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A Jurisdiction of Jurisdictions

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1. Introduction

Multi-level governance ('MLG') systems generate accountability problems. The difficulties are visible in policy-making processes as well as in regulatory and law implementation efforts. Accountability matters have been identified in European governance and non-European governance.[1]

European administrative law has dealt with the judicial angle to the MLG accountability quandary. Specifically, the focus has been put on the deficient legal protection of a citizen when he is a party to a European administrative cooperative procedure, i.e. a procedure in which administrations from different Member States participate, or a procedure in which administrations of one or various Member States plus the EU participate. Scholars have raised this concern and put forward various solutions.

However, one alternative has not been explored yet. This alternative is the idea of aligning adjudicative jurisdictions (that of Member States and the CJEU) so as to form a cooperative mode for the revision of cooperative procedures: a European jurisdiction integrated by the coordinated action of European jurisdictions. The idea may sound sensible to the ears of political scientists but less so to legal scholars because current EU constitutional constraints block the implementation of such a proposal. But, is there really no legal argument to ground a European-level cooperative exercise of jurisdiction over cooperative procedures? If there were, not only could it inspire European MLG, but it might also shed some light on MLG systems outside Europe. The article addresses the challenge of how such argumentation should be shaped.

In order to do so a three-step analysis is undertaken. First, the issue of judicial protection of a party to a cooperative procedure is explained (section 2). Second, the proposal of a jurisdiction of jurisdictions is elaborated (section 3). Third, the legal rationale for the proposal is explored (section 4).

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1 See G.A. Bermann, 'Regulatory Cooperation with Counterpart Agencies Abroad: the FAA's Aircraft Certification Experience' (1993) 24 *Law & Pol'y Int'l Bus* 669.

2. The issue of judicial protection in cooperative procedures

MLG implies that the components of different governance levels cooperate. This also applies to European MLG.[2] Such cooperation is a manifestation of the partnership principle identified primarily in policy making[3] and less frequently in policy implementation.[4] The latter also demands cooperation, as there exist 'long chains of actors from the different governance levels that need to be coordinated'.[5] In Europe, the EU and national administrations form a chain of actors that constitute a so-called European multi-level Administration (MLA) characterised by the partnership principle in the same way as MLG.[6]

An analysis of EU law implementation through the lens of legal scholarship leads to the same conclusion: EU law implementation requires cooperation among EU administrations. From the perspective of constitutional law it is understood that a type of *cooperative* federalism inspires and explains the way in which EU secondary law is implemented.[7] From the perspective of adminis-

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2 See A. Benz, 'Mehrebenenverflechtung in der Europäischen Union' in M. Jachtenfuchs & B. Kohler-Koch (eds.), *Europäische Integration* (Leske+Budrich 2003) 317.

3 See G. Marks, L. Hooghe & K. Blank, 'European Integration from the 1980s: State-Centric *v.* Multi-level Governance' (1996) 34 *JCMS* 341; W. Wessels, 'An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes' (1997) 35 *JCMS* 267; J. Scott, 'Law, Legitimacy and EC Governance: Prospects for "Partnership"' (1998) 36 *JCMS* 175, 189; J. Scott & D.M. Trubek, 'Mind the Gap: Law and New Approaches in Governance in the European Union' (2002) 8 *ELJ* 1, 4; C. Harlow, *Accountability in the European Union* (Oxford University Press 2005) 181; B.G. Peters & J. Pierre, 'Governance Approaches' in A. Wiener & T. Diez (eds.), *European Integration Theory* (Oxford University Press 2009) 91-104.

4 See M. Bach, 'Eine leise Revolution durch Verwaltungsverfahren-Bürokratische Integrationsprozesse in der Europäischen Gemeinschaft' (1992) 21 *ZfS* 16; W. Wessels, 'Beamtengremien im EU-Mehrebenensystem-Fusion von Administrationen?' in M. Jachtenfuchs & B. Kohler-Koch (eds.), *Europäische Integration* (Leske+Budrich 2003) 353-383.

5 See C. Harlow & R. Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *ELJ* 542, 543.

6 See the proposal on using MLA as a framework describing the administrative compound that the EU and national administrations form in A. Benz, A. Corcaci & J.W. Doser, 'Unravelling multilevel administration. Patterns and dynamics of administrative co-ordination in European governance' (2016) 23 *JEPP* 999.

7 '(...) the brand of "federalism" which can be envisaged for Europe is the exact opposite to a unitary, centralized system of government; it is a system in which power is shared by local and central sovereignties and the limited – central – sovereignty is but the "participatory" combination of the local ones.' in M. Cappelletti, 'Foreword to the Florence Integration Project Series' in M. Cappelletti, M. Seccombe & J.H.H. Weiler (eds.), *Integration Through Law – Europe and the American Federal Experience, Book 1 – A Political, Legal and Economic Overview* (Walter de Gruyter 1986) VIII. See also U. Everling, 'Zur föderalen Struktur der Europäischen Gemeinschaft' in K. Hailbronner, G. Ress & T. Stein, *Staat und Völkerrechtsordnung – Festschrift für Karl Doehring* (Springer 1989) 179-198; R Schütze, *From Dual to Cooperative Federalism* (Oxford University Press 2013).

trative law it has been broadly acknowledged that the *cooperative* mode is a relevant mode of secondary law implementation. Starting in the second half of the 1990s, scholars have increasingly underscored that there is a cooperative way of implementing secondary law.[8] In fact, every subject of EU regulation foresees cooperative formulae for administrative implementation.[9] The traditional division between direct-indirect EU law implementation is now blurred due to the existence of this third *cooperative* manner.[10]

As regards *why* inter-administration cooperation is carried out, two factors help in explaining this phenomenon.

First, politicians equipped the Communities with a distinct structure in which their bureaucratic arm mainly had the task of supervising - but not implementing. Whereas national administrations were the entities mainly responsible for implementing EU law, the Commission made sure that implementation took place as envisaged. The duty of the administrative branch of the Communities would be *faire faire*-ing (making sure that other administrations do what they are supposed to do). The provision in today's article 291 TFEU mandating that in principle Member States implement Union acts was part of the original institutional design of the Communities. Consequently, the implementation of EU legal acts is mostly entrusted not to a central administration but to all EU national administrations. Secondary law implementation in the EU is, thus, decentralised.

Second, it is a fact that every composite and decentralised political entity, such as one like the EU, requires cooperation among its components in order to achieve its goals.[11] In the EU, the action of Member States needs to be concer-

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8 See E. Schmidt-Aßmann, 'Empfiehlt es sich, das System des Rechtschutzes und der Gerichtsbarkeit in der Europäischen Gemeinschaft weiterzuentwickeln?' (1994) 49 *JZ* 832, 833; I. Pernice & S. Kadelbach, 'Verfahren und Sanktionen im Wirtschaftsverwaltungsrecht' (1996) *DVBl* 1100, 1102; A. Hatje, *Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung* (Nomos 1997) 47; S. Schreiber, *Verwaltungskompetenzen der Europäischen Gemeinschaft* (Nomos 1997) 40.

9 See E. Schmidt-Aßmann, 'Strukturen Europäischer Verwaltung und die Rolle des Europäischen Verwaltungsrechts' in A. Blankenagel, I. Pernice & H. Schulze-Fielitz (eds.), *Verfassung im Diskurs der Welt – Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag* (Mohr Siebeck 2004) 395-415.

10 As explained by Schneider in reference to the division between direct and indirect execution, '(...) this dualistic conceptualisation does no longer fit with the realities of the European integration process.' in J.P. Schneider, 'Regulation and Europeanisation as Key Patterns of Change in Administrative Law' in M. Ruffert (ed.), *The Transformation of Administrative Law in Europe – La mutation du droit administratif en Europe* (Sellier – European Law Publishers 2007) 315.

11 E. Schmidt-Aßmann, 'Verfassungsprinzipien für den Europäischen Verwaltungsverbund' in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle (eds.), *Grundlagen des VerwaltungsrechtsBand I* (C.H. Beck 2012) 279 para 25.

ted if they are to be effectively united in diversity. The idea can be phrased in constitutional terms: subsidiarity has to go hand in hand with solidarity.[12] In the realm of administrative implementation, this means that EU and national administrations must cooperate. The recommendation to pursue implementation through cooperation contained in the Sutherland report's section 'Enforcing the Rules through Partnership' expressly voiced this reality.[13]

As regards *how* inter-administration cooperation may be carried out, the answer is that this can be done in three different ways: (i) through information exchange between administrations ('*informationelle Kooperation*'), (ii) through institutionalised cooperation forms ('*institutionelle Kooperation*'), and (iii) through procedural cooperation ('*prozedurale Kooperation*').[14] Secondary law constantly resorts to the form of cooperation in which several administrations participate in one sole administrative procedure (procedural cooperation). In sectors where European administrations have to operate as if they were one (e.g. customs) it is difficult to conceive an alternative. Procedural cooperation happens in administrative procedures that are termed cooperative, complex or composite.[15]

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12 C. Calliess, *Subsidiaritäts – und Solidaritätsprinzip in der Europäischen Union* (Nomos 1996) 167-169; C. Delsol, 'La bonne étoile de la subsidiarité' in P. Blickle, T.O. Hüglin & D. Wyduckel (eds.), *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft – RechtstheorieBeiheft 20* (Duncker & Humblot 2002) 85-88.

13 P. Sutherland, 'The Internal Market after 1992: Meeting the Challenge. Report presented to the Commission by the High Level Group on the functioning of the Internal Market (commonly called the Sutherland Report)' (*University of Pittsburgh*) http://aei.pitt.edu/1025/1/Market_post_1992_Sutherland_1.pdf, accessed 30 June 2019, Section IV.

14 See E. Schmidt-Aßmann, 'Verfassungsprinzipien für den Europäischen Verwaltungsverbund' in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle (eds.), *Grundlagen des VerwaltungsrechtsBand I* (C.H. Beck 2012) 279-282 paras 25-26; J.H. Lee, *Demokratische Legitimation der Vollzugsstruktur der sektorspezifischen Regulierungsverwaltung* (Nomos 2017) 276-278.

15 A wide gamut of terms is used to refer to this concept. In English the terms composite, complex and mixed proceedings or procedures is used. In Italian the terms *procedimenticomposti*, *collegati* and *complessi* define slightly differentiated but very similar concepts. In Spanish the term *procedimiento compuesto* prevails. In German the term *mehrstufiges Verwaltungsverfahren* (multilevel administrative procedure) is very common, though terms that express similar though not identical ideas such as *gemischt national-europäisches Verwaltungsverfahren* (mixed national-European administrative procedure), *mehrphasiges Verwaltungsverfahren* (multi-phase administrative procedures), or *gestuftes Verwaltungsverfahren* (tiered administrative procedures) are also employed. The adjective cooperative, however, conveys a very relevant aspect of these procedures that these terms do not, i.e. the fact that several subjects concert their action towards a common interest. Indeed cooperative procedures are composite, complex in the sense that they are formed by several procedural segments. However, they are, most importantly, procedures aimed at a common European interest attained through common action. We deem that *cooperative* expresses better than *composite* or *complex* this core function of this type of procedures. The term cooperative procedure in its original language may be found in G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004) 151; D. Ehlers, 'Anforderungen an den Rechtsschutz nach dem Europäischen Unions – und Gemeinschaftsrecht' in D. Ehlers & F. Schoch (eds.), *Rechtsschutz im öffentlichen Recht* (De Gruyter 2009) 136-137 paras 8; E. Alberti Rovira, 'El federalismo actual como federalismo cooperativo' (1996) 58 *RMS* 51, 65.

However functional as it may be, procedural cooperation is also problematic: 'Many hands'[16] intervening in the same procedure may prove an economic, efficient and effective method for European MLA, but it also poses difficult questions that remain unsolved. Cooperative procedures are highly complex, and therefore to some extent opaque. This opacity harks back to the black spots that have been detected in MLG and reminds us that cooperative procedures are the offspring of MLG. As is the case in other expressions of MLG, the lack of transparency of cooperative procedures hinders accountability and, as a consequence, legitimacy. Having various actors involved in an MLG system entails accountability gaps, the complexity of dividing responsibility among the parties and, ultimately, the dilution of authority and responsibility.[17] These risks affect both EU and non-EU governance.[18]

Legal literature has analysed a particular aspect of this problem: judicial review of cooperative procedures (judicial accountability). In this regard, scholars have mentioned time and again that the legal protection provided to an interested party in a cooperative procedure is not the best. This assertion is commonplace in EU administrative law literature.[19] As doctrine indicates, the fact that more than one jurisdiction is entitled to review actions occurring within a cooperative procedure leads to legal uncertainty and may end up by leaving the rights and interests of an addressee in a black hole.[20] The interested party to a cooperative procedure will find there is no clear indication as to which is the competent judicial organ to review the procedure or one of its sections. She will also find that he may need to request review before different jurisdictions, which implies

16 This expression in Y. Papadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance' (2007) 13 *ELJ* 469, 473.

17 Reference to these problems in J. Scott, 'Law, Legitimacy and EC Governance: Prospects for "Partnership"' (1998) 36 *JCMS* 175; C. Harlow & R. Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *ELJ* 542; L. Hooghe & G. Marks, 'Types of multi-level governance' in H. Enderlein, S. Wälti & M. Zürn, *Handbook on Multi-level Governance* (Edward Elgar 2010) 17-32.

18 A perspective exceeding the EU in K.A. Daniell & A. Kay, *Multi-level Governance – Conceptual challenges and case studies from Australia* (ANU Press 2017).

19 Referring to each of the authors that have made remarks in this respect exceeds by far the scope of this article. The following are listed as a sample. In older literature see I. Pernice & S. Kadelbach, 'Verfahren und Sanktionen im Wirtschaftsverwaltungsrecht' (1996) *DVBl* 1100, 1111; S. Galera Rodrigo, *La aplicación administrativa del derecho comunitario. Administración Mixta: tercera vía de aplicación* (Civitas – Instituto Andaluz de Administración Pública 1998) 80; H.P. Nehl, *Principles of Administrative Procedure in EC Law* (Hart 1998) 89. In more recent literature see G.A. Bermann, 'A restatement of European administrative law: problems and prospects' in S.R. Ackerman & P.L. Lindseth, *Comparative Administrative Law* (Edward Elgar 2010) 603; S. Alonso de León, *Composite Administrative Procedures in the European Union* (Iustel 2017) 215.

20 See H.C.H. Hofmann, J.P. Schneider & J. Ziller (eds.), 'Introduction to the ReNEUAL Model Rules / Book I – General Provisions' (*ReNEUAL*), http://reneual.eu/images/Home/BookI-general_provision_2014-09-03_individualized_final.pdf, accessed 30 June 2019, para 27.

additional costs and could potentially draw contradictory responses. She may find he has no legal standing for the revision of certain acts of the cooperative procedure if the legal system of the competent judicial organ considers such an act non-reviewable.[21]

These deficiencies have a common origin: there exists a mismatch between the design of cooperative procedures as a unitary sequence that harmoniously joins the actions of various administrations, and the multi-jurisdictional architecture of judicial review for these procedures. Cooperative procedures are conceived as sequences that ignore intra-EU borders between jurisdictions, while the judicial review system overseeing them is based – precisely – on those borders. Judicial review of an act of a cooperative procedure is the competence of a judicial organ of the international law subject that implemented this act. This means that, in a cooperative procedure, judicial organs from more than one jurisdiction may be competent to review different sections of the procedure. The mismatch causes a high degree of confusion and risks perverting a fundamental function of administrative procedures: instead of acting as an instrument that guarantees citizens' rights, cooperative procedures may end up doing just the opposite. Therefore, judicial review over cooperative procedures needs to be improved.

In view of this problematic situation, scholarship has tabled different proposals to better the legal position of citizens in cooperative procedures. For instance, (i) that an arbitration chamber be set up to give guidance regarding which precise rules apply to the different sections of a cooperative procedure;[22] (ii) that EU sectorial secondary law should foresee situations of potential confusion for citizens, and expressly clarify the path they should follow to request judicial protection in cases of cooperative procedures;[23] (iii) that the preliminary ruling procedure of article 267 TFEU be modified so as to allow citizens to directly ask the CJEU about EU law in those cases in which both the EU and a national administration participate in the cooperative procedure;[24] (iv) that any

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21 See M. Eliantonio, 'Judicial Review in an Integrated Administration: The Case of Composite Procedures' (2014) 7 *REALaw* 65.

22 S. Galera Rodrigo, 'European legal tradition and the EU legal system: understandings and premises about the rule of law's requirements' in S. Galera Rodrigo (ed.), *Judicial review – A comparative analysis inside the European legal system* (Council of Europe 2010) 277-299.

23 A. von Arnauld, 'Die Rückkehr des Bürgers: Paradigmenwechsel im Europäischen und Internationalen Verwaltungsrecht?' (2011) 59 *JÖR N F* 497.

24 J. Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund* (Duncker & Humblot 2004) 288-290; J. Hofmann, 'Rechtsschutz und Haftung im Europäischen Verwaltungsverbund' in E. Schmidt-Aßmann & B. Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund – Formen und Verfahren der Verwaltungszusammenarbeit in der EU* (Mohr Siebeck 2005) 368; W. Weiß, *Der Europäische Verwaltungsverbund – Grundfragen, Kennzeichnen, Herausforderungen* (Duncker & Humblot 2010) 162-163.

request against any of the acts executed in the course of a cooperative procedure be reviewed with the final act of the procedure by the organ with jurisdiction over this final act;[25] (v) that a channel of inter-judicial communication and cooperation be established, enabling the judges of the various jurisdictions with competence over the procedure to cooperate in order to provide the best protection for a citizen's request;[26] (vi) that in case of EU-national cooperative procedures the EU may participate in national judicial proceedings,[27] or; (vii) that the Treaties be modified so as to extend the jurisdiction of the CJEU to the national sections of a cooperative procedure ending with an EU act.[28]

Yet a proposal suggesting a comprehensive system of cooperative judicial review, based on a set of impugnation rules imitating those that national jurisdictions use for their domestic administrative procedures, has not been explored in depth. In the next two sections such a potential solution is considered. The approach chosen is to discuss first the proposal in its end form and, second, the reasoning accounting for existing constitutional constraints that could justify its implementation; this has the advantage of allowing freedom when trying to envisage a better arrangement. The purpose is not to ignore current legal reality, but to focus on an aspect of the problem that is not usually reflected upon: what a better system should look like. The discussion on how the proposal fits with existing law is then explained in section 4.

3. A jurisdiction of jurisdictions

3.1. The proposal and its justification

One can try to imagine the best design for judicial review in European cooperative procedures. Among the most fitting and least disruptive solutions that arise in the exercise is one that makes a case for the following: EU judicial organs cooperating in the revision of cooperative procedures in the same way EU administrations currently do so in cooperative procedures. Just as EU administrations work together within a sole sequence aiming at law implementation, judicial organs would have to work together within one judicial sequence reviewing cooperative procedures; just as current EU secondary law

25 G. Winter, 'Subsidiarität und Legitimation in der Europäischen Mehrebenverwaltung' (2004) 6 *TranState Working Papers* 1, 29.

26 L. De Lucia, 'Amministrazione europea e tutela giurisdizionale' in M.P. Chiti & A. Natalini (eds.), *Lo spazio amministrativo europeo – Le pubbliche amministrazioni dopo il Trattato di Lisbona* (il Mulino 2012) 381.

27 W. Weiß, *Der Europäische Verwaltungsverbund – Grundfragen, Kennzeichnen, Herausforderungen* (Duncker & Humblot 2010) 164.

28 G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004) 294.

combines the action of several European administrations with no prejudice to European administrative pluralism,[29] the proposed design would have to combine the action of several European judicial organs with no prejudice to European judicial pluralism. National laws governing judicial institutions should contemplate the coordination mechanism for this. The result would be that European jurisdictions would jointly shape a sole European jurisdiction through cooperation, complementing the current inter-administrative cooperative mode of executing EU secondary law. The effect of intra-EU jurisdictional boundaries on this European jurisdiction of jurisdictions would be the same as that in cooperative procedures: judiciaries of Member States would cooperate so as to form *one sole orderly* sequence. In the abstract this is sensible: if administrative action is carried out by a network of administrations pertaining to different Member States but connected to each other and acting as one, the judicial organs supervising their action should also be connected and act as one. Let cooperative network administration be reviewed by a cooperative judicial network.[30]

One will have to ask then *why* is *this* alternative fit and if existing proposals do not tackle the issue already.

The following has to be noted, despite risking misinterpretation: to a certain extent permanent cooperation between national judiciaries is inevitable. It is plausible to consider that it is more a question of when and how this form of cooperation will happen. In fact, authorised academic literature has suggested this orientation as the natural one.[31] If we have reached a point in our European journey where the EU integrates in one procedure the action of several national administrations to the extent that each of those resemble an organ of a wider administration,[32] splitting the jurisdiction over such procedures in isolated compartments counters the logic that produced the procedures in the first place. Moreover, the logic of compartmentalization weakens the legal position of citizens and leaves them as the most unprotected party in the affair. Against these reasons, however, sovereignty is invoked to argue that Member States are entitled to isolate their judicial jurisdiction from any form of compulsory cooperation. Enforceable law protects this conservative position. Nevertheless, it is reasonable to contend that European administrative implementation requires – and will finally receive – an new answer. Anything to the contrary, it is here considered,

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29 See L. De Lucia, 'Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts' (2012) 5 *REALaw* 17.

30 See C. Harlow & R. Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *ELJ* 542.

31 See E. Schmidt-Aßmann, *Kohärenz und Konsistenz des Verwaltungsrechtsschutzes* (Mohr Siebeck 2015).

32 Though avoided here, this poses difficult questions on its democratic justification.

is tantamount to trying to argue that we should go back to the days in which Member States administrations were not obliged to cooperate with each other in the way they are today. This approach will need to respect the general version of the principle of subsidiarity and, therefore, cannot imply unnecessary intromission in the Member States' exercise of judicial autonomy. Given this systematic constraint, recourse to the jurisdictional cooperation here envisaged is sensible and difficult to avoid.

In order to operationalize inter-jurisdictional cooperation, a system of rules must first be elaborated to determine which tribunals cooperate and how jurisdiction is distributed among them when reviewing a cooperative procedure (section 3.1.1). It is methodologically sound to base these rules on a comparative analysis of the different solutions Member States apply when internally distributing judicial revision of different segments in an administrative procedure where several organs or authorities intervene (section 3.1.2).[33] The rulings the CJEU has already adopted in cases of cooperative procedures finalised by EU institutions should also be brought into close consideration (section 4.1), as well as a dogmatic analysis of cooperative administrative action (section 4.2). The outcome should be a framework that could reliably guide judges and citizens through the process of judicial revision of a cooperative procedure, , while coupling coherent judicial practice with respect to Member States autonomy.

As of today this program has not been completed. For instance, though academia has initiated the process, a complete dogmatic explanation of cooperative administrative action in the EU is still not present.[34] Nor is it easy to find analysis comparing the solutions that European national doctrines on subjective protection in administrative procedures provide with European cooperative procedures. A comprehensive system is also missing even though several solutions have been put forward.[35] Studies on CJEU case law on cooperative procedures have been put forward and have adopted a different perspective to the one of this article.[36] They all act as a reminder of the fact that if academics do not assist it with solid doctrine, the CJEU risks getting lost in its own incon-

33 The CJEU resorts to comparative analysis of European legal orders as a means to find legal solutions. See M. Fehling, 'Rechtsvergleichende Methode und europäisches Verwaltungsrecht' (2016) 1 *EuR* 59.

34 One of the first statements in this sense is in E. Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft' (1996) 31 *EuR* 270. See a more recent statement calling for a dogmatic of cooperation in E. Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik* (Mohr Siebeck 2013) 91. A list of existing contributions in note 94 ahead.

35 A list of some of these is at the end of the section preceding this one.

36 See F. Brito Bastos, 'Derivative Illegality in European Composite Administrative Procedures' (2018) 55 *CMLR* 101.

sistencies when dealing with judicial supervision of cooperative administrative action.[37]

This article wishes to further the unfinished plan laid above and justifies itself as a contribution in this direction. It embraces and converges with previous reflections and suggestions from the academic literature[38] but purports to increase their depth and breadth.

3.1.1. Rules for the system

The following question that needs to be asked then is: according to which criterion should judicial organs intervene in a networked exercise of jurisdiction over a cooperative procedure? If several courts ought to cooperate, how is the task going to be divided among the different co-operators? Which organ should review which part of the cooperative procedure?

The answer to these questions lies in national and EU law. National legal orders as well as the EU legal order already deal with internal composite administrative procedures. The experience these legal orders have amassed in this regard provides a clue. By comparing Spanish, German and EU law, rules on which court should review which section of a cooperative procedure might be inferred. In the following paragraphs these rules are formulated and grounded.

By virtue of a first rule, preparatory measures carried out before the end of the cooperative procedure shall, in principle, be questioned jointly with the final act of such procedure before the court with jurisdiction over the administration adopting the final act. For instance, if a procedure initiated before the French administration is concluded by the Irish administration, action against the preparatory measures carried out in France would have to be heard before the competent Irish judge as part of an action against the final act executed by the Irish administration. Spanish, German, and EU law coincide and apply this rule to their internal administrative procedures.

Applying this rule to cooperative procedures would (i) prevent the court of a Member State from adjudicating on a section of an unfinished procedure where a preparatory measure had been impugned, and (ii) prevent rulings over

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37 This is a personal interpretation of the article cited in note 36 before.

38 The solution this article argues for is both compatible and wider than several of the solutions proposed before (see the end of the section preceding this one); for instance, with (i) advocating for a channel of inter-judicial communication, or (ii) suggesting that the Treaties be modified so as to extend the jurisdiction of the CJEU to the national sections of a cooperative procedure ending with an EU act.

different segments of the procedure from contradicting each other. In order to implement this rule, a mechanism needs to be established so that the court adjudicating over the final act could contact a foreign court and inquire about the legality of preparatory measures carried out in its jurisdiction.

By virtue of a second rule operating as an exception to the first rule, specific preparatory measures of the cooperative procedure could be challenged before the procedure ends. This is important given the potential relevance of certain preparatory measures for the parties concerned. The law according to which the preparatory measures are carried out would determine whether proceedings against a preparatory measure could be instituted. The claim would be brought before the courts competent to interpret such law. The national law applicable to such a preparatory measure would have to take into account that a preparatory measure is not an isolated measure, but a measure incorporated into a European multi-jurisdictional procedure.

This rule would be applicable, for instance, to a procedure granting the license of authorised economic operator (AEO). In this procedure, an administration foreign to the administration issuing the final authorisation provides the latter with information for the granting of AEO status.[39] The foreign administration not issuing the authorisation may communicate information that conditions the content of the decision on the granting of AEO status.[40]

If the information provided causes a refusal to grant AEO status, the concerned party would need to know before which judicial body action should be brought: against the notifying administration, against the administration finally denying AEO status, or against both? According to the rule proposed, the concerned party could present action against the reporting administration because the report issued would be of considerable relevance for the final outcome of the procedure. The court of the informing administration would be the one to measure the relevance of such a report within the whole procedure and decide on its legality.

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39 See Regulation (EU) 952/2013 of the European Parliament and the Council of 9 October 2013 setting out the Union Customs Code [2013] OJ L269/1, art 38-39; Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [2015] OJ L343/558, arts 10, 14 and 31.

40 Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [2015] OJ L343/558, art 31.4.

By virtue of a third rule, legal certainty demands that legal action against preparatory measures of a cooperative procedure which were duly notified, definite and obviously challengeable *per se* should be questioned in due time and form, regardless of the fact that they are not the final act of the procedure. Claims against these measures should be brought following the law according to which the acts were executed.

European case law stemming from the *Deggendorf* judgment provides a list of examples in which this third rule was applied.[41] The paradigmatic case is one in which a concerned party faces a damaging act carried out by a national authority and questions it on the grounds of illegality of a previous Commission regulation or decision, the questioning term of which (two months), had already expired. When there is no doubt about the fact that the party concerned knew about the Commission's prejudicial first action and about the fact that she enjoyed standing, legal certainty demands that the concerned party shall question the act of the Commission in due time.

3.1.2. Justification of the rules of the system

The framework that these three rules shape is based on rules long accepted in several European legal orders.

With respect to the first rule, Spanish and German law concur in prescribing for national procedures that the challenge of a preparatory measure, in principle, shall be raised jointly with the challenge against the final measure of the procedure.[42] This rule is based on the argument that allowing the opposite (preparatory measures being autonomously challengeable) would hinder the development of the administrative procedure.[43] The chance to autonomously challenge a

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41 See Case C-188/92 *TWD Textilwerke Deggendorf GmbH v the Federal Republic of Germany* [1994] ECR I-846; Case C-241/95 *The Queen v Intervention Board for Agricultural Produce* [1996] ECR I-6720, paras 14-16; Case C-178/95 *Wiljo NV v Belgische Staat* [1997] ECR I-596; Case C-408/95 *Eurotunnel SA and others v Sea France* [1997] ECR I-6315, para 29; Case C-239/99 *Nachi EuropeGmbH v Hauptzollamt Krefeld* [2001] ECR I-1220.

42 In Spanish law, see art 112.1 of the Law on the Common Administrative Procedure of the Public Administrations, enacted on 1 October 2015, and art 25.1 of the Law on the Adjudicative Jurisdiction for Administrative Judicial Review, enacted on 13 July 1998. In German law, the questioning of preparatory measures is almost always framed in terms of whether or not the measure is an administrative act (*Verwaltungsakt*). The question on the *Verwaltungsakt* – character of the measure – shall be responded with due consideration to the *Verwaltungsakt* traits contained in § 35 VwVfG.

43 See this argument in Spanish law in J.A. García-Trevijano Garnica, *La impugnación de los actos administrativos de trámite* (Montecorvo 1993) 105. This argument in German law in H. Maurer, *Derecho Administrativo – Parte general* (Marcial Pons 2011) 494 para 26; K. Rennert & H. Geiger, '§44 a' in H. Geiger and others, *Eyermann Verwaltungsgerichtsordnung – Kommentar* (C.H. Beck 2014) 287 para 1.

procedure's preparatory measures would also make it more difficult for courts to rule, since they would be asked to rule only on a portion of the procedure.[44] Based on slightly different grounds,[45] EU case law reaches the same conclusion for procedures involving only the EU. The CJEU argued that allowing courts to rule on portions of a procedure not yet finalised would be equivalent to allowing an irregular judicial interference in the Commission's administrative activity. Following the same rationale, it required that the activity of the Commission in relation to any given procedure should be brought to a conclusion before it may be judicially scrutinised.[46]

With respect to the second rule, Spanish, German and EU law envisage ways to admit the exceptional challenge of certain preparatory measures of a procedure due to their significant impact on the legal sphere of a concerned party to the procedure.

Spanish law has historically admitted that the preparatory measures of a procedure can be assimilated into the final act when such measures directly or indirectly determine the outcome of the procedure or impede its continuation. This goes back to the *Ley Camacho* of 1881. Years later, the 1958 LPA expanded the cases in which a preparatory measure could be autonomously questioned. This law stipulated that preparatory measures producing defencelessness or irreparable damage to the legitimate rights or interests of the persons concerned were also assimilated to final measures and were, therefore, challengeable. Today enforceable laws foresee that preparatory measures of an administrative procedure can be assimilated to a final one in the following three cases: when these measures (i) directly or indirectly determine the outcome of the procedure, (ii) impede its continuation, or (iii) produce either defencelessness or irreparable

44 In Spanish law this argument was raised in 1953. See E. Serrano Guirado, 'El recurso contencioso administrativo y el requisito de que la resolución cause estado' (1953) 10 *RAP* 109. In German law see H. Sodan, '§42' in H. Sodan & J. Ziekow (eds.), *Verwaltungsgerichtsordnung – Großkommentar* (Nomos 2014) 614 para 18.

45 Case 53/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v the Commission of the European Communities* [1986] ECR I-1985, para 16; Case C-39/93 P *SFEI and others v the Commission of the European Communities* [1994] ECR I-2701, para 28; Case C-282/95 P *Guérin automobiles v the Commission of the European Communities* [1997] ECR I-1571, para 34. For more recent rulings, see Case T-251/13 *Gemeente Nijmegen and others v Commission* [2015] ECR II-27, para 28; CaseT-676/14 *Kingdom of Spain v Commission* EU:T:2015:602, para 13.

46 See Case 60/81 *International Business Machines Corporation v the Commission of the European Communities* [1981] ECR I-2640, para 20. Identical reasoning in Case T-64/89 *Automec Srl v the Commission of the European Communities* [1990] ECR II-369, para 46, and in Cases C-463/10 P and C-475/10 P *Deutsche Post AG and the Federal Republic of Germany v the European Commission* [2011] ECR I-9671, para 51.

damage to the legitimate rights or interests of the concerned persons (article 112.1 LPA[47] and article 25.1 LJCA[48]).

German law admits that certain acts carried out within an administrative procedure may be challenged autonomously before the procedure comes to an end if those preliminary actions amount to an administrative act or *Verwaltungsakt*.[49] German tribunals have admitted action against acts not finalising an administrative procedure. For instance, they have admitted proceedings against partial authorisations (*Teilgenehmigung*) and against previous resolutions (*Vorbescheid*) that can be considered the preparatory measures of a subsequent final administrative act.[50]

In EU law the CJEU gradually carved out a flexible concept of decision, thereby assimilating certain preparatory measures to final decisions.[51] Via this flexible conceptualisation of decisions, the CJEU admitted actions of annulment against preparatory measures. In several cases, the CJEU assimilated certain preparatory measures to decisions based solely on the effect that such measures had on the sphere of rights of the concerned persons.[52] In several other cases, the CJEU carried out this assimilation using a reasoning that takes into consideration both the legal effect of the measure and the *position* of the measure in

47 Law on the Common Administrative Procedure of the Public Administrations, enacted on 1 October 2015.

48 Law on the Adjudicative Jurisdiction for Administrative Judicial Review, enacted on 13 July 1998.

49 Under German law the discussion on the possible questioning of preparatory measures is almost always framed in terms of whether or not the measure is an administrative act (*Verwaltungsakt*). The question on the *Verwaltungsakt* – character of the measure – shall be answered with due consideration to the traits contained in § 35 VwVfG. In German case law, see the Judgment of the High Administrative Court of Koblenz of 12 December 1963, reference 1 A 22/63, available in *DVBl*, 13/1964, 540; the Order of the High Court of Nordrhein-Westfalen of 28 November 1979, reference VI B 1013/79, para 13; the Order of the High Administrative Court of Münster of 5 October 2015, reference 1 B 830/15, para 10; the Order of the Federal Administrative Court of 8 November 2016, reference 3 B 11.16, para 36.

50 See F.J. Peine, *Allgemeines Verwaltungsrecht* (C.F. Müller 2014) 88 para 367; T. Schmidt-Kötters, '§ 42 VwGO' in H. Posser & H.A. Wolff (eds.), *VwGO – Kommentar* (C.H. Beck 2014) 173 para 185; R. Schmidt, *Allgemeines Verwaltungsrecht – Grundlagen des Verwaltungsverfahrens Staatshaftungsrecht* (Rolf Schmidt 2016) 136 para 371.

51 CJEU doctrine on challenging preparatory measures has evolved into a rule-exception system by virtue of which, exceptionally, a concerned person has standing to institute proceedings against preparatory measures of a procedure if postponing this challenge to the end of the procedure implies defencelessness for the concerned person. See J. Schwarze, *Europäisches Verwaltungsrecht – Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (Nomos 2005) 1369. See Cases T-10-12 and 15/92 *SA Cimenteries CBR and othersv theCommission of the European Communities* [1992] ECR II-2668, para 43.

52 See Case C-170/89 *Bureau européen des unions de consommateursv theCommission of the European Communities* [1991] ECR I-5735, para 11; Cases T-346-348/99 *Diputación Foral de Álava and others v theCommission of the European Communities* [2002] ECR II-4264, para 43.

the procedure (final-not final).[53] In addition, the CJEU also admitted the action of annulment against Commission decisions that were not the final measure of a procedure but needed to be subsequently executed by a national administration.[54] The reason for admitting an action of annulment against this last type of decisions is that they display their legal effects directly before their implementation by national administrations.

With regard to the third rule, Spanish, German and EU law also establish that action against definite and obviously-challengeable acts of a procedure that have been duly notified should be questioned in due term and form, whether or not they are incorporated into a process to be concluded by a subsequent act. Spanish case law is clear in this respect: legal acts autonomously communicated to a concerned party should be impugned in due time. This excludes trying to impugn an act by way of impugning subsequent acts based on it.[55] German law is also clear: administrative acts – whether ending a procedure or included in a longer procedural sequence – shall be judicially impugned within due time.[56] As explained above, in EU case law the *Deggendorf* doctrine has prevented the CJEU from accepting indirect and extemporaneous impugnment of acts integrated in a procedural sequence when: (i) these acts are of considerable legal relevance, (ii) they have been notified, and (iii) there is little doubt on the legitimacy of the concerned party to challenge them.

3.1.3. An example

The way in which this proposal would work can be shown through the customs procedure for the request of an authorisation for central

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53 See Case C-39/93 P *SFEI and others v the Commission of the European Communities* [1994] ECR I-2701, para 28; Case C-521/06 *Athinaïki Techniki AE v the Commission of the European Communities* [2008] ECR I-5829.

54 See Cases 41-44/70 *NV International Fruit Company and others v the Commission of the European Communities* [1971] ECR I-411, paras 25-28; Cases C-15/98 and C-105/99 *Italian Republic and Sardegna Lines – Servizi Marittimi della Sardegna SpA v the Commission of the European Communities* [2000] ECR I-8894, para 36; Case T-189/02 *Ente per le Ville vesuviane v the Commission of the European Communities* (CFI, 18 July 2007), para 37; Case C-15/06 P *Regione Siciliana v the Commission of the European Communities* [2007] ECR I-2594, para 31.

55 See the Judgment of the Supreme Court (*Tribunal Supremo*) (First Section of the Administrative Litigation Division) of 24 January 1991, Second Legal Ground, and the Judgment of the Supreme Court (*Tribunal Supremo*) (Third Section of the Administrative Litigation Division) of 17 March 2016, Third Legal Ground.

56 Acts should be impugned within the month following the notification of the act. In case that prior administrative revision is required, judicial impugnation should be carried out within the month following the notification of the outcome of the administrative revision. See §§ 68 and 74 (1) of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*).

clearance.[57] In this procedure, a national customs authority may receive a request for centralised clearance authorisation that involves more than one national customs authority. The authority taking the decision shall consult the involved authorities on the granting of the authorisation. Should one of the consulted authorities consider that the authorisation cannot be granted and an agreement in this respect cannot be reached, the requesting party will not be granted centralised clearance for the territory of the non-consenting authority. The interested party in the procedure may want to bring action if the scope of the final central clearance authorisation is reduced due to the opposition of one of the consulted authorities.

How would the proposed rules work in this case (for instance, if The Netherlands is the Member State granting the authorisation and Spain a consulted Member State opposing the granting of the authorisation)?[58] If laws on adjudicative jurisdiction in The Netherlands and Spain were to be designed following what is here suggested, the concerned party in this procedure would find that both laws foresee cases like this one. Dutch law would foresee that a European national administration could contribute to an administrative procedure initiated and concluded by the Dutch administration. Conversely, Spanish law would expressly foresee that an administrative action carried out by the Spanish administration could contribute to a procedure finalised in another EU country.[59]

The first rule would be fulfilled if the law in The Netherlands envisaged that Dutch authorities are competent to adjudicate over the final resolution of a cooperative procedure, including those preliminary measures carried out by other European administrations. In accordance with the second rule, Dutch law would also envisage that if one of these preliminary measures was relevant for the concerned party and was carried out by a European administration, the measures could be autonomously questioned before such European administration in the legal terms established by the law of that administration. It would be deduced from Dutch law that the report provided by the Spanish administration which led to the denial of the authorisation could be challenged in Spain in accordance with Spanish law. Impugnment would need to be made within the terms fixed by the law – in this case that of Spain – just as the third rule proposes.

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57 See Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [2015] OJ L343/558, art 229.

58 These two Member States are chosen as an example. They could be substituted by any other two Member States of the European Union.

59 In Spain this would affect, at least, Act 29/1998, dated 13 July, Regulating the Administrative Jurisdiction for Judicial Review, and Act 39/2015, dated 1 October, on a Common Administrative Procedure for the Public Administrations.

Conversely, Spanish law would foresee that actions executed by the Spanish administration but being part of a procedure carried out by another European administration would be adjudicated by the authority having jurisdiction over the act concluding such a procedure (first rule). The law in Spain would also foresee that preliminary measures of certain legal relevance executed by the Spanish administration but being part of a procedure carried out by another European administration are the object of Spanish jurisdiction, despite the fact that they are not the measure concluding a procedure (second rule). It would be interpreted from Spanish law that the communication provided by the Spanish administration that caused the denial of the authorisation could be challenged in Spain in accordance with Spanish law (third rule).

4. Grounding a jurisdiction of jurisdictions

The arrangement proposed is logical. In the end, it suggests transplanting to cooperative procedures the revision criteria that internal administrative law already uses with internal composite procedures. It takes advantage of the experience of internal law and at the same time respects current European jurisdictional plurality. It would improve the legal protection of citizens involved in European cooperative administrative action.

Nevertheless, the solution *does not fit in the enforceable legal frame*. According to international public law, unless a treaty establishes the opposite, a court may not review a foreign public act – save an incidental exam – regardless that such act is a preparatory measure of a procedure over which concluding act it has jurisdiction.[60] For instance, a Spanish court does not have jurisdiction over a preparatory measure carried out by the French administration, despite the fact that the procedure ends with a decision of the Spanish administration. If there is no international treaty enabling cooperation between national jurisdictions,

60 States are not granted unlimited legal power to act, they must do so according to a base or principle of jurisdiction. These are: (i) the territorial principle; (ii) the nationality principle or personality principle; (iii) the protective principle, and; (iv) the universality principle. The most common are the territorial principle and the protective principle. National laws are enacted accordingly and foresee that courts cannot adjudicate over the acts of a foreign administration. Such is the case, for instance, with article 24 of the Spanish Organic Law on the Judiciary, according to which the administrative courts of Spain are competent to exert jurisdiction over acts dictated by the Spanish administrations. A large list of literature justifies this explanation. *Inter alia*, see L. van Praag, *Juridiction et Droit international public – La juridiction nationale d'après le droit international public coutumier en temps de paix* (Belinfante Frères 1915) 319 para 119; H.G. Maier, 'Jurisdiction Rules in Customary International Law' in K.M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International 1996) 64-69; C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008).

a system of joint and coordinated judicial revision for cooperative procedures in which several national administrations participate is not possible.

The same happens with cooperative procedures concluded by an EU act in which national administrations participate. The CJEU has clearly asserted that its jurisdiction does not allow adjudicating over the legality of acts of national administrations,[61] whether or not EU law affects these national acts. This criterion is also applicable to preparatory acts that are part of a cooperative procedure;[62] the principle of conferral reinforces this restriction to the jurisdiction of the CJEU.[63] According to the treaties the CJEU can only review the legality of acts of the European Union, but not of acts of national administration executed within a cooperative procedure to be finalised by the EU. The rule is that each court may act within its island of jurisdiction, also when facing a cooperative procedure (*Trennungsprinzip*).[64] When it comes to the judicial revision of cooperative procedures, European jurisdictions operate in a model that has an archipelagic structure.

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61 *Inter alia*, Case 96/71 *R & V Haegeman v the Commission of the European Communities* [1972] ECR I-1005, paras 5-12; Case 92/78 *Simmenthal SpaA v the Commission of the European Communities* [1979] ECR I-778, paras 27-30; Case T-167/94 *Detlef Nölle v the Council* [1995] ECR II-2593, para 35; Case T-47/02 *Manfred Danzer & Hannelore Danzer v the Council* [2006] ECR II-1782, para 19; Case T-91/05 *Sinara Handel GmbH v the Council and the Commission of the European Communities* [2007] ECR II-248, para 29.

62 *Inter alia*, Case C-97/91 *Oleificio Borelli SpA v the Commission of the European Communities* [1992] ECR I-6330, paras 9-10; Case T-114/99 *CSR Pampryl SA v the Commission of the European Communities* [1999] ECR II-3334, para 57; Case T-22/97 *Kesko Oy v the Commission of the European Communities* [1999] ECR II-3779, para 83; Case C-6/99 *Association Greenpeace France and Others v Ministère de l'Agriculture et de la Pêche and Others* [2000] ECR I-1676, paras 53-54; Case C-269/99 *Carl Kühne GmbH & Co KG and Others v Jütro Konservenfabrik GmbH & Co KG* [2001] ECR I-9541, paras 52-53 and 58; Case T-76/02 *Mara Messina v the Commission of the European Communities* [2003] ECR II-3205, para 47; Case T-168/02 *IFAW Internationaler Tierschutz – Fonds gGmbH v the Commission of the European Communities* [2004] ECR II-4137, para 61; Case C-407/04 P *Dalmine SpA v the Commission of the European Communities* [2007] ECR I-901, para 62; Case T-18/07 R *Hans Kronberger v European Parliament* (CFI, 21 May 2008), para 37; Cases C-512/07 P(R) and C-15/08 P(R) *Achille Ochetto & European Parliament v Beniamino Donnici & the Italian Republic* [2009] ECR I-1, para 51; Cases C-393/07 and C-9/08 *Italian Republic v European Parliament* [2009] ECR I-3679, para 74; Case C-343/07 *Bavaria NV & Bavaria Italia Srl v Bayerischer Brauerbund eV* [2009] ECR I-5491, para 57; Case T-341/10 *F91 Diddeléng and Others v Commission* [2012], para 52; Case C-562/12 *MTÜ Liivimaa Lihaveis v Eesti-Läti programmi 2007-2013 Seirekomitee* EU:C:2014:2229, para 48.

63 See M. Lagrange, 'Les pouvoirs de la Haute Autorité et la application du Traité de Paris' (1961) *RDP* 40; H.P. Kraußer, *Das Prinzip begrenzter Ermächtigung im Gemeinschaftsrecht als Strukturprinzip des EWG – Vertrages* (Duncker & Humblot 1991) 58; S. Seyr, *Der effet utile in der Rechtsprechung des EuGH* (Duncker & Humblot 2008) 338; K. Walter, *Rechtsfortbildung durch den EuGH* (Duncker & Humblot 2009) 229-230; F. Rosenkranz, *Die Beschränkung der Rückwirkung von Entscheidungen des Europäischen Gerichtshofs* (Mohr Siebeck 2015) 17; R. Schütze, *European Union Law* (Cambridge University Press 2015) 207.

64 See J. Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund* (Duncker & Humblot 2004).

Moreover, there are substantial issues that would need to be solved in order to implement the idea of a jurisdiction of jurisdictions. *Inter alia*, which mechanism would enable the cooperation between courts? How would courts actually work together when deciding (in the example above, how would the Dutch and Spanish courts cooperate?)? How would the alignment of all European legislations be possible if the EU does not have the competence to legislate over national administrative procedures and jurisdictions?

Then, is the conclusion that *de lege lata* a jurisdiction of jurisdictions is legally baseless? Is there no argument in existing law for it? On this question we want to propose a reasoning that suggests there may be legal grounds upon which a jurisdiction of jurisdictions could start to be elaborated. Two arguments could be put forward. Both refer to a cooperative procedure in which national administrations participate but the EU ends the procedure: the first argument regards CJEU case law; the second one is doctrinal and concerns the concept of legal relationship (*Rechtsverhältnis*).

4.1. The argument stemming from case law

At first reading, case law is solid. The Court of Justice declared that it would not review the legality of an act of a national administration carried out in a cooperative procedure. This approach bars a proposal that allows the CJEU to exert jurisdiction over national preparatory measures of a cooperative procedure. However, the case law of the CJEU needs further scrutiny.[65] Perhaps the Court of Justice has already opened the door to the possibility of adjudicating over preparatory measures of national administrations in a cooperative procedure without expressly admitting it.

4.1.1. The initial criterion: Borelli case[66] (C-97/91)

In 1988 the Italian company *Oleificio Borelli SpA* requested financial aid to build an oil mill in the region of Liguria from the European Agricultural Guidance and Guarantee Fund. The Commission was the body to take the final decision,[67] but in order to grant aid the prior approval of Italy was

65 An excellent analysis in F. Brito Bastos, 'Derivative Illegality in European Composite Administrative Procedures' (2018) *CMLR* 101.

66 See E. García de Enterría, 'The Extension of the Jurisdiction of National Administrative Courts by Community Law: the Judgment of the Court of Justice in *Borelli* and Article 5 of the EC Treaty' (1993) 13 *YEL* 19.

67 This procedure is contained in the expired Council Regulation (EEC) 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed, arts 13-15. Reference to the Commission's decision power in art 13.2.

compulsorily required.[68] The procedure of requesting aid was, therefore, a co-operative procedure in which Italian authorities and the Commission intervened. At the end of the procedure the Commission rejected the aid application of *Oleificio Borelli*[69] because the regional authority of Liguria issued an unfavourable opinion on the project.[70] The company contested the Commission's decision before the CJEU, arguing that the unfavourable opinion of the Italian regional authority was unlawful. The Court of Justice refused to review the opinion of the Italian authority and dismissed the application. In paragraphs 9 and 10 of the judgment the Court of Justice declared:

'It should be pointed out that in an action brought under Article 173 of the Treaty the Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority.[71]

That position cannot be altered by the fact that the measure in question forms part of a Community decision-making procedure, since it clearly follows from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision-taking authority (...)'[72]

Given the clear assignment of the deciding power within the procedure to the national authority, the Court of Justice did not extend its jurisdiction to a measure of a national administration. The CJEU has later respected this criterion.[73] In fact, it is deemed that contradicting it is '(...) most unwise and would do nothing to promote the cause of respect for the rule of law (...).'[74]

4.1.2. A case contradicting the criterion? The Kingdom of Sweden case (C-64/05 P)

In *Kingdom of Sweden* the Court of Justice ruled over an appeal brought by the Kingdom of Sweden requesting that a judgment of the Court of First Instance[75] be set aside. The judgment had previously dismissed an an-

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68 *Ibid*, art 13.3.

69 In principle the aid request of *Oleificio Borelli* was intended to qualify for the financial year 1989 but it could not, and finally qualified for the financial year 1990.

70 Case C-97/91, para 4.

71 Case C-97/91, para 9.

72 Case C-97/91, para 10.

73 See case law in footnote 62.

74 See Case C-6/99 *Association Greenpeace France and Others v Ministère de l'Agriculture et de la Pêche and Others* [2000] ECR I-1676, Opinion of AG Mischo, in relation to para 99.

75 Case T-168/02 *IFAW Internationaler Tierschutz – Fonds gGmbH v the Commission of the European Communities* [2004] ECR II-4137.

nulment action against a decision of the Commission denying access to the environment-defending association *IFAW*[76] to certain documents.[77] The Commission based the denial on the fact that the Federal Republic of Germany had requested the Commission the non-disclosure of the documents as allowed by article 4.5 of Regulation 1049/2001.[78] The Court of Justice then centred its attention on whether Germany's non-disclosure request should have been motivated. The Court interpreted article 4.5 of Regulation 1049/2001 based on the assumption that it is a matter of EU law.[79]

Through the analysis the Court understood that the aim of Regulation 1049/2001 was to improve the transparency of the Community decision-making process;[80] this implied that the right of access to documents held by the Parliament, the Council and the Commission extended not only to documents drawn up by those institutions but also to documents received from third parties.[81] In addition, the only permissible limits to the right of access to documents the Court are those based on grounds of public or private interest.[82] Consequently – the Court reasoned – an EU institution may not object to a document disclosure if a Member State does not provide any reasons for objecting to such disclosure.[83]

Following this logic the Court of Justice ruled that the decision of the Commission denying access to *IFAW* had to be annulled,[84] and did so due to the lack of motivation in the notification served by Germany. Therefore, the Court of Justice did not follow the statement of *Borelli* which established that the irregularity of the national administration's preparatory measure could not affect the validity of the decision of the Commission.[85] In *Kingdom of Sweden* the Court did not treat the preparatory measure by Germany and the decision

76 Case T-168/02.
77 The documents were correspondence the Commission kept between the Federal Republic of Germany, the city of Hamburg and the German Chancellor in relation to the approval under the Habitats Directive of the enlargement of a factory in Mühlenberger Loch and the reclamation of part of the estuary of the Elbe for a runaway.
78 Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L143/43. According to article 4.5, 'A Member State may request the institution not to disclose a document originating from that Member State without prior agreement'.
79 Case C-64/05 P *Kingdom of Sweden v Commission* [2007] ECR I-11420, paras 65-74.
80 Case C-64/05 P, para 54.
81 Case C-64/05 P, para 55.
82 Case C-64/05 P, para 52.
83 Case C-64/05 P, paras 75, 88, 89 and 90.
84 Case C-64/05 P, para 100.
85 Case C-97/91, para 12.

of the Commission as isolated compartments, because the irregularity of the former did affect the validity of the latter.

Had the Court applied in *Kingdom of Sweden* the same solution as in *Borelli*, the Court would have abstained itself from analysing the lawfulness of the notification sent by Germany and redirected the applicants to German courts. At the same time, the Court would have recalled that the German court could refer a preliminary question in case it had doubts on the interpretation of article 4.5 Regulation 1049/2001 when analysing the lawfulness of the German notification.

In order to sustain this divergence between the solution given in *Borelli* and that in *Kingdom of Sweden* the Court argued that, whereas cooperative procedures such as the one in *Borelli* clearly assign the decision power to the national administration intervening in the procedure, others, such as the one in the *Kingdom of Sweden* case, do not.[86] The Court followed *Borelli* and used in *Kingdom of Sweden* the clarity of decision-power assignment between administrations as a criterion to extend or deny its jurisdiction over national preparatory measures of a cooperative procedure. The Court linked this power distribution between administrations to the existence of a unitary procedural European-level sequence.[87] It understood that, in a unitary decision-making procedure, there is a lack of clarity in power distribution between the Commission and Member States, and therefore their acts in the procedure cannot be separately contemplated. On the contrary, when the powers of Commission and national administrations can be identified and differentiated within the procedure, they can also be considered and reviewed in isolation from each other by separate courts (national and CJEU). This happens in cooperative procedures where different segments or sub-procedures of the main procedure can be identified.

This solution of *Kingdom of Sweden* is not an isolated one and closely resembles judgments of the CJEU based on the derivative illegality of a decision of the Commission.[88] The criterion that *Borelli* introduced has, therefore, led to antagonistic rulings. Despite its superficial soundness, this criterion must be questioned. After close analysis of the administrative procedure of the *Borelli* and *Kingdom of Sweden* cases, a first conclusion is that (i) both were equally clear regarding the distribution of power among administrations and (ii) both responded to the same decisional power distribution structure. There was no substantial difference between them in this respect. In both procedures the applicable regulation fixed when and how national administrations intervened

86 Case C-64/05 P, para 93.
87 Case C-64/05 P, para 93; Cases C-512/07 P(R) and C-15/08 P(R), para 52.
88 Please see the judgments listed and analyzed in F. Brito Bastos, 'Derivative Illegality in European Composite Administrative Procedures' (2018) 55 *CMLR* 101.

in the procedure. In the allegedly unclear distribution of powers of the procedure in *Kingdom of Sweden*, article 13.3 of Regulation 1049/2001 was unequivocal regarding the moment and manner for intervention of national administrations. This differentiation the Court used between clarity and lack of clarity in competence distribution in a cooperative procedure does not seem to correspond to reality and introduces a degree of confusion. When are competences clearly or unclearly set within a cooperative procedure? Is it when the Court deems it fit to deny or extend its jurisdiction to a national preparatory measure? Similarly, it is arguable that the influence that national preparatory measures have in the resolution of both procedures is equal. In the procedure of *Borelli*, the opinion coming from the regional authority was binding for the Commission. In the procedure of the *Kingdom of Sweden*, the request of a Member State is binding if fulfilling the requirements the CJEU demands.[89]

Secondly, regarding the argument that in the *Borelli* case there existed identifiable segments or sub-procedures while there did not in *Kingdom of Sweden*, the conclusion is the same: there was no substantial difference among them in this respect. The procedure of the *Borelli* case was *one* European-level procedural sequence case and so was the procedure of *Kingdom of Sweden*. Both procedures started with a request from an interested party and both ended with a decision from the Commission. Both were open to participation of national administrations. In one case national administrations participated through a binding opinion that had to be mandatorily issued by the Member State (*Borelli*), and in the other they did so through a notification expressing a declaration of will (*Kingdom of Sweden*). The difference between both acts was not one of essence because *both were preliminary measuresof a procedure*.

As a consequence, it is here understood that the contrast the Court of Justice made between (i) cooperative procedures with identifiable sub-procedures in which power distribution between Member States and Commission is clear, and (ii) cooperative procedures with non-identifiable sub-procedures in which power distribution between Member States and Commission is not clear, is unnatural and inadequate. Both of the cooperative procedures the Court of

89 This assertion is subject to further discussion. The core of the argument backing it is that when comparing the text of article 4.5 of Regulation (EC) 1049/2001 with the judgments of the CJEU interpreting it, one may conclude that a duly motivated request served by a Member State invoking article 4.5 compels the Commission to proceed as requested. See Case T-59/09 *Federal Republic of Germany v European Commission* EU:T:2012:75, paras 34 and 37; Case T-669/11 *Spirlea v Commission* EU:T:2014:814, paras 49-50. In this regard, it must be underscored that the potential degree of uncertainty on whether the request submitted by a Member State complies with the requirements set by the CJEU *does not reduce in any measure the degree of obligation of the Commission to follow what the Member State requires if the requirements set by the CJEU are fulfilled. Uncertainty of requirement fulfillment by the Member State shall not be confused and deemed as discretion of the Commission to decide.*

Justice analysed in *Borelli* and *Kingdom of Sweden*: (i) do clearly set the different functions the Commission and Member States have; (ii) constitute *one* procedural sequence aiming at the attainment of a European-level interest; and (iii) assign binding power to a national preparatory measure. The differences that may exist between both procedures are not of the essence, and cannot be the differentiation upon which denial or extension of jurisdiction to national preparatory measures can be solidly motivated.

4.1.3. Analysis

The *Kingdom of Sweden* and alike judgments evidence that the Court of Justice has extended its jurisdiction to the national preparatory measures of a cooperative procedure. Though the Court argued the extension of its jurisdiction using the criterion set in *Borelli*, the fact is that in *Kingdom of Sweden* the Court ended up doing the same as courts do with their internal administrative procedures: decide on the lawfulness of preparatory measures jointly with the decision over the final measure. Moreover, in the *Kingdom of Sweden* case the Court of Justice found that it could not avoid doing so in order to issue a reasonable judgment. This case was, perhaps, a turning point in the doctrine of the Court but it is not an isolated one: recent cases such as the preliminary ruling issued in *Berlusconi* coincide in the approach.[90]

Somehow this solution is aligned with what we argue is the best logic for judicial revision over cooperative procedures. It signals a way of thinking about jurisdiction over cooperative procedures that is worth developing. In fact, in order to provide better judicial protection to those involved in an administrative procedure, national legal orders have evolved to a point where they apply this same criterion.

Perhaps new arguments can be suggested to the Court of Justice so that it may justify jurisdiction over national preparatory measures on more solid grounds. Here, the implied powers doctrine could be useful. The Court of Justice could make the case that the power to decide on the final act of the procedure implies the power to do so also over preparatory measures executed by Member States. The argument would be that it is legally logical and necessary that the Court extend its jurisdiction to these national preparatory acts. Internally, at a national level, this is self-evident. At a European level *Kingdom of Sweden* supports the point. The Court could recognize that the ability to review the lawfulness of national preparatory measures should be understood as embedded

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90 See Case C-219/17 *Silvio Berlusconi & Finanziaria d'investimento Fininvest SpA v Banca d'Italia & IVASS* EU:C:2018:1023. Further analysis in *Cooperación procedimental en la Unión Europea: límites jurisdiccionales* (forthcoming).

in its jurisdiction. Preventing the Court from reviewing national preparatory measures would amount to preventing it from reviewing the final decisions of the Commission to which the preparatory measures contribute, because the lawfulness of such Commission acts may not be fully assessed if the lawfulness of the preparatory measure is not assessed. The English rule 'When the law bestows anything upon any one, it is deemed to bestow also that without which the thing cannot be'[91] could be invoked in favour of this jurisdiction extension. The Court could recall that 'No axiom is more clearly established in law, or in reason, than that wherever the end is required [in this case, adjudicating over a decision of the Commission ending a cooperative procedure], the means are authorized [in this case, adjudicating over the national measures leading to the decision]'.[92]

4.2. The argument stemming from the concept of legal relationship

In addition to the possibilities that the rationale of the CJEU opened, an abstract-conceptual dogmatic argumentation referring to the idea of legal relationship (*Rechtsverhältnis*, *relación jurídica*) can support the elaboration of a jurisdiction of jurisdictions.

The argument could be made that both the interested party to a cooperative procedure and the several administrations responsible for the procedure are in fact parties to ***one*** legal relationship – a legal relationship understood as a linkage between the legal interests of legal subjects qualified by law.[93] It can be con-

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91 This rule was used by Sawer to argue that the doctrine of implied powers was also present in English common law. See G. Sawer, '"Implied powers" in bundesstaatlichen Verfassungen des britischen Commonwealth' (1959-60) 20 *ZaöRV* 562. Translation into English from Latin in J.A. Ballentine, *Law Dictionary of Words, Terms, Abbreviations and Phrases which are Peculiar to the Law and of those which have a Peculiar Meaning in the Law* (The Lawbook Exchange 2005) 406. Original Latin phrase: *Quando lex aliquid alicui concedit conceditur et id sine quo res ipsa esse non potest.*

92 J. Madison, 'Federalist N° 44 – Restrictions on the Authority of the Several States' in A. Hamilton, J. Jay & J. Madison, *The Federalist Papers* (first published 1788, Project Gutenberg 2007) 289.

93 The term legal relationship has been defined by a large number of scholars. In Spanish literature see L. Mendizábal Martín, *Teoría general del Derecho* (Tipografía la Editorial 1915) 111; F. de Castro y Brabo, *Derecho civil de España – Tomo primero* (Casa Martín 1942) 465; L. Bagolini, 'Notas acerca de la relación jurídica' (1950) *Anuario de Derecho Civil* 7; J.E. Soriano García, 'Evolución del concepto "relación jurídica" en su aplicación al Derecho público' (1979) 90 *RAP* 33; S. Muñoz Machado (Dir), *Diccionario del español jurídico* (Real Academia Española & Consejo General del Poder Judicial 2016) 1439; L. Parejo, *La vigilancia y supervisión administrativas* (Tirant lo Blanch 2016) 124. In German literature see N. Achterberg, 'Rechtsverhältnisse als Strukturelemente der Rechtsordnung' (1978) *Rechtstheorie* 385; N. Achterberg, *Allgemeines Verwaltungsrecht* (C.F. Müller 1986) 372; B. Remmert, 'Verwaltungsrechtsverhältnis' in D. Ehlers & H. Pünder (eds.), *Allgemeines Verwaltungsrecht* (De Gruyter 2016) 579; D. Ehlers, 'Rechtsverhältnisse in der Leistungsverwaltung' (1986) *DVBl* 912.

sidered that in this legal relationship *two* positions exist: (i) that of the party concerned to the procedure, and (ii) that of **a** European public power processing the procedure. This European public power could be deemed as *a composite power that is exerted not through one but through various administrations (national administrations plus EU)*. On this assumption it would be reasonable to argue that, in the frame of this one relationship between citizen and European power, the European power should grant the citizen adequate legal protection which includes satisfactory access to judicial review. This implies that *the* European power processing the cooperative procedure would be responsible *vis-à-vis* the citizen to grant this legal protection *through each of its components* (national administrations and EU). Hence, the obligation of judicial supervision over the cooperative procedure would be an obligation of the European power considered as a unitary aggregate. The components of *the* European power would have the obligation to cooperate so as to shape this *one* protection that the citizen deserves *vis-à-vis* the European power they jointly constitute. One of the alternatives for the components of the European power to provide such unitary and adequate protection is that they cooperate in the fashion of the proposed jurisdiction of jurisdictions. This concerted action would embody a sophisticated version of the principle of loyal cooperation.

Therefore, the conceptual elaboration of a type of legal relationship that embraces all actors of a cooperative procedure is worth exploring. This would be a valuable point from which to start discussing whether citizens could have the right to request from European courts (national plus EU) the provision of optimal judicial protection via cooperation between courts in cases where combined action of European administrations is exerted through a cooperative procedure. We want to suggest that the doctrinal development of a *European cooperative legal relationshipbe consideredas a basis for an argument in favour of a subjective right of the citizen to the concerted action of European courts overseeing European cooperative administrative action*. The concept of a cooperative legal relationship could serve as the framework within which such a right could be envisaged and, eventually, invoked.

Certainly, scholarship has conceptualized European cooperative administrative action using mainly the notions provided by the doctrine of legal acts (*Rechtsfomenlehre*) - doctrine of administrative action (*Handlungsformenlehre*)[94]

94 E. Schmidt-Aßmann stands out as – perhaps – the author who has most intensely promoted the systematization of European administrative cooperative activity. He and other German language-speaking authors have carried out this task from the perspective of both doctrines. *Inter alia*, see E. Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft' (1996) *EuR* 270; X. Arzoz Santisteban, *Concepto y régimen jurídico del acto administrativo comunitario* (IVAP 1998); E. Schmidt-Aßmann, 'Strukturen des Europäischen Verwaltungsrechts – Einleitende Problemskizze' in E. Schmidt-Aßmann & W. Hoffmann-Riem (eds.), *Strukturen des Europäischen Verwaltungsrechts* (Nomos 1999) 9-43; U. Mager, 'Die staatengerichtete Entscheidung als supranationale Handlungsform' (2001) *EuR*

and by the doctrine of the administrative procedure. Reference to the third systematization reference for administrative activity that the legal relationship constitutes is seldom made.[95] Responsible for the underutilization of the concept of legal relationship are – perhaps – the accusations of irrelevance made against it in national discussions.[96] Nevertheless, despite strong opinions against it, the doctrine of the legal relationship is recognised as useful.[97] Scholarship has repeatedly underscored its suitability as a concept for explaining the different legal positions parties may hold *vis-à-vis* each other through time. The notion of legal relationship perfectly embraces the aggregate of interactions that legal subjects have with each other; it has an organic function.[98] Furthermore, au-

66; E Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee – Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung* (Springer 2004); T. von Danwitz, *Verwaltungsrechtliches System und Europäische Integration* (J.C.B. Mohr (Paul Siebeck) 1996); S. Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluß* (Mohr Siebeck 1999); J. Sommer, *Verwaltungskooperation am Beispiel administrativer Informationsverfahren im Europäischen Umweltrecht* (Springer 2003); G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004); A. von Bogdandy, J. Bast & F. Arndt, 'Tipología de los actos en el derecho de la Unión Europea. Análisis empírico y estructuras dogmáticas en una presunta jungla' (2004) 123 *Rev Est Pol*. 9; B. Schöndorf-Haubold, 'Gemeinsame Europäische Verwaltung: die Strukturfonds der Europäischen Gemeinschaft' in E. Schmidt-Aßmann & B. Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund – Formen und Verfahren der Verwaltungs-zusammenarbeit in der EU* (Mohr Siebeck 2005); M. Vogt, *Die Entscheidung als Handlungsform der Europäischen Gemeinschaftsrechts* (Mohr Siebeck 2005); F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Mohr Siebeck 2005); J. Bast, *Grundbegriffe der Handlungsformen der EU entwickelt am Beschluss als praxisgenerierter Handlungsform des Unions- und Gemeinschafts-rechts* (Springer 2006); A. Hombergs, *Europäisches Verwaltungskooperationsrecht auf dem Sektor der elektronischen Kommunikation* (Lit 2006); M. Ruffert, 'Überlegungen zu den Rechtsformen des Verwaltungshandelns im europäisierten Verwaltungsrecht' in M. Wallerath (ed.), *Fiat iustitia – Recht als Aufgabe der Vernunft – Festschrift für Peter Krause zum 70. Geburtstag* (Duncker & Humblot 2006) 215-236; K. Heußner, *Informationssysteme im Europäischen Verwaltungsverbund* (Mohr Siebeck 2007); T. von Danwitz, 'Die Handlungsformen des Europäischen Verwaltungsrechts' in T. von Danwitz, *Europäisches Verwaltungsrecht* (Springer 2008) 231-272; W. Weiß, *Der Europäische Verwaltungsverbund* (Duncker & Humblot 2010); A. Glaser, *Die Ent-wicklung des Europäischen Verwaltungsrechts aus der Perspektive der Handlungsformenlehre* (Mohr Siebeck 2013); T. Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (Mohr Siebeck 2014).

95 Throughout this research no analysis of European cooperative administrative action based on the concept of legal relationship has been found.

96 F. Hase, 'Das Verwaltungsrechtsverhältnis: Überlegungen zu einem Grundbegriff des öffentlichen Rechts' (2005) *Die Verwaltung* 454; H. Meyer, 'Aussprüche und Schlußworte – Rechtsverhältnisse in der Leistungsverwaltung' (1987) *VVDStRL* 272; E. Schmidt-Aßmann, 'La doctrina de las formas jurídicas de la actividad administrativa – Su significado en el sistema del Derecho administrativo y para el pensamiento administrativista actual' (1993) *DA* 7, 28.

97 See R. Breuer, O. Bachof & H. Maurer, 'Aussprüche und Schlußworte – Rechtsverhältnisse in der Leistungsverwaltung' (1987) *VVDStRL* 154; T. von Danwitz, 'Zu Funktion und Bedeutung der Rechtsverhältnislehre' (1997) *Die Verwaltung* 339, 344.

98 The notion of legal relationship is said to be one of the most fundamental and general legal concepts. See N. Bobbio, *Teoría General del Derecho* (Debate 1991) 195. Since a legal relationship extends to every interaction taking place among the subjects to the relationship, each of the legal acts taking place in its scope can be interpreted, ordered and explained coherently in relation to each other. See H. Nawiasky, *Teoría General del Derecho* (Rialp 1962) 232; M.F.C. Savigny, *Sistema de Derecho romano actual – Tomo primero* (Centro Editorial de Góngora 1924) 65; J. Pietzcker, 'Das Verwaltungsrechtsverhältnis – archimedischer Punkt oder Münchhausens Zopf?' (1997) *Die Verwaltung* 281.

thorised scholarship understands that *subjective rights spring from legal relationships.*[99] It would be, thus, sensible to define a cooperative legal relationship as a first step in the shaping of a subjective right of citizens to judicial cooperative review over European cooperative procedures.

5. Conclusion

European administrative law scholarship has paid attention to the issue of the judicial accountability of MLG. More specifically, it has considered alternative solutions for improving the judicial protection provided to citizens involved in European cooperative procedures.

In this regard, the present suggestion could enrich the debate. This proposes that European jurisdictions (national and the EU) join their action within one sequential judicial revision exercise when reviewing cooperative procedures. When adjudicating over a cooperative procedure, European courts could potentially exercise a unitary, composite jurisdiction through cooperation instead of exercising their jurisdictional powers in an isolated fashion. By way of transposing to a European level the rules that internal legal orders apply to their administrative procedures, each court would be able to exercise its action co-ordinately with the remaining courts when adjudicating over cooperative procedures. Ultimately, the legal protection of the citizen would be improved. Nevertheless, it is not possible to implement this suggestion as of today because of enforceable law. Arguments are required, therefore, to base the evolution suggested.

Two can be put forward.

First, the CJEU has introduced this logic when overseeing Commission acts ending a cooperative procedure in which national administrations participate (*Kingdom of Sweden* and alike cases). Despite the fact that the Court founded its decision on a criterion it deems reliable and capable of preserving the CJEU from adjudicating over national preliminary measures of a cooperative procedure, this can be questioned. The criterion the Court relied upon is not as solid as the assertiveness it shows when invoking it. It can be considered – as we believe – that the Court opened the door to extending its jurisdiction to the preliminary national measures of a cooperative procedure. In fact, the Court was forced to do so because otherwise it would not have been able to fulfil its duty to adjudicate. Perhaps an argument based on the implied powers doctrine

99 See G. Jellinek, *System der subjektiven öffentlichen Rechte* (J.C.B. Mohr (Paul Siebeck) 1919) 41-42; E. García de Enterría & T.R. Fernández Rodríguez, *Curso de Derecho Administrativo, Tomo I* (Civitas 2013) 486.

could better serve the Court when facing the same situation and help the Court assume that, in certain cases, it will have to extend its jurisdiction to national preliminary measures.

Second, the case can be made that a citizen involved in a cooperative procedure is a party to a legal relationship in which he is facing *one composite* European public power which is exercised through various administrations. This conceptual framework would be adequate to ground the future subjective right of the citizen to a legal protection exercised in the way here proposed. If a cooperative legal relationship is recognised to exist, it would be sensible for the citizen to expect that the components of the European public power he faces in the relationship coordinate their jurisdictions, so as to offer him the same level of legal protection that today Member States provide in their internal administrative procedures.