FROM MUTUAL RECOGNITION TO EU AUTHORIZATION: A DECLINE OF TRANSNATIONAL ADMINISTRATIVE ACTS?*

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Abstract

The paper has two goals. First it seeks to examine the main features of transnational administrative decisions in the EU legal system (i.e. acts of one Member State which, according to a European secondary legal norm, produce juridical effects in one or more of the other Member States). Second it discusses the tendency towards centralisation and re-nationalisation in the most recent legislation and the consequences of the abandonment of the model of transnational administrative decisions in some important economic areas. Finally, some brief conclusions on the perspective of horizontal administrative cooperation will be drawn.

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1. Introduction

In the European legal order the principle of mutual recognition has always been one of the key instruments for the creation of the single market[1], as it is now for the construction of an "area of freedom, security and justice" ("free movement of judicial decisions")[2]. Limiting the analysis to the single market, our starting point must be that of the famous Cassis de Dijon decision[3] in which the Court of Justice stated that "Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter"[4]. According to the European Court, however, exceptions to this are cases in which administrative controls – which must be appropriate and not excessive – are necessary on the part of the destination State in order to protect essential needs (public health, consumer and environmental protection, correctness in

[1] There is a vast amount of material on this theme: see for all C. Janssens, *The Principle of Mutual Recognition in EU Law* (2012); M. Möstl, *Preconditions and Limits of Mutual Recognition*, in Comm. Mkt. L. Rev., 405–436 (2010); *The Law of the Single European Market*, C. Barnard, J. Scott (Eds), (2002); G. Rossolillo, *Mutuo riconoscimento e tecniche conflittuali* (2002); V. Hatzopoulos, *Le principe communautaire d'équivalence et de reconnaisance mutuelle dans la libre prestation de services* (1999); P. Maduro, *We the Court* (1998).

[2] See among others K. Lenaers, *The principle of mutual recognition in the area of freedom, security and justice*, in Dir. Un. Eur., 525 ff. (2015); C. Janssens, *The Principle of Mutual Recognition*, cit. at 1; M. Möstl, *Preconditions*, cit. at 1.

[3] Court of Justice, cause 120/78 of 20 February 1979, *Rewe v Bundesmonopolverwaltung für Branntwein*, C:1979:42.

[4] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon'), OJ C 256, 03/10/1980, 2-3.

commercial transactions, etc.). On this basis the principle has been gradually extended to cover also the other freedoms to circulate recognised in the Treaty[5].

In essence, the principle of mutual recognition is aimed at reaching a deep integration of the market, whilst at the same time respecting the diversities within the Member States[6]. However, the mutual recognition founded only on the Treaty (and therefore on the repeated intervention of the Court o Justice) could potentially have led to "a colossal market failure", as it was based in most cases on legal action taken by private citizens who found their fundamental freedoms to be limited[7]. In substance, "one cannot plan, produce and market product lines hoping that eventually a court decision will vindicate a claim of mutual recognition or functional parallelism"[8]. For this reason, as is well known, a rich and complex legislation followed, aimed at facilitating the free circulation of goods, services, capital and people in the single market (for e.g. harmonisation, technical harmonisation, standardisation and normalisation policies)[9].

In this context, in some cases secondary laws regulated precisely the division of tasks between the various administrations of the common market, providing for authorisations issued by the Commission (or other EU bodies) or by national administrative bodies. In the latter case the national measures can produce legal effects within the territory of the other Member States or across the entire EU: These are transnational administrative acts[10].

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[5] On this topic, see C. Janssens, *The Principle of Mutual Recognition*, cit. at 1, 14-23.

[6] E.g. J. Pelkmans, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, Bruges European Economic Research Papers 24, 1(2012).

[7] E.g. N. Bernard, *Flexibility in the European Single Market*, in *The Law of the Single European Market*, cit. at 1, 101 ff., spec. 110.

[8] J.H.H. Weiler, *The Constitution of the Common Market Place: The Free Movement of Goods*, in P. Craig, G. De Burca (Eds) *The Evolution of EU Law*, 368 (1999).

[9] See for all, P. Craig, *The Evolution of the Single Market*, in *The Law of the Single European Market*, cit. at 1, 1-40.

[10] Some clarification is necessary on this point. According to doctrine, transnational administrative acts can have different forms: M. Ruffert, *The transnational Administrative Act*, in O.J. Jansen, B. Schöndorf-Haubold (Eds) *The European Composite Administration*, 277 ff (2011). The first form is the administrative act which produces "effect-related transnationality"; in this case an "administrative act is enacted in a state with regard to the addressee resident there, and which develops a legal effect beyond the borders of this state" (281).

Transnational administrative acts - used by the EU legislator also in cases unconnected with market integration [11] – have attracted the attention of many scholars, who have examined many of their characteristics and highlighted the numerous legal problems related to their use [12]. Nevertheless some recent

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In the second form "the transnational character results from the fact that the issuing authority and the addressee of the administrative act are located in different sates" ("addressee-related transnationality": 287 ff.). In the third form "a foreign authority itself crosses the state border in order to issue an administrative act abroad" ("authority-related transnationality: 290 f.). See also M. Ruffert, *Rechtsquellen und Rechtsschichten des Verwaltungsrecht*, in W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Voßkuhle (Eds) *Grundlagen des Verwaltungsrechts*, 2° ed., vol. I, 1234 f (2012). In this article the term transnational act/effect will be used mainly according to the first meaning i.e. "effect-related transnationality".

[11] See e.g. A.M. Keessen, *European Administrative Decisions*, Groningen/Amsterdam, 2009, spec. 58 ff and 117 ff.; M. Gautier, *Acte administratif transnational et droit communautaire*, in G.-B.Auby, Dutheil de la Rochère (Eds) *Droit Administratif Européen*, Bruxelles, 1303 ff, (2014).

[12] See for e.g. J.J. Pernas García, *The EU's Role in the Progress Towards the Recognition and Execution of Foreign Administrative Acts: The Principle of Mutual Recognition and the Transnational Nature of Certain Administrative Acts*, in J. Rodrigo-Arana Muñoz (Ed) *Recognition of Foreign Administrative Acts*, Cham, Heidelberg et al., 15-31 (2016); A.S. Gerontas, *Deterritorialization in Administrative Law: Exploring Transnational Administrative Decisions*, in Col. J. Eur. L., 423 ff., (2013); T. Kemper, *Der transnationale Verwaltungsakt im Kulturgüterschutzrecht*, in Natur und Recht, 751 ff. (2012); H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union*, 645-648 (2011) (who talked about "transterritorial application of national decisions"); C. Ohler, *Europäisches und nationales Verwaltungsrecht*, in Terhechte (Ed) *Verwaltungsrecht der Europäischen Union*, 345 ff. (2011); H. Wenader, *Recognition of Foreign Administrative Decisions*, in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 755 ff. (2011); L. De Lucia, *Amministrazione transnazionale e ordinamento europeo* (2009); A.M. Keessen, *European Administrative Decisions*, cit. at 11; N. Bassi, *Mutuo riconoscimento e tutela giurisdizionale* (2008); M. Gautier, *Acte administratif transnational et droit communautaire*, cit., 1303 ff. (Ead, *Une autre traversée du Rhin. A propos de l'acte administratif transnational*, in AJDA, 2015, p.1139-1143); G. Sydow, *Verwaltungskooperation in der Europäischen Union* (2004); J. Becker, *Der transantionale Verwaltungsakt*', in Deutsches Verwaltungsblatt, 856 ff. (2001); M. Ruffert, *Der transnationale Verwaltungsakt*, in Die Verwaltung, 453 ff. (2001); S. Galera Rodrigo, *La aplicacìon administrativa del derecho comunitario*, 108 ff. (1998); V. Neßler, *Der transantionale Verwaltungsakt – Zur Dogmatik eines neuen Rechtsinstituts*, in Neue Zeitschrift für Verwaltungsrecht, 864 ff. (1995); E. Schmidt-Aßmann, *Deutsches und Europäisches Verwaltungsrecht* in Deutsches Verwaltungsblatt, 924 f. and 935 f. (1993). For a more general perspective, see G.

developments can present the opportunity for further reflection on the possible future of the transnational act within the EU legal system. This article aims to contribute to the research on this theme. In particular, after having briefly illustrated four types of national acts with cross-border effects (par. 2) and having shed light of some elements they have in common (par. 3), a recent legislative tendency (and to a lesser extent jurisprudential) which seems to be moving towards a re-dimensioning of these decisional models will be examined (par. 4). After that an attempt will be made to explain the reasons behind this orientation of European legislation (par. 5) and to reach some (provisory) conclusions on this matter (par. 6).

2. Market unity and State competences in the legal discipline of transnational administrative acts

Through the legal discipline of transnational administrative acts, the EU legislator in general balances two values: the unity of the single market (or rather the effective exercise of the fundamental freedoms) and the protection of the competences and important interests of the Member States (towards not only the European Union, but also the other Member States) [13]. This balancing is not done in a uniform way, but varies depending on the type of transnational act. The analysis below highlights the principal traits of four common types of transnational act in EU legislation[14].

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della Cananea, *From the Recognition of Foreign Acts to Trans-national Administrative Procedures*, in *Recognition of Foreign Administrative Acts*, cit. at 12, 219 ff.; M. Ruffert, *Recognition of Foreign Legislative and Administrative Acts*, in *Max Planck Encyclopedia of Public International Law*: http://opil.ouplaw.com/home/EPIL.

[13] E.g. G. Sydow, *Verwaltungskooperation*, cit. at 12, 48 ff.

[14] See L. De Lucia, *Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts*, in Rev. Eur. Adm. L., 2012/2, 17-45. For partially similar classifications see: A.M. Keessen, *European Administrative Decisions*, cit. at 11; H.C. Röhl, *Procedures in the European Composite Administration*, in J. Barnes (Ed) *Transforming Administrative Procedure*, Seville, 92 ff. (2008); G. Sydow, *Verwaltungskooperation*, cit. at 12, 126 ff.; S. Galera Rodrigo, *La aplicacìon administrativa*, cit. at 12, 108 ff.

2.1. Authorisations with automatic transnational effects

The first are authorisations that automatically produce transnational effects. These administrative measures allow the beneficiary to exercise a fundamental freedom beyond their home country territory without the host administrations having to give their own consent[15]. This model – that has its origins in the rulings of the Court of Justice on mutual recognition [16] – generally presupposes a high level of harmonisation between national legal orders. For example, in this group we find: the authorisation for the sale of mineral waters[17]; the licence for the provision of air transport services for passengers, post and/or goods[18]; and the authorisation for the taking up and pursuit of the business of direct insurance or reinsurance[19].

The criteria for the division of administrative tasks are centred here on the home administration, which exercises its powers autonomously. This means that greater importance is placed on the unitary principle, which leads to a particular bias towards the exercise of fundamental freedoms. As a consequence, the transnational effect is in this case particularly incisive in the host country, which must accept the host authorisation, allowing the private party to carry out their activities. Nevertheless, host countries are not completely powerless to react; indeed the majority of the EU secondary norms allow them to respond in

[15] For reference to "perfect mutual recognition", see M. Tison, *Unraveling the General Good Exception. The case of Financial Services*, in M. Adenas, W.H. Roth (Eds) *Services and Free Movement in EU Law*, 321 ff. (2002); see also E. Schmidt-Aßmann, *Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*, in Europarecht, 300 (1996) ("echte Transnationalität"); whilst for "passive mutual recognition", see K.A. Armstrong, *Mutual Recognition*, in *The Law of the Single European Market*, cit. at 1, 240 ff.

[16] E.g. Court of Justice, C-390/99 Judgment of the Court of 22 January 2002, *Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)*, C:2002:34; M. Möstl, *Preconditions*, cit.

[17] Directive No 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters.

[18] Articles 3 ff. of the Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

[19] Art. 14 of the Directive No 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

situations where important collective interests are endangered (e.g. health and environment) through the suspension of activities in its their territory authorised by the transnational act (so-called 'safeguard measures')[20]. These measures are however, preceded or followed by agreements or contacts with the home administration in order to reach a mutual understanding for the solution of the critical issue.

2.2. Joint decisions

The joint decision is a national authorisation which is the result of a composite procedure in which all the State administrations involved (and at times also the Commission) participate with a co-decisional role. Examples which can be mentioned here are the authorisation of the placing on the market of genetically modified organisms not contained in food substances[21] and that for inter-community transport of waste for disposal[22].

Despite differing in certain ways, these EU norms provide for cooperation mechanisms within the procedure conducted by a single State. Following the examination of the request and of the documents presented by the applicant at a national level, a multilateral phase then takes place in which the administrations affected are called (at times through silent assent) to express their agreement on the issuing of a favourable decision. Only in the absence of opposition from the other administrations can the competent office grant the authorisation. Directive 2001/18 stipulates that where there is an objection from one of the Member States (or the Commission), the matter must be returned to the Commission (see below).

This model represents a further form of balancing between the principle of the protection of the State competences and that of unity and is justified by the overwhelming importance of the public interests affected by those legal regulations which require

[20] E.g. Art. 155, Dir. No 2009/138/EC; Art. 11, Dir. No 2009/54/EC.

[21] Articles 18 ff. of the Directive No 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms (consolidated version).

[22] Articles 4 and 7 ff. of the Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (consolidated version).

the prior involvement of the public bodies concerned in the decision process. In substance, the proceeding is aimed at "(…) compensating administrative polycentrism with the unity of the decision"[23].

Also in these legal norms any of the States affected can initiate a revision procedure (also in conjunction with a safeguard measure) for the protection of health and environment "indicating whether and how the conditions of the consent should be amended or the consent should be terminated…" (Article 20, Dir. 2001/18). It is important to emphasise that here the State offices cannot unilaterally take a final decision on the matter but can only start a second level procedure which has to be conducted jointly with the other Member States (and at times the Commission).

2.3. Authorisations subject to recognition

In general, this decisional model – whose fundamental structure is based on the rulings of the Court of Justice on mutual recognition [24] – is made up of two or more interconnected authorisations issued in the legal system of each Member State. The first measure has legal effects only in the home country, whereas the second allows effects to be produced also in the host country. For this reason, at times this is referred to as authorisations in sequence[25]. The recognition of some professional qualifications[26] is in this group.

The transnational effect acts here within the recognition procedure that is carried out by the second State. In fact the host administration is limited to looking at the results of the examination (e.g. technical or chemical tests) on which the first act

[23] S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in Id. *La crisi dello Stato*, 86 ff. (2003).

[24] E.g. Court of Justice, C-272/80 of 17 December 1981, *Frans-Nederlandse Maatschappij voor biologische Producten*, C:1981:312: host authorities "are not entitled unnecessarily to require technical or chemical analyses or laboratory tests where those analyses and tests have already been carried out in another Member State and their results are available to those authorities, or may at their request be placed at their disposal" (par. 14). See also Court of Justice, C-25/88 of 11 May 1989, *Wurmser and Others*, C:1989:187, par. 18-19.

[25] E.g. E. Schmidt-Aßmann, *Verwaltungskooperation*, cit. at 15, 285.

[26] Directive No 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (consolidated version).

was based and, without repeating the tests, can only determine the effects in its legal system[27]. Hence the home administration substitutes that of the host country by carrying out the majority of the necessary analyses[28]. This model is therefore a response to the need to put greater weight on the role of the host administrations, which in the majority of cases must ensure that the first act is adapted to their own legal system. In this way room is given to national diversity[29].

Nevertheless, in some cases (for e.g. the recognition of the authorisation for the commercialisation of pharmaceutical[30] or biocidal products[31] on the market) the EU legislator provides for variations to this model. In these cases it is established that a Member State cannot unilaterally refuse to recognise an authorisation issued by another State: if there is no agreement, a negotiation phase is foreseen within specific coordination groups[32] and, if the negotiation fails, the decision is left to the Commission which must act according to comitology rules (examination procedures), after having listened to the opinions of technical bodies. These legal regulations therefore limit to a certain extent the autonomy of the national administrations and hence the possibilities for differentiation.

2.4. Mutual recognition in parallel

Finally, mention should be made here to parallel authorisations[33] which represent a further variation of the act subject to recognition. Also in these cases, checks and controls are carried out by one individual national administration and, on the

[27] E.g. Court of Justice, C-452/06 of 16 October 2008, Synthon, C:2008:565.
[28] G. Biscottini, *Diritto amministrativo internazionale*, 117 (1964); Id, *L'efficacité des actes administratifs étrangers,* Recueil des Cours de l'Académie de droit international de La Haye, 639 ff. (1961).
[29] See e.g. K.A. Armstrong, *Mutual Recognition*, in *The Law of the Single European Market*, cit. at 1, 242, who talked about the "… domestification of the foreign regulatory process ...".
[30] Articles 28 ff. of the Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (consolidated version).
[31] Articles 32 ff. of the Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (consolidated version).
[32] Art. 35, Reg. No 528/2012; Art. 27, Dir. 2001/83/EC.
[33] See E. Schmidt-Aßmann, *Verwaltungskooperation*, cit. at 15, 286.

basis of this, other national authorities issue a single authorisation whose effectiveness is limited to their own territory. This model - used for example for some authorisations for the placing on the market of pharmaceuticals for human[34] or veterinarian use[35] or of biocidals[36] - includes functional and structural elements partly from the model of authorisations subject to recognition, and partly from that of common decisions. Indeed, despite the need for consent to be expressed by every national administration on the results of the inquiry carried out by another Member State (as is the case of administrative acts subject to recognition), mutual recognition in parallel favours - also through proceedings aimed at solving eventual administrative disagreements - the preventative aligning of the content of each authorisation. From a functional point of view, this is an element that characterizes the common decision.

3. Common features in the types of authorisation described

It is well known that every form of execution (whether centralised or decentralised) of European law is founded on complex cooperation mechanisms between national and European administrations in order to ensure coordinated, efficient and as far as possible homogeneous actions, as well as reciprocal control amongst the various public bodies involved[37]. The forms and

[34] Articles 28 ff., Dir. 2001/83/EC.

[35] Articles 32 ff. of the Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products (consolidated version).

[36] Articles 34 of Regulation (EU) No 528/2012.

[37] For all, see L. De Lucia, *Strumenti di cooperaizone per l'esecuzione del diritto europeo*, in Id., B. Marchetti (Eds) *L'amministrazione europea e le sue regole*, 171 ff. (2015); E. Schmidt-Aßmann, *Verfassungsprinzipien fuŕ den Europäischen Verwaltungsverbund*, in, *Grundlagen des Verwaltungsrechts*, cit. at 15, vol. I, 261 ff.; H.H. Trute, *Die Demokratische Legimation der Verwaltung*, ivi, 341 ff. spec. 427 ff.; W. Kahl, *Der Europäische Verwaltungsverbund: Strukturen – Typen – Phänomene*, in *Der Staat*, 353-387 (2011); E. Chiti, *The administrative implementation of European Union law: a taxonomy and its implications*, in H.C.H. Hofmann, A.H. Tuŕk (Eds) *Legal Challenges in EU Administrative Law*, Cheltenham et al., 9 ff. (2009); E. Schmidt-Aßmann, *Einleitung*, in Id., B. Schöndorf-Haubold (Eds) *Der Europäische Verwaltungsverbund*, 1 ff. (2005); G. Sydow, *Vollzug des europäischen Unionsrechts im Wege der Kooperation nationaler und europäischer Behörden,* in *DöV*, 66 ff. (2006).

means of cooperation vary however in every normative field - we can therefore speak about different sectorial administrative unions. Indeed, in each sectorial union four elements are combined in different ways: decisional autonomy/interconnection of decisional powers, national competence/European competence [38]. The combination of these elements changes however in relation to the specific administrative activities that are carried out in each sectorial union.

With limited reference to transnational authorisations it can be observed that administrative cooperation performs also the function of assuring alternative (or better compensative) forms of involvement in the decisional process of the host authority (and at times of the European administration) [39]. In these institutional contexts, the public bodies concerned (even if different from that which issued the act) can in fact intervene at various points in the life of the transnational act in order to protect important collective interests (e.g. safeguard measures). Consequently, under the force of the transnational measure the fundamental freedoms can be exercised in the European Union and this is made possible through the coordination of the administrative functions of the origin and host authorities. On the other hand, within the sectorial unions, the national administrations can compare positions in relation to problems that could be caused by the act.

Despite the fact that each typology of transnational act consists of different forms of division of tasks between national administrations, they have three elements in common.

3.1. The inter-administrative tie

In all cases, the transnational effect aims at guaranteeing the effective division of tasks between a plurality of national authorities. In particular, the host administration cannot (unilaterally) question the validity or appropriateness of the measure of other States and must from time to time link this to legal consequences as established by European laws [40]. This

[38] See in general M. Ruffert, *Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund*, in *Die Öffentliche Verwaltung*, 761 ff. (2007).
[39] E.g. G. Sydow, *Verwaltungskooperation*, cit. at 12, 49 ff.
[40] For a similar view see M. Ruffert, *Der transnationale Verwaltungsakt*, cit. at 12, 473 ff.

outcome, which can be called an 'inter-administrative tie'[41], operates in different ways in the models described above. Its scope is wider with regard to authorisation with automatic transnational effects (i.e. when the country of origin has extensive decisional autonomy). Its scope is more limited, on the other hand, when a interconnection of decisional powers is provided for, i.e. with regard to joint decisions and in authorisation subject to recognition (including mutual recognition in parallel). In essence, there is an inverse relationship between the scope of the inter-administrative tie and the protection of the interests of the host country.

From a structural point of view, moreover, in the authorisation with automatic transnational effects and in the joint decision, the cross-border effect has two elements: the first of which is substantive, under which the private party can exercise a fundamental freedom; and the other organisational (the inter-administrative tie itself) which is binding on the other authorities, preventing them from carrying out autonomous checks on the validity of the measure issued by other States; the tie here has an instrumental function with regards to the substantive effect. In acts subject to recognition, the tie has a procedural nature and consists of the fact that the destination administration cannot contest (autonomously) the examination that the country of origin has carried out before issuing the first act. These limits are in any case set up to safeguard the freedom of private parties, even though this protection occurs within the recognition procedure itself.

3.2. Administrative conflict resolution

The transnational act represents an instrument to govern administrative pluralism. Is therefore likely that the public players involved will express contrasting points of view concerning the same administrative matters, depending either on their praxis, the interpretation of norms or conflicts of interest. In other words, given that the cross-border effects concern not only the administration that issued the measure, but also other States - and at times also European bodies - in many EU norms these effects

[41] For reference to the German concepts of *Tatbestands-*, *Festellungs-* and *Bindungswirkung*, see in general E. Schmidt-Aßmann, *Verwaltungskooperation*, cit. at 15, 299 f.

can be questioned by one of the host authorities or by the Commission (or by the European Supervisory Authority). This is foreseen, for example, when a State administration intends to contest a transnational act (e.g. through a safeguard measure) and it opposes the issuing of a joint decision or the recognition of an authorisation. In these cases often specific administrative procedures are provided for with the aim of resolving conflict between different administrations (e.g. negotiation, mediation, decisions taken by the Commission or other EU entities). The goal of these procedures is to reach a decision which is as far as possible shared between the parties in conflict, hence avoiding the recourse to the European judges[42]. In summary, they should transform conflict into cooperation.

As a consequence, in many cases the balance between public and private interests is not a product solely of the transnational authorisation but can also be realised outside of this as the outcome of a negotiation between the public players involved in a conflict within a sectorial union. For this reason, such measures can result in a limited stability of private rights which can lead to a high degree of uncertainty for private parties.

3.3. The competence of the home country judges and the bi-polarity of the transnational act

Transnational authorisations can raise problems with regard to the protection of rights, as administrative pluralism often corresponds to a plurality of potentially competent courts[43]. According to general principles, the recipient must challenge the unfavourable decision in the court of the legal system to which the issuing administration belongs[44]. However, when a European

[42] For an overview see, L. De Lucia, *Conflict and Cooperation within European Composite Administration (Between Philia and Eris)*, in Rev. Eur. Adm. L., 1, 43 ff. (2012).

[43] E.g. F. Shirvani, *Haftungsprobleme im Europäischen Verwaltungsverbund*, in *Europarecht*, 619 ff. (2011); A.M. Keessen, *European Administrative Decisions*, cit. at 11, spec. chap. V.

[44] See in general Court of Justice, C-562/12 of 17 September 2014, *Liivimaa Lihaveis*, C:2014:2229. In doctrine, see, amongst other M. Ruffert, *Der transnationale Verwaltungsakt*, cit. at 12, who raises the question of the possible remedies against an administrative act issued by another State which violates in an extreme way the fundamental rights of a private individual (476); see also T. Kemper, *Der transnationale Verwaltungsakt*, cit. at 12, 755; F. Shirvani,

decision has to be implemented through an administrative act (with transnational effects) of a Member State[45], this rule has to be adapted: Given that in this case the recipient can be considered directly and individually concerned by the EU decision, they must address the matter to the European court, without having to wait for the implementation of the EU measure at national level[46].

The position of third parties is more complex, however. In fact such measures can violate the principle of effective legal protection when the third party must undertake legal action in a country which is not that of their residence (or of establishment): economic costs or limitations with regards to the *locus standi*[47] could constitute a barrier to their access to the courts[48]. Without going into this complex problem in too much depth, it should be observed that in some circumstances these limits could nonetheless be compensated for by the fullness of the protection in front of an ordinary court. During a civil trial in which the applicant asks to be safeguarded in the face of the private activity authorised by the transnational measure enacted abroad, the host (ordinary) court must not question the legitimacy of the authorisation, focusing its attention solely on the conduct of the private party causing the alleged damage. In the judgment, the act itself is therefore unimportant and cannot serve as a justification for the detrimental conduct[49].

Most of these legal norms place the burden of responsibility of conduct above all on the beneficiary of the transnational authorisation who must consequently protect third parties and collective interests (e.g. public health, environment etc.), adopting all the necessary precautions, even if these are over and above

Haftungsprobleme, cit. at 43, 619 ff.; A.M. Keessen, *European Administrative Decisions*, cit. at 11, spec. chap. V; J. Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund* (2004).

[45] E.g. Art. 34, Dir. 2001/83: A Commission decision on one State's refusal of recognition of a host authorisation of a pharmaceutical product.

[46] E.g. Court of Justice, C-188/92 of 9 March 1994, *TWD v Bundesrepublik Deutschland*, C:1994:90 and C-178/95, of 30 January 1997, *Wiljo v Belgische Staat*, C:1997:46.

[47] E.g. A.M. Keessen, *European Administrative Decisions*, cit. at 11, chap. V.

[48] E.g. N. Bassi, *Mutuo riconoscimento*, cit. at 12, 69 ff.; M. Ruffert, *Der transnationale Verwaltungsakt*, cit. at 12, 476.

[49] For a wider view see L. De Lucia, *Administrative Pluralism,* cit. at 14, 35 ff., with reference to the jurisprudence.

those prescribed in the authorisation itself[50]. In other words the transnational measure in the host country is characterised by bi-polarity, as in principle it only guarantees the protection of specific public interests, but it does not govern private relationships and does not ensure the correct functioning of the social dynamics[51].

4. Recent moves away from transnational administrative authorisations

In the face of these complicated regulations, a current legislative (and jurisprudential) trend can be seen which in some cases foresees the substitution of transnational authorisations with forms of centralisation (par. 4.1.) or, on the contrary, the weakening of the cross-border effect (par. 4.2.).

4.1. Centralisation

As an example of centralisation, mention can be made here of the new regulation for authorisations to take up the business of a credit institution, the responsibility for which in the Eurozone is now attributed to the European Central Bank[52]; in the past these acts were instead issued by the Member States and produced automatically transnational effects (the so-called "European passport")[53], or of the recent regulation of the European Union Agency for Railways[54], which gives the Agency a series of powers, amongst which the issuing of the authorisations for the placing on the market of railway vehicles and types of vehicles and

[50] See e.g. Art. 20, para. 2, Dir. 2001/18; Art. 25, Dir. 2001/83.

[51] See as above L. De Lucia, *Administrative Pluralism*, cit. at 14, 37 ff.

[52] Articles 20-21 of the Council Regulation 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. On this issue see for e.g. S. Antoniazzi, *The ECB's Banking Supervision And European Administrative Integration: Organisation, Procedures And Legal Acts*, in this Journal, 2, 318 ff. (2015).

[53] Articles 25 ff. of the Directive No 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.

[54] Regulation (EU) No 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004.

authorisation for the placing in service of trackside control-command and signalling sub-systems; in the past also these acts had automatic transnational effects[55].

In addition there is the registration of ratings agencies; today this administrative act is issued by the European Banking Authority[56], whilst under the previous regulation it was the result of a composite procedure (similar to the joint decision) of national competence but still with transnational effects[57]. The same can be said of some biocidal products that now can be directly authorised by the Commission [58]; this procedure was not provided for in the previous EU legal discipline (which dealt only with authorisations subject to recognition)[59]. Finally, whilst in the past the release on the market of novel foods and novel food ingredients was subject to authorisation adopted through a joint decision[60], since 2015 these measures have been passed to the competence of the Commission which must act with the support of the European Food Safety Authority[61].

4.2. Weakening of the cross-border effect

There is however a movement in the opposite direction

[55] Articles 20 ff. of the Directive 2008/57 (EC) of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community.

[56] Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies.

[57] Articles 15 ff. of the Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

[58] Art. 41, Reg. No 528/2012. According to the recital 26 of the Reg. cit. "To facilitate the placing on the EU market of some biocidal products with conditions of use analogous in all Member States, it is opportune that these products are authorised at EU level".

[59] Art. 4 of the Directive No 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market.

[60] Articles 4 ff. of the Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients.

[61] Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001.

towards giving more weight to national interests at the expense of the transnational effect (and hence the unitary needs).

This development we see above all in the rulings of the Court of Justice regarding driving licences[62]. Driving licences are administrative acts with automatic transnational effects[63], which have the dual aim of facilitating the free movement of people taking up residence in a Member State other than the one issuing the licence and of improving road safety[64]. In the past, the Court of Justice, by virtue of the principle of reciprocal recognition, clarified that Directive 91/439/EC (which in this regard was similar to the current one)[65] precluded "a Member State from refusing to recognise a driving licence issued by another Member State on the ground that, according to the information available to the first Member State, the holder of the licence had, on the date on which it was issued, taken up normal residence in that Member State and not in the Member State in which the licence was issued"[66]. Subsequently, however, the EU Judges - to curb the practice of the so-called "driving licence tourism" - recognised wider powers to the destination authorities to check the existence of the requirement of residence, allowing them to verify from this point of view the validity of every single licence issued in other Member States[67]. Therefore, despite the absence of any legislative change, in the interest of protecting road safety the Court has restricted the scope of the inter-administrative tie. Hence a new decisional model has emerged: the national administrative act

[62] Directive No 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licenses.

[63] Art. 1, par. 2, of the Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast).

[64] E.g. M. Ruffert, *Europäisiertes Allgemeines Verwaltungsrecht im Verwaltungsverbund*, in *Die Verwaltung*, 543 ff., spec. 554 (2008); M. Szydło, *EU Legislation on Driving Licences: Does It Accelerate or Slow Down the Free Movement of Persons?*, in *German Law Journal*, 13, 345 ff. (2012). See also N. Bassi *Il mutuo riconoscimento in trasformazione: il caso delle patenti di guida*, in Riv. It. Dir. Pubbl. Com., 1517 ff. (2008).

[65] Council Directive 91/439/EEC of 29 July 1991 on driving licences.

[66] Court of Justice, C-476/01, of 29 April 2004, *Kapper*, C:2004:261, par. 47. See also Court of Justice C-230/97, of 29 October 1998, *Awoyemi*, C:1998:521.

[67] For a review of this legislation with reference to Germany, see M. Ruffert, *Verwaltungsrecht im Europäischen Verwaltungsverbund*, in Die Verwaltung, 547, spec. 551-555 (2015).

with transnational effects subordinated to controls[68].

Another couple of examples of this can be found in secondary legislation. In Directive 2001/18 (on the placing on the market of GMO products) the foundation of the authorisational effect is variable. As mentioned above, when there is the consensus of all the Member States, the competent national administration can issue the favourable measure: unanimity represents here the justification of the cross-border effects[69]. If there a is a conflict (i.e. when there are objections from one or more States) the decisional power passes to the Commission which must define the question in a binding way for all the Member States. This system has proved to be dysfunctional, however, essentially due to the alarm this causes in public opinion in some Member States[70]. For this reason in 2015 the directive was modified: today the Member States, in addition to being able to raise an objection to the placing on the market of a GMO, can ensure (through a rather complex system) during the authorisation proceedings that all or part of their territory is excluded from the cultivation of candidate products because of environmental policy objectives, town and country planning, land use, socioeconomic impacts, agricultural policy objectives, etc.[71]. In essence, each Member State can unilaterally refuse the transnational effect without this leading to an administrative conflict with the other States and without therefore generating the need for a Commission decision.

The placing on the market of plant protection products is

[68] E.g. E. Schmidt-Aßmann, *Verwaltungskooperation*, cit. at 15, 300 ff. For another example of this model, see also Art. 34 of the Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas.

[69] See the Opinion of the Advocate General in Case C-6/99 delivered on 25 November 1999, *Greenpeace France and Others*, C:1999:587, par. 56.

[70] See for all, M. Weimar, *Risk Regulation and Deliberation in EU Administrative Governance – GMO Regulation and its Reform*, in Eur. L.J., 622-640 (2015).

[71] Art. 26-ter, Dir. 2001/18, added by the Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC regarding the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs). See. M. Porpora, *Gli OGM e la frammentazione della* governance *nel settore alimentare*, in Riv. It. Dir. Pubbl. Com., 1661 ff. spec. 1678 ff. (2016).

another example of this[72]. Even though the regulation is a highly complex, it must be highlighted that, in contrast to the past, on the basis of current legislation each Member State can refuse to recognise the authorisation for the placing on the market issued by another Member State for reasons connected with the health of people or animals and for the protection of the environment[73]. Also in this case, the refusal, differently to the old regime[74], does not give rise to an administrative conflict (and all that follows) but simply to the exclusion of the transnational effect in each single Member State.

5. Towards the reshaping of the transnational administrative authorisation?

Could these trends mean that the transnational administrative authorisation is in crisis and that it is destined to be re-dimensioned? Only time will give the answer to this question, if for no other reason than the fact that we need to see whether these tendencies extend to other fields. For the moment some brief observations can be made on this point.

The principle of mutual recognition has been interpreted in various ways by scholars. For example according to some it represents one of the consequences of the "horizontal opening up" of the States originating from European integration[75], which results in a form of governance of the single market based on the competition (or better a competition in the shadow of EU hierarchy) between national authorities and national legal orders[76]. Others, on the contrary, maintain that it gives rise to an institutional system aimed at resolving conflicts between the

[72] Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC.

[73] Articles 36, par. 3 and 41, Reg. No 1107/2009.

[74] Articles 10 and 11, Council Directive No 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market.

[75] See for e.g. M. Kment, *Grenzüberschreitendes Verwaltungshandeln – Transnationale Elemente deutschen Verwaltungsrechts* (2010).

[76] T. Börzel, *European Governance: Negotiation and Competition in the Shadow of Hierarchy*, in J. Comm. Mkt. St., 191 ff. (2010); in different terms, P. Maduro, *We the Court*, cit. at 1, spec. 111 ff.

norms of the various Member States[77].

As is well known, this second approach has greatly influenced the study of EU law. According to one of the most original theories on this theme, the concept of conflict between norms and legal systems in itself should constitute one of the bases for a renewed European constitutionalism[78]. At the centre of this complex and fascinating reconstruction is the idea that the strengthening of EU democracy necessitates the abandonment of the mere defence of the national State, which itself cannot be the federal prototype for the European Union. The proposal is thus made of a "horizontal constitutionalism", meaning a system in which the function of the EU law is to ensure the co-existence of different legal systems within the EU, identifying rules and principles which could be acceptable to all. All of this should be founded on a (meta-)principle that is able to increase the democratic potential of the Member States: Taking their neighbours' concerns seriously[79].

This idea, which has a markedly deliberative mould, is well-suited to interpreting and justifying conceptually many of the secondary norms which regulate transnational administrative acts[80] - norms and proceedings that in many cases are aimed at facilitating the reaching of consensus within the single sectorial unions of the national administrations around a decision issued (or to be issued) by a single Member State and consequently to avoid forms of rejection by national constituencies.

It must be underlined that this deliberative need is often heightened by the fact that many transnational acts are

[77] E.g. G. Rossolillo, *Mutuo riconoscimento e tecniche conflittuali*, cit. at 1. For a general overview, see also M. Ruffert, *Recognition of Foreign Legislative and Administrative Acts*, cit. at 12.

[78] The reference here is obviously to Christian Joerges, of which see for example: Id., M. Everson, *Reconfiguring the Politics–Law Relationship in the Integration Project through Conflicts–Law Constitutionalism*, in Eur. L.J., 644 ff. (2012); Id., *The Idea of a Three-Dimensional Conflicts Law as Constitutional Form*, RECON Online Working Paper, 5 (2010); Id., *Rethinking European Law's Supremacy*, EUI Working Paper Law, 12(2005).

[79] C. Joerges, M. Weimar, *A Crisis of Executive Managerialism in the EU: No Alternative?*, Maastricht Faculty of Law Working Paper 7, 29 (2012).

[80] E.g. H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy*, cit. at 12, 645; see also L. De Lucia, *Amministrazione transnazionale*, cit. at 12, spec. chap. 6.

instruments for risk management. They are decisions (for example regarding GMOs, pharmaceuticals, plant protection products, biocidals and so on) which, owing to technical or scientific uncertainties, can endanger important public interests (for example human or animal health, the environment etc.). This justifies the recourse to highly complex administrative proceedings (involving many different national and European entities), who are able not only to generate consensus, but also to gain knowledge and guarantee rational decisions which can be adapted to the conditions of uncertainty[81]. All of this clearly requires the maximum level of trust amongst administrative bodies (especially technical ones) from the various legal systems.

Even so, for some time now scholars have highlighted the limitations of this approach, for example by underlining that, if properly founded, also the lack of trust of an administration towards its counterpart in another Member State, must lead to legal consequences[82]. Moreover, as has been seen, the price of the deliberative horizontal governance (even more so for "risky" decisions) can be very high in terms of the complexity of decision-making processes and can cause significant differences in the practices followed by the national administrations (which in turn can be transformed into protectionist behaviours)[83]. In other words the legal discipline of transnational acts in many cases has shown negative consequences, due to an excessive guarantee of institutional pluralism.

These considerations explain the tendency towards centralisation in the fields mentioned above. This change is partly

[81] On this matter there is a wide range of material. See for e.g. A. Barone, *Il diritto del rischio* (2006); W. Hoffmann-Riem, *Risiko-und Innovationsrecht im Verbund*, in Die Verwaltung, 140 ff. (2005); A. Scherzberg, *Risikosteuerung durch Verwaltungsrecht: Ermöglichung oder Begrenzung von Innovationen?*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 214 ff. (2004); *Risk Regulation in the European Union: Between Enlargement and Internationalization*, G. Majone (Ed), EUI (2003).

[82] E.g. E. Schmidt-Aßmann, *Perspektiven der Europäisierung des Verwaltungsrechts*, in P. Axter, B. Grzeszick, W. Kahl, U. Mager, E. Reimer (Eds) *Das Verwaltungsrecht in der Konsoliedierungsphase*, Die Verwaltung, Beiheft 10, 263 ff., spec. 272 ff. (2010).

[83] See for e.g. F. Bignami, *The Challenge of Cooperative Regulatory Relations after Enlargement*, in G. Bermann, K. Pistor (Eds) *Law and Governance in an Enlarged European Union*, 104 (2004).

linked to the recent crisis and to the different administration abilities of Member States in the field of finance[84]. It also stems more generally in part from the need to simplify certain authorisation procedures[85]. In any case this offers the advantage of unifying the decision-making moment, with significant benefits for example in terms of the protection of rights and of the clearer identification of the responsibility for individual decisions[86]. But above all centralisation allows for the optimisation of the State's administrative resources[87]. For example the new rules on banking supervision and the authorisation of biocidals give fundamental preparatory tasks back to the national authorities. In essence, centralisation, despite simplifying the decisional process, is itself founded on complex collaboration techniques with the Member States and hence allows the interests and characteristics of each individual national context to emerge; all of which, however, under the control (but not necessarily under the hierarchy) of the EU authorities. It could thus be seen as a form of soften centralisation. Administrative pluralism has therefore not failed (nor could it fail); with respect to the principles of subsidiarity and effectiveness (Art. 298 TFEU)[88], it has been streamlined, without being deprived of the instruments that guarantee deliberative forms of decision (and conflict resolution): suffice to think of the role that the comitology committees (or analogous bodies) play in

[84] E.g. E. Chiti, *In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum*, in *Cambridge Yearbook of European Legal Studies*, 311 ff. (2015).

[85] See e.g. the Commission Staff Document Impact Assessment, Accompanying the documents Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, SWD(2013) 8 final ,of the 1 January 2013, spec. par. 3. See also the Proposal for a Regulation of the European Parliament and of the Council on novel foods COM/2013/0894 final - 2013/0435 (COD), in particular par. 2, 3, and 6.

[86] E.g. B. Marchetti, *Il sistema integrato di tutela*, in *L'amministrazione europea e le sue regole*, cit. at 37, 209 ff.; E. Schmidt-Aßmann, *Verwltugskooperation*, cit. at 15, 296.

[87] E.g. P. Maduro, *We the Court*, cit. at 1, spec. 111 ff.

[88] Stating that "the centralisation of decision-making can be due to the fact that the Member State alone is not able in a sufficient or effective way to carry out its administrative tasks", G. Sydow, *Verwaltungskooperation*, cit. at 12, 47 (our translation).

these decision-making processes[89].

Along these lines, the fact should not be overlooked that the centralisation in the Commission (or other EU institutions or bodies) of authorisation competences is considered by the Court of Justice one of the instruments that can ensure the orderly functioning of the internal market where there is a risk of differing behaviours between the Member States (Art. 95 TCE and now Art.114 TFEU) [90]; an objective that leaves the EU legislator a wide margin of choice[91].

The process towards giving more weight to national interests is a more complex issue. Above all given that the phenomenon described above depends on the characteristics of each sector, it is impossible to formulate general remarks on this point. However, it can be observed that in the case of driving licences the problem which led to the reduction in the scope of the inter-administrative tie, has an essentially procedural nature. In fact in future it cannot be excluded that a more sophisticated system of administrative cooperation (for example also through information technology) could contribute to overcoming many of the problems encountered[92]. On the other hand, especially for GMO products, there are political problems respect to which no general agreement has been found between the Member States and the EU institutions[93]. This has led the EU Legislator (on the initiative of the Commission) to change the balance in the sectorial unions, giving the Member States the possibility to be excluded, in full autonomy, from the effects of the authorisation[94].

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[89] On this issue, see for all C. Joerges, J, Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, in Eur. L.J., 273 ff. (1997).

[90] In jurisprudence, recently Court of Justice, C-270/12 of 22 January 2014, *United Kingdom v Parliament and Council*, C:2014:18, par. 110; in doctrine, in general M. Möstl, *Preconditions*, cit., 415 f.

[91] E.g. Court of Justice, C-66/04 of 6 December 2005, *United Kingdom v Parliament and Council*, C:2005:743, par. 45 f.

[92] For arguments on this area, see Court of Justice C-419/10 of 26 April 2012, *Hofmann*, C:2012:240, par. 82.

[93] See the Commission report on the proposal to modify regulation (CE) no. 1829/2003 regarding the possibility of the Member States to limit or prohibit in their territory the use of foodstuff or animal feed which has been genetically modified COM(2015) 177 final.

[94] Nevertheless in October 2015 the European Parliament, contrary to this tendency towards re-nationalisation, rejected the proposal of the Commission

6. Final remarks

What has been said so far does not mean that the project for the "horizontal governance" of the single market is definitively waning. It suggests rather that we need to take note of the practical problems that this conceptual and institutional approach has produced and to reflect on possible corrective measures. Without claiming to identify binding rules on this issue, the legislation mentioned above (and the rulings of the Court of Justice) give some interesting clues about a possible rationalisation of the legal discipline of some common market authorisation procedures.

First, we need to move away from forms of "procedural optimism" (or better "procedural ingenuity"), meaning the idea that a well-structured administrative procedure can in all cases contribute to overcoming all forms of institutional dissent, including political dissent. The new legal discipline of the GMOs represents a perfect example of this.

Secondly, it seems reasonable and useful to give EU bodies the competence to issue authorisations when:

a) these can affect the entire EU market and

b) they concern "(…) fields which are characterised by complex technical features"[95]. In this case the centralisation of administrative powers would conform to the principles of proportionality and subsidiarity.

As a result, it would be better to resort to complex national decision-making - such as joint decisions or some form of authorisation subject to recognition - only when dealing with relations between two or three countries (as happens now for the cross-border transport of waste). Practice has shown that in other cases, this model can easily be transformed into a dissipation of administrative (and private) resources. For the same reasons, national authorisations with automatic transnational effects should concern simple and non-discretionary cases, as otherwise problems of market fragmentation (due to dishomogeneity in the execution phase) could arise.

Obviously, if such indications were taken on board in future

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to extend the limitation mechanism already identified for the GMO cultures also to GMO foods and animal feed: see the European Parliament legislative resolution of 28 October 2015 , P8_TA(2015)0379

[95] See again Court of Justice C-66/04, par. 45.

by the EU legislator, a substantial strengthening of executive activity at European level would follow. However, this would require a major adjustment effort both in the legislation and in the behaviour of European bodies, above all to avoid excessively technocratic forms of decision-making[96] and, more generally, to guarantee a respectful relationship with the networks of national authorities who continue to represent an essential factor for the legitimacy of the EU administration. Moreover, it would be important for the rules which call for the centralization to be structured in multi-polar form, to allow (and to force) the European administration to take full responsibility for the consequences of its decisions on the internal social dynamics of Member States.

If this were to happen the process of centralisation that is currently taking place could bring significant benefits in the future.

[96] On this issue see e.g. M. Weimar, *Risk Regulation and Deliberation*, cit. at 70.