REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 12, NR. 1, 209-220, PARIS LEGAL PUBLISHERS © 2019

# The Grand Chamber's Take on Composite Procedures under the Single Supervisory Mechanism

Comments on Judgment of 27 June 2018, C-219/17 *Silvio Berlusconi v Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and others*, EU:C:2018:502

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## 1. Introduction

The recent landmark judgment of *Berlusconi (Fininvest)*[1] reaffirms the Union Courts' initial stance regarding the division of jurisdiction for matters arising from composite procedures.[2] Remarkably, however, in *Berlusconi*, the CJEU for the first time offers a conceptual discussion on the long discussed issue of jurisdiction in composite matters, and does so in the new context of the Single Supervisory Mechanism (SSM). In this respect, the Court first clarifies that where an EU institution enjoys discretion in the final decision-making under the arrangement of a composite procedure, the Union Courts shall have an exclusive jurisdiction over the procedure as a whole. Consequently, Member State courts are prevented from reviewing any steps leading to the adoption of a final decision, regardless of the legal effects thereof in the domestic legal order or the domestic procedural rules allowing for such a review. While seemingly logical, the binary approach to judicial competence opens more doors to uncertainty, than it closes. One key concern is regarding the appropriate conduct of review under exclusive jurisdiction; concretely whether and how the Union Courts are competent to review preliminary acts taken under *national* law. Generally, where interpretation of the respective national rules is clear, such a review would consist of a verification of compliance with the essential procedural guarantees by the Union institution or body, which took the final decision. This approach seems to apply also in cases where the Union institution has a limited discretion to review the national preliminary acts when taking the final decision.

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* DOI 10.7590/187479819X15656877527269 1874-7981 2019 Review of European Administrative Law

1 Case C-219/17 *Silvio Berlusconi v Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and others*, EU:C:2018:502.

2 For a definition see below and in Herwig C.H. Hofmann and others (eds.), *ReNEUAL Model Rules on EU Administrative Procedure* (Research Network on EU Administrative Law 2014) 28; for more background on the concept of composite administration see e.g. Eberhard Schmidt-Aßmann, 'Introduction: European Composite Administration and the Role of European Administrative Law' in Oswald Jansen & Bettina Schöndorf-Haubold (eds.), *The European composite administration* (Intersentia 2011) 6-8.

The following discussion identifies that despite the black-and-white understanding of discretion developed by the Court in *Berlusconi*, under more general jurisdiction, the Union Courts will always verify that decisions of the Union institutions are taken with all due care.

## 2. The background and facts of the case

### 2.1. Single Supervisory Mechanism as a composite procedure

Increasingly, European administration[3] takes the form of composite procedures. Composite procedures are those in which actors of several jurisdictions cooperate, normally by provision of information or by taking other types of preliminary acts such as decisions, before the adoption of a final legally binding act, at either the EU or a Member State level. European legal scholarship has focused extensively on the issue of composite decision-making in the EU, especially from the perspective of effective judicial protection and the legality review.[4] The key concern identified is that preliminary acts leading to the adoption of the final measure remain outside the scope of review under the strict division of jurisdiction.[5]

Procedures of composite nature exist in various policy areas, ranging from the early agricultural policies, planning procedures in environmental protection,

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3 The existence of European administration is a hotly debated topic in existing European legal and political science scholarship. Terms such as 'integrated', 'mixed', 'composite' or 'multi-level' administration and governance have been used to refer to the similar phenomenon which is the vast diversity of forms of administrative cooperation between the EU and Member State authorities in their capacities to implement and administer European legislation. See a recent account on the nature and development of EU administration in Herwig C.H. Hofmann, 'European Administration: Nature and Developments of a Legal and Political Space' in *Research Handbook on EU Administrative Law* (Edward Elgar Publishing 2017); as well as the classical literature on the types of procedures in EU administration in Mario P. Chiti, 'Forms of European Administrative Action' (2004) 68 *Law and Contemporary Problems* 37; Sabino Cassese, 'European Administrative Proceedings' (2004) 68 *Law and Contemporary Problems* 21; Schmidt-Aßmann (n. 2).

4 See among the extensive literature Herwig C.H. Hofmann, 'Composite Decision Making Procedures in EU Administrative Law' in *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar Publishing 2009); Oswald Jansen & Bettina Schöndorf-Haubold (eds.), *The European Composite Administration* (Intersentia 2011); Schmidt-Aßmann (n. 2); Mariolina Eliantonio, 'Judicial Review in an Integrated Administration: The Case of "Composite Procedures"' (2015) 7 *Review of European Administrative Law* 65; Sergio Alonso de León, 'Composite Administrative Procedures in the European Union' (Universidad Carlos III de Madrid 2016), https://e-archivo.uc3m.es/handle/10016/23445, accessed 12 April 2019; Filipe Brito Bastos, 'Derivative Illegality in European Composite Administrative Procedures' (2018) *Common Market Law Review* 101.

5 See also the discussion on how composite nature of a procedure affects the review of legality of the conduct, as different from a review of compliance with procedural rights in composite procedures in Bastos (n. 4) 109, 113.

emissions trading, transport or energy, to more structured cooperation through the alert systems in the field of visa and immigration matters.[6] The case of *Berlusconi* represents a landmark case also because it concerns a new EU composite regulatory regime – the Single Supervisory Mechanism (SSM). The SSM, in operation since November 2014,[7] constitutes the legal framework governing prudential supervision of credit institutions and other entities in the Eurozone, with the European Central Bank (ECB) as the main supervisory authority. According to the accompanying SSM Framework Regulation,[8] the ECB, in performance of its supervisory activities, relies heavily on cooperation from the national competent authorities (NCAs).[9] An example of such supervisory activity of the ECB is the assessment of the acquisitions of qualifying holdings in credit institutions.[10] Under this procedure, the NCA, which received a notification about an intention to acquire a qualifying holding in a credit institution 'shall assess whether the potential acquisition complies with all the conditions laid down in the relevant Union and national law'. The NCA then 'shall prepare a draft decision for the ECB to oppose or not to oppose the acquisition' and submit it to the ECB. The ECB decides whether or not to oppose the acquisition based on its assessment of the proposed acquisition and the NCA's draft decision. The procedure is composite in nature and it was the subject of dispute in the landmark *Berlusconi* case. This contribution evaluates the *Berlusconi* judgment from the perspective of the implications for the review in composite procedures where the final decision-maker is an EU institution or a body.

### 2.2. The acquisition of holdings in question

Mr Silvio Berlusconi, through his company Fininvest – (the applicants) – owned approximately 30% of Mediolanum, an Italian financial holding company. Following Mr Berlusconi's conviction for tax fraud, the Banca d'Italia and the IVASS (Instituto per la Vigilanza sulle Assicurazioni) decided

6 See detailed policy discussions in Herwig C.H. Hofmann, Gerard C. Rowe & Alexander H. Türk (eds.), *Specialized Administrative Law of the European Union: A Sectoral Review* (Oxford University Press 2018).

7 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ *L 287*, 29.10.2013, pp 63-89.

8 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation).

9 See e.g. Christos Gortsos, 'Competence Sharing Between the ECB and the National Competent Supervisory Authorities Within the Single Supervisory Mechanism (SSM)' (2015) 16 *European Business Organization Law Review* 401.

10 Title 3 of the SSM Framework Regulation – cooperation with regard to the acquisition of qualifying holdings (Articles 85-87).

his reputation did not meet the requirements for acquisition holders under the new SSM framework. The decision was annulled by the Council of State for breaching the principle of non-retroactivity.

In the meantime, however, Mr Berlusconi became an owner of a qualifying holding in the capital of a bank, due to a merger of Mediolanum by Banca Mediolanum, an Italian credit institution. The Bank of Italy and IVASS thus required Fininvest to submit a new application for authorisation of this acquisition. Following the SSM procedure, the Bank of Italy sent an adverse opinion on the reputation of Fininvest to the ECB. The ECB Supervisory board, by decision of 25 October 2016[11], decided the reputation of the acquirers of the qualifying holding in Banco Mediolanum did not satisfy the requirements necessary for approval of the acquisition in question.

The applicants thus challenged the ECB's decision by three court proceedings[12], including by an enforcement action before the Council of State. In the absence of clear precedents from the CJEU concerning this type of procedure, the Council of State referred the matter to the CJEU. Concretely, the questions referred concerned (a) whether Article 263 TFEU must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by NCAs in the procedure concerned and (b) whether the answer to that question is different where a specific action for a declaration of invalidity on the ground of alleged disregard of the force of res judicata attaching to a national judicial decision is brought before a national court.[13] The result is the judgment by the Grand Chamber, which took a conceptual spin on the issue of jurisdiction in composite disputes.

## 3. The Grand Chamber's take on the composite SSM

### 3.1. Finding

*The Grand Chamber, following an opinion of Advocate General Campos Sánchez-Bordona,*[14] *decisively precluded national courts from reviewing the*

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11 Under Articles 22-23 of Directive 2013/36/EU and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, Text with EEA relevance, OJ *L 176*, 27.6.2013, pp 338-436.

12 The other two actions are for annulment (a) before the General Court brought on 23 December 2016, Case T-913/16 *Fininvest and Berlusconi v ECB*, pending and (b) before the Regional Administrative Court, Lazio for annulment of the acts of the Bank of Italy in this procedure.

13 *Berlusconi* (n. 1) para 40.

14 Opinion of Advocate General Campos Sánchez-Bordona of 27 June 2018, Case C-219/17 *Berlusconi (Fininvest)*, EU:C:2018:502, para 126.

*legality of decisions to initiate procedures, preparatory acts or non-binding proposals, adopted by NCAs in the procedure concerned. Furthermore, it deemed a specific action for a declaration of invalidity on the ground of alleged disregard of the force of* res judicata *of a national judgment immaterial to that effect.*

*In order to reach that decision, CJEU reaffirmed its previous stance vis-à-vis the division of jurisdiction between domestic and Union Courts for disputes arising from composite procedures. Rendering the jurisdiction to the level of the final decision-making authority, which holds discretion with regard to the adoption of the final legally binding measure. The Court held: Article 263 TFEU 'confers upon the Court of Justice [...] exclusive jurisdiction to review the legality of acts adopted by the EU institutions.'*[15]

### 3.2. Reasoning

The Court reached the above conclusions by reasoning, first of all, that the strict two-level division of jurisdiction between national and EU courts results from the unitary rather than multi-stage structure of the procedure, in which 'an EU institution is to have an exclusive decision-making power.'[16] Accordingly, the unitary design of the procedure needs to be subject to a review at only one jurisdictional level. Where a national preliminary act however 'is necessary stage of a procedure for adopting an EU act in which the EU institutions have only a limited or no discretion, so that the national act is binding on the EU institution,'[17] it is for the national courts to rule on 'any irregularities that may vitiate such a national act, [...] even if the national rules of procedure do not so provide.'[18]

In *Berlusconi* dispute, the ECB had discretion regarding whether or not to follow the preliminary opinion of the national authority under the SSM. The first line of reasoning effectively positions the existence or absence of discretion at the final decision-making level as a criterion for the determination of jurisdiction in composite matters.[19]

Second, the exclusive jurisdiction of the Union Courts in 'single' composite procedures, according to the Grand Chamber, arises from the requirement that the decision-making process be *effective*. If national courts were to exercise jurisdiction over preliminary acts, there would be a 'risk of divergent assessments in one and the same procedure.'[20] The Court thus found that both the type of the national legal procedure for review of national preparatory acts for the final

15 *Berlusconi* para 42.
16 *Berlusconi* para 44.
17 *Berlusconi* para 45.
18 *Berlusconi* para 46.
19 See section 4 for the specific comments.
20 *Berlusconi* para 50.

decision taken by an EU institution, as well as the nature of the claims in law in such a procedure, are immaterial.[21]

The Grand Chamber then reviewed the nature of the procedure at hand, finding that the 'EU Courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision [...] is affected by any defects rendering unlawful acts preparatory to that decision.'[22] The following part provides two general implications of the Grand Chamber's finding in *Berlusconi*.

## 4. Comments

The Grand Chamber's comprehensive assessment of the general question of attribution of jurisdiction in composite matters and the detailed review of the existing case-law and the literature by the Advocate General in his opinion in *Berlusconi*, suggest the greater systemic importance of the case. The present contribution identifies two implications of this ruling, specific for the *vertical* type of composite decision-making with the final authority being an EU institution.[23]

First, the Court explicitly reaffirms the rigid dual approach to attribution of jurisdiction in composite matters. As stated above, where the final decision-making authority is an EU institution, which enjoys discretion in the specific arrangement of the procedure, the Union Courts will have *exclusive* jurisdiction over the procedure as a whole. Consequently, the Member State courts are precluded from reviewing any steps leading to the adoption of a final decision, regardless of the national procedural rules or the legal effects of such preliminary steps in the domestic legal order. Second, the exclusive jurisdiction which rests firstly with the General Court (under Article 263 TFEU), in light of the requirements of effective judicial protection and the respect for the rule of law, would then demand a review of national preliminary conduct governed by respective national laws, by the Union Courts. The key question is how such a review shall be conducted; i.e. whether and how the General Court is competent to review preliminary acts taken under *national* law. This case note, being limited in scope, identifies one possible approach – a general jurisdiction to conduct a review of EU institution's compliance with essential procedural guarantees. This approach constitutes the first available alternative to the review of national law, as it transfers the burden of responsibility back to the authority under its

21 *Berlusconi* para 51.

22 *Berlusconi* para 57.

23 Herwig CH Hofmann, 'Multi-Jurisdictional Composite Procedures - the Backbone to the EU's Single Regulatory Space' (2019), 2019 University of Luxembourg Law Working Paper Series, https://papers.ssrn.com/abstract=3399042, accessed 10 June 2019.

own jurisdiction issuing the final decision, irrespective of the existence of discretion. The only distinction then arising out of the existence or absence of discretion in such a review is the additional possibility for the review of preliminary steps before the domestic courts where discretion at the EU level is limited. The following sections address these two points in turn.

### 4.1. The two-level division of jurisdiction in composite procedures

The judgment of *Berlusconi* builds upon the CJEU's early case-law on matters of composite nature. Concretely, the strict division of jurisdiction over composite decision-making was first asserted in the 1992 case of *Borelli*.[24] *Borelli* concerned a reverse scenario, i.e. where the national authority took the binding decision (with an EU-wide effect), in the specific context of Regulation (ECC) No 355/77 on the EAGCF funding. Nonetheless, the logic of the reasoning was the same as applied in *Berlusconi*. Essentially, in *Borelli*, the Court held, without calling it as such however, that the *exclusive* jurisdiction rests with the national court, having the obligation to submit a preliminary reference to the CJEU on questions of interpretation and validity of the final EU act.[25]

In the previous *Berlusconi*-type case-law, i.e. where an EU institution takes the binding decision within a composite procedure, the Court held that no acts taken in the preparation of the final decision are reviewable by neither EU nor domestic courts.[26] In such circumstances, the CJEU's *exclusive* jurisdiction was to ensure a full review of compliance with the respective EU law requirements, in this case concerning access to documents, by the EU institution in accepting to take the final legally binding measure.[27] In *Berlusconi*, the Court made this logic of attribution more explicit, taking as a differentiator the existence or absence of discretion at the final level of decision-making.

This established approach of the strict division of jurisdiction has been challenged in the existing legal scholarship, contrasting it with the ever more

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24 Case C-97/91 *Borelli SpA v Commission*, EU:C:1992:491, followed later in e.g. Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats Ltd v Commission*, EU:C:1993:19. For further discussion on the *Borelli* judgment see e.g. Herwig C.H. Hofmann, 'Composite Decision Making Procedures in EU Administrative Law', in *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar Publishing 2009) 12-13, see for a discussion of other cases to that effect also paras 64-72 of the Opinion of AG *Sánchez-Bordona* (n. 14).

25 See to that effect more recently Case C-562/12 *Liivimaa Lihaveis MTÜ*, EU:C:2014:2229, para 48.

26 Case C-64/05 P *Sweden v Commission*, EU:C:2007:802; see also the revision of related case-law in the Opinion of AG (n. 14) paras 73-79.

27 *Sweden v Commission*, para 94.

confounded and interdependent nature of European administration.[28] The main concern relates to the fact, that generally, under EU law and the CJEU case-law, preparatory, non-binding or intermediary steps in a procedure do not constitute reviewable acts.[29] Only acts that are capable of affecting the interests of third parties by bringing about a distinct change in their legal position can be directly challenged before the General Court.[30] At the same time, the reviewability of non-binding acts adopted in the course of composite procedures is also precluded before the national courts for the risk of diverging rulings by the two jurisdictions.[31] With *Berlusconi*, the well-identified concern,[32] i.e. to what extent can the Union Courts under exclusive jurisdiction review the legality of preliminary steps by an authority of another jurisdiction before the final adoption of the legal act, seems to persist albeit in a different fashion.

The Court's logic in *Berlusconi* suggests that *exclusive* jurisdiction entails the review of respective national preliminary acts taken under national laws. A new level of uncertainty therefore arises, i.e. whether the Union Courts are competent to review national acts, considering the established premise that the interpretation of facts arising under national law rests solely with the national courts.[33] Furthermore, if it is accepted that the Court shall in the specific circumstances of composite decision-making have such a power to review national acts, the question is how.

Many of the proposed solutions or alternatives, such as establishing an inverse preliminary reference procedure whereby the Court of Justice could consult the national court in case of unclear interpretation of the national rules concerned, fall much beyond the Court's powers.[34] Naturally, the Court is not pre-

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28 Hofmann Jens, 'Legal Protection and Liability in the European Composite Administration' in Oswald Jansen and Bettina Schöndorf-Haubold (eds), *The European composite administration* (Intersentia 2011) 446.

29 Eliantonio (n. 4) 79-81.

30 Case C-60/81 *IBMvCommission*, EU:C:1981:264, paras 9-10; and more recently C-506/13 P *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro vCommission*, EU:C:2015:562, para 16; Joined Cases C-105/15 P to C-109/15 P *De Mallis a.O.v Commission and ECB*, EU:C:2016:702, para 51.

31 Opinion of AG (n. 14) endnote 65.

32 Mariolina Eliantonio, 'Judicial Review in an Integrated Administration: The Case of "Composite Procedures"' (2015) 7 *Review of European Administrative Law* 65, 78. Other aspects which might limit the effectiveness of judicial protection in composite procedures can arise from the limited ability of the authorities of a different level to review each others' input into the decision-making, whether for reasons of proximity to the national procedures or for reasons of requirements of mutual assistance for instance. The Court proceedings where such a review would be necessary could be furthermore subject to an excessively long duration and costs which could run to the detriment of concerned individuals seeking remedy for the interferences with their interests.

33 See recently e.g. Case C-574/16 *Grupo Norte Facility SA*, EU:C:2018:390, para 32 and the case-law cited.

34 Eliantonio (n. 4) 96-99, identifying for instance the creation of a possibility to transfer a case from the national to the EU court, or establishing a single judicial procedure for the composite matters before the competent court of the final decision-making authority in order to reduce the legal uncertainty and the time and costs implications of complex litigation, or to expand the scope of reviewable acts under Article 263 TFEU and also to preparatory measures.

pared to revise the traditional division of jurisdiction, which in a way acts to guarantee the autonomy of the EU legal order as established by the Treaties. Furthermore, the unwillingness to revise the case-law on the attribution of jurisdiction stems from the objectives of effectiveness and efficiency of EU legislation, and especially in administering complex policies.[35] Nevertheless, the strict established division based on the notion of exclusive jurisdiction comes at the detriment of legal certainty for the individuals concerned, the general legality and hence legitimacy of EU administrative conduct. The following part identifies *general* jurisdiction to review compliance with essential procedural requirements as a first available approach to review in *Berlusconi*-kind of circumstances.

### 4.2. Discretion, exclusive jurisdiction and general jurisdiction

In *Berlusconi*, the Court links the existence of Union Courts' *exclusive* jurisdiction with the EU institution's degree of discretion in taking the final measures.[36] Where the EU institution enjoys the choice to accept or reject suggestions of a national authority, in the words of the Grand Chamber, the exclusive jurisdiction requires *both* 'to rule on the legality of the final decision' and 'to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.'[37]

A suggested approach which avoids the CJEU's 'competence creep' in interpreting national acts taken under national law, is to review any errors vitiating national preliminary acts through the lens of EU institutions' compliance with essential procedural requirements in preparing a final measure with all due care.[38] The *duty of care* requires an EU institution to 'examine carefully, fairly and impartially all relevant aspects in a case.'[39] Considering that in *Berlusconi*

35 *Berlusconi* para 49.
36 *Berlusconi* para 45.
37 *Berlusconi* para 44.
38 Or in the words of Filipe Bastos 'derivative illegality', see Bastos (n. 4).
39 The duty of care, fully articulated as the duty of the competent institution 'to examine carefully and impartially all the relevant elements of the case', is one of the essential procedural guarantees against arbitrariness in administrative proceedings, especially where the institutions enjoy wide discretion.[1] Today the duty is also enshrined as one of the elements of the right to good administration, worded under Article 41 (1) of the Charter of Fundamental Rights as the right of every person: 'to have his or her affairs handled impartially, [and] fairly'. Concretely, the duty requires that the Commission's decisions are well reasoned and communicated in order to allow the complainants to exercise their rights of defence and the Court to exercise effective review. For a background on the right to good administration and the relation between duty of care and discretion see e.g. Paul Craig, 'Article 41 – Right to Good Administration' in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights* (Hart-Nomos 2014) 41; Joana Mendes, 'Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law' (2016) 53 *Common Market Law Review* 1.

the ECB enjoyed discretion, the Union Court's exclusive jurisdiction necessitates a more general review of whether the ECB used its discretion with all due care, i.e. whether it conducted a 'careful, fairly and impartial examination' when taking a decision which can negatively affect individual interests (Article 41 of the CFR).

The review of compliance with essential procedural guarantees, and mainly the duty of care, is considered in this contribution as the general power or competence of the Union Courts, i.e. *general* jurisdiction. Ultimately, this contribution suggests that existence or absence of discretion is, and indeed shall be, irrelevant for the purposes of the exercise of *general* jurisdiction by the Union Courts. Two points support this argument. First, discretion is a fluid concept, difficult to square within clear boundaries.[40] Second essential procedural requirements, and specifically respect for the duty of care supported by adequate reasoning, constitute general principles of EU law. As such, all conduct of EU institutions, bodies and agencies needs to comply with these general principles.

Regarding the former, it is well established that in order to pursue challenging policy objectives and safeguard public interests, certain delegation is required. Hence, complexity is warranted. The recognition for the need to afford discretion, e.g. to EU agencies and bodies, has resulted in a limited judicial review by the Union Courts, so as not to replace the complex assessments carried out by the Union authorities granted such powers, often in the name of technical complexity and expertise required to do so.[41] The need for, and respect of, such "expertise" is also present in composite procedures. In similar fashion, national authorities are required to support EU-level decision-making with provision of information or factual assessments undertaken with "expertise" of a closer proximity to the issue concerned. To identify the real existence of discretion in the final decision-making falls beyond its identification within the respective legislative framework. Instead, its actual exercise should be determinative.

To that extent, an approach developed in the Union jurisprudence, which concentrates on reviewing compliance of discretionary decision-making with essential procedural requirements. Accordingly, the CJEU has found that the European authorities' broad discretion 'applies not only to the nature and scope of the measures to be taken but also applies, to some extent, to the finding of

40 For an exceptionally insightful discussion on the notion of discretion in public decision-making see especially Joana Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (2017) 80 *The Modern Law Review* 443; Mendes (n. 39); See also Dominique Ritleng, 'Judicial Review of EU Administrative Discretion: How Far Does the Separation of Powers Matter?' in Joana Mendes & Ingo Venzke (eds.), *Allocating Authority: Who Should Do What in European and International Law?* (Bloomsbury Publishing Plc 2018).

41 Alexander Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 *Common Market Law Review* 361, 371.

the facts.'[42] As a standard formula in the review of facts, the Union Courts verify that the institution respects the rules governing the procedure from the accompanying statement of reasons, but at the same time that the Institution takes an assessment based on a correct statement of the law and facts, and without committing any manifest error of assessment of those facts or a misuse of powers.[43]

Essentially, such is a procedural review. A procedural review proves itself indispensable where the possibilities for reviewing the substance or factual correctness of the decisions become confounded with the technical or other expertise,[44] as is often the case in composite decision-making.

A first-hand feasible solution currently available in circumstances of persistent strict division of jurisdiction in composite matters is therefore *general* jurisdiction to expand the factual review to a review of compliance with essential procedural requirements. An advantage of this approach is that such *general* jurisdiction applies whenever an EU institution is involved in decision-making, irrespective of its final decision-making capacity and discretion therein. Indeed, the General Court, which is competent to undertake such a factual assessment in composite matters, seems to move in that direction. An indication to this effect is the case of *CRM Srl*.[45] The General Court, in its review of composite procedure involving invalid national acts binding for the Commission, found unlawful Commission's lack of full apprehension of all the relevant aspects before proceeding with its obligation to publish an authorisation.[46] The General Court maintained that even in the circumstances that the EU institution does not effectively possess much discretion, it is bound to respect essential procedural requirements, including its duty of careful and impartial examination.[47]

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42 Case T-456/11 *ICdA a.o. v Commission*, EU:T:2013:594, para 46, and T-689/13 *Bilbaina de Alquitranes a.o. v Commission*, EU:T:2015:767, para 24.

43 See e.g. Case T-589/08 *Evropaïki Dynamiki v Commission*, EU:T:2011:73, para 24, with further references.

44 Case T-5/02 and the appeal before the Grand Chamber C-12/03 P *Tetra Laval BV*, EU:C:2005:87 and related case-law, where the Court found that '[n]ot only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.' (para 31). See for further in-depth discussion on the implications of this case-law Mendes (n. 39).

45 The *CRM Srl* case concerned a composite procedure for registration for protection of geographical indications (PGI). Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ *L* 208, 24.7.1992, pp 1-8. Accordingly, the Commission can only take a PGI decision once the Member State concerned submitted a request to that effect, since the division of powers in this type of procedure presupposes a verification of a number of conditions linked to the geographical area which Member State authorities are better placed to check.

46 See for instance a recent Case T-43/15 *CRM Srl v Commission*, EU:T:2018:208, paras 81, 92.

47 Finally, however, the General Court did not annul the contested Commission Regulation as the ruling of the regional court that was ignored by the Commission in breach of good administration and its duty of care, had in the meantime been successfully appealed before the Council of State. Substantively therefore the result of the Commission Regulation would have

Thusly avoiding a 'competence creep' whereby national laws are reviewed by Union Courts, as anticipated implication of *Berlusconi* judgment.

Hence, while the *exclusive* jurisdiction discussed in *Berlusconi* maintains the strict division of jurisdiction in composite matters, a *general* jurisdiction to conduct a procedural review of compliance with essential procedural requirements embodies a first-hand available judicial tool to ensuring effective protection and legality review in composite matters.

However, this kind of *general* jurisdiction essentially only achieves a transfer of responsibility to the institution at the EU level in the aim of maintaining the *exclusive* jurisdiction and preventing conflicting interpretations in composite matters. Indeed, it focuses solely on the review of the conduct of a Union institution. Nonetheless, when it comes to for instance the issue of effective redress, the current CJEU case-law on EU liability seems to suggest a reverse approach, i.e. assuming the primary liability rests with the Member State authorities.[48] This is however beyond the scope of this article and shall remain a general observation.

## 5. Conclusions

In *Berlusconi*, the Grand Chamber links the exclusive jurisdiction in composite matters with the vested discretion in the final decision-making authority. While review of preliminary measures, which are non-binding leading to the adoption of the final decision, is generally not allowed under EU law, the logic in *Berlusconi* seems to suggest that exclusive jurisdiction would entail such a review. A question asked in such a scenario is whether the Union Courts are competent to consider preliminary national measures taken under national law, and whether they shall do so in the light of national or EU law. This contribution suggests the latter as a currently first and most likely available approach for the General Court vested with the exclusive jurisdiction to rule in a vertical composite dispute with an EU institution as a final decision-maker. In this respect, the Union Courts are under general jurisdiction to ensure that whenever an EU institution is involved in decision-making, irrespective of its degree of discretion therein, it is required to undertake full and impartial review of all the facts in respect of its duty of care, a general principle of EU law and an essential procedural guarantee.

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been the same despite the procedural irregularity leading up to it preventing the possibility for its annulment.

48 Due to the limited scope of this paper, see to that extent especially the recent account on the EU's 'residual liability' in CJEU case-law in Paul Craig, 'Remedies I: EU', *EU Administrative Law* (New Edition, Third Edition, Oxford University Press 2018) 754-757.