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COMPOSITE PROCEDURES AND PROCEDURAL
GUARANTEES: THE “BORELLI DOCTRINE”
IN THE LIGHT OF RENEUAL MODEL RULES

ABSTRACT. In the last three decades composite procedures have become increasingly significant in EU law, attesting the overcoming of the traditional dichotomy between direct and indirect administration. Among the case law of the European Court of Justice, the Oleificio Borelli case represents a paradigmatic example of the lack of protection that may occur during composite procedures, undermining the protection of individuals and, as a result, the principles on which EU administrative action is based. After an introduction on composite administrative procedure, sketching the main features of the European Agricultural Guidance and Guarantee Fund (EAGGF) in the context in which the Borelli case arose, this paper aims to re-read the leading case in the light of the draft of codification on administrative procedure presented by the Working Team ReNEUAL (Model Rules) in order to verify if, applying the Model Rules, the lack of procedural guarantees which emerged in that case can be dealt with. It will be argued that the insufficiencies that the Borelli case has shown can be addressed by shifting focus from the national court procedure to the lack of procedural safeguards at the confluence of national and EU law.

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1. Introduction

The increasing importance of administrative procedure at European Union (EU) level is emphasized in many studies dedicated to European administration,¹ especially after the entry into force of the Treaty of Lisbon.²

The first contribution to this evolution has been given by the Court of Justice (CJEU) and dates back several decades. The general principles of administrative action elaborated by CJEU case law laid the foundations for the conceptualisation itself of administrative procedure at EU level.

The method applied by the Court case law – gathering principles from the legal traditions of the Member States in order to reshape them while converging at EU level –

1 The doctrinal studies on the topic are countless. For just a few instances of the main Italian studies, see S. CASSESE, *I lineamenti essenziali del diritto amministrativo comunitario*, in *Riv. it. dir. pubbl. com.*, 1991, p. 3 et seq.; ID., *Il procedimento amministrativo europeo*, in F. Bignami-S. Cassese (eds.), *Il procedimento amministrativo nel diritto europeo*, Giuffrè, Milan, 2004, p. 31 et seq.; A. ADINOLFI, *I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri*, in *Riv. it. dir. pubbl. com.*, 1994, p. 521 et seq.; M.P. CHITI, *Diritto amministrativo europeo*, Giuffrè, Milan, 2004, p. 290 et seq.; G. DELLA CANANEA, *I procedimenti amministrativi dell'Unione Europea*, in M.P. Chiti-G. Greco (eds.), *Trattato di diritto amministrativo europeo*, Giuffrè, Milan, 2007, p. 497 et seq. More recently, looking beyond Italy, see H.C.H. HOFFMANN, *Seven Challenges for EU Administrative Law*, in *Review of European Administrative Law*, 2009, 2, p. 37 et seq.; J. ZILLER, *Is a law of administrative procedure for the union institutions necessary?* in *Riv. it. dir. pubbl. com.*, 2011, 3-4, p. 699 et seq.; ID. *Alternative in Drafting an EU Administrative Procedure Law*, at <<http://www.europarl.europa.eu/studies>>, 2011; A. SIMONATI, *The Principles of Administrative Procedure and the EU Courts: an Evolution in Progress?*, in *Review of European Administrative Law*, 2011, 1, p. 45 et seq.; B.G. MATTARELLA, *The concrete options for a law on administrative procedure bearing on direct EU administration?* in *Riv. it. dir. pubbl. com.*, 2012, 3-4, p. 537 et seq.; J. SCHWARZE, *European Administrative Law in the Light of the Treaty of Lisbon*, in *European Public Law*, 2012, 2, p. 285 et seq.; E. NIETO GARRIDO, *Possible Developments of Article 298 TFEU: Towards an Open, Efficient and Independent European Administration*, *ivi*, p. 373 et seq.; P. CRAIG, *A General Law on Administrative Procedure, Legislative Competence and Judicial Competence*, in *European Public Law*, 2013, 3, p. 503 et seq.; ID. *The Lisbon Treaty*, Oxford University Press, Oxford, 2013.

2 The Treaty of Lisbon recognised the “Charter of Nice” (Charter of Fundamental Rights of the European Union of 7 December 2000), the same legal value as the Treaties, increasing the range of provisions related to administrative procedure. In particular, reconfirming the importance of the rule of law (see Preamble and Articles 2 and 21 TEU) and identifying the role of general principles simply with regard to fundamental rights (see Article 6, para. 3 TEU), the Treaty does not preclude the concurrent application of other general principles stemming from the CJEU, in particular principles of administrative law, which often refine general principles of a constitutional character (J. SCHWARZE, *European Administrative Law in the Light of the Treaty of Lisbon*, in *European Public Law*, 2012, 18, p. 293 et seq.). This aspect is also underlined in A. SIMONATI, *The Principles of Administrative Procedure and the EU Courts*, already quoted, p. 45; E. SCHMIDT-ASSMANN, *Principes de base d'une réforme du droit administratif*, in *Revue française de droit administratif*, 2008, p. 670 et seq.

led, as an outcome, to an evolution of national rules on administrative procedure. The entry into force of the Italian general law on administrative procedure (Law 241 of 1990) as well can be seen as a result of the convergence of EU and national legal systems towards certain common principles and values.³ Moreover, eminent scholars described the increasing integration of the law systems of Member States of the (former) European Community (“Europeanisation”) as one of the main evolutionary factors of national administrative systems.⁴

Whereas the written sources for procedural guarantees are growing (thanks to the CFREU being recognised the same legal value as the Treaties by the Treaty of Lisbon and the role played by the European Convention for the Protection of Human Rights and Fundamental Freedoms ECHR), case law is still the “*natural habitat*”⁵ for the drawing up of principles of administrative procedure.⁶

The creative law-making process of the CJEU led to a statement of principles such as due process and effective judicial protection, which contributed to the creation of European administrative law and are, without any doubt, binding on EU Institutions⁷

3 See M. CARTABRIA, *La tutela dei diritti nel procedimento amministrativo, la legge n. 241 del 1990 alla luce dei principi comunitari*, Giuffrè, Milan, 1991.

4 E. SCHMIDT-ASSMANN, *Recenti sviluppi del diritto amministrativo generale in Germania*, in *Dir. pub.*, 1997, 1, p. 27 *et seq.* The phenomenon is also evident with regard to the term “European administrative law”. The term is developing in two different, but somehow overlapping forms: in a narrower sense it describes the administrative law which regulates the direct and indirect execution of EU law, and in a broader sense, it deals with the process of harmonisation of the legal standard of administrative action between national laws of the Member States and the EU: «*Europeanization of administrative law*» (J. SCHWARZE, *European Administrative Law in the Light of the Treaty of Lisbon*, *supra*, note 2, p. 290). See recently S. TORRICELLI, *L’uropeizzazione del diritto amministrativo italiano*, in B. Marchetti-L. De Lucia (eds.), *L’amministrazione europea e le sue regole*, Il Mulino, Bologna, 2015, p. 247 *et seq.*

5 See M.P. CHITI, *Le forme di azione dell’amministrazione europea*, in F. Bignami-S. Cassese (eds.), *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 68.

6 The starting point for this judicial practice is the case of *Algera* (CJEU, 12 7 1957, C-7/56, C-3,7/57, in *Racc.*, 81, p. 464), a *leading case* concerning the question of the revocation of administrative acts. The Court derived its obligation to create law-making from the absence of express Treaty provisions on the question concerned, using the subject matter of ‘*déni de justice*’ (imported from the French *Code Civil*) to state that «La Cour, sous peine de commettre un déni de justice, est donc obligée de le résoudre en s’inspirant des règles reconnues par les législations, la doctrine et la jurisprudence des pays membres». See G. DELLA CANANEA-C. FRANCHINI, *I principi dell’amministrazione europea*, Giappichelli, Turin, 2010.

7 There is now widespread agreement that the principles of law are to be applied by the institutions of the

as written rules and represent the *acquis communautaire*.⁸

The emergence of composite procedures, resulting from systems of shared administration, often called into question those principles with the risk of jeopardising them.⁹

In the framework of a complex and polycentric decisional process, where different actors, at both national and EU level, interact, following a shared and interrelated policy rather than an approach of strict separation, the rights and interests of addressees and third parties are at risk of falling into the ‘black hole’ between situations covered by the EU-level review and accountability mechanisms and those of the Member States.

The Oleificio Borelli case¹⁰ represents a paradigmatic example of the lack of

Union and that the Court may condemn a breach of these principles just like a breach of any written norm. Accordingly, the term “law” used in Article 19 TEU (ex 220 TEC) to describe the parameters of judicial review of EU Courts includes unwritten principles (see J. SCHWARZE, *European Administrative Law in the Light of the Treaty of Lisbon*, *supra*, note 2, p. 288 *et seq.*, spec. 293; see also S. CASSESE, *Le basi del diritto amministrativo*, Garzanti, Milan, VI, 2000, 317 *et seq.*).

8 See M.P. CHITI, *Are there Universal Principles of Good Governance?*, in *European Public Law*, 1995, p. 241 *et seq.*; A. ROMANO-TASSONE, *Il diritto amministrativo comunitario. Prospettive attuali e compiti della dottrina*, in R. FERRARA-S. SICARDI (eds.) *Itinerari e vicende del diritto pubblico in Italia. Amministrativisti e costituzionalisti a confronto*, Cedam, Padua, 1998, p. 109 *et seq.*

9 Regarding the concept of composite procedure, and its different classifications, see C. FRANCHINI, *Amministrazione italiana e amministrazione comunitaria*, II, Cedam, Padua, 1993; M.P. CHITI, *I procedimenti composti nel diritto comunitario e nel diritto interno*, in *Attività amministrativa e tutela degli interessati. L'influenza del diritto comunitario*, Giappichelli, Turin, 1997; G. DELLA CANANEA, *I procedimenti amministrativi composti dell'Unione europea*, in F. Bignami-S. Cassese (eds.) *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 307 *et seq.*; G. DELLA CANANEA-M. GNES, *I procedimenti amministrativi dell'Unione europea. Un'indagine*, Giappichelli, Turin, 2004; O. Jansen-B. Scöndorf-Haubold (eds.), *The European Composite Administration*, Intersentia, Cambridge, 2011; S. ANTONIAZZI, *Procedimenti amministrativi comunitari composti e principio del contraddittorio*, in *Riv. it. dir. pubbl. com.*, 2007, p. 640 *et seq.*; H.C.H. HOFMANN, *Composite Procedures in EU Administrative Law*, in H.C.H. Hofmann-A Türk (eds.), *Legal Challenges in EU Administrative Law: The Move to an Integrated Administration*, Edward Elgar, Cheltenham, 2009, p. 136 *et seq.*; C. ECKES-J. MENDES, *The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?*, in *European Law Review*, 2011, 11, p. 651 *et seq.*; M. ELIANTONIO, *Judicial Review in an Integrated Administration: the case of the Habitats Directive*, in *European Energy and Environmental Law Review*, 23, 2014, p. 116 *et seq.*

10 CJEU, V, 3 12 1992, C-97/91, with a memorable comment by E. GARCÍA DE ENTERRÍA, *La ampliación de la competencia de las jurisdicciones contencioso-administrativas nacionales por obra del Derecho Comunitario*. Sentencia Borelli de 3 de diciembre de 1992 del Tribunal de Justicia y el artículo 5 CEE, in *Revista española de derecho administrativo*, 1993, pp. 297-314; English version in *Yearbook of European Law*, 1994, pp. 19-37; today also in *Scritti in onore di Alberto Predieri*, Giuffrè, Milano, 1996, pp. 875-900; R. CARANTA, *Sull'impugnabilità degli atti*

protection that may occur during composite procedures, undermining the protection of individuals and, as a result, the principles on which EU administrative action is based.

After an introduction on composite administrative procedure and the main features of the European Agricultural Guidance and Guarantee Fund (EAGGF) in the context in which the Borelli case arose, the leading case¹¹ will be re-read in the light of the draft codification of administrative procedure, foreseen by scholars,¹² and presented by the Working Team ReNEUAL¹³ (Model Rules). The aim of this paper is to verify if, in applying the Model Rules, the lack of procedural guarantees which emerged in that case can be dealt with.

The analysis will allow us to shed light on this ruling (which has enduring importance in legal practice and academic debate) highlighting how, despite the solution

endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione, in *Foro amm.*, 1994, pp. 752-765.

11 The decision in the Borelli case was so innovative that eminent scholars commented that «la doctrina de esta Sentencia, con independencia del caso concreto en que se ha producido, tiene una enorme trascendencia» (E. GARCÍA DE ENTERRÍA, *La ampliación de la competencia*, supra, note 11, p. 301).

12 About the debate on codification of EU administrative procedure see G. DELLA CANANEA, *L'amministrazione europea*, in S. Cassese (eds.) *Trattato di diritto amministrativo, Diritto amministrativo generale*, II, Giuffrè, Milan, 2003, p. 1890 *et seq.*; J. SCHWARZE, *European Administrative Law*, Sweet & Maxwell, London, 2006, 1st ed., CLXV *et seq.* Among the first opponents of the codification see C. HARLOW, *Codification of EC administrative procedures? Fitting the Foot to the Shoe or the Shoe to the Foot*, in *European Law Journal*, 1996, p. 3 *et seq.*; see also A. WEBER, *Sviluppi del diritto Amministrativo Europeo*, in *Riv. it. dir. pubbl. com.*, 1998, 3-4, p. 589 *et seq.* In favour of the codification see F. BIGNAMI, *The Democratic Deficit of the European Community Rulemaking: a Call for Notice and Comment in Comitology*, in *Harvard International Law Journal*, 1998, p. 451 *et seq.*

13 The ReNEUAL – the Research Network on EU Administrative Law, is composed of academics and experts in EU law forming a Working Group that elaborated some “restatements” and guidelines in a draft of a general law on administrative procedure. After the European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union, the Model Rules were presented during the ReNEUAL Conference that was held in May 2014 in Brussels (see the Reports of C. NAPOLITANO, *EU Administrative Procedures. Presenting and Discussing the ReNEUAL Draft Model Rules*, in *Riv. it. dir. pubbl. com.*, 3-4, 2014, p. 879 *et seq.*; ID., *Verso la codificazione del procedimento amministrativo dell'Unione europea: problemi e prospettive*, *ivi*, 1, 2015). As some of the members of the working group underlined, the term “Code” used to describe the system of Model Rules (see G. DELLA CANANEA-D.U. GALETTA, *Codice ReNEUAL del procedimento amministrativo dell'Unione Europea*, Editoriale Scientifica, Naples, 2016, p. XL) has to be understood in a broader sense, not seeking to describe a static system, but rather a positivisation of values and principles in order to regulate the administrative procedures of EU institutions (see the intervention of Prof. J. ZILLER, at the Confernece *Verso la codificazione del procedimento amministrativo dell'Unione europea: problemi e prospettive*, held in November 2014 at the Università degli Studi di Milano).

given by the Court, the real lack of protection was not due to the Italian judicial review system but rather to the “grey zone” between national and EU procedural guarantees.

In the last part of the paper, the capacity of Model Rules to solve the challenge of composite procedure will be verified also in the light of the current feature of funding procedure related to the European Agricultural Guarantee Fund (EAGF), which replaced the EAGGF.

2. Composite procedures in EU law

Scholars identify three models of action in EU institutions: (i) Direct Administration, when the Commission and its bureaucratic dependencies, the array of European Agencies and the Council act directly; (ii) Indirect Administration, when EU institutions act through the authorities of national Member States (supervising the action of the latter); (iii) the specific mixed process embedding EU and national organs (developed more recently).¹⁴ The reasons of the choice of each type of action and their scope of application is complex and cannot be examined in detail here.

Suffice to say that the features of Direct Administration, based on the binary formula of Community decision – national execution, appeared adequate at first, when the economic policies pursued by the three Communities were more limited. At this early stage the need to set up a complex administrative system was not perceived, and even avoided in order to maintain executive power at national level, encouraging the growth of the new system.

This political choice led, in combination with other well-known factors – such as the tendency to recognise juridical relevance only to the conclusive act of the

14 See S. CASSESE, *Il procedimento amministrativo europeo*, in F. Bignami-S. Cassese (a cura di), *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 31; G. DELLA CANANEA, *I procedimenti amministrativi composti*, *ivi*, 307 *et seq.*; ID. *The European Union's Mixed Administrative Proceedings in Law and Contemporary Problems*, 2004, p. 197 *et seq.*, at <scholarship.law.duke.edu>. See also, more recently, J. ZILLER, *Les concepts d'administration directe, d'administration indirecte et de coordination et le fondements du droit administratif européen*, in J.B. Auby-J. Duthiel de la Rochere (edited by), *Traité de Droit Administratif Européen*, Bruxelles, Bruylant, 2014, p. 327 *et seq.*; M.P. CHITI, *La legittimazione per risultati dell'Unione europea quale "comunità di diritto amministrativo"*, in *Riv. it. dir. pubbl. com.*, 2, 2016, p. 397 *et seq.*, spec. 414.

proceeding and the lack of distinction between normative and administrative acts¹⁵ – to a lack of interest in the procedural phenomenon.¹⁶

Not even the earliest studies on European administration, at first, investigated procedural aspects, being focused, as happened at national level, on the study of Community institutions and their acts¹⁷ rather than the procedure leading to those acts.¹⁸

The reversal of this trend is related to the changing landscape described above, to the enhancement of Community powers¹⁹ and to the expansion of the array of European administrations, often provided with direct executive powers.²⁰ Also significant were the spread of new forms of action based on co-operation between national and EU authorities (co-ordinated procedures),²¹ or the involvement, in the same proceeding, of national and EU administrative acts (composite procedures).²²

15 See Articles 202 and 211 TEC today replaced, in practice, by Articles 16 TEU and 290-291 TFEU. Among scholars, G. DELLA CANANEA, *L'amministrazione europea*, in S. Cassese (eds.) *Trattato di diritto amministrativo generale*, *supra*, note 13, p. 1803 *et seq.*

16 C. FRANCHINI, *I principi applicabili ai procedimenti amministrativi europei*, in F. Bignami-S. Cassese (eds.) *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 282 *et seq.* For a comparative perspective see S. BATTINI-B.G. MATTARELLA-A. SANDULLI, *Il procedimento amministrativo*, in G. Napolitano (eds.) *Diritto amministrativo comparato*, Giuffrè, Milan, 2007, p. 107 *et seq.* See also S. STICCHI DAMIANI, *L'atto amministrativo nell'ordinamento comunitario*, Giappichelli, Turin, 2006, p. 28 *et seq.*

17 G. DELLA CANANEA, *I procedimenti amministrativi dell'Unione Europea*, *supra*, note 2, p. 502.

18 Among the earliest studies on the topic, see A. WEBER, *Il diritto amministrativo procedimentale nell'ordinamento della Comunità europea*, in *Riv. it. dir. pubbl. com.*, 1992, p. 393 *et seq.* For the first monograph on European Administrative Procedure see H.P. NEHL, *Principles of Administrative Procedure in EC Law*, Hart, Oxford, 1999.

19 Traditionally attributed to the introduction of both the Single European Act (SEA) and the Treaty on European Union (TEU) (see G. BOSCO, *Commentaire de l'Acte unique européen des 17-28 février 1987*, in *Cahiers de Droit Européen*, 1987, p. 371 *et seq.*).

20 It is worth underlining that this new trend did not lead to a complete removal of the “executive federalism”, still provided by Article 290 TFEU, stating, as a rule, that Member States shall adopt all measures of national law necessary to implement legally binding Union acts, and giving implementing powers to the Commission and to the Council as an exception.

21 See M.P. CHITI, *I procedimenti composti nel diritto comunitario e nel diritto interno*, *supra*, note 10, p. 55. In G. DELLA CANANEA, *I procedimenti amministrativi dell'Unione europea*, in M.P. Chiti-G. Greco (eds.), *Trattato di diritto amministrativo europeo*, *supra*, note 2, p. 528.

22 See G. DELLA CANANEA, *I procedimenti amministrativi composti dell'Unione europea*, in F. Bignami-S.

The diffusion of mixed procedures imposed to acknowledge the relevance of administrative procedure at EU level²³ also gained an organisational aspect,²⁴ allowing the different actors involved to exchange information and co-operate. It also raised new questions regarding the judicial protection of individual interests,²⁵ especially in terms of reviewability of intermediate procedural measures, but also the *audi alteram partem* principle and the guarantee of a complete gathering of information.²⁶

Cassese (edited by) *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 307 *et seq.*

23 On “procedural fairness” see J.A. USHER, *The CE Good Administration of European Community Law*, in *Current Legal Problems*, 1985, p. 269 *et seq.*, in which the A., observing the emergence of the principle of good administration in case law, combined with good faith, fairness, and diligence, stated that «in many cases [...] the failure on the part of an EC institution to observe the principles of good administration does not in itself affect the legality of what has been done» (284). See also E. PICOZZA, *Il regime giuridico del procedimento amministrativo comunitario*, in *Riv. it. dir. pubbl. com.*, 1994, 321 *et seq.*, and the already quoted monograph by H.P. NEHL, *Principles of Administrative Procedure in EC Law*, *supra* note 19; A. MASSERA, *I principi generali*, in M.P. Chiti-G. Greco (eds.), *Trattato di diritto amministrativo europeo*, *supra* note 2, p. 356 *et seq.*; D. DE PRETIS, *Procedimenti amministrativi nazionali e procedimenti amministrativi europei*, in G. Falcon (eds.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario*, *Ricerche e tesi in discussione*, Cedam, Padua, 2008, pp. 49-72.

24 See M.P. CHITI, *I procedimenti composti nel diritto comunitario e nel diritto italiano*, *supra* note 10, p. 55 *et seq.*; G. DELLA CANANEA, *I procedimenti amministrativi dell’Unione Europea*, *supra* note 2, 508 *et seq.* For the description of European administrative proceedings as tools to ensure the uniform, or at least combined, exercise of different and separated powers, see S. CASSESE, *Il procedimento amministrativo europeo*, *supra* note 2, p. 37.

25 Among general principles of EU law the very existence of effective legal protection designed to ensure compliance with EU law is the essence of the rule of law. A generally accepted principle of modern legal systems and enshrined in national constitutions (see Art. 24, 101, 111 and 113 of the Italian Constitution), as well as international treaties (see Art. 6 and 13 ECHR), the principle of effective legal protection is considered a general principle of Community law by the Court of Justice (CJEC 15 5 1986, C-222/84, *Johnston*) and lastly incorporated in Article 47 CFREU. At national level, the Italian code of administrative court procedure (Leg. Dec. 2 July 2010, no. 104 s.m.i.) states that «The administrative jurisdiction shall ensure full and effective protection in accordance with the principles of the Italian Constitution and European law». Among scholars, see M.A. SANDULLI, *Fonti e principi della giustizia amministrativa*, at giustizia-amministrativa.it, 2008; ID., *Principi costituzionali e comunitari in materia di giurisdizione amministrativa (Relazione al Convegno di diritto amministrativo su Riflessioni sulla giurisdizione del giudice amministrativo svoltosi a Gaeta il 22 maggio 2009)*, at giustamm.it, 2009 also published in M.A. Sandulli (eds.) *Il nuovo processo amministrativo*, Giuffrè, Milan, 2013, I.

26 The question of the reviewability of intermediate procedural measures has been taken into account in many studies: among others see E. GARCÍA DE ENTERRIA, *La ampliación de la competencia de las jurisdicciones administrativas nacionales per obra del derecho comunitario*, *supra* note 2; M.P. CHITI, *I procedimenti composti nel diritto comunitario e nel diritto italiano*, *supra* note 10, p. 63; more recently ID. *I procedimenti amministrativi composti e l’effettività della tutela giurisdizionale*, *Giorn. dir. amm.*, 2, 2019, p. 187 *et seq.* In the field of electronic communications see L. SALTARI, *I procedimenti comunitari composti: il caso delle telecomunicazioni*, in *Riv. trim. dir.*

3. The Oleificio Borelli Case: Preliminary Remarks on the European Agricultural Guidance and Guarantee Fund (EAGGF)

To better outline the circumstances behind the Oleificio Borelli case, it is necessary to briefly discuss the features of funding proceedings through the EAGGF in place at the time of the relevant facts.²⁷

According to the aim of increasing agricultural productivity by developing technical progress and ensuring the rational development of agricultural production, typical of the CAP (Common Agricultural Policy, Art. 39, para. 1, lett. a TEEC) the Community legislator established the European EAGGF (Art. 40, no. 4, TEEC) and regulated the founding procedure of this important European policy (see Regulation No. 25 of 1962 on the financing of the CAP, as amended by Regulation (EEC) No. 728/70).

The allocation procedure of the EAGGF represents, within the framework of CAP implementation, an example of composite procedure. As will be further analysed below, the fund disbursement field within CAP is still characterised, despite the development of the legal framework, by models of co-administration.

It is well known that the structural funds of the Union constitute enduring financing instruments, designed to support the Commission and the Member States during the establishment, implementation and funding of the EU structural policies. Essentially, the Fund contribution lies in subsidies co-financed by the beneficiary itself, by the Commission (amounting to an average 25%) and by the Member State (usually a 5% share), granted on the basis of projects approved by the Commission and the Member State involved.

pubbl., 2005, 2, p. 389 *et seq.* spec. p. 429 *et seq.* More recently H.C.H. HOFMANN-M. TIDGHI, *Rights and remedies in implementation of EU policies by multi-jurisdictional networks*, in *European Public Law*, 2014, spec. p. 147 *et seq.*

²⁷ Reg. no. 1782/2003 established two new Funds: the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). The new Funds are regulated by Reg. no. 1290/2005 of the Council, of 21 June 2005, on the financing of the common agricultural policy. The current legal framework, that will be further examined below, provides for detailed “Fund-specific Regulations” for each type of Fund and a general regulation (no. 1303/2013) laying down common provisions (P. CHIRULLI, *Amministrazioni nazionali ed esecuzione del diritto europeo*, in B. Marchetti-L. De Lucia (eds), *L'amministrazione europea e le sue regole*, *supra* note 5). For issues arising from the new legal framework see B. MARCHETTI, *Fondi strutturali e tutela giurisdizionale: variazioni degli schemi regolatori e conseguenze sull'architettura giudiziaria dell'UE*, in *Riv. it. dir. pubbl. com.*, 2012, p. 1150 *et seq.*

For the limited purposes of this study, it is necessary to examine in greater detail the legislation relevant to the case.

Council Regulation (ECC) No. 335/77 outlines, providing a scant legal framework, the granting procedure for the Fund. The legislation foresees, firstly, the development by the Member States of “programmes” designed to develop the treatment, processing or marketing of one or more agricultural products. These programmes are subject to the Commission’s approval, responsible for deciding on a binding opinion of the Standing Committee on Agricultural Structure. What is then expected is the drafting of “projects”, bringing in state-level defined “programmes”, aimed at contributing to improving the situation of the basic agricultural production sector, by ensuring producers an adequate and lasting share in the economic benefits derived from the programme itself (Art. 9). Criteria for granting aid from the Fund are listed in Article 11, while the project examination procedure is defined in Articles 13 and 19. The procedure provides for the involvement of three players: the beneficiary, the Member State and the Commission.

To benefit from the contribution, all applications for aid from the Fund, accompanied by all the information required to ascertain the matching criteria laid down in Article 11, must, first of all, obtain approval from the Member State in the territory of which the project is to be carried out, and only then they can be submitted to the Commission through the national authorities. The Commission decides on the applications submitted during the previous semester twice a year (6/30 and 12/31), after the Fund Committee has been consulted on the financial aspects. The decision, adopted on a binding opinion of the Standing Committee on Agricultural Structure, is notified to the Member State concerned and the beneficiary.

Article 21 relates to the specific circumstance in which the insufficiency of resources available prevents the granting of aid: in this case, applications can be “carried forward”, in agreement with the applicants, to the next financial year. This procedure takes place through a “request to carry forward” presented by the Member State to the Commission, within thirty days following the communication of a negative outcome.

The legislative process can be illustrated as follows:

Step 1 (Applicant): presentation of the application to the Member State;

Step 2 (Member State): granting of approval;

Step 3 (Member State): forwarding the duly examined application to the Commission;

Potential steps in the event of a shortage of available funds:

Potential step 1 (Commission): communication of insufficiency of resources;

Potential step 2 (Member State): application to carry forward to the next financial year within thirty days;

Step 4 (Commission): final decision of the Commission (following consultation with the Fund Committee upon projects submitted or carried forward) with the necessary precondition of approval by the Member State.

The close cooperation provided by the Member States to the procedure of funding allocation can be attributed to the shared nature of the funding, financed both by the Commission and by the Member State. Nevertheless, the outlined procedure represents a typical hypothesis of dissociation between the authority charged with the task of gathering and providing information and the one responsible for the final decision.

3.1. The facts and the judgment of the Court

The Oleificio Borelli S.p.A. company brought an action before the Court of Justice for the annulment (ex Art. 173 EEC, now 263 TFEU) of the denial of the Commission for the issuing of the EAGGF contribution for the 1990 financial year.

The application, accompanied by the necessary approval from the Liguria Region, was initially presented for the financial year 1989, but, due to the unavailability of financial resources, was carried forward to the next financial year, in accordance with Article 21 of the above-mentioned Regulation No. 355/77. Pending the re-enactment, the Italian Authorities informed the Commission, by letter dated January 1990, of the unfavourable opinion of the Liguria Regional Council concerning the original request; in line with this, the Commission issued the contested refusal.

The appellant contested the unfavourable opinion of the regional administration directly before the Court, arguing that the related nature of “preparatory” or “intermediate” measure would have precluded its appeal before the competent Italian Courts. On that specific point, however, the Court rejected the appeal on grounds of competence, stating that it could not rule on the validity of an act issued by a national authority.

The Advocate General Darmon concluded²⁸ in favour of the legitimacy of the rejection stated by the Commission because of the lack of the necessary favourable opinion from the Member State. In particular, the thesis proposed by the applicant company, for which the validity of the funding application should have been assessed and “photographed” at the moment of the first submission – without taking into account that, pending the carry-forward period, the basis of the acceptance of the application with the favourable opinion of the national authority no longer prevailed – was rejected, in consideration of the crucial role played by the national opinion during the *de quo* procedure, to enforce the guarantee of the willingness of the Member State to participate in the shared funding. In his conclusion, Advocate dealt at length with the nature of the unfavourable opinion offered, concluding that it could not have been considered an intermediate measure which could not be appealed with the national legislation, since Borelli S.p.A. was responsible for bringing proceedings in the national courts and, if the action should be declared inadmissible, «to raise the question that the principle of the “right to an effective judicial remedy” may have been infringed».

The Court’s decision confirmed the rejection, by adding that, since the funding proceedings preclude the Commission from examining the project facing an unfavourable opinion, it would have been precluded *a fortiori* from reviewing the lawfulness of the national opinion (pt. 11). Such a circumstance would have determined the “imperviousness” of the Court decision to any potential invalidity of the act the prerequisite of which was the competence of the Member State («any irregularity that might affect the opinion cannot affect the validity of the decision by which the Commission refused the aid applied for»)²⁹.

This final act, the Court stated, should have been brought before the national courts. With regard to the protested inadmissibility of the claim against the opinion, the Court stated that it is up to national judges to rule, where appropriate after obtaining a preliminary ruling from the Court, on the lawfulness of the national measure,

28 Advocate General Darmon’s opinion, on 9 June 1992, case C-97/91.

29 For a more detailed look at the question of the immunity of vices in national acts at European level, see R. CARANTA, *Sull’impugnabilità degli atti endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione*, *supra*, note 11, spec. p. 758 *et seq.*

regarding «an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case».

3.2. The reviewability of intermediate procedural measures and the advice of the Liguria Region: the issue of Step 2

The most quoted principle stated by the abovementioned *leading case* is the one in which it is claimed that the requirement «of judicial control of any decision of a national authority» reflects a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR, and it requires the overcoming of the obstacles set by the relevant internal procedure which does not allow the contesting of the unfavourable opinion provided by state organs. The Court, adopting a principle already enshrined in previous judgments,³⁰ specifies that the right to an effective legal remedy legitimises the restriction on the procedural autonomy of the Member States and requires additional guarantees.

It should be pointed out that the principle of “procedural autonomy”, the impact of which has been thoroughly investigated by scholars,³¹ was defined with increasing detail by the case law of the Court of Justice and refers to the “independent” choice, recognised to the Member States, of the means aimed to grant effectiveness to Community legislation. The principal validity shall be derived indirectly via the Treaty rules, examined from the viewpoint of the principle of conferral,³² that do not confer the powers to legislate on procedural matters on the EU.³³

30 CJEU, 15 10 1987, in C-222/86, quoted in the case mentioned in the text, stated that «the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right. As the Court held in its judgment of 15 May 1986 in Case 222/84... that requirement reflects a general principle of Community law which enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms» It is well known that the right to an effective legal remedy is today enshrined in Arts. 47 CFREU and 19 TFEU.

31 See D.U. GALETTA, *L'autonomia procedurale degli Stati membri dell'Unione europea: Paradise Lost?*, Giappichelli, Turin, 2009 and the English version: *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the “Functionalized Procedural Competence”, of EU Member States*, Springel, Heidelberg, 2010.

32 According to the interpretation of Article 5, paragraph 1 TEU, given by the CJEU.

33 More recently M.C. ROMANO, *Situazioni legittimanti ed effettività della tutela giurisdizionale. Tra ordinamento europeo e ordinamenti amministrativi nazionali*, Jovene, Naples, 2013; M. LOTTINI, *Principio di autonomia*

“Procedural” rules, covered by the aforementioned principle, shall include the set of formal and substantive regulations which, in each Member State, govern national disputes.³⁴ Procedural autonomy has been raised in relation to purely procedural dispositions (such as the time limits to file claims before the courts) as much as with respect to substantive and procedural rules (for instance, limits within which a granted benefit can be legitimately withdrawn). Although the circumstance that the EU is not a competent regarding procedures implies that, within this specific field, the primacy of Community law holds only a mediated relevance, through the principle of “*effet utile*”, this did not prevent case law establishing firm limits in procedural autonomy, precisely for the need of granting the *effet utile* of the principle of *direct effet*³⁵ and thus, *ipso facto*, the primacy of Community law,³⁶ regarding the obligation to interpret national law in conformity with Community law.³⁷ As is well known, the primacy of EU law and the obligation affecting internal judges to interpret national law so that it does not involve a limitation of rights enshrined by the EU legal system are reflected within the framework of procedural rules through the so-called *Rewe criteria*³⁸ of

istituzionale e pubbliche amministrazioni nel diritto dell’Unione Europea, Giappichelli, Turin, 2017 with a focus on institutional autonomy, and F. APERIO BELLA, *Tra procedimento e processo. Contributo allo studio delle tutele nei confronti della pubblica amministrazione*, Editoriale Scientifica, Naples, 2017.

34 See J. MARTENS DE WILMARS, President of the I Chamber of the CJ at the time of *Rewe case*, *L’efficacit  des diff rentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorit s nationales et les particuliers*, 1981, spec. p. 390.

35 The principle of direct effect, stated in the *van Gend & Loos* case (5 2 1963, in C-26/62) and repeated in the well-known *Costa c. Enel* case (15 7 1964, in C-6/64), refers to the capacity of EU law to create directly rights and duties on the addressees («senza cio  che lo Stato eserciti quella funzione di diaframma che consiste nel porre in essere una qualche procedura formale per riversare sui singoli gli obblighi e i diritti», G. TESAURO, *Diritto dell’Unione Europea*, Cedam, Padua, 2012, p. 189 *et seq.*).

36 D.U. GALETTA, *supra*, note 32, p. 20.

37 It is well known that this principle has been derived from Art. 4, para. 3 TEU. It implies that in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty (13 11 1990, in C-106/89, *Marleasing*, par 8). It follows that the national provision may not be interpreted in a way that precludes the full application of EU rights (see G. DELLA CANANEA, *Il rinvio ai principi dell’ordinamento comunitario*, in M.A. Sandulli (eds) *Codice dell’azione amministrativa*, Giuffr , Milan 2017, 2^a ed., p. 133 *et seq.*).

38 See CJEU, 16 12 1976, in C-33/76, more recently, *ex multis*, CJEU, 3 9 2009, in C-2/08, *Olimpiclub*.

equivalence and effectiveness.

In the case at issue the procedural autonomy is so limited as to allow the Court of Justice to profile an obligation on the Member State (and, through that, on its judges) to grant a further remedy beyond the existing ones, ruling that «it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure at issue... and, consequently, to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case».³⁹

Scholars have not failed to highlight how in spite of the “aggressive” approach of the Court of Justice to the judgment under examination, the case law that took up the so-called “dottrina Borelli” in relation to the right to an effective remedy (Arts. 47 CFREU and 19 TFEU) has adopted a more moderate approach, emphasising the requirement of *necessity* to justify “supplementary” interpretations such as the one submitted in this case.⁴⁰ Only when the national system, examined as a whole, does not provide an effective remedy, has it been claimed that national judges are obliged by Community law to develop a new remedy.

By observing the facts of the Borelli case against this backdrop and within the requirement of *necessity* an immediate objection arises about the circumstance assumed to have hampered the effective compliance of Community law and imposed a revision of Italian procedural law: the preclusion to challenge the opinion before the national courts.⁴¹ It is from such assumption that the Advocate General begins reasoning, followed by the Court, stating that «It was therefore for Borelli to bring proceedings in the national courts. It would then have been open to such a court to make a reference under Article 177 of the EEC Treaty to the Court of Justice for a preliminary ruling on

39 See paragraph 13.

40 H.C.H. HOFMANN, *Art. 47 – Right to an Effective Remedy*, in S. Peers-T. Harvey-J. Kenner-A. Ward (eds.) *The EU Charter of Fundamental Rights. A Commentary*, Hart, Oxford and Portland, 2014, spec. p. 1217.

41 The issue has been specifically mentioned by scholars «*Un informe o acto consultivo no es recurrible, en efecto, en ninguno de los sistemas nacionales del contencioso-administrativo y a partir de ahora van a serlo en esta clase de procedimientos en virtud de la doctrina Borelli que comentamos*» (E. GARCÍA DE ENTERRÍA, *La ampliación de la competencia de las jurisdicciones contencioso-administrativas nacionales por obra del Derecho Comunitario*, *supra* note 11, p. 883).

questions concerning the interpretation or validity of rules of Community law to the extent to which it considered that a decision on such a point was necessary to enable it to give judgment».⁴²

The assumption seems to be denied by reading the national administrative rulings which admitted, already at the time of the relevant facts, contestability of the opinions determining a procedural stop (Council of St., sect. V, 8 11 1982, no. 767; Id., Plenary Session, 10 7 1986, no. 8; Id., sect. V, 29 12 1987 no. 832).⁴³

In view of this fact it is reasonable to suppose nothing would have precluded the administrative judge deciding on the opinion of the Region, therefore there would have been no reason to directly contest it before the Court of Justice nor to impose on the national legal system the establishment of any further remedy in addition to those already existing.⁴⁴

The lack of protection criticised by the applicant company was not due to the fact that Italian administrative justice was ill-suited to deal with the instances of mixed decision making, as argued during the trial,⁴⁵ but from the particular features of the “substantive” procedure, which did not allow for a complete exchange between the applicant and the Italian State, after the transfer of information to the Commission.

42 See paragraph 33.

43 Among scholars, see A.M. SANDULLI, *Manuale di diritto amministrativo*, Jovene, Naples, II, 1989, p. 1219 *et seq.* Also in the Spanish legal system, already at the time of the relevant facts, it was admissible to challenge intermediate procedural measures by means of which «*se deciden directa o indirectamente el fondo del asunto*» even if «*de tal modo que pongan término a aquella /la vía administrativa / o hagan imposible o suspendan su continuación*» (see Art. 37 Ley de la Jurisdicción contencioso-administrativa mentioned by E. GARCÍA DE ENTERRÍA, *La ampliación de la competencia de las jurisdicciones contencioso-administrativas nacionales por obra del Derecho Comunitario*, *supra* note 11, p. 833).

44 It will be shown in the following pages that the contradiction is only apparent considering that, according to the composite feature of the procedure, the applicant became aware of the negative opinion of the Liguria Region only by receiving the denial of funding by the Commission. This is the reason why the applicant brought the proceeding before the Court of Justice seeking the annulment of both measures.

45 It seems to be stated by G. MASTRODONATO, *Procedimenti amministrativi composti nel diritto comunitario*, Cacucci, Bari, 2008, p. 114 *et seq.* The A. derives the principle of inadmissibility of claims against intermediate procedural measures from case law in electoral matters. The specific features of such a matter do not contradict but confirm the abovementioned case law which admitted, at the time of the relevant facts, the contestability of opinions leading to a procedural stop.

In summary the *vulnus* was not due to the procedural rules of the Italian administrative courts, but rather shortcomings of the composite proceedings of the Fund (or, at best, to Community rules on procedure for the part where, limiting the control of the Court of Justice, redress of the aforementioned procedural shortcomings was prevented).⁴⁶

From the procedural perspective, which specifically interests us here, Regulation 355/77 does not provide for a communicative obligation for the Member State during the delivery of the statement.

The peculiarities of the case further complicate the picture: it was an opinion stated to revoke the initial position expressed by the Region⁴⁷ and the case documents (judgment, report for the hearing, Advocate General's opinion) confirm that the adverse opinion provided by the Liguria Region was not submitted to the applicant, but only to the Commission.⁴⁸ Even if preliminary exchanges between the firm and the Region to assess the application are acknowledged⁴⁹ and there is also a preliminary inquiry

46 The issue that arose in the Borelli case should have been resolved following an alternative pattern: considering the powers of the Court of Justice as broader, allowing the Court to evaluate the lawfulness of the decision of the Commission the annulment of which was sought, also in the light of previous decisions. This solution assumes the CJEU can overcome its traditional *self-restraint* in evaluating Member States' authority measures (see R. CARANTA, *Sull'impugnabilità degli atti endoprocedimentali*, *passim*, *supra*, note 11 and more recently H.C.H. HOFFMANN-M. TIDIGHI, *Rights and Remedies*, *supra* note 27, p. 158 *et seq.*). See also F. BRITO BASTOS, *The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice*, in *Review of European Administrative Law*, 8, 2015, p. 269 *et seq.* where the abovementioned *self-restraint* of the CJ is described as "*substantive Borelli principle*" and compared to the so-called "*jurisdictional Borelli principle*", regarding the issue of reviewability of intermediate procedural measures. The approach of the Luxembourg's judges on this topic seems to be evolved: see CJEU, Grand Chamber, 19 12 2018, in C-219/17, especially paragraph 49 *et seq.* and the remarks of M.P. CHITI, *I procedimenti amministrativi composti e l'effettività della tutela giurisdizionale*, *supra*, note 26.

47 See paragraph 29 AG Darmon's opinion of 9 June 1992 «That opinion therefore clearly had the effect of revoking the approval initially given by the Regional Council of Liguria».

48 See paragraph 12 AG's opinion «The Italian authorities went back on their initial decision and on 19 January 1990 informed the Commission that the Regional Council of Liguria, by Decree No 109 of 18 January 1990, had issued an *unfavourable* opinion on Borelli's application».

49 See paragraph I Report of the hearing, where it is stated that, after the Provincial Agri-Food Department of Imperia and the competent councillors of the Regions concerned had expressed doubts as to the reliability of the contracts submitted with the application for aid, Borelli replaced the contracts giving further clarification.

initiated by the Commission itself to obtain documentary integration,⁵⁰ there is no evidence of the opinion being transmitted to the company. This circumstance seems to be confirmed since the applicant appears to fully hear the content of the opinion only during the proceedings (and this determines, accordingly, a modification of the application during the proceedings).

Here, the real issue of the application moves from the problems associated with the procedures of the national court to the lack of procedural safeguards at the confluence of national and EU law.

4. The need to turn to codification of administrative procedures and the ReNEUAL proposal

As stated in the opening paragraphs, the drawing-up of principles of administrative procedure has been traditionally a “praetorian” prerogative of the CJEU because of the significant fragmentation into sector-specific and issue-specific rules and procedures of EU administrative law. Beside the highly regulated sectors where procedural rules are varied and detailed (the public procurement sector is one example),⁵¹ the rather experimental design of procedural rules in many other fields of EU law, or their absence, requires the use of general principles of EU administrative law to fill the gaps.

In this framework, although the administrative principles common to the Member States represented for decades the only “guidance” of CJEU case law, the abovementioned evolutions related to the entry into force of the Treaty of Lisbon accelerated the expansion of those principles. Scholars effectively described Article 41 of CFREU as *«l’axe ou la colonne vertébrale d’une future codification de la partie générale du droit administratif de l’Union»*.⁵²

50 See para. III Report of the hearing «the Community authorities which received the documentation relating to the contracts (Annex XVII to the application) confined themselves to asking Borelli for further particulars of a different nature».

51 G. DELLA CANANEA, *L’amministrazione europea*, *supra*, note 13, p. 1888.

52 E. SCHMIDT-ASSMANN, *Principes de base d’une réforme du droit administratif*, *cit.*, p. 671. Among the Italian studies devoted to analysing the code of administrative procedure (Law no. 241/1990) from a comparative perspective see M.A. Sandulli (ed.), *Il procedimento amministrativo in Europa, Atti del convegno di Milano*, Giuffrè, Milan, 2000.

The growing relevance of written sources on general principles of administrative procedure and the concurrent constitutionalisation of EU law⁵³ imposed on legal practitioners⁵⁴ as well as on EU institutions the requirement to consider the need to “codify” common procedural standards (see the European Parliament resolution of 15 January 2013 with recommendations for the Commission on a Law of Administrative Procedure of the European Union,⁵⁵ and, more recently, the European Parliament resolution of 9 June 2016).⁵⁶

The ReNEUAL model rules set out proposed accessible, functional and transparent rules which make visible the rights and duties of individuals and administrations alike.

The ReNEUAL *Working Team* shaped a “Model” for legal practitioners, both at academic and institutional level.

Starting from the latter, model rules attracted the attention of EU institutions (see the abovementioned resolutions of the European Parliament of 2013 and 2016) and could lead to the adoption of a Regulation or more coordinated normative acts.⁵⁷

Irrespective of the concrete use of model rules in future legislative projects, they undoubtedly spur further academic debates offering a catalogue of rules (partially emerging from case law and partially designed *ex novo*, following an *innovative codification* approach), which can make the system of EU administrative procedure

53 See A.V. BOGDANDY, *I principi costituzionali dell'Unione europea*, at *federalismi.it*, 2005; *I principi fondamentali dell'Unione europea. Un contributo allo sviluppo del costituzionalismo europeo*, Napoli, Univ. Suor Orsola Benincasa, 2010, p. 20 *et seq.*; A. PIZZORUSSO, *Il patrimonio costituzionale europeo*, Il Mulino, Bologna, 2002.

54 The need to take into account rules on administrative procedure at EU level after the Treaty of Lisbon is demonstrated, in addition to the authors already quoted, is underlined by A. MEUWESE-Y. SHUURMAN-W. VOERMANS, *Towards a European Administrative Procedure Act*, in *Review of European Administrative Law*, 2009, 2, p. 3 *et seq.* For a position hostile to the codification see G. BERTEZZOLO, *Serve una codificazione del procedimento amministrativo europeo?*, in M. Malo-B. Marchetti-D. de Pretis (eds) *Pensare il diritto pubblico*, Liber Amicorum per Giandomenico Falcon, Editoriale Scientifica, Naples, 2015, p. 75 *et seq.*

55 European Parliament resolution 2012/2024(INL).

56 European Parliament resolution 2016/2610/RSP, with attached a draft of a Regulation of the European Parliament and the Council.

57 G. DELLA CANANEA-D.U. GALETTA, *Codice ReNEUAL del procedimento amministrativo dell'Unione Europea*, *supra*, note 14, XXVII.

more functional and transparent. It is well known that the process of bringing together in one document existing principles, which are scattered across different laws and regulations and in the case law of courts, is *per se* a factor of simplification, facilitating access to the rules.⁵⁸

The ReNEUAL model rules force legal practitioners to face standard models for decision-making procedures at EU level, looking with new eyes at administrative procedure rules both at EU and national level (the influence on the national legal systems is unquestionable, at least from a “cultural” perspective).

5. The Solution Provided by the ReNEUAL Model Rules in the Regulatory Framework of the Borelli Case

After clarifying the facts and the main legal issues that arose in the Borelli case, it is worth verifying if the ReNEUAL Model Rules provide a possible answer.

For this purpose, it is Book III, concerned with single-case decision-making, that has to be taken into account first and foremost.

Although only some national codes of administrative procedure of EU Member States regulate administrative rulemaking, no codification of this kind neglects single-case decision-making, which also has a central role in Italy.⁵⁹

The drafting technique chosen by the *Working Group* provides for an introduction devoted to “motivate” and “explain” the normative choices (as the EU lawmaker does with the “Whereas”). The introduction to Book III, while highlighting that «The model rules do not seek to eliminate the particularities of sector-specific legislation», takes into account precisely the EU legislation containing «procedural and substantive conditions for eligibility to EU funds» (para. 5), stating that such conditions are mainly determined on a case-by-case basis and adding that the applicable “lex specialis” must be interpreted «in the light of the model rules» (para. 5 cit.). In more

58 Regarding the simplifying effect of the “codification process” that occurred with the Italian rules on administrative court procedures see M.A. SANDULLI, *Anche il processo amministrativo ha finalmente un codice*, at federalismi.it, 2010, p. 14, *passim*.

59 C. NAPOLITANO, *Verso la codificazione del procedimento amministrativo dell’Unione europea: problemi e prospettive*, *supra* note 14, p. 297.

specific terms, according to the “*lex specialis principle*” regulating the relation with the specific procedural rules of the EU,⁶⁰ model rules play a paradigmatic but subsidiary role in the procedural and substantive conditions for eligibility for EU funds.

Article III-8, regarding the «Management of procedures and procedural rights», despite not concerning specifically composite procedures, plays an important role. It includes among the rights of the parties (*i.e.*, the addressee of the intended decision and other persons who are adversely affected by it and who request to be involved in the procedure) the right «to be notified of all procedural steps and decisions that may affect them in accordance with Article III-33» (para. 1, lett. d).⁶¹ The wide meaning chosen to describe the object of the prescribed notification (“all procedural steps and decisions”) should allow, also in composite procedures, the filling of the informative gaps between the players involved at each level.

In the same way, Article III-30 may have an impact, even if indirect, on composite administrative procedures, stating that the decision shall provide information to the addressee concerning the possibility to appeal and the competent authority.⁶² The provision may be useful when the mixing of procedures jeopardises the proper identification of the competent review body.⁶³

60 See Article «I-2 *Relation to specific procedural rules of the European Union*» («*Rapporto con specifiche norme procedurali dell’Unione Europea*»).

61 Article III-8 (Management of procedures and procedural rights) «(1) The parties shall have the following rights related to the management of the procedure: (a) to be given information on all questions related to the procedure in a fast, clear and understandable manner; ... (d) to be notified of all procedural steps and decisions that may affect them in accordance with Article III-33...».

62 Article III-30 (Duty to indicate available remedies) «(1) Decisions shall provide information to the addressee concerning: (a) the possibility of administrative appeal, where this exists, including cases where an appeal can be made to a public authority other than that which adopted the decision, and (b) the time limit for making an appeal. (2) Decisions shall also inform the addressee of the possibilities of judicial challenge, including the time limits within which this can be brought, and of possible recourse to an Ombudsman».

63 See the Conclusions of E. SCHMIDT-ASSMANN, in G. DELLA CANANEA-D.U. GALETTA, *Codice ReNEUAL del procedimento amministrativo dell’Unione Europea*, *supra*, note 14, XXXIII. More recently see D.U. GALETTA-H.C.H. HOFMANN-O.M. PUIGPELAT-J. ZILLER, *Proposal for a Regulation on the Administrative Procedure of the European Union’s institutions, bodies, offices and agencies*, europarl.europa.eu/studies, 2015, p. 29, where is stated that «The duty to indicate available remedies..., which is foreseen in many national APAs, is very positive, since it facilitates the use of existing remedies by the parties, especially in composite procedures between the Union’s

It is also worth mentioning Art. III-23, concerning the right to be heard,⁶⁴ which establishes that «every party has the right to notice of the central issues that are to be decided by the public authority and the core arguments that inform its reasoning, in order that the party can effectively make known its views on the matter and can exercise its rights of defence» (para. 3).

This fundamental procedural right is specified having regard to composite procedure in Article III-24, devoted to the «Right to be heard in composite procedures». Paragraph 4 of Article III-24 may apparently “solve” the *Oleificio Borelli* case, stating that «In a case of composite procedure, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles in Article III-23(3)-(5)».⁶⁵ This concrete rule provides for the guarantee of the *right to be heard* in the segment of the composite procedure leading to a “*legally binding recommendation*”.

Some remarks are necessary.

The provision: (i) seems to be applicable only to “recommendations”⁶⁶ and (ii) refers only to legally bound recommendations made by EU authorities, although it also operates having regard to domestic authorities if sector-specific legislation so provides.

administration».

64 Article III-23 (Right to be heard by persons adversely affected) «(1) Every party has the right to be heard by a public authority before a decision, which would affect him or her adversely, is taken.... (3) Every party has the right to notice of the central issues that are to be decided by the public authority and the core arguments that inform its reasoning, in order that the party can effectively make known its views on the matter and can exercise its rights of defence...».

65 Article III-24 (“Right to be heard in composite procedures”) «...(4) In a case of composite procedure, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles in Article III-23(3)-(5). Where sector-specific legislation renders Book III applicable to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the recommendation. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings».

66 According to Article 288 TFEU recommendations are legal acts of the Union which have no binding force.

The narrow wording of the provision is quite easy to overcome assuming that it may be extended to all intermediate measures binding on the final decision.⁶⁷ Such an interpretation seems to be confirmed by the general provision under Art. III-24, para. 1: «The application of the right to be heard will depend on the division of responsibility in the decision-making process». If it is true that the responsibility for taking a decision stems from the binding character of the contribution of the authority involved, it follows that this connection operates regardless of the *nomen iuris* of the act embodying this binding measure.⁶⁸

The statement *sub* (ii) means that whereas the right to be heard of addressees is always safeguarded in cases of the adoption of binding internal measures by EU institutions, the same procedural rule applies to internal measures enacted by domestic authorities only «where sector-specific legislation renders Book III applicable to Member States» (para. 4).

The divergence results from the scope of application of the Model Rules, a topic which is strictly connected to another important issue: finding a legal basis for the codification of administrative procedures in the EU.⁶⁹ The issue cannot be examined here. Suffice to say that the Model Rules are applicable to EU authorities implementing EU law, but they do not apply to the authorities of Member States unless EU sector-specific law renders them applicable (Art. I-1). Books V and VI on legal aid and interadministrative information management, applicable to the administrations of the Member States irrespective of sector-specific legislation, are an exception to this rule.⁷⁰

67 The solution is suggested by the non-binding character of recommendations. The measures in question «are not intended to produce binding effects. Consequently, they cannot create rights upon which individuals may rely before a national court» (CJEU, 13 12 1989, in C-322/88, para. 16).

68 For this principle see, *ex multis*, the quoted CJEU, in C-322/88, paragraph 14: «the choice of form cannot alter the nature of a measure», it must nevertheless be ascertained whether the content of a measure is wholly consistent with the form attributed to it. The same principle is valuable in the Italian legal system (see R. VILLATA-M. RAMAJOLI, *Il provvedimento amministrativo*, Giappichelli, Turin 2006, p. 628).

69 See *Introduction of the ReNEUAL Model Rules* pp. 14-21; among scholars, P. CRAIG, *A General Law in Administrative Procedure, Legislative Competence and Judicial Competence*, *supra*, note 2, *passim*; most recently M. RUFFERT, *The Constitutional Basis of EU Administrative Law*, Lecture hold at the University of Rome, Tor Vergata, on 16 October 2016.

70 Scholars did not fail to underline the “indirect” effects of Model Rules. Even if they are in general not

In accordance with the aforementioned overall intention, the legislation regarding the «right to be heard in composite procedures» provides for a differentiated regime for EU authorities and national administrations.

To compensate for a possible deficiency in sectoral legislation, imposing a respect of the rules on the Member States, and the lack of any other provision of Community law where procedural requirements are specified, the abovementioned Article III-24, Section 4 provides for the national authority to apply national legislation regarding administrative proceedings necessarily complying with EU general principles on “*fair hearings*.”⁷¹

This last legal provision, intervening in a residual manner to grant respect of the observance of the procedural adversarial principle in the part of the composed procedure taking place before the national administrative authorities, even in the lack of an “*ad hoc*” provision, seems, almost standing as “closure rule,” to prevent the risk of a “protection void,” such as the one in the *Oleificio Borelli* case. Continuing with the analysis of the *Rules*, Section 5 of Article III-24 might actually offer a key to solving the case in question. The rule proposes a second-degree solution, assuming the failure of the analysed provisions in view of the not formally binding nature of the recommendation.⁷² According to paragraph 5, in multi-step proceedings «where the EU authority’s decision is predicated on a recommendation made by another public authority and where there was no opportunity for a hearing before such a public authority,» the right to be heard before a decision is taken «shall include knowledge of the recommendation and the ability to contest its findings.» Basically, the provision,

applicable to the authorities of Member States, they can indirectly influence the actions of those authorities. As far as the law of Member States provides for discretion concerning the concrete design of administrative procedures by the competent authorities or even leaves normative gaps, officials of Member States can find guidance in the ReNEUAL Model Rules (Preamble of Book I, I-3, the Italian version in G. DELLA CANANEA-D.U. GALETTA, *Codice ReNEUAL del procedimento amministrativo dell’Unione Europea, supra*, note 14, p. XXVIII).

71 This rule is to be considered applicable to the authorities of Member States if involved in a composite procedure and competent to adopt measures with binding effects.

72 Scholars underlined that «L’articolo III-24(5) affronta una variante della situazione trattata nel precedente paragrafo. Si tratta della situazione in cui esiste una raccomandazione di un’altra autorità pubblica ma essa non è formalmente vincolante per l’autorità pubblica che prende la decisione finale» (G. DELLA CANANEA-D.U. GALETTA, *Codice ReNEUAL, supra* note 14, p. 110).

encompassing the protection system laid out by the outlined institutes, provides for the recovery, before the final decision-maker, of the procedural participation that did not take place before the public authority involved during the infraprocedural stage (in this case too, the obligation lies with the EU authorities and, where required, with the Member States).⁷³

The circumstance that the final decision should somehow include and consider the outcomes of the procedural stage conducted at a different institutional level, is furthermore confirmed in Article III-29 on the subject of «Duty to give reasons»⁷⁴, in which «the duty to provide reasons in cases of composite procedures will be shaped by the respective roles of the EU and the Member State in making the decision.»

By applying the presented rules to a specific case, imagining that a case similar to the one decided by the Court of Justice in December 1992 would unfold during the validity of the Model Rules, it is ultimately possible to state that the regulatory framework under analysis would successfully avoid the “information asymmetry” which prevented the Oleificio Borelli company from enjoying an effective protection of its rights.

In particular, in the first place the fine web of communicative obligations (Art. III-8, Section 1, Point d and III-30) and the compulsory establishment of the adversarial procedure (see Art. III-24, Section 4 and the abovementioned Art. III-23, Sections 3-5) would have allowed the company to challenge the legitimacy of the favourable opinion withdrawn by the Liguria Region before the Italian authorities (in view of the described case law, which already allowed the appeal of infraprocedural acts likely to cause a procedural interruption). Moreover, even where the aforementioned means proves to be insufficient (for instance, due to a lack of specific legislation imposing compliance of the procedural guarantees by the Italian State), the Model Rules would have allowed the rectification of the *gap* in protection detected in

73 Article III-24, paragraph 5.

74 Article III-29 (Duty to give reasons) «The public authority shall state the reasons for its decisions in a clear, simple and understandable manner. The statement of reasons must be appropriate to the decision and must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the decision in such a way as to enable the parties to ascertain the reasons for the decision and to enable the competent court to exercise its powers of review. The duty to provide reasons in cases of composite procedures will be shaped by the respective roles of the EU and the Member State in making the decision, as set out in Article III-24».

the case at hand, by allowing the deficiencies of the part of the trial carried out before the internal authorities to be “counterbalanced” by a full adversarial procedure before the EU institutions (Art. III-24, Section 5).

The case analysed above confirms that the set of principles and rules provided by ReNEUAL implement a system of procedural guarantees which is effective and may overcome the complexity of composite procedures.

6. The Solutions Offered by the Model Rules in the Existing Regulatory Framework

The foregoing considerations represent an outdated delineation of the solutions offered by the *Rules*, moving from an obsolete regulatory framework established by Regulation n. 355/1977.

As previously mentioned,⁷⁵ Regulation n. 1782/2003 introduced a new and simplified payments system for farmers, managed through the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), replacing the European Agricultural Guidance and Guarantee Fund (EAGGF). In this new policy context, the relevant financial rules are laid down in Regulation n. 1290/2005.

In light of the foregoing considerations, we could say that Model Rules can manage critical issues arising from composite procedures, even in the renewed regulatory framework.

The current system is based on the devolution of competences to the Member States for granting and withdrawing funding. In particular, it is up to each Member State, under the EU regulatory framework, to manage the grants, to carry out all the necessary controls to prevent irregularities and frauds and to recover undue financing.⁷⁶ The national authorities (the so-called national paying agencies) play a very special role for

75 See *supra*, note 27.

76 See CGA, 14 September 2009, n. 812, where it is clear that Member States shall comply with the European regulatory framework («i fondi stanziati per il sostegno ai nuovi insediamenti agricoli non appartengono alla Regione, ma sono alla stessa “assegnati”, affinché vengano adoperati per il sostegno alla imprenditoria, secondo i principi e le regole fissate dall’ordinamento comunitario da cui provengono, restando all’ordinamento statale di riferimento ed alle singole regioni spazi operativi e regolamentari nei soli ambiti consentiti dalla disciplina comunitaria di riferimento»).

the beneficiaries of EU funding, since they have no direct contacts with the Commission. The EU Commission plays thus the mere role of ultimate controller of the management activities conducted by the national agencies and, where it is ascertained that there has been an undue disbursement of funds, it can suspend or withdrawn funding.⁷⁷

The above-mentioned new features of the procedure affect the distribution of competences set out in Regulation 1290/2005.

Although the national paying agencies – in an early stage internal to the Member State – examine the requests, control that the financial transactions of the Fund are carried out fairly, prevent and pursue irregularities and recover wrongly paid funds for infringement of the EU regulation (Art. 9, para. 1), the Commission intervenes *ex post*, through the monitoring of the activities of the Member State. In particular, by verifying all documentation submitted by the national agencies (its sole interlocutors), the Commission shall check that management and control systems exist and function properly in the Member States and, if not, it shall reduce or suspend payments (Art. 9, para. 2, Regulation 1290/2005) and comply with the relevant recovery obligations. The Commission may take its decision on the clearance of the accounts on the basis of the completeness, accuracy and veracity of the annual accounts submitted by the Member State (Art. 30) and it may decide to pursue a conformity clearance procedure when it considers that expenditure was not in compliance with Union and national rules, by excluding any expenditure affected by the non-compliance with the procedure. Before any decision to refuse financing is taken, the Commission shall inform the Member State in writing (Art. 31, para. 3).

In summary, on a opposite course to the previous system, the management of the Funds is in the hands of the Member States: only the national paying agencies adopt the necessary acts and measures to ensure correct financial contributions, offer reasonable assurance that the necessary controls have been carried out and have contacts with third beneficiaries. When conformity clearance is carried out, the findings from the Commission's inspection and the Member State's replies shall be notified in writing.

77 B. MARCHETTI, *Fondi strutturali e tutela giurisdizionale: variazioni degli schemi regolatori e conseguenze sull'architettura giudiziaria dell'UE*, *supra*, note 27.

Therefore, the Member State may be required to initiate a recovery procedure.

It is worth noting that, where irregularities or negligence are detected and recovery procedures shall be undertaken by Member States, two exceptions are allowed in Article 32, paragraph 6: (i) if the costs likely to be incurred total more than the amount to be recovered; (ii) if recovery proves impossible owing to the insolvency of the debtor. This, albeit limited, freedom of action of the Member States may affect the protection of the third beneficiary's position because, according to the case-law,⁷⁸ since Member States have discretion in the decision to recover undue payments, their discretionary power precludes the right of beneficiaries to contest the Commission's decision under Article 263 TFUE.

This regulatory framework creates thus a "protection void", such as the one of the *Oleificio Borelli* case. In that case, the final decision of the Commission was based on a binding opinion issued by the Member State (*sub specie* the opinion of the Region) whose proceeding did not allow to contest the decision itself. In this case, the recovery procedure undertaken by the Member State is the result of a decision of the Commission that, although binding on the national agencies, cannot be contested in legal proceedings⁷⁹ by the adversely affected beneficiary.

Beyond all issues relating to legal proceedings, Model Rules offer a possible answer to the above-mentioned protection needs.

In particular, it is worth mentioning the second and third sentence of paragraph

78 See *ex multis*, TUE, 6 June 2002, in *C 105/01, SLIM Sicilia c. Commissione e CGUE*, 2 May 2006, in *C-417/04, Regione Siciliana c. Commissione*, where it is established that «in accordance with settled case-law, the condition that the decision forming the subject-matter of the proceedings must be of direct concern to a natural or legal person, as laid down in the fourth paragraph of Article 230 EC, requires the contested Community measure to affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (see, in particular, *Case C-404/96 P Glencore Grain v Commission* [1998] ECR I-2435, paragraph 41, and *Case C-486/01 P National Front v Parliament* [2004] ECR I-6289, paragraph 34)» (pt. 28).

79 B. MARCHETTI, *Fondi strutturali e tutela giurisdizionale*, cit., *passim*. Special emphasis is put by the Author on the necessity to recognize the third beneficiaries' standing to contest the Commission's acts before the Court of Justice, since actions in national courts are often referred to the Court of Justice for a preliminary ruling. On the binding nature of the "intermediate" decisions taken in composite procedures concerning the judicial protection of people affected by the final provision, see BRITO BASTOS, *The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice*, cit., p. 279 *et seq.*

5 of Article III-24. This specific (and limited) reference is justified by the peculiar structure of the new financing procedure of the common agricultural policy, different from the procedure in force during the Borelli case, which, as already mentioned, could be examined in the light of a number of dispositions of the Model Rules.

We can say that the main features of the new regulatory context are: (i) the “recommendation” adopted by the Commission is not always legally binding; (ii) the final decision is taken by the Member State.

The first element refers to paragraph 5 of Article III-24 (instead of para. 4, concerning binding recommendations), while the need of a national agency’s decision restricts our analysis to the second and third sentence of the aforesaid paragraph 5.

As already mentioned, the basic rule in case of decisions taken on the basis of non-binding recommendations preventing the defendant from defending himself is that the right to be heard before the final decision is taken shall include: «knowledge of the recommendation and the ability to contest its findings» (Art. III-24, para. 5, first sentence). Where, as in the present case, sector-specific legislation of the EU renders Book III applicable to Member States and it is up to the Member States to take the final decision, the preceding obligation applies *mutatis mutandis*.

By applying the Model Rules to an act of secondary legislation, the introduction in the regulatory system governing the common agricultural policy of a disposition making the Model Rules applicable to such sector would oblige Member States to allow third beneficiaries to contest the Commission’s decision during the recovery procedure.

In the absence of such sector-specific legislation or of any EU legislation specifying the aforementioned procedural requirements, the sole guarantee of protection of the third beneficiary’s position would be the aforesaid “closure rule” (Art. III-24, para. 5, third sentence). Such disposition shall include that «the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings».

In conclusion, the case at hand and the examined articles implement a system of procedural guarantees, which is particularly effective and able to overcome the complexity of composite procedures even in the current regulatory context.

It is worth noting that, even if the Model Rules are not translated into rules on administrative procedure covering the non-legislative implementation of EU law and

policies, they still represent an important guide for academia, institutions and, more in general, legal practitioners of EU law. As demonstrated in the previous pages, the Model Rules offer an original and pragmatic solution to a number of critical issues that have arisen in EU procedural practice, which, in accordance with the multi-level evolution of EU administrative law, are certain to arise more and more.