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Judicial Annulment of National Preparatory Acts and the Effects on Final Union Administrative Decisions: Comments on the Judgment of 29 January 2020, Case C-785/18 *Jeanningros*, EU:C:2020:46

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Abstract

The European Court of Justice's classic Borelli doctrine concerned administrative procedures where national authorities adopt preparatory acts which are binding upon the Union administration. In such cases, preparatory acts cannot be reviewed by Union courts as part of the review of the final Union decision and must instead be reviewed by national courts. Jeanningros provided the Court of Justice with an opportunity to clarify one of Borelli's remaining loose ends – the question of whether national courts should review the national preparatory acts even if the Union administration has already adopted the final decision. The Court answered in the affirmative, but nevertheless left new open questions for legal practice and scholarship to confront.

1. Introduction

In recent years, the Court of Justice of the European Union (CJEU) has delivered a number of landmark rulings on the judicial review of composite decision-making. The basic legal problem addressed in those rulings is already a familiar one in European administrative law.[1]

The problem lies in a mismatch between the European Union's (EU) system of judicial review, on the one hand, and the structure of composite administrative procedures, on the other. The EU judicial system is based on a strict division of competences, whereby only national courts may review national acts, and only Union courts may review Union acts. Composite administrative procedures, where national and Union authorities decide jointly, fit poorly within that rigid dual divide.

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1 See M Eliantonio, 'Judicial Review in an Integrated Administration: The Case of "Composite Procedures"' (2015) 7 Review of European Administrative Law 65; F Brito Bastos, 'Derivative Illegality in European Composite Administrative Procedures' (2018) Common Market Law Review 101; J Gaztea, 'A Jurisdiction of Jurisdictions' (2019) 12 Review of European Administrative Law 9.

The basic approach of Union courts to this mismatch has been to assign the responsibility for judicial review to the Union or the national courts, depending on the level of administration which exercises the defining decision-making powers. Thus, in *Borelli*, the Court of Justice held that it is for the national courts to review a composite procedure, if the national administration in question adopts preparatory acts which, under the applicable legislation, oblige the Commission to take a specific final decision.[2] A key application of this line of case law is in the domain of the administrative procedure for the registration of protected designations of origin (PDOs) and geographic indications (PGIs) – the domain from which the dispute leading to the Court's ruling in *Jeanningros* emerged.[3]

Jeanningros settles a doubt on the *Borelli* case law that had been lingering in legal scholarship for years. This doubt concerned the manner by which to judicially review a binding national preparatory act, when the final decision has already been taken at Union level. In what follows, this case note will briefly summarise the facts of the case and the Court of Justice's reasoning (section 2), and elaborate on some of the conceptual and practical problems posed by its chosen approach (section 3).

2. The background to the case and the Court of Justice's reasoning

The *Jeanningros* judgment was delivered by the Court of Justice on the 29th of January 2020. The facts leading to the main proceedings in France concerned a minor amendment made to the PDO of the 'Comté' cheese. The competent French administrative bodies had enacted a decree that changed the product specification for Comté cheese. According to that decree, no milk extracted with the assistance of robotic milkers could be used in the production of Comté.

GAEC Jeanningros, an agricultural cooperative, brought actions before the French Conseil d'État to challenge the lawfulness of the decree. Even though the administrative procedure had not yet been concluded, as a final decision could only be taken by the Commission, the action was fully in line with the case law of the Court of Justice on the registration of PDOs and PGIs. Given the limited role of the Commission in the administrative procedure, and the binding character of the national preparatory acts, those acts must be challenged just like national definitive decision.[4]

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2 Case C-97/91 *Borelli* EU:C:1992:491.
3 Case C-785/18 *Jeanningros* EU:C:2020:46.
4 See for instance Cases C-269/99 *Carl Kühne* EU:C:2001:659 and C-343/07 *Bavaria* EU:C:2009:415.

However, while judicial proceedings were still pending before the Conseil d'État, the Commission took the final decision, which approved the French authorities' intended amendments to the European Union's protected designation of origin 'Comté'.

The Conseil d'État referred to the European Court of Justice for a preliminary ruling. In essence, the Conseil d'État asked whether the conclusion of the administrative procedure at Union level, with the Commission's final decision, should be taken to mean that the judicial review of the national preparatory act had become devoid of purpose or whether, instead, the right to effective judicial protection under Article 47 of the EU Charter of Fundamental Rights should be interpreted as requiring national judicial proceedings to continue. In its previous case law, the Conseil d'État took the first view. It held that Commission decisions registering a PDO rendered it unnecessary to rule on the lawfulness of national preparatory acts.

The Court agreed with Advocate General Campos Sánchez-Bordona that the case law on the composite procedure for the *registration* of PDOs could be applied by analogy to the procedure for the *amendment* of already registered PDOs.[5] The reason was that the two administrative procedures, as set out in Regulation 1151/2012 of the European Parliament and of the Council of 21 November 2012, are based on a similar structural division of powers between national authorities and the Commission.[6] National authorities prepare an application for registration or amendment of a registration, with regard to which the Commission has only 'limited, if any, discretion'.[7] Indeed, the Commission's powers are limited to checking that national authorities' applications for amendment include the information required and do not contain any manifest errors. Accordingly, the Court of Justice held that

[r]egulation No 1151/2012 establishes a division of powers between the Member State concerned and the Commission (...) in the sense that, in particular, the decision to register a name as a PDO could be made by the Commission only if the Member State concerned had submitted to it an application for that purpose, and that such an application could be made only if that Member State had checked that the application was justified.[8]

Reasoning that, in the administrative procedure, 'decision-making power (...) belongs to national authorities', the Court of Justice concluded that

5 *Jeanningros* (n3) para 28; Opinion of AG C Sánchez-Bordona in *Jeanningros*, para 53.
6 *Jeanningros* (n3) paras 30-31.
7 ibid paras 24-25.
8 ibid paras 23-24.

it is for national courts alone to rule on the lawfulness of measures adopted by those authorities — such as measures relating to the application to register a name — which constitute a necessary step in the procedure for adopting an EU act, since the EU institutions have, with regard to those measures, only limited, if any, discretion.[9]

By contrast, 'the measures adopted by those institutions — such as registration decisions — are subject to judicial review by the Court'.[10] Consequently, the Court considered that it was exclusively for national courts, and not for the EU Courts, to review the national act, as is the case for any definitive decision taken by the same authority.[11] Emphasising that national courts are required, by virtue of Articles 19(1) TEU and 47 of the EU Charter of Fundamental Rights, to observe the fundamental right to effective judicial protection,[12] the Court then concluded that this right would be compromised if, once the Commission had taken the final decision, a national court found that there was no longer any need to adjudicate on an action for annulment against the national preparatory decision. The key reason was that, because the Union courts cannot review binding national preparatory decisions, an action before national courts 'is the only opportunity for natural or legal persons affected by such a decision to oppose it'.[13]

Concluding its reasoning, the Court of Justice agreed with the Advocate-General,[14] according to whom a national judicial annulment of the national authority's act would create 'a chain reaction in the form of depriving the Commission's decision of a legal basis'.[15] The Court of Justice, however, preferred a different formulation, holding that 'any possible annulment of (...) a decision taken by the national authorities would deprive the Commission's decision of any basis and, consequently, entail a review of the case by the Commission'.[16]

3. Comments

In recent years, the CJEU's case law has been particularly rich with rulings on the judicial review of composite administrative procedures.

9 ibid para 25.
10 ibid para 25.
11 ibid paras 28 and 35.
12 ibid paras 32-36.
13 ibid paras 37-38.
14 ibid para 39.
15 Sánchez-Bordona (n5) para 65.
16 *Jeanningros* (n3) para 39.

Many of those rulings are true milestones in European administrative law and, more specifically, in the law of composite decision-making.

In *Berlusconi & Fininvest* and *Iccrea Banca*,[17] in the respective domains of the Single Supervisory Mechanism and the Single Resolution Mechanism, the Court took the unprecedented step of holding that national courts must, in many cases, refrain from reviewing the actions of national authorities involved in composite decision-making.[18] The Court has also been quite active in addressing judicial review issues in composite procedures of a horizontal kind, where authorities of distinct Member States make decisions together. In *B/Luxembourg* and *Berlioz*,[19] two cases on requests for information between the fiscal administrations of different Member States, the Court of Justice clearly prioritised effective judicial protection of individuals over national jurisdictional divides, and required national courts to indirectly review information requests issued in another Member State.

In this light, *Jeanningros* may at first sight read like a comparatively uninteresting development. Indeed, to a significant degree, it simply solves one of the loose ends of the CJEU's classic *Borelli* case law – a jurisprudence which made three things clear. First, where national authorities adopt preparatory acts which are binding on the Union administration taking the final decision at the procedure's conclusion, national courts must review the national preparatory act as they would review any national final decision. Second, the Union courts must refrain from reviewing that act indirectly as part of a review against the final decision taken at Union level. And third, the illegalities that may affect the preparatory act are irrelevant for the validity of the final decision (i.e., no derivative illegality may occur).

What the *Borelli* case law – or its developments in the domain of PDOs and PGIs – did not clarify was precisely the issue at stake in *Jeanningros*. What if the final decision is taken by the Union administration before the national court has had the opportunity to review the binding national preparatory act upon which it is based?

The Court's answer was that, on the one hand, any pending judicial challenge against the national preparatory act should continue and, on the other, a national

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17 Case C-219/17 *Berlusconi & Fininvest* EU:C:2018:1023; Case C-414/18 *Iccrea Banca* EU:C:2019:1036. On the former case, see S Demková, 'The Grand Chamber's Take on Composite Procedures under the Single Supervisory Mechanism' (2019) 12 Review of European Administrative Law 209. On the latter case, see M Markakis, 'Composite Procedures and Judicial Review in the Single Resolution Mechanism: Iccrea Banca' (2020) 13 Review of European Administrative Law 109.

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

19 Case C-682/15 *Berlioz* EU:C:2017:373; Joined Cases C-245/19 and C-246/19B EU:C:2020:795. See P Mazzotti & M Eliantonio, 'Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union' (2020) 5 European Papers 41.

judgment annulling that act should lead the Union administration to revoke a decision taken on that basis. Though the latter point is expressed only briefly at the very end of the ruling ('any possible annulment of (...) a decision taken by the national authorities would deprive the Commission's decision of any basis and, consequently, entail a review of the case by the Commission'),[20] its conceptual and practical implications are significant. Four of these implications are considered below.

First, from a conceptual perspective, it is difficult to square *Jeanningros* with what tends to be the standard, albeit often implicit, doctrinal account about the fate of preparatory acts in many administrative laws. This account holds that preparatory acts have no self-standing relevance. They are simply instrumental to the adoption of a final decision. The purpose of their existence is exhausted once the administrative procedure to which they belonged has concluded with the decision. As the Union courts put it, 'any unlawful features vitiating (...) a preparatory act must be relied on in an action directed against the definitive act for which it represents a preparatory step'.[21] Indeed, even the plaintiff in the original *Borelli* ruling held that the final decision 'itself encapsulates all the decisions of the institutions and bodies involved in the procedure'.[22] *Jeanningros* shows that the Court of Justice does not hold this reasoning to apply to composite procedures where national authorities adopt preparatory acts that decisively shape the final decision. It is not only that binding national preparatory acts may be reviewed autonomously from the final Union-level decision. Those acts may be autonomously reviewed *even after* the final decision has been taken.

A second issue concerns the expectation that the Union administration review its own decisions in order to implement a national judgment annulling the national preparatory act. One may wonder whether that expectation is coherent with the Court's own categorical statements that the illegality of national preparatory acts cannot affect the validity of Union decisions. Indeed, in *Borelli,* the Court of Justice famously held that 'any irregularity that might affect' a national binding act 'cannot affect the validity' of the Commission's final decision.[23] However, the CJEU does not even require the Commission to annul the decision, in application of the general principle set out in *Algera* that it may destroy its own illegal decisions with retroactive effects.[24] Instead, the Court of Justice in *Jeanningros* framed the Commission's self-review by citing previous judgments on its power to withdraw definitive decisions upon the emergence of 'substantial

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20 *Jeanningros* (n3) para 39.
21 See Case 60/81 *IBM* EU:C:1981:264, para 12 ; Case T-404/08 *Fluorsid* EU:T:2013:321, para 133.
22 Opinion of AG Darmon in *Borelli* (n2) para 30.
23 Borelli (n2) para 12.
24 See Case T-727/16 *Repower* EU:T:2018:88, para 93 and the case law cited there.

new *facts*' (emphasis added).[25] Put differently, it is not the *invalidity* of the national preparatory act as such, but its *elimination* by a national ruling, that entails the invalidity of the final EU-level decision. This is similar to the suggestion that, under the scope of the *Borelli* doctrine, national preparatory acts constitute a 'factual presupposition' for the legal possibility of adopting a final EU decision. Hence, their annulment by a national court 'will leave the subsequent EU legal act without an essential presupposition for its valid enactment'.[26] That the Commission is now considered obliged to revoke its own previous decisions on these grounds appears clear. What remains unclear is whether, in case it fails to do so, affected parties may resort to non-invalidating judicial remedies against the decision, such as an action for failure to act under Article 265 TFEU.[27]

A third issue posed by *Jeanningros* concerns the deadline for annulment of the national preparatory act. What time limits apply to the judicial review of national preparatory acts *after* a final decision has been taken at Union level?

I am not familiar with any legal order that has specific deadlines for the judicial review of preparatory acts, let alone for cases where final decisions have already been taken. However, one could conclude that, in the spirit of the *Borelli* case law, the binding national preparatory act should be given identical treatment to any definitive decision from the same authority. The relevant Member State's usual time-limits to bring actions for annulment would therefore apply. Here lies what is perhaps the most baffling implication of *Jeanningros*.

In many legal orders, administrative decisions that are vitiated by especially severe illegalities may be challenged without any time-limits. In Portugal, for example, illegal administrative acts must, as a general rule, be challenged within *three months*.[28] However, if adopted, say, without the minimum quorum, in total disregard for applicable procedural rules, or in violation of *res judicata*, administrative acts may be challenged at *anytime* – be it three months or thirty years after their adoption.[29] By contrast, Article 263(6) TFEU provides that Union acts must be challenged within a delay of *two months* 'of the publication

25 The Court cites Joined Cases C-454/16P, C-456/16P and C-458/16P *Global Steel Wire* EU:C:2017:818, para 31, which in turn refers to T-186/98 *Inpesca* EU:T:2001:42, paras 47-48.

26 F Brito Bastos, 'The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice' (2015) 8 *Review of European Administrative Law* 269, 297.

27 I am grateful to one of the anonymous reviewers of this case note for her/his observations on this point.

28 Article 58(1) b) of the *Código de Processo nos Tribunais Administrativos* (Code of Procedure in Administrative Courts).

29 See Article 161 of the *Código do Procedimento Administrativo* (Administrative Procedure Code) and Article 58(1) CPTA. Article 162(3) of the Code of Administrative Procedure allows, at least in theory, for safeguarding some of the real-world, factual implications resulting from null decisions, on a case-by-case basis and based on principles such as legitimate expectations or proportionality. However, it is notoriously difficult to find examples of the provision being applied in practice.

of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be'.

The original *Borelli* case law made clear that binding national preparatory acts in composite procedures must be judicially challenged before national courts and independently from the final Union decision. What *Jeanningros* adds is that the national preparatory act may in fact be challenged *after* the final Union decision has been taken. However, if we also consider the differing national and Union deadlines for annulment, it becomes apparent that national preparatory acts may potentially be challenged *long after the time for the challenge of the final Commission decision has passed* – and perhaps even indefinitely.

Member States adopt different deadlines for annulment, and different criteria as to which administrative decisions are so gravely illegal that they should be indefinitely challengeable. The well-known two-month time limit to bring actions for annulment against Commission decisions may induce many market actors into trusting the stability and definitive status of those decisions after that time has elapsed. And yet, the Commission will have to exercise its power of self-review at very different moments in time, depending on the laws of the Member State where the national stage of the administrative procedure took place, and where national preparatory acts have been judicially annulled or declared void. In this light, one may object to the contention that *Jeanningros* undermines the uniformity of Union law, as well as legal certainty.[30] Nevertheless, it is difficult to imagine an alternative to the application of the standard national deadlines. In order to reduce the impact of the unpredictability of cross-border variations on the stability of the Commission's final decisions, one could imagine, as a potential solution, applying the two-month deadline in Article 263 TFEU to the judicial review of binding national preparatory acts. However, that solution would leave many plaintiffs in a worse position, given that they would likely need to bring actions against the national administration within a shorter timeframe than under applicable national rules. It is difficult to find overriding constitutional reasons that could plausibly justify rendering individuals' fundamental right to an effective judicial protection more difficult to exercise.

Finally, *Jeanningros* raises questions about the practical and technical steps needed to implement the judgment. In essence, it requires the Commission to withdraw its own decision if it becomes aware that a national judgment has annulled the binding national preparatory acts upon which it is based. There are, however, no formal channels for national courts to notify the Commission (or another Union body) of the outcome of their judgments. Perhaps in future, legislative reforms of the procedural framework for protected designations of origin and geographic indications – or any other administrative procedure that

30 For the principle of legal certainty under EU law, see Case C-183/14 *Salomie* EU:C:2015:454, para 31: 'EU legislation must be certain and its application foreseeable by those who are subject to it'.

falls under the scope of the *Borelli* line of case law – such a mechanism could be established.[31] This would certainly promote clarity and legal certainty as to how *Jeanningros* can be implemented in practical terms. Until then, two avenues seem to present themselves.

One would be for the defendant national authorities to inform the Union administration of the national judgments annulling their preparatory acts. Since those acts are adopted as 'a necessary step in the procedure for adopting an EU act',[32] it is logical that the national body which issued them notifies the Union administration of any events which may affect the decision-making procedure. However, another option could be devised. Some Union case law seems to suggest that national administrative authorities cannot always be trusted to ensure effective follow-up at Union level of national judicial decisions annulling their contribution to a composite procedure. In *CRM*, the Commission proceeded with the administrative procedure for the registration of a PDO after having been advised to do so by the competent national authority *despite* the judicial annulment of the latter's preparatory acts.[33] In this light, the option of directly communicating their judgments to the Commission should remain available to national courts. Under the general principle of loyal cooperation, enshrined in Article 4(3) TEU, such communication should be made possible. In fact, as its recent ruling in *Eurobolt* shows,[34] the Court of Justice appears increasingly open to direct exchanges between national judges and the Commission. The national court may, under *Eurobolt*, request information and evidence from the Commission that it may need to make a judgment. Why should it not be able to inform the Commission of judgments that have an immediate impact on the lawfulness of its administrative decision-making processes?

31 In this sense, see F Brito Bastos (n26) 298.
32 *Jeanningros* (n3) para 25.
33 Case T-43/15 *CRM* EU:T:2018:208.
34 Case C-644/17 *Eurobolt* EU:C:2019:555, paras 30-31.