant information and the possibility of OLAF to forward information or requests for action to Member State authorities.

⁴⁰ For the competence of an agency to undertake investigations itself in the Member States see e.g. Article 2 (b) (i) of Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ 2002 L 208/1, under which the Agency shall 'monitor the overall functioning of the Community port State control regime, which may include visits to the Member States, and suggest to the Commission any possible improvements in that field.'

⁴¹ Generally, they will have to inform the relevant Member States' authorities about their intention, who in turn have the duty to loyally cooperate. See for many, e.g.: Article 20 paragraph 2 of Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer, OJ 2000 L 244/1 as amended: "2. When requesting information from an undertaking the Commission shall at the same time forward a copy of the request to the competent authority of the Member State within the territory of which the undertaking's seat is situated, together with a statement of the reasons why that information is required"

⁴² See for example in the area of agricultural law, Article 7 (2), (3) and (4) of Regulation Commission Regulation (EC) No 2729/2000 of 14 December 2000 laying down detailed implementing rules on controls in the wine sector, OJ 2000 L 316/16.

⁴³ The secondary legislation in the area of food safety, also in reaction to the BSE crisis, is probably the most detailed as to the nature, the frequency and the standard as well as financing of controls by national authorities to ensure Community wide safety standards (Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ 2004 L 165/1).

⁴⁴ An example is Article 10 (3) of Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83/1. Injunctions are only permitted where a specific legal basis for their use exists. Sanctioning of violations of rights of inspections within this system is generally undertaken under the law of the Member States (Art. 9 Regulation 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests, OJ 1996 L 292/2), who are obliged to provide for effective and equivalent protection of EU law through their national legal systems. An important exception is the area of competition law enforcement where in the area of anti-trust under the Regulation 1/2003 (OJ 2004 L 1/1), the Commission has extensive rights to sanction violations under EC law and in the area of state aid control, the Commission has a 'fast track access' to the infringement procedure under Article 23 of Regulation 659/1999 combined with the possibility to use best-available information (e.g. Art. 18 (1) Regulation 384/96 on protection against dumped imports, OJ 1996 L 56/1, as amended by Regulation 2117/2005, OJ 2005 L 340/17).

From a descriptive approach, I would now like to change to an analysis of problems of integrated administration and search for solutions to improve the status of EU administrative law. For this again, a background consideration is necessary. The legal framework for composite procedures arises from EU law. However, very few provisions exist in EU law, which are applicable throughout various policy areas. Most are policy-specific. Amongst the few general provisions are the Comitology decision,⁴⁵ directives on data protection⁴⁶ as well as directives on access to information.⁴⁷ Additional sources of general EU administrative law arise from general principles⁴⁸ and fundamental rights.⁴⁹ They apply within the sphere of EU law irrespective of the applicable law to the procedure, which can be national or European. But this general EU administrative law, except for the comitology decision, generally does not establish any specific procedural rules on supervision and review. Policy specific law generally leaves to the Member States to establish the procedure as well as the conditions for supervision and judicial control of administrative action. One of the central difficulties in the EU system of integrated administration is adapting supervision of administrative action to the integrated nature of composite administrative procedures. Difficulties arise from the multitude of administrative actors from different jurisdictions. By their integrating their actions, composite procedures result in a mix of legal systems being applicable to a single administrative procedure. The mixed composition of applicable laws, differs from one policy area to another. The result is a developing integrated administration with a lack of procedural rules governing the interaction and accountability of joint procedures. This was also at the

⁴⁵ Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, [1987] OJ L 197/33 and Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, [1999] OJ L 184/23. Decision 2006/512/EC, OJ 2006 L /11. For a discussion of this pre-2006 development, see C.F Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (OUP, 2005). For a discussion of the post 2006 development, see Manuel Szapiro in this volume.

⁴⁶ Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8/1.

⁴⁷ See for the EC, Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

⁴⁸ General principles of EU law are equally applicable such as the ‘duty to care’ are uniformly applicable to Member States acting within the sphere of EU law and EU institutions and bodies themselves. This for example addresses the question of which standards the information needs to be collected is addressed in many policy areas in which it will not be sufficient for administrations to rely on using pre-existing knowledge in the administrations or relying on information provided by the parties. Instead, decisions will have to be rested on scientific expertise, created in compliance with specific standards inherent to the scientific method and ‘founded on the principles of excellence, transparency and independence’ in order to ensure the scientific objectivity of the measures and preclude any arbitrary measures.’ (For a background to the discussion see the contributions to Christian Joerges, Karl-Heinz Ladeur, Ellen Vos (eds.), *Integrating Scientific Expertise into Regulatory Decision-Making*, Nomos (Baden-Baden 1997). The resulting judicial review of scientific expertise itself is then limited. It is restricted to a review of reasoning. Its review takes place in the context of composite procedures in a multiple-step procedure. See e.g. Joined cases T-74/00, T-76/00, T-83 - 85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others v Commission* [2002] ECR II-4945, paras 199, 200; Case T-27/98 *Nardone v Commission* [1999] ECR-SC I-A-267; ECR-SC II-1293, paras 30 and 88; T-70/99 *Alpharma v Council* [2002] ECR II-3495, para 183.

⁴⁹ All provisions which regulate activity within the scope of Community law need to be interpreted in the light of fundamental rights guaranteed by the Community legal order. Generally see Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, para 31; Case C-299/95 *Friedrich Kremzow v Austria* [1997] ECR I-2629, para 15; Case C-276/01 *Steffensen* [2003] ECR I-3735, para 70. The definition of the scope of Community law is widely defined in Case C-260/89, *ERT-AE v DEP* [1991] ECR I-2925, paras 42, 43: ‘As the Court has held (see Joined Cases C-60 and C-61/84 *Cinéthèque v Fédération Nationale des Cinémas Français*, para 25) (...), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law.’ ‘On the other hand, where such rules do fall within the scope of Community law, [the ECJ] must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures.’ This is well illustrated in cases *ERT* (Case C-260/89 *ERT* [1991] ECR I-2925), *Wachauf* (Case 5/88 *Wachauf v Bundesamt fuer Ernährung und Forstwirtschaft* [1989] ECR 2609) and *Steffensen* (Case C-276/01 *Steffensen* [2003] ECR I-3735, paras 71-77).

heart of the problems for *Tillack*. Administrative cooperation had not been followed by a sufficient administrative law framework establishing rules and principles for cooperation procedures and supervision of such joint administrative activity.

The emergence of composite procedures (with forms of vertical and horizontal administrative cooperation) gives rise to many legal problems, especially for the protection of rights and supervision of administrative action.⁵⁰ Supervision of administrative action takes place in forms of administrative, parliamentary and judicial supervision, necessary to holding public actors to account and ensuring the observance of legality of administrative action within the European administrative networks.

A Judicial Supervision of Composite Procedures

Judicial control is in practice one of the most important modes of supervision of administrative activity although from the outset this mode is limited to *ex-post* control. It also has effect in respect of the future conduct of administrative activity. Member State law defines most of the elements of the Member State authorities' contribution to a composite procedure. This includes the consequences of errors during the Member State element of the procedure, the applicable language regime of the administrative procedure,⁵¹ and last but not least, the criteria and conditions for judicial review of an act adopted by a Member State authority. In this system, judicial review will generally be only possible in the jurisdiction which issued the act. These issues are central to the problems of effective accountability and supervision of administrative activity in the EU's network administration. It is possible that individuals who have neither had any real possibility to know about a Member States involvement in and its contribution to an administrative procedure will be subject to the effects of its outcome and will have to attempt to remedy potential flaws in an act which is in force unless withdrawn or declared void by a court, in a language and a legal system which they are unaccustomed to.⁵²

⁵⁰ Deidre Curtin, Holding (Quasi-)Autonomous EU Administrative Actors to Public Account, 13 *European Law Journal* [2007], 523-541, at 540: 'One of the main problems regarding the checks and balances under construction in the 'undergrowth' of legal and institutional practice is the chronic lack of transparency of the overall system. It is not that there is no public accountability (...) it is rather that it is not visible and often not structured very clearly.'

⁵¹ With further discussion see e.g. Kerstin Reinacher, *Die Vergemeinschaftung von Verwaltungsverfahren am Beispiel der Freisetzungsrichtlinie*, Tenea Verlag (Berlin 2005), 96-98.

⁵² The language regime is only one of the aspects to the structure. One of the essential rights of citizens in the EU is to be able to communicate with institutions and bodies of the EU in their language and to be able to obtain a copy of all rules and single-case decisions affecting them directly or indirectly in their respective language. With a decentralised administration in the EU which takes decisions and issues acts with trans-territorial effect, this general right is limited to the language of the issuing country. Given that for example a Latvian administration's decision will be able to take effect vis-à-vis individuals in Greece and the amount of Latvian speakers in Greece will most likely be very limited the dimension of the problem should become very clear. Responsibility for an act is also difficult to establish from outside of a legal system, especially in countries with a different legal system. Federally organised states like for example Belgium and Germany have complex rules of responsibility internally, a structure like the Swedish model of agencies might be different from countries with a more hierarchic internal organisation.

Given the integrated nature of administrative procedures, judicial control of Europe's integrated administration faces several problems: the dilution of responsibilities and the multitude of different forms of administrative cooperation complicate the allocation of responsibility and the application of general principles of law. In composite administrative procedures for the single-case implementation of EU law, the European courts face the challenge of how to address the integration of administrations through procedure. Due to a lack of abstract procedural provisions in European law, a certain amount of confusion over the different roles of administrative actors in composite and co-operative procedures is as inevitable as problematic.⁵³ Judicial supervision is difficult in cases where Member States and EU authorities cooperate. Effective judicial control therefore relies on the courts ability to allocate responsibility and to reduce the inherent complexity of EU administrative governance arrangements. Judicial control must allocate responsibility for decision making and safeguarding rights despite the fact that a decision was taken in an integrated fashion.⁵⁴ In essence, the problems consist of linking administrative procedures into complex composite structures without establishing supervision adequately developed to address the conditions of the networks.

Given that the trend to integrating administrations seems rather inevitable in an increasingly integrated European Union and in absence of a real central administration, the real challenge to the EU legal system is therefore to find ways to adapt the means of judicial supervision to the emerging reality of an integrated administration. This requires identifying problems in the structure of judicial review and discussing potential solutions. In the following, I would like to restrict this discussion to two major themes: One is adapting the judicial review procedure to composite procedures, the other is adapting judicial review to the fact that much of the administrative cooperation is information exchange and thus does traditionally not qualify for judicial review on the European and national levels.

The first notion of a lack of network structures of courts in the EU might surprise at first sight. After all, one of the central innovations which was used for constitutionalising the Community legal order (and thereby taking EC and EU law out of the realm of public international law), was the creation of the preliminary reference procedure under Article 234 EC.⁵⁵ The result was a system in which the national judge is also a Community judge and supremacy of Community law does not imply inferiority of national Courts. The weakness of this structure thus developed in Article 234 EC and the case law interpreting it, is that only established a two-level network of courts. Only national courts have the right

⁵³ For further detailed analysis see the excellent analyses by: S. Cassese, 'European Administrative Proceedings', 68 *Law and Contemporary Problems* (2004) 21-36.

⁵⁴ See Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463. The Community judge faces here similar problems to a judge of a member state court when reviewing administrative procedures with several agencies involved and complex structures of internal interaction.

⁵⁵ In *Costa v ENEL* and *Simmenthal II*, the ECJ had, for example, famously stressed the importance and role of a network of Courts established by Article 234 EC (ex 177) with the goal of holding both European and national actors accountable. It was thus assured that the relations between the Courts were non-hierarchic in so far as national law could not – against the explicit wording of Article 234 EC – request the exhaustion of national remedies prior to a request for preliminary ruling by the ECJ.

and obligation to request a preliminary reference from the ECJ. This cooperation is vertical in the form of a one-way relationship. Administrative forms of cooperation on the other hand have, as was shown above, developed much more complex forms of composite procedures with vertical and horizontal cooperation. Insofar, the relation between the Courts is much more conservatively organised according to a strict separation of a two-level hierarchic system than the administrative structures in many policy areas which have evolved from a two-level structure to a network.⁵⁶ The problems arising from such a two-level vertical relation have become evident in the two case-study *Tillack*. In these and other cases, final review of composite administrative action is supposed to include an incident review of the legality of action by other authorities acting under procedural law (and often in languages) unknown to the reviewing court. This has in reality led to gaps in judicial supervision of administrative action.

A potential solution to address these problems could be to broaden also the possibilities of cooperation between courts. The preliminary reference procedure under Article 234 EC was probably one of the most important and influential procedural innovations which made European integration as we know it possible. This exceptional success can be used as an example how to proceed in other than the vertical relation but needs to be updated to the current stage of integration in order to ensure judicial protection in the face of integrated procedures.

Such update should include, first, expanding the relation between courts. A key innovation would consist of enabling a better interaction of Courts. So far the ECJ only has the power to receive requests for preliminary rulings from Member State Courts. It could, and in my view should, also be given the possibility to refer questions to Member State Courts. This would be necessary in cases where clarification of issues of national law is necessary in the context of reviewing the legality of a final act adopted by a Community institution following a composite procedure. This would expand the existing one-way vertical relation between Courts established in Article 234 EC, to become a two-way relation. Additionally, however, the horizontal relation between Courts of Member States also needs to be addressed. Member State Courts should be authorised under EC law to seek a preliminary ruling from courts of other Member States when that is necessary to review the final national decision which was established with the input of other Member State administrations under a composite procedure. Expanding the judicial network in the vertical and horizontal direction would then allow for much more effective supervision of administrative cooperation in multiple-step procedures and increase considerably the legal certainty in the system. Judicial review could be undertaken by one court but with supervision of all participants in the administrative network. Gaps in the legal protection such as those apparent in *Tillack* could be effectively excluded.

⁵⁶ This old-fashioned conceptual approach has been heavily criticised in the literature, see for example Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund*, Duncker & Humblot (Berlin 2004), 163-182; Eberhard Schmidt-Assmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd edition, Springer (Berlin 2004), 336-338.

The second element of the legal structure of a system of integrated administration which poses difficulties for judicial supervision is the fact that cooperation takes place in the form of joint procedures for establishment and exchange of information. The nature of this activity is in many cases, not regarded as a reviewable final administrative decision but a preparatory act for a final decision taken by another authority. This is generally no problem if one single jurisdiction is involved, but in composite procedures with input from several jurisdictions, the situation is different. Courts generally suffer from a lack of legal knowledge and real possibility to disentangle the legality of various jurisdictions' final decision.

A potential solution to this problem could, next to the expansion of the preliminary ruling procedures, consist of re-considering the definition of reviewable acts under EU law (for actions for annulment under Article 230 EC). Under the current case-law of the ECJ, reviewable acts are only limited to final acts capable of bringing about a 'distinct change' in an applicant's legal position.⁵⁷ Information exchange and joint gathering and storage of information have the tendency to escape this definition. It is generally simple factual conduct rather than a reviewable final administrative decision. This was the problem which *Tillack* faced when attempting to seek review of the legality of OLAF's actions.

Administrative action through factual conduct is frequent and has in reality become increasingly important.⁵⁸ A problematic type of a factual conduct arises primarily in the framework of information networks in Europe's integrated administration. Once a piece of information is circling in the network, an individual can only affect the correction of that information – be if factually correct or not - unless a special legal provision allows for its review. Generally however, there is no remedy against use and computation of information once entered into administrative networks, as long as this information does not lead to a final decision either on the European or the Member State level.⁵⁹ This was also *Tillack's* problem. Once OLAF had gained access to the information on the confiscated documents and computers, OLAF was not inclined to issue a decision addressed at *Tillack*. Instead OLAF's goal was to

⁵⁷ The leading case is Case C-60/81 *IBM* [1981] ECR 2639, para 9 which defined that 'any measure the legal effects of which are binding on, and capable of affecting the legal interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void.'

⁵⁸ Factual conduct is often linked to processing and computing data in administrative networks. The decision to distribute information on the other hand can be subject to a procedure under Article 230 EC, see: Joined Cases C-317/04 and C-318/04 *European Parliament v Council and Commission* of 30 May 2006, [2006] ECR I-nyr. The distribution of data is generally an activity which can have far reaching and serious impact on the rights of individuals. An example is the listing of an individual in the Schengen Information System by a Member State administration, which may lead to him or her being refused to travel into or within the Schengen area (with references in German and French case law see: Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund*, Duncker & Humblot (Berlin 2004), 283, 284). Factual conduct can arise in the above discussed cases of preparatory acts. They are thus acts which are not aimed to produce a final change in a legal position. Instead they are aimed at adding elements to an ongoing administrative procedure through statements of fact or the transfer of preliminary information. This is often the case where the act is but one step in a composite administrative procedure on the European level. Factual conduct will however also arise where an institution publishes information or issues public statements, which do not amount to a decision. Such cases for example arise when the Commission or an agency releases a press release alleging a journalist to have bribed a Commission official to obtain information. See case reported Case C-521/04 P(R) *Tillack v Commission* Order of the President of 19 April 2005, [2005] ECR I-nyr, para 6. Another example would be the publishing of damaging warnings or confidential business information on a website or similar publications which could damage the economic standing of a company.

identify a leak of information inside its organisation and thus circumvent the fact that it had no other possibility of finding the journalist's source of information.

Two approaches seem possible to address this problem arising from integrated administration. One could be to adapt the approach to judicial protection to the realities of integrated administration and the growing role of information networks therein. This would imply the ECJ's jurisprudence to redefine the meaning of the legal effect of a decision. In an important case on protection of legal privilege, the CFI has shown what such a solution could look like. It developed the notion of a 'tacit decision,' with other words an understanding that a factual conduct could be considered to entail an implicit administrative decision. The CFI, unlike the ECJ, seems to favour the solution to expand the categories of reviewable acts under an action for annulment. It held that the Commission when during an on-spot investigation seizes a document and places it in the investigation file, 'that physical act necessarily entails a tacit decision by the Commission to reject the protection claimed by the undertaking (...). That tacit decision should therefore be open to challenge by an action for annulment.'⁶⁰

An alternative solution could be to allow for a declaratory action for illegality of factual conduct. A declaratory decision by the ECJ and CFI would enable the review of situations which so far could only be addressed in the framework of an action for damages under Article 288 EC. The problem of the declaratory action however could be rather elegantly addressed by the ECJ and CFI if they were prepared to develop their case law on damages cases under Article 288 EC. To date, three conditions need to be fulfilled for granting damages.

'It is settled case-law that the non-contractual liability of the Community for the unlawful acts of its bodies, for the purposes of the second paragraph of Article 288 EC, depends on fulfilment of a set of conditions, namely: the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damaged complained of.'⁶¹

So far, however, where an administration enjoys discretion, mere illegality will not give rise to a damages claim. The required standard is a 'sufficiently serious' breach which in the case-law of the ECJ and CFI is difficult to establish.

⁵⁹ Given the expanding use of information networks in European administrative law, this appears to be a dangerous development for legal protection of citizens in EU law, especially in view of the inclusion of sensitive matters for fundamental rights such as criminal investigations and police-cooperation.

⁶⁰ Case T-125/03 *AKZO Nobel* [2007] of 17 September 2007, ECR II-nyr, para 49.

⁶¹ Case T-193/04 *Tillack v Commission* [2006] ECR II-3995, para 116 referring to Case 26/81 *Oleifici Mediterranei v EEC* [1982] ECR 3057, para 16; Case T-175/94 *International Procurement Services v Commission* [1996] ECR II-729, para 44; Case T-336/94 *Efisol v Commission* [1996] ECR II-1343, para 30; and Case T-267/94 *Oleifici Italiani v Commission* [1997] ECR II-1239, para 20.

‘the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.’⁶²

In order to improve judicial review through a declaratory action, it is well imaginable that the Courts would review the order of conditions for granting damages by first finding on the illegality of an action, irrespective of whether the administration enjoyed discretion or not. The Court could then take into account material and immaterial damages. The latter could be found to exist where a right of an individual has been breached. The damage sought or awarded could in most cases of illegality be a declaration of illegality. This approach would follow the principle of *qui peut le plus, peut le moins*. If the Court has the right to award financial damages, it could also give satisfaction by stating the illegality and thereby contributing to the future lawful conduct of administrations.⁶³ The development of such an approach to a declaratory damages action, as we might call it, would be a significant contribution to judicial review in composite administrative procedures.

B Parliamentary and Administrative Supervision

Next to judicial supervision, forms of parliamentary and administrative supervision of composite procedures are important to assure the legality of administrative action.

Parliamentary control of network administration is exercised by regional and national parliaments as well as the EP. Each however only has control options over their respective administrations. Administrations linked in networks exchanging information and being integrated into composite procedures easily escape the control mechanisms established through parliamentary inquiry structures and ombudsmen. The problem is essentially the same as with judicial review in Courts: Parliamentary supervision is separated according to levels; administrative procedures are integrated.

One of the main forms of parliamentary supervision, next to investigative enquires and the budgetary powers, is the institution of a parliamentary ombudsman. The European Ombudsman’s (EO) powers

⁶² T-193/04 R *Tillack v Commission* Order of the President of the Court of First Instance of 15 October 2004, [2004] ECR II-nyr., para 53 referring to judgments in Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, para. 28, Joined Cases C-178/94, C-179/94, C-188/94, C189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, para. 25, Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, para. 109, Case C-424/97 *Haim* [2000] ECR I-5123, para. 38).’

⁶³ This proposal adopted here for the problems of composite procedures was developed in detail by Nicholas Forwood, prior to becoming Judge at the European Court of First Instance for cases of legislative failure. Judge Forwood wishes to stress that his comments were made in his function as practising lawyer many years ago and can not be regarded as the comments of a judge speaking extra-judicially. See: Nicholas Forwood, Judicial protection of the individual – 10 years of the Court of First Instance, in: *Cour de Justice des Communautés européennes* (ed.) *Le Tribunal de Première Instance des Communautés Européennes 1989-1999*, (Luxembourg 2000) 56-66.

are limited to investigate maladministration in institutions and bodies of the EU. But a large number of practical administrative problems with European law arise from authorities of the Member States implementing European law.⁶⁴ The definition of admissibility of the EO's review is thus a definition based on an organic definition of administrative actors, as opposed to a functional definition of administrative activity.⁶⁵ Such an organic definition leaves lacunae within the grey-zone of the often highly integrated European and Member State administrative activity.

In order to address these potential lacunas in ombudsman supervision of administrative activity, the European, national and regional ombudsmen have created the European Network of Ombudsmen.⁶⁶ The idea is to be able to transfer complaints between the European and the relevant national and regional ombudsmen. Thereby complaints should be automatically handled by the ombudsman in charge of the administration being the source of alleged maladministration.⁶⁷ However, the strict organic distinction of competences also within the network of ombudsmen can lead to difficult situations in composite administrative procedures. To address these problems a special procedure was developed through which national or regional ombudsmen may ask for written answers to queries about EU law, its interpretation and its application to special cases from the EO. The EO either provides the answer directly or, if appropriate, channels the query to another EU institution.⁶⁸

The same problem of maintenance of a two-level supervision structure holds true for most forms of administrative supervision of composite procedures. In the area of data protection, for example, the European Data Protection Supervisor (EDPS) is a quasi-agency which can issue binding decisions on the institutions and bodies of the EU requiring a change or rectification of an administrative practice relating to data collection and use.⁶⁹ Despite these powerful competences of supervision the reach of

⁶⁴ The example of the Tillack case showed the shortcomings of the ombudsman system for effective control. Given the non-binding nature of the European Ombudsman's recommendations (see also: Order of the Court of First Instance in Case T-103/99 *Associazione delle cantine sociali venete v European Ombudsman and European Parliament (ACSV)* [2000] ECR II-4165, paras 47-50) OLAF could simply ignore the proposals. What is more, only the ECtHR cited the ombudsman's findings. The ECJ hardly bothered to mention the ombudsman's reports and did not take them into account for its decision-making. This reality is to a certain degree at odds with the European Ombudsman's mandate under Article 195 EC, under which he has the objective 'to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies.'

⁶⁵ The latter functional definition has for example been chosen for defining the reach of European fundamental rights. Article 51 (1) of the Charter of Fundamental Rights, for example, explicitly includes obligations to observe EU fundamental rights by Member States' agencies when they are 'implementing Union law.'

⁶⁶ For a detailed description, see Carol Harlow, Richard Rawlings, Promoting Accountability in Multi-Level Governance: A Network Approach, *European Governance Papers* No. C-06-02, 19-27 (<http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-02.pdf>).

⁶⁷ According to the European Ombudsmen's annual report 2006, 127, '[t]he European Network of Ombudsmen consists of almost 90 offices in 31 European countries. Within the Union, it covers the ombudsmen and similar bodies at the European, national, and regional levels, while at the national level, it also includes Norway, Iceland, and the applicant countries for EU membership. Each of the national ombudsmen and similar bodies in the EU Member States, as well as in Norway and Iceland, has appointed a liaison officer to act as a point of contact for other members of the Network.'

⁶⁸ European Ombudsman, Annual Report 2006, 129

⁶⁹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8/1.

the EDPS is limited to European institutions and bodies. A network of data protection supervisors⁷⁰ has been created to follow-up on data protection cases within the European administrative network. This approach addresses the difficulties of jurisdictional limitations.

A possibly more effective solution to these problems of parliamentary and administrative supervision, however, could be the creation of an independent agency in charge of handling complaints by individuals even during an ongoing procedure. Similar to the powers of the EDPS, this agency could investigate cases of maladministration by national or European agencies in integrated procedures and take decisions before even a final decision is taken in order to prevent the need for judicial review. Such an agency, or integrated network of agencies, would be a potential network solution for a network problem. If this review procedure would be structured to allow for one single review procedure of the contributions to a composite procedure from administrations of different jurisdictions by the supervisory agencies of these jurisdictions, a real step towards developing supervisory procedures fit to the reality of integrated administrative procedures would be achieved. It would thus be a potentially appropriate approach in the face of integrated administration and create a kind of internal administrative police force reviewing procedures before the mistakes can take effect through final acts. It would mirror by its construction and approach the integrated nature of decision making by allowing for composite real-time review. Rights of intervention of the agency would be needed to be granted vis-à-vis Member State as well as EU institutions and bodies.

V Summary and Outlook for EU Administrative Law

This contribution addressed specific legal problems arising from the development of composite administrative procedures in the EU. Composite procedures are a specific form of highly integrated administrative procedural cooperation for implementation of EU policies. The development of composite procedures in a multitude of policy areas creates problems especially with respect to supervision and accountability. Problems arise from the gap between forms of organisation: Administrative procedures are increasingly organised according to concepts of network structures. On the other hand, accountability and supervision mechanisms, especially possibilities of judicial review, mostly follow a traditional pattern of a two-level system with distinct national and European levels. Such traditionally organised supervisory structures face difficulties in allocating responsibility for errors during the procedures and finding adequate remedies for maladministration within a network. They also have difficulties coping with the fact that the substance of administrative cooperation in composite

⁷⁰ This network includes data protection authorities in charge of matters of the second and third pillars of the EU as well as different Member State data protection authorities.

procedures is the joint gathering and subsequent sharing of information. Therefore, obsolete notions of judicial review on the basis of a final act have proven to be insufficient to ensure effective legal protection.

The developments discussed in this contribution not only show that ‘Europe’s governance laboratory remains radical and experimental’⁷¹ but also argue that that should remain so. Solutions for the new challenges of a changed landscape of administrative action in the EU need to be as innovative as the developments linking administrative procedures into networks. So far, forms of supervision and structures to hold administrations accountable have not followed this tendency of creative development. The *Tillack* case is one example of potential difficulties caused by this development.

Solutions discussed in this paper are oriented to reconstruct a network structure of accountability and supervision as well as control of legality appropriate for the network of actors. The questions of judicial as well as administrative and political control seem linked. In order to allow for effective judicial review against a final act which was established in a composite procedure, in absence of harmonised administrative procedural rules, it would be necessary to provide for a network of courts. This would be best achieved by expanding the preliminary reference procedures not only in the vertical relationship between Member States courts and the ECJ but also between the ECJ and the Member States courts. Additionally, a form of horizontal preliminary reference procedure between different Member States courts would be necessary. This judicial network through procedures of preliminary references would be able to follow the emerging administrative networks and allow for effective judicial supervision of a network administration. Next to this, the expansion of the review of factual conduct seems a missing element of judicial protection on the European level. A viable solution for its creation is the further development of the action for damages towards a declaratory action. Forms of administrative and parliamentary supervision of administrative action equally need to be adapted to the integrated nature of composite procedures in EU administrative law.

In summary, this contribution has led to the following understandings: Maintaining legality and effective supervision is a challenging task in the face of this ever evolving network structure. This task is only slowly being acknowledged in academic legal thinking. It is however a real and important challenge. The result of the necessarily limited considerations to a topic as vast as this, undertaken in this paper are firstly, that integrated administration and composite administrative procedures are the outcome of the approach to European integration in which administrative tasks are undertaken decentrally with only very limited input from the European level. Insofar the EU is different from many federal states where both a parallel federal and state administration exist. The consequence of this

⁷¹ Christian Joerges, Michelle Everson, Re-conceptualising Europeanisation as a public law of collisions: comitology, agencies and an interactive public adjudication, in: Herwig C.H. Hofmann, Alexander Türk (eds.), *EU Administrative Governance*, Elgar Publishing (Cheltenham 2006), 512.

specificity of European integration is that forms of supervision of administrative action need to be adapted to the specific nature of the administrative network. So far there are only very timid first steps to do so. The key is to move beyond a simplistic two-level understanding of European integration with the EU and the Member States as distinct entities.