Procedural rights in composite administrative procedures

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Contents

Abstract

The two contributions in this legal working paper discuss the various aspects of composite administrative procedures in the context of both Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) decision-making procedures. It addresses the definition of such procedures, their relevance in the SSM and SRM context, the allocation of powers in such procedures, differences between composite procedures in the SSM and SRM spheres and differences between composite procedures and mere cooperation or exchange of information procedures. They were originally presented at the ECB legal colloquium on 'Composite administrative procedures in the European Union', which took place in Frankfurt am Main in 2020.

The first paper focuses on composite procedures – characterised by a decision-making process that has stages at both the national and the Union level. The final decision in such procedures requires the active participation of both levels. Such procedures result in an entity's or an individual's interests being affected by one uniform act (the final decision), however, the decision-making process itself is regulated during its different stages by different procedural rules and managed by different administrations – both national and European. The participation of different administrations acting within their own legal framework and fulfilling their own responsibilities raises salient issues, which are addressed in this paper, relating to the commitment of the Union and the Member States to the rule of law, good administration and judicial protection.

In particular, the paper focuses on the following procedural and defence rights: (a) legal professional privilege; (b) the privilege against self-incrimination; (c) the right to be heard; and (d) due process requirements.

These rights may be reduced in strength or even eliminated altogether either due to the interconnectedness in composite procedures of the Union and national law spheres, or when punitive law enforcement takes precedence over non-punitive procedures. In this context the paper also examines the established interpretations of procedural and defence rights by both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). The allocation of jurisdiction between the CJEU and national courts on acts emanating from SSM and SRM composite procedures is also considered.

In conclusion, the paper aims to identify potential gaps and contradictions that may arise from the close and mutually dependent cooperation under composite procedures, which result in a uniform final act but which lack an overarching procedural framework.

The second paper considers what falls within the category of actual composite procedures and focuses on composite procedures within the SSM and the SRM, as well as on those composite procedures involving both (national and Union) supervisory and resolution authorities. Subsequently, the paper turns to a number of

problems related to the interpretation of certain specific rules regarding SSM and SRM procedures. In particular, the author addresses: (a) the scope of the protection granted to due process rights in the two different systems, as a result of the different balance of interests at stake; (b) the powers that the ECB and the SRB enjoy, when necessary, to remedy at an early stage any prejudicial consequences that may arise from the national phase; and (c) the side effects of the allocation of jurisdiction between the Court of Justice of the European Union (CJEU) and the national courts.

Keywords: European Central Bank; composite administrative procedures; Single Supervisory Mechanism (SSM); Single Resolution Mechanism (SRM); Due process requirements; national competent authorities (NCAs); national resolution authorities (NRAs), the Single Resolution Board (SRB); procedural and defence rights; legal professional privilege; the privilege against self-incrimination; the right to be heard; national punitive proceedings; admissibility in national proceedings of materials gathered by Union bodies; punitive and non-punitive; allocation of jurisdiction between the Court of Justice of the European Union (CJEU) and the national courts.

JEL codes: K (law and economics);G2 Financial Institutions and Services; G21 Banks • Depository Institutions • Micro Finance Institutions • Mortgages; K2 Regulation and Business Law; K23 Regulated Industries and Administrative Law

Procedural rights in composite administrative procedures

By Christina Eckes[1]

1 Introduction

Composite procedures are characterised by a decision-making process involving both national and Union administrations. The final decision in such procedures requires the active participation of both levels. In the context of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), the relevant administrations are the national competent authorities (NCAs) or the national resolution authorities (NRAs), at the national level, and the European Central Bank (ECB) or the Single Resolution Board (SRB), at the European level.

Composite procedures result in interests being affected by one uniform act (the final decision); however the decision-making process itself is regulated during its different stages or legs by different procedural rules and managed by different administrations – both national and European. The participation of different administrations acting within their own legal framework and fulfilling their own responsibilities raises salient issues relating to the commitment of the Union and the Member States to the rule of law, good administration and judicial protection.

This paper will focus more specifically on the generally accepted procedural and defence rights, which may lose their bite, first as a result of the interconnectedness in composite procedures of the Union and national law spheres, and second when punitive law enforcement builds on non-punitive procedures. Particular attention is given to legal professional privilege, the privilege against self-incrimination and the right to be heard. The paper aims to identify potential gaps and contradictions that may arise from the close and mutually dependent cooperation under composite procedures that result in a uniform final act but lack an overarching procedural framework.

Section 2 of the paper briefly highlights the relevance of composite procedures in the SSM and SRM context. Section 3 identifies and explains how and why the protection of certain rights may come under pressure in composite procedures. In particular, Section 3.1 discusses problems arising from the interlocking legal spheres. Section 3.2 focuses on composite procedures with interlocking punitive and non-punitive legs. It also sets out the established interpretations of procedural and defence rights by the European Court of Human Rights (ECtHR). Section 4 focuses entirely on the right to be heard, identified as one of the most pressing issues in the context of composite procedures in the SSM and SRM context. Section 4.1 highlights

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the relevance of this right. Section 4.2 traces its development in the case-law of the Court of Justice of the European Union (CJEU) comprising both the General Court (GC), formerly known as the Court of First Instance (CFI), and the Court of Justice (ECJ). Section 4.3 spells out the criteria that need to be met for the right to be heard to be effectively protected. It also discusses which administration should offer an opportunity to be heard. Finally, Section 5 contains some concluding remarks.

2 Relevance of composite procedures

Composite procedures could result in a lowering or circumvention of the protection of procedural rights. SSM and SRM proceedings contain a number of compelling examples of composite procedures.[2] The actual enjoyment of the protection of a party's procedural rights may be reduced, on the one hand, when the national administration does the preparatory work and the European administration takes the final decision based on the information provided to it in that national preparatory work. For example, this situation arises when the ECB exercises its banking supervision competences following preparatory work by the relevant NCA. On the other hand, the protection of procedural rights may not be guaranteed when the European administration carries out preparatory work and this information feeds into the decision-making of the national administration. Such a situation arises when the ECB carries out an investigation and the results of this investigation are used as the basis for punitive sanctions being imposed at the national level.

In the context of banking supervision (SSM), the ECB has direct law enforcement powers. It exercises significant competences with far-reaching consequences following preparatory work by the relevant NCA, when it grants authorisations, withdraws authorisations, or opposes the acquisition or reinforcement of a qualifying holding in the capital of a credit institution. The substance of the final decision in these procedures depends to a significant extent on the expertise and powers of the NCAs.

In the context of ECB investigations, the results of Union administrative investigations may be used as evidence in national punitive proceedings. The ECB carries out its own investigations and the concomitant results of these investigations may – as a matter of principle – be used as evidence when imposing punitive sanctions at the national level. In the absence of Union rules providing clear guidance on the procedural admissibility in national proceedings of materials gathered by Union bodies, such admissibility remains unclear. This raises crucial questions concerning the protection of defence rights in such a composite law enforcement setting. In the SSM context for example, NCAs deal with a large part of sanctioning banks (punitive sanctioning). They do so at the ECB's request.[3]

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2 See for more details the contribution by Raffaele D'Ambrosio.

3 See Article 18(5) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63) (hereinafter the 'SSM Regulation' or 'SSMR'), which concerns, inter alia, the imposition of sanctions on significant credit institutions for violations of national law.

3 Procedural and defence rights in composite procedures

In composite procedures the national and European legal spheres interlock to make the decision-making process hinge on activities carried out in both spheres. Divergent rules apply in this case to the Union and national legs of the procedure.

3.1 Interlocking legal spheres

On a constitutional and hence more abstract level, the Union and its Member States commit to comparable guarantees of fundamental rights. All Member States are bound by the EU Charter of Fundamental Rights (CFR) when they give effect to Union law.[4] This would therefore apply when an NCA sanctions a bank following a request from the ECB or when an NRA implements a decision of the SRB.

Nonetheless, the level of procedural protection provided, the specific procedural safeguards, and the precise interpretation of what a fundamental right means in a specific situation, differ considerably between Union law and different national laws. This leads to a different level of protection for procedural rights in the 27 different national and the Union legal spheres. Generally, this is an accepted result of different legal cultures and histories.[5]

Different rules may apply, for example, to the gathering of evidence. The far-reaching interference with interests or even rights in the second part of the procedure may not be foreseeable at the time that the preparatory work takes place and the level of procedural protection during this preparatory work may be lower for this reason. Examples of such differences are: (i) legal professional privilege, which is subject to different rules in different legal contexts; (ii) defence rights, which depend on the gravity of interference; and (iii) the privilege against self-incrimination, which may be undermined by composite procedures with interlocking punitive and non-punitive legs.

The relevant difference in composite administrative procedures is that these divergences in the levels of protection and actual enjoyment of a party's rights may lower standards in the procedure as a whole when compared with the standards guaranteed in the component parts of the procedure. Similarly, the fact that the different legs of the procedure may have very different implications for the rights of individuals, i.e. punitive or non-punitive proceedings, may lower the level of protection to the level guaranteed for less invasive (non-punitive) proceedings.

A well-known example is the privilege accorded to legal professionals. This privilege generally prevents lawyers from being compelled to testify with regard to communications they have had with their clients. As a result, the ECJ does not allow the Union institutions to require access to documents protected by legal professional

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4 Article 51(1) of the CFR refers to 'implementing EU law', however, the ECJ considers the CFR to be applicable within the scope of Union law.

5 Christina Eckes, 'Integrated Rights Protection in the European and International Context: Some Reflections About Limits and Consequences' in: Inge Govaere and Sacha Garben (eds.), *Interfaces between EU and International Law*, Hart Publishing, 2019.

privilege.[6] Under Union law, however, in-house lawyers (employed by the party to a case) are not protected by legal professional privilege. The ECJ considers the 'independence' of the lawyer to be one of the boundaries that delimit the scope of legal professional privilege.[7] The distinction made between in-house and external ('independent') lawyers 'is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose'.[8] The Court added that such a conception 'reflects the legal traditions common to the Member States and is also to be found in [the] legal order of the [Union], as is demonstrated by Article [19] of the Protocols on the Statutes of the Court of Justice …'.[9]

The fifth paragraph of Article 19 of the Statute of the Court of Justice reads: 'Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.' The provision does not single out lawyers but instead refers to (national) agents, advisers and lawyers. This inclusive formulation does not justify a distinction between in-house and external lawyers but appears to assume an 'independent' exercise of their duties for all three categories to which it refers.

By contrast, in-house lawyers are not protected by legal professional privilege in the majority of national jurisdictions of the Member States. Thus, it may be correct to consider independence a boundary of legal professional privilege in the 'legal traditions common to the Member States'. However, in certain Member States there is a different approach. In common law jurisdictions and also in the Netherlands, where in-house lawyers are admitted to the bar, legal professional privilege covers the communications between in-house lawyers and their clients.[10]

Recital 48 of the SSMR reads: 'Legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the [CJEU]'. Article 10(1)(f) of the SSMR even states that the ECB may request all information necessary from 'third parties to whom the entities referred to in points (a) to (d) [these are credit institutions, financial holding companies, etc.] have outsourced functions or activities [such as for example internal control, compliance,

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6 See the judgment of the Court of Justice of 18 May 1982, *AM & S Europe Limited* v *Commission*, 155/79, EU:C:1982:157.

7 Ibid., paragraphs 21 and 22: Legal professional privilege protects the confidentiality of written communications between lawyers and their clients, 'provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment'.

8 Ibid., paragraph 24.

9 Ibid.

10 See, for example, the judgment of the Court of Justice of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v *European Commission*, C-550/07 P, EU:C:2010:512.

etc.]'. Thus, it appears that legal professional privilege is limited to the strict professional relationship between banks and their lawyers. Other parties are subject to the ECB's investigatory powers without any restriction.

This difference would become salient, for example, in the (hypothetical) situation where a Union actor, i.e. the ECB, carries out investigations in the context of a procedure to impose a punitive administrative fine on a national central bank. In the SSM setting for example, the ECB enjoys far-reaching powers to gather information.

The ECB may in the SSM context seize copies of internal communication between a Dutch (or UK) bank and its in-house lawyers. This information could be transmitted by the Union supervisor as evidence to the Dutch NCA – De Nederlandsche Bank (DNB). If the ECB then asks DNB to open sanctioning proceedings,[11] documents that otherwise would be procedurally excluded as evidence might become part of the proceedings.

How is DNB to assess the critical piece of evidence? It was gathered on the basis of powers provided for by Union law and was subsequently introduced in a legal order that provides for a higher level of protection. No common rules exist on what evidence from the Union investigation is admissible in national proceedings. As a result, the interlocking of legal spheres, with different standards of protection, may undermine in this hypothetical situation the legal professional privilege that the Dutch in-house lawyer is used to enjoying under national law.

3.2 Composite procedures with interlocking punitive and non-punitive legs

As a general rule, those subject to administrative procedures enjoy less extensive protection than those subject to punitive procedures. This is reflected in Article 6 of the European Convention on Human Rights (ECHR) and Articles 47 and 48 of the CFR. It is also settled case-law of the ECtHR.

One aspect of the strengthened procedural protection available to those subject to punitive procedures is the privilege against self-incrimination.[12] Neither the CFR nor the ECHR expressly provide for the privilege against self-incrimination. However, it is settled case-law of the ECtHR.[13] As such, it is also the basis for interpreting Articles 47 and 48 of the CFR. The privilege against self-incrimination concerns both the right not to incriminate oneself and the overlapping right to remain silent.[14] It also prohibits law enforcement authorities from using significant compulsion against a person to obtain information in order to use it as evidence to incriminate them. The

11 See the SSMR.

12 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

13 See the ECtHR judgments of 9 February 2016, *Shlychkov* v *Russia*, (application no. 40852/05), paragraph 81; and of 17 December 1996, *Saunders* v *UK*, (application no. 19187/91), paragraph 68.

14 Stijn Lamberigts, 'The Privilege against Self-Incrimination: A Chameleon of Criminal Procedure', *New Journal of European Criminal Law*, 2016, pp. 418-438.

privilege against self-incrimination is only available once an individual is subject to punitive proceedings.

Supervised persons, for example, banks, are in principle obliged to cooperate with the ECB and provide all requested information. The privilege against self-incrimination is not codified in either the SSM Regulation or the SSM Framework Regulation.[15] A norm similar to Article 9(2) of the OLAF Regulation, imposing a duty to inform the persons subject to an investigation of their rights, including the privilege against self-incrimination, does not exist in the SSM legal framework.[16]

However, Article 29(2) of the SSM Framework Regulation recognises that the duty of the parties to an ECB procedure to 'state truthfully the facts known to them' is 'subject to the limits relating to sanctioning procedures under Union law'.[17] Based on this, it appears that the ECB may sanction a credit institution's refusal to provide information only within these limits. The objective appears to be to reconcile preserving the effectiveness of the ECB's supervisory powers without prejudice to the core aspects of the privilege against self-incrimination.

However, when different non-punitive and punitive procedures, conducted by the Union and national administrations, closely interlock and information and evidence gathered by the ECB is transferred from the Union leg of the procedure to another national leg of the procedure the privilege against self-incrimination may be lost. Information gathered in the SSM context may, at the request of national criminal investigation authorities, even be transferred to other national criminal proceedings.[18]

In this context, the Italian Constitutional Court requested a preliminary ruling from the ECJ in May 2019 on whether, under Union law, the right to remain silent can also be invoked in proceedings before the National Commission for Companies and the Stock Exchange (*Commissione Nazionale per le Società e la Borsa* – CONSOB).[19] The Constitutional Court maintained that Union law requires Member States to punish failure to cooperate with financial market supervisory authorities. Thus, before deciding the question of (national) constitutionality, the Constitutional Court considered it appropriate to seek the ECJ's view on whether this duty to punish a failure to cooperate also applies vis-à-vis individuals who are suspected of committing an offence, and whether this can be considered compatible with the right to remain

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15 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

16 Article 9(2) of the OLAF Regulation (Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1)) reads: 'The Office may interview a person concerned or a witness at any time during an investigation. Any person interviewed shall have the right to avoid self-incrimination.'

17 Article 29(2) of the SSM Framework Regulation reads: 'The parties shall, subject to Union law, assist the ECB in ascertaining the facts of the case. In particular, subject to the limits relating to sanctioning procedures under Union law, the parties shall state truthfully the facts known to them.'

18 See Article 3 of Decision (EU) 2016/1162 of the European Central Bank of 30 June 2016 on disclosure of confidential information in the context of criminal investigations (ECB/2016/19) (OJ L 192, 16.7.2016, p. 73).

19 Case C-481/19 *Consob*.

silent as this may lead the national administration to force a person to make self-incriminating statements.

Without common Union rules on the scope of the privilege against self-incrimination it remains unclear how the privilege is upheld in the context of interlocking non-punitive investigations and punitive procedures. This is highly problematic in the light of the settled case-law of the ECtHR.

The ECtHR protects the privilege against self-incrimination in settled case-law.[20] When two legs of the procedure are closely interlinked, the privilege against self-incrimination may be protected in two ways: (i) the element of significant compulsion is removed in the non-punitive leg of the procedure; or (ii) the use of information or evidence obtained under compulsion is restricted such that it cannot incriminate in the punitive leg.[21]

Procedures with interlocking non-punitive and punitive legs also exist in a purely national context. One example being tax procedures, which may either run in parallel or have different legs that follow each other. The ECtHR has held in this context that the lower protection in the non-punitive leg of the procedure must not undermine the protection in the punitive leg of the procedure (option (ii)).[22] Implementing option (i) entails more practical difficulties when the punitive leg is not yet known and follows on from the non-punitive leg of the procedure. It would require a general change to the practices for gathering information in the non-punitive leg.

In any event, in both of the highlighted scenarios, namely legal professional privilege and the privilege against self-incrimination, the lack of common rules and standards may result in the higher level of protection in part of the composite procedure being circumvented.

4 The right to be heard

The right to be heard is another highly relevant procedural right that comes under pressure in composite procedures within the Union. It is enshrined in Article 41(2)(a) of the CFR as part of the right to good administration. The provision confers upon ‘every person’ ‘the right … to be heard, before any individual measure which would affect him or her adversely is taken’. The right of adversely affected parties to express their views on the likely outcome before a procedure is concluded serves two purposes. It protects the individual and the rule of law and aims to ensure rational decision-making by providing the administration with information that it may otherwise not have. Thus, it incorporates both an individual rights dimension and a substantive dimension aimed at improving decision-making.

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20 See the ECtHR judgment of 5 April 2012, *Chambaz* v *Switzerland*, (application no. 11663/04).

21 The latter option was indicated by the ECtHR in *Saunders*, cited above.

22 See the ECtHR judgment of 24 November 1993, *Imbrioscia* v *Switzerland*, (application no. 13972/88).

4.1 Relevance of the right to be heard in SRM procedures

A body of case-law on composite procedures under the SRM is currently emerging. Relevant cases are the *Portigon* and *Hypo Vorarlberg Bank* cases[23], which concerned ex ante contributions to the Single Resolution Fund (SRF). These ex ante contributions to the SRF are calculated by the SRB, after consulting the ECB or the NCA and in close cooperation with the NRAs.[24] The SRB then forwards the decision to the NRAs, which are responsible for collecting the relevant contributions from the banks concerned in their jurisdiction. Thus, the procedure concerned is a composite procedure consisting of multiple phases, with an actionable decision that definitively determines the position of the institution at the end of the procedure.

In all of these cases, violations of the right to be heard and of other essential procedural requirements have been alleged with regard to the SRB's decision. In the first *Portigon* case, decided in 2019,[25] the right to be heard was raised but not discussed by the General Court because the SRM decisions challenged had other procedural flaws; inter alia, the lack of an electronic signature and insufficient reasoning. The General Court declared them void without examining the alleged violation of the right to be heard.

In the admissibility section of its judgment, the General Court identified a 'direct link' between the SRB and the bank concerned. The Court justified this link by stating that the NRAs do not have any discretion in implementing the SRB's decisions, but are under an execution obligation.[26] This will become relevant in the context of the criteria discussed in Section 4.3 regarding where and how the right to be heard should be protected.

4.2 Development of the right to be heard in the CJEU's case-law[27]

The CJEU has developed a relevant body of case-law on the right to be heard in composite procedures. The first and foremost point emerging from this body of case-law is that, even in the absence of any rules governing the procedure in question, protection of the right to be heard should not suffer.[28] In other words, if codified

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23 On the issue of ex ante contributions in 2016 to the SRF, see the judgment of the General Court of 28 November 2019, *Portigon AG* v *SRB*, T-365/16, EU:T:2019:824. Actions are also pending challenging ex ante contributions for the years 2017, 2018, and 2019: see *Portigon* v *SRB*, T-420/17; *Portigon* v *SRB*, T-413/18; *Portigon* v *SRB*, T-481/19; *Hypo Vorarlberg Bank* v *SRB*, T-414/18; and *Hypo Vorarlberg Bank* v *SRB*, T-479/19 – all specifically alleging an infringement of the right to be heard.

24 Article 70(2) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1) (hereinafter the 'SRMR').

25 See the judgment in *Portigon AG* v *SRB*, T-365/16, cited above.

26 Ibid., paragraph 64 et seq.

27 This section draws on: Christina Eckes and Joana Mendes, 'The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?', *European Law Review*, 2011, Vol. 36, pp. 651-670.

28 See the judgments of the General Court of 19 February 1998, *Eyckeler & Malt AG* v *Commission*, T-42/96, EU:T:1998:40, paragraph 77; and of 17 September 1998, *Primex Produkte Import-Export GmbH & Co and Others* v *Commission*, T-50/96, EU:T:1998:223, paragraph 59.

specialised rules, such as the SRMR, do not (sufficiently) accommodate the right to be heard, individuals can still rely on the general principle.

The fundamentally relevant case-law has emerged in four policy areas that involve composite procedures, namely the remission of import duties, the European Social Fund, individual sanctions, and state aid. The leading case concerning the remission of import duties is *France Aviation*.[29] The procedure for the remission of import duties begins and ends with the national administration. However, in between the start and the end of the procedure an intermediate supranational stage takes place. The applicant applies to the competent national administration. In certain cases, defined in the applicable regulation, the competent national administrative body must then send the application to the Commission. The Commission in turn decides whether the application is justified, after consulting a group of experts. The competent national administration is then responsible for communicating the decision to the applicant.

France Aviation turned on an alleged failure by the French administration to share all the relevant documents with the Commission. The General Court held that 'the applicant's right to be heard in a procedure such as that to which these proceedings relate must actually be secured in the first place in the relations between the person concerned and the national administration'.[30] The General Court also stated that even in situations where the preparatory act does not adversely affect the applicant but is positive, the Commission 'had a duty to arrange for the applicant to be heard by the [national] authorities' if it diverged from the decision of the national administration.[31] The latter was the case in *France Aviation*. The Commission should have used its right to inquire to ensure that the requirements of the right to be heard were met by the national administration.

Importantly, where no direct contact takes place between the Union administration (Commission) and the person concerned (applicant) the right to be heard should 'in the first place'[32] be discharged before the national authority.

Another line of cases emerged in the context of financial assistance provided by the European Social Fund. In these procedures, the Commission determines the reduction of financial assistance after giving the Member State concerned (not the beneficiary) an opportunity to be heard. The financial assistance to be repaid is then requested by the Member States from the beneficiaries (legal entities). While national administrations are the sole actor in contact with the beneficiaries when financial assistance granted under the European Social Fund is reduced, the Commission's decisions directly affect the private parties concerned.

In the leading case of *Lisrestal*,[33] the General Court, and on appeal also the ECJ, held that a direct link is in fact established between the beneficiary and the Commission –

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29 See the judgment of the General Court of 9 November 1995, *France Aviation* v *Commission*, T-346/94, EU:T:1995:187.

30 Ibid., paragraph 30.

31 Ibid., paragraph 36.

32 Ibid., paragraph 30.

irrespective of the lack of contact – because first, the Commission is legally fully liable for its decisions; second, national administrations, despite their formal role, do not have a formal power to make an assessment of their own; and third, the Commission's decisions directly concern the beneficiaries of the financial assistance, who assume primary liability for the repayment of the sums at issue.

The General Court concluded that the Commission must itself ensure compliance with the right to be heard. The Commission is obliged either to hear directly the persons concerned or to ensure 'that they had had the possibility, of effectively setting forth their views on the proposed reduction in assistance'.[34]

The procedural circumstances in *Lisrestal* concerning the lack of contact and the direct relevance of the decision of the Union administration appear comparable to the situation in cases already discussed concerning ex ante contributions to the SRF. As the General Court concluded in *Portigon*, the determination of ex ante contributions to the SRF by the SRB directly affects the institution concerned and the NRA does not exercise discretion when implementing the SRB's decision.[35] This also led the General Court to conclude that the SRB's decision is not a preparatory act.[36]

Another case concerning the reduction of financial assistance is *Vlaams Fonds*.[37] Here, the right to be heard was exercised before the Member State concerned. However, the final decision was based on Commission documents of which the beneficiary had not been informed. The General Court held that if the Union body continues to investigate and gathers additional information it is patently clear that only having a hearing in the preceding national leg of the composite procedure cannot be regarded as sufficient.

It is now settled case-law that a direct link between the Union administration and the person concerned can be established even when the two have not had direct contact. This is the case when the person is directly affected by the decision of the Union administration because the national administration does not exercise discretion when implementing that decision.

In 1991, in the case of *Technische Universität München*,[38] the ECJ confirmed that the right to be heard is guaranteed in both legs of a composite procedure. The Commission had rejected the University of Munich's application for the duty-free import of certain scientific instruments into the internal market without granting the university an opportunity for a hearing. The Commission argued that any such hearing would have to take place before the national administration because the (institutional)

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33 See the judgments of the General Court of 6 December 1994, *Lisrestal – Organização Gestão de Restaurantes Colectivos Ldª and Others* v *Commission*, T-450/93, EU:T:1994:290; and of the Court of Justice of 24 October 1996, *Commission* v *Lisrestal – Organização Gestão de Restaurantes Colectivos Ldª*, C-32/95 P, EU:C:1996:402.

34 See the judgment in *Lisrestal* v *Commission*, T-450/93, cited above, paragraph 49.

35 See the judgment in *Portigon AG* v *Commission*, T-365/16, cited above, paragraph 70 et seq.

36 Ibid., paragraph 73.

37 See the judgment of the General Court of 9 July 2003, *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap* v *Commission*, T-102/00, EU:T:2003:192.

38 See the judgment of the Court of Justice of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438.

interaction took place between the Union and the national administration and not between the Union administration and the applicant. The ECJ rejected that point and held that the Union and national administrations must coordinate and ensure that the right to be heard is protected throughout the procedure. It emphasised that those concerned should not be confronted with a lowering of their right to be heard because a decision is taken in a composite procedure.

One common denominator of the different strands of case-law in the different policy areas is that they take the perspective of the protection of the individuals concerned. This perspective differs only in the context of state aid law. Here, the CJEU continues to rely on an institutional interaction perspective. This is also the perspective relied on by the SRB in the *Portigon* case.[39] However, the General Court specifically rejected this perspective for the SRM procedures at stake.[40]

Finally, an important limitation of the right to be heard was developed in the case-law concerning restrictive measures against individuals, i.e. counter-terrorist sanctions against individuals consisting of the freezing of assets and travel bans. The *People's Mojahedin Organization of Iran (PMOI)* cases are also cases in point.[41] The General Court held in these cases that the particular urgency of individual sanctions justified the fact that PMOI could only be heard in relation to subsequent listings and not in relation to their inclusion on the list concerned. This is similar to the approach taken, for example, in the context of dawn raids in competition law.

4.3 Criteria for and possibilities to discharge the obligation to offer a hearing

The criteria that emerge from the case-law discussed and which are relevant for the legal assessment of composite procedures in the context of the SSM or SRM concern the establishment of a direct link between the Union administration and the person concerned. The *first question* to be asked is: Does a direct link exist between the Union administration and the person/institution concerned because direct contact is foreseen between the Union administration and the person concerned? If this is not the case, the *second question* is: Is there nonetheless a direct link because the person concerned is directly affected by the decision of the Union administration? This is the case if the national administration does not have any discretion or power of appraisal or assessment, i.e. it cannot deviate from the findings of the Union administration.

In other words, if the lack of direct contact does not establish a direct link (first), the fact that the national administration has no power of appraisal and cannot determine the outcome (second) can nonetheless establish a direct link (*Lisrestal*).

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39 See the judgment in *Portigon AG* v *SRB*, T-365/16, cited above, paragraph 59.

40 Ibid., paragraph 69, referring to the opinion of Advocate General Wathelet in *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2013:335.

41 See the judgments of the General Court of 4 December 2008, *People's Mojahedin Organization of Iran* v *Council (PMOI III)*, T-284/08, EU:T:2008:550; of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council (PMOI II)*, T-256/07, EU:T:2008:461; and of 12 December 2006, *Organisation des Modjahedines du peuple d'Iran* v *Council and UK (PMOI I)*, T-228/02, EU:T:2006:384.

If such a *direct link* is established the hearing is supposed to be most effective if it is ensured by the Union administration. The Union administration is responsible that a hearing is organised. However, the Union administration may in such cases rely on the national administration to comply with the right to be heard. It does not have to organise the hearing itself. Relying on the national administration follows the institutional interaction logic of a procedure, in which the only contact of the person concerned is foreseen to take place with the national administration. In some cases, a hearing in both legs of the procedure may be necessary (*Technische Universität München*).[42]

In other words, no preference exists for meeting the requirements of the right to be heard either directly or indirectly, i.e. for organising the hearing before the Union administration or for the Union administration to rely on the national administration to discharge the obligation to organise a hearing (on the Union's behalf). The requirements for a hearing can either be met by requesting the national authority to hold the hearing (*France Aviation*) or by referring to an earlier hearing by the national administration, as long as (*Vlaams Fonds*) no additional information has been taken into account.

In contrast with earlier case-law, there is currently no preference for holding a hearing either before the national or the Union administration, as long as an effective hearing is offered. Whether the obligation to provide a hearing is discharged directly or indirectly, and in the latter case without any interaction with the person concerned, is immaterial.

The standard requirement is to have a coordinated approach in which the Union and the national administration ensure together that the requirements of the right to be heard are met throughout the procedure. The Union administration remains accountable for ensuring the hearing, even if it decides to discharge its obligation indirectly.

5 Concluding remarks

Composite procedures constitute a particular challenge for the effective protection of procedural and defence rights. The general rule is that individual rights should not suffer as a consequence of the particular institutional arrangements in any given policy area.

We have seen that a sufficient level of protection can be reached in different ways. In relation to legal professional privilege and the privilege against self-incrimination problems have arisen due to differences in procedural rules and standards of protection. The initial reaction may be to propose the adoption of common procedural rules for these situations.

Indeed, defining procedural rules, for example, for the admissibility of information specifically for the SSM, at the Union level may be strongly desirable from an

[42] See also the judgment of the General Court of 18 January 2000, *Mehibas* v *Commission*, T-290/97, EU:T:2000:8.

individual rights perspective. However, it will come at the cost of national procedural autonomy, which could very well trigger follow-up tensions in other substantive areas of national law, and would include laws governing evidence within the scope of the CFR. This would be a classic example of a spill-over effect as a result of 'inefficiencies' in the protection of rights. Therefore, a degree of caution should be exercised in this regard.

The right to be heard raises difficulties for a number of reasons. The different legs of the composite procedure may have a direct adverse effect on the person concerned without there being any direct contact between the administration and the person concerned.

The core issue is that the Union administration, even if it is not required to have direct contact with the persons concerned must nonetheless ensure an effective opportunity to be heard if a direct link is established because its decisions directly affect the person concerned. In such cases, the CJEU accepts that the actual hearing may take place before the national administration. The Union administration may decide to meet its own obligation to provide a hearing by relying on the national administration to comply with the right to be heard, i.e. provide an indirect hearing. It may do so either by referring to a past hearing, if the factual basis of the decision has not changed, or by requesting a new hearing. The Union administration may also hold the hearing itself. The relevant issue remains that the rights of the person concerned do not suffer from the particular institutional arrangements of the procedure.

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Raffaele D’Ambrosio was born in Salerno on the 4th January 1964 and in December 1986 graduated with honour (110/110 cum laude) at the Law School of the LUISS University in Rome.

In September 1992 he joined the Legal Services Directorate of the Banca d’Italia, where he currently holds the position of Senior Legal Counsel. He is responsible for advising and arguing cases – before the lower and higher Courts – in the areas of banking and financial supervision, and for advising the Italian members of EBA’s and ECB’s governing bodies on regulatory issues related to prudential matters. He constantly acts as a trainer for internal training programmes at the Banca d’Italia,

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During his professional career he also worked for the Legal Services Directorate of the European Central Bank (December 2012 to September 2013) where he was in charge of drafting the regulatory framework for the cooperation between the European Central Bank and the National Competent Authorities within the Single Supervisory Mechanism. He also worked for the Italian Markets Authority (Consob) from November 1986 to September 1992, where he was in charge, amongst others, of drafting Consob's regulations implementing the 1991 Italian Law on Investment Firms and Regulated Markets.

He has an extensive academic experience. He has been appointed Professor of Financial Institutions' Law at the University of Bologna (1999-2000) and Professor of Banking Law at the University of Viterbo (2000-2001). He has also worked, since 1997, on several research projects in the field of banking and financial regulation and supervision. Currently, he is a Member of EuBAR, a research group established by the University of Luxembourg to conduct a research on the administrative and criminal sanctions in the European Banking Union, and also a Member of the Advisory Board of the European Banking Institute. He is regularly invited as a speaker in LL.M. programs on Business and Company Law, Italian Law of Markets in Financial Instruments and Global Markets Regulation.

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