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Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts

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Abstract

This article seeks to examine some aspects of transnational administrative measures in the EU legal system: acts of one State of the European Union which, according to a European secondary legal norm, produce juridical effects in one or more than one of the other Member States. Having highlighted the role that administrative cooperation plays in this area, three models of transnational authorisation are described, and reference is made to some of their common features, amongst which, in particular, those relating to the judicial protection of rights. It will then be demonstrated that some of the elements which characterise transnational authorisation can also be seen in the administrative sanctions imposed by a National Competition Authority under Regulation 1/2003. Finally, some brief conclusions on horizontal administrative cooperation will be drawn.

The European Union is a composite legal order founded upon a complex system of cooperation between governmental, judicial and administrative bodies aimed at reaching the objectives set out in the Treaties. European integration has among its many consequences the horizontal opening up of national legal systems. The Treaties, the secondary laws and the decisions taken by the Courts of Justice of European Union have formed at times types of 'runways' down which norms, judgements and administrative acts can pass from one Member State to another.[1] Transnational administrative measures can be placed in this context: acts of one State which, according to a European

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1 S. Cassese, 'La funzione costituzionale dei giudici non statali' [2007/57] *Rivista Trimestrale di diritto pubblico*, 614.

secondary legal norm, produce juridical effects in one or more than one of the other Member States.[2]

Administrative acts with effects outside the home State have been seen for some time in international law.[3] In EU secondary legislation, however, their level of formalisation is high enough[4] to allow for the identification of decision-making paradigms, which are characterised by a significant level of coherence. For this reason these decisions are coming under increasing scrutiny from scholars.[5]

The topic is complex, as numerous examples of such acts can be found in the European legal system. Under current legislation there are, for instance, cross-border administrative measures ranging from authorisations and sanctions, acts of certification[6] and decisions emitted in one State that must be enforced in another State's legal system.[7] Additionally, the term 'transnational effects' is used to identify juridical phenomena which are not always identical.[8]

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2 For some scholars the term 'transnational' is considered to be misleading, and they propose that of the 'transterritorial application of EU law', H.C.H. Hofmann, G.C. Rowe & A.H. Türk, *Administrative Law and Policty of the European Union* (Oxford 2011), 645.

3 G. Biscottini, *Diritto amministrativo internazionale* (Padova 1964), *passim*; Id, 'L'efficacité des actes administratifs étrangers' [1961/104 III] *Recueil des Cours de l'Académie de droit international de La Haye*, 639 ff.; C. Pamboukis, *L'acte public étranger en droit international privé* (Paris 1993), *passim*; W. Meng, 'Recognition of Foreign Legislative and Administrative Acts' in: R. Bernhard (Ed.) *Encyclopedia of Public International Law*, vol. 10, 348 ff.

4 M. Ruffert, 'Recognition of Foreign Legislative and Administrative Acts', in: *Max Planck Encyclopedia of Public International Law* (www.mpepeil.com).

5 E.g. C. Ohler, 'Europäisches und nationales Verwaltungsrecht' in: Terhechte (Ed.), *Verwaltungsrecht der Europäischen Union* (Baden Baden 2011), 345 ff.; L. De Lucia, *Amministrazione transnazionale e ordinamento europeo* (Torino 2009), *passim*; A.M. Keessen, *European Administrative Decisions* (Groningen/Amsterdam 2009), *passim*; N. Bassi, *Mutuo riconoscimento e tutela giurisdizionale* (Milano 2008), *passim*; M. Gautier, 'Acte administratif transnational et droit communautaire', in: Auby & Dutheil de la Rochère (Eds) *Droit Administratif Européen* (Bruylant 2007), 1069 ff.; G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Tübngen 2004); J. Becker, 'Der transantionale Verwaltungsakt' [2001/116] *Deutsches Verwaltungsblatt*, 856 ff.; M. Ruffert, 'Der transnationale Verwaltungsakt'[2001/34] *Die Verwaltung*, 453 ff.; S. Galera Rodrigo, *La aplicacìon administrativa del derecho comunitario* (Madrid 1998), 108 ff.; V. Neßler, 'Der transantionale Verwaltungsakt – Zur Dogmatik eines neuen Rechtsinstituts', [1995/14] *NVwZ*, 864; E. Schmidt-Aßmann, 'Deutsches und Europäisches Verwaltungsrecht' [1993/108] *Deutsches Verwaltungsblatt*, 924 f. and 935 f.

6 E.g. the EC vehicle-type approval certificate (Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles: *OJ* 2009, L 263/1–160). See also, *inter alia*, Court of Justice Causes C 178/97 *Banks et al.* [2000] ECR 2000 I-2005 and C 202/97 *FTS* [2000] ECR I-883.

7 E.g. Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures: *OJ* 2008 L 15028–38.

8 As highlighted in some studies, the transnationality of an administrative act can be connected either to the effect itself (when a measure allows a subject, resident or established in a Member State, to exercise an activity also in another country) or to the recipient (when the issuing authority and the recipient of the measure are in two different Member States) or that connected to the issuing authority (when an administration can issue a measure or carry out an administrative activity abroad); cfr. M. Ruffert, 'Der transnationale Verwaltungsakt', cit.

Finally, it must be highlighted that the subject can be analysed from various points of view as, for example, from that involving conflicts between norms of public law of different Member States,[9] or that of the principle of mutual recognition,[10] or alternatively that of administrative cooperation.[11]

From the prospective of administrative law, the most fertile terrain for an initial analysis is offered by the European secondary laws governing a number of authorisations on the exercise of one of the fundamental freedoms protected in the Treaties (i.e. the free circulation of goods, capital, services and people) in the internal market. These legal norms provide many examples of administrative acts that have EU-wide effects, all responding to the need to balance (in various different ways) the same contrasting values. It is for this reason that fairly homogeneous decisional typologies can be found in this context.

This article seeks to examine some aspects of this theme. Firstly, after having looked at the role that administrative cooperation plays in this area (§ 1), three models of transnational authorisation will be described (§ 2), and reference will be made to some of the elements they have in common (§ 3) – including, in particular, those relating to judicial protection of rights (§ 4). It will then be shown that some features which characterise transnational authorisations can also be seen in the administrative sanctions imposed by one of the National Competition Authorities under Regulation 1/2003 (§ 5). Finally, some brief conclusions will be drawn (§ 6).

Before going on, some of the European norms relating to transnational acts that affect the free circulation of goods should be briefly outlined.

Directive No 2009/54/CE of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters,[12] stipulates that the waters extracted from the ground can be authorised by national authorities with a recognition measure if the conditions laid down by the same Directive are present (Articles 3 ff. and annexes). These waters can be marketed in all the territories of the European Union (Art. 10).

According to the consolidated version of Regulation No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients,[13] the placing on the market of foods and food

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9 E.g. G. Rossilillo, *Mutuo riconoscimento e tecniche conflittuali* (Padova 2002), *passim*.

10 V. Hatzopuolos, 'Le principe de reconnaissance mutuelle dans la libre prestation de services' [2011/47] *Cahiers de droit européen*, 47 ff.;M. Möstl, 'Preconditions and limits of mutual recognition' [2010/47] *CML Rev.*, 405 ff.; K.A. Armstrong, 'Mutual Recognition', in: Barnard & Scott (Eds), *The Law of Single European Market* (Oxford and Portland 2002), 225 ff.

11 G. Sydow, *Verwaltungskooperation*, cit., *passim*; R. Caranta, 'La cooperazione tra amministrazioni nazionali nell'ambito del mercato unico' [1997/149] *Giurisprudenza italiana*, 1449 ff; E. Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft' [1996/31] *EuR*, 293 ff.

12 *OJ* 2009 L 164/45–58.

13 Consolidated version.

ingredients belonging to certain categories (Article 1, paragraph 2) and which have 'not hitherto been used for human consumption on a significant degree', must be authorised by the competent national authorities, according to Art. 4, 6, 7 and 8, following a complexadministrative procedure in which all States and the Commission are required to participate; the national act issued produces legal effects across the entire European Union.

Finally, the consolidated version of 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,[14] establishes that the commercialisation of a biocide product containing active substances permitted by the same Directive (Article 11), is subordinated to an authorisation or a national registration, whose validity is limited to single States. According to the Directive, at the request of the interested party, the competent destination administrations are, in principle, obliged to recognise the authorisations and the registrations issued in other States, without repeating the controls already undertaken in the instance of the first authorisation or registration (Article 4).[15]

1 Fundamental Freedoms and Administrative Cooperation

1.1 Transnational Authorisations and Fundamental Freedoms (a Brief Overview)

It is well known that the Court of Justice has given a decisive impetus to the process of the realisation of a single market thus guaranteeing, in the absence of secondary harmonisation laws, the effective exercise of the fundamental freedoms protected in the Treaties (regarding in particular the free circulation of goods and services). In a famous decision taken in 1980,[16] the Court ruled 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'. 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 State of

14 Consolidated version.

15 Directive 98/8 has been repealed by 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 (*OJ* 2012 L 167/1-123). Regulation No 528/12 shall apply from 1 September 2013, containing mechanisms for the reciprocal recognition of national authorisations which are more articulated than those established by Dir. 98/8.

16 Court of Justice Case C 120/78 *Rewe/Bundesmonopolverwaltung* [1979] ECR 649.

destination in order to protect essential needs (public health, consumer and environmental protection, correctness in commercial transactions, etc.).[17] Without going into greater detail here, there are four points which need to be outlined in order to clarify the relationships between fundamental freedoms and administrative acts with cross-border effects.

First, these principles have been progressively extended by the Court from the circulation of goods to the other fundamental freedoms.[18]

Second, this and subsequent decisions taken by the Court of Justice have implicitly clarified that in principle the functioning of the internal market presupposes the identification of rules for coordination (or of conflict resolution) between national legal systems[19] and above all of techniques for the division of tasks between internal administrations. These rules aim to reconcile the protection of the important public interests of the host country with the effective free circulation of goods, services etc., and avoiding duplication of unnecessary controls. In substance, the European Court indicated the principle of proportionality as the criteria with which to balance on a case by case basis, the unity of the single market (or rather the effective exercise of the fundamental freedoms) with the principle of subsidiarity, which protects the competences of the destination State toward not only the European Union, but also the other Member States (that is, in a horizontal sense).[20]

Third, these rulings allow for the identification (at least *in nuce*) of two models of transnational acts that have subsequently been refined by the community legislator. In the first,[21] the national administrative act permits the exercise of a private activity across the whole internal market, without the host States being entitled to demand new authorisations;[22] and in the second, despite allowing the host administration to exercise powers of authorisation in relation to a subject (of goods or activities), they are limited by the obligation to respect the principles of proportionality, as they are not allowed to repeat the same checks or verifications carried out in the first Member State when the results of these are available to them.[23]

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17 Cfr. 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* 1980 C 256/2–3.

18 V. Hatzopuolos, *Le pricipe de reconnaissance mutuelle*, cit., 47 ff.; M. Möstl, 'Preconditions and limits of mutual recognition', cit., 410 ff.; S. Nicolin, *Il mutuo riconoscimento tra mercato interno e sussidiarietà* (Padova 2005), 129 ff.; Tridimas & Nebbia (Eds) *European Union Law for the Twenty-First Century*, vol. 2 (Oxford and Portland Oregon 2004), *passim*.

19 E.g. G. Rossolillo, *op.loc.cit.*

20 G. Sydow, *Verwaltungskooperation*, cit., 48 ff.

21 M. Tison, 'Unravelling the General Good Exception. The Case of the Financial Services', in: Andenas & Roth (Eds), *Services and Free Movement in EU Law* (Oxford 2002), 321 ff.

22 E.g. Court of Justice Cases C 110 and 111/78 *Van Wesemael* [1979] ECR 35.

23 E.g. Court of Justice Cases C 272/80 *Frans-Nederlandse Maatschappij voor biologische Producten* [1981] ECR 3277 and C 25/88 *Bouchara et al.* [1989] ECR 1105.

Fourth, this jurisprudence has subsequently been further developed by the European legislator that has issued a wide range of harmonisation norms intended to emphasise, amongst other things, the principle of equivalence between national legal systems.[24] A large number of these legal norms regulate national administrative acts with transnational effects.

1.2 The Transnational Administrative Act and Administrative Cooperation

In secondary EU legislation, the transnational act responds to the need to govern administrative pluralism in order to realise the common economic and legal area. For this purpose, tools for administrative cooperation are required.[25] Essentially, it should be noted that in most cases the execution of European law is founded on numerous techniques of informational, procedural and institutional collaboration (e.g. committees, agencies) that act both in a vertical sense, between the Member States and the EU institutions and bodies, and in a horizontal sense, between the States.[26] All these techniques are used by secondary law to foster collaborative environments which can be called sectorial administrative unions.[27]

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24 In general, V. Hatzopuolos, *Le principe communautaire d'equivalence et de reconnaissance mutuelle dans la libre prestation de services* (Bruxelles: Bruylant, Athina: Sakkoulas 1999), *passim*; J.H.H. Weiler, 'The Constitution of the Common Market Place: The Free Movement of Goods', in: Craig & De Burca (Eds), *The Evolution of EU Law* (Oxford 1999), 349 ff.

25 G. Sydow, *Verwaltungskooperation*, cit., *passim*; R. Caranta, 'La cooperazione tra amministrazioni', cit., 1456 ff; E. Schmidt-Aßmann, 'Verwaltungskooperation', cit., 293 ff; P. Craig, 'Shared Administration and Networks: Global and EU Perspectives', in Oxford Legal Studies Research Paper n. 6/2009 (also available on www.ssrn.com).

26 In general, E. Schmidt-Aßmann, 'Verfassungsprinzipien für den Europäischen Verwaltungsverbund', in: Hoffmann-Riem & Schmidt-Aßmann & Voßkuhle (Eds), *Grundlagen des Verwaltungsrechts*, 2° ed., vol. I (München 2012), 261 ff.; H.H. Trute, 'Die Demokratische Legimation der Verwaltung', ivi, 341 ff. spec. 427 ff.;W. Kahl, 'Der Europäische Verwaltungsverbund: Strukturen – Typen – Phänomene'[2011/50] *Der Staat*, 353-387; E. Chiti, 'The administrative implementation of European Union law: a taxonomy and its implications', in: Hofmann & Türk (Eds), *Legal Challenges in EU Administrative Law* (Cheltenham et al. 2009), 9 ff; E. Schmidt-Aßmann, 'Einleitung', in: Id & Schöndorf-Haubold (Eds), *Der Europäische Verwaltungsverbund* (Tübingen 2005), 1 ff.;G. Sydow, 'Vollzug des europäischen Unionsrechts im Wege der Kooperation nationaler und europäischer Behörden' [2006/59] *DöV*, 66 ff; on the informational cooperation, see A. von Bogdandy, 'Informationsbeziehungen innerhalb des Europäischen Verwaltungsverbundes', in: Hoffmann-Riem & Schmidt-Aßmann & Voßkuhle (Eds), *Grundlagen des Verwaltungsrechts*, vol. II (München 2008), 347 ff.; K. Heussner, *Informationssysteme im Europäischen Verwaltungsverbund* (Tübingen 2007), *passim*; on the procedural cooperation see, H.C.H. Hofmann, 'Composite decision making procedures in EU administrative law', in *Legal Challenges in EU Administrative Law*, cit., 136 ff; G. Della Cananea, 'The European Union's Mixed Administrative Proceedings' [2004/68] *Law and Contemporary Problems*, 197 ff.

27 L. De Lucia, *Amministrazione transnazionale*, cit., 56 ff.

In general terms, sectorial unions are multi-level administrative systems aimed (through criteria of division of tasks between the subjects involved) at executing specific European laws and which, in each legal area, are the result of the mediation between the need to protect Member State competences and that of protecting the single market (and the exercise of fundamental freedoms therein). They allow for the dialectic confrontation between the public interests involved, whilst at the same time keeping it within physiological limits. In other words, these forms of administrative cooperation perform the function, in addition to ensuring the efficient and homogenous execution of EU law and the reciprocal controls between the various authorities, of compensating the Member States for the lack of exercise of administrative competence; a compensation which is made necessary by the subsidiarity principle which can also act in a horizontal direction.[28]

This function of sectorial unions becomes ever clearer in the presence of acts with transnational effects: in this case, administrative cooperation gives rise to alternative forms of involvement in the decisional process of the host authority (and at times of the European administration). In these institutional contexts, the public bodies involved (even if different from that which issued the act) can in conjunction with the other authorities, intervene at various points in the life of the transnational act in order to protect important collective interests. 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 powers of the host authorities. On the other hand, within the sectorial unions, the national administrations can cooperate and compare positions during the various phases of the existence of the act and in relation to problems that can arise. This distinction between the substantive and the organisational levels is relative however, as these two dimensions continuously interfere with each other.

The concept of sectorial unions presents some advantages in the analysis of the subject. In the first place, the legal regulation of the transnational measure is connected to the structure of its respective sectorial union. Despite the differences between the various models, one main principle can be identified: when it is an autonomous decisional power of the origin Member State, the transnational effect enters into the host legal system with particular strength; when on the other hand, there is a intertwining of decisions, the transnational effect on the host legal system is weaker.[29] Second, this concept allows all forms of administrative collaboration to be taken into account, not only those relating to the formation phase of the transnational decision but also the subsequent

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28 G. Sydow, *Verwaltungskooperation*, cit., 48 ff.

29 For a general overview, see M. Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' [2007/60] *DöV*, 761 ff.

phases. Third, observing the entire sectorial administrative union, it can be understood that the cross-border act represents one of the elements of a complex balancing mechanism between public and private interests, which constitutes a true public arena.[30] Fourth, beyond solely the transnational measure, this concept also helps juridical analysis to reach a higher level of detail than would otherwise be possible with the use of more general formulas which refer to the all European composite administration.

2 Decisional Models

It is now possible to briefly examine three types of transnational authorisations.[31] However it must be made clear that this analysis refers to examples which are diffused in secondary European legislation, but is not exhaustive and does not include all existing types, which could also be made up of a mix between the various models.

2.1 Authorisations with Automatic Transnational Effects

Authorisations that automatically produce transnational effects belong to this first group. These allow the beneficiary to exercise a fundamental freedom outside their home country without the host administrations having to give their own consent. This model has its origins in the rulings of the Court of Justice on mutual recognition and presupposes a high level of legal harmonisation between national legal orders.[32]

Worthy of mention here, for example, are authorisations for the sale of mineral waters as established by Directive 2009/54 mentioned previously, the issuing of licences for the provision of air transport services for passengers, post and/or goods pursuant to 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 (Articles 3 ff);[33] as well as the authorisation for the exercise of credit-provision activities (for the provision of transfrontier services and, following the outcome of a control procedure, for the establishing of a branch within the territory of another Member State) according to Articles 25 ff., Directive 2006/48/EC of the European Parliament and of the

30 S. Cassese, 'L'arena pubblica', in: Id, *La crisi dello Stato* (Bari-Roma 2001), 126 ff.

31 For similar classifications see for example, G. Sydow, *Verwaltungskooperation*, cit., 126 ff.; A.M. Keessen, *European Administrative Decisions*, cit., *passim*; H.C. Röhl, 'Procedures in the European Composite Administration', in: Barnes (Ed.) *Transforming Administrative Procedure* (Seville 2008), 92 ff.; S. Galera Rodrigo, *La aplicacìon administrativa*, cit., 108 ff.

32 E.g. Court of Justice Case C 221/05 *Sam Mc Cauley Chemists* [2006] ECR I-6869 § 25; M. Möstl, *Preconditions and limits of mutual recognition*, cit.

33 *OJ* 2008 L 293/3-20.

Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.[34]

The criteria for the division of tasks are here centred on the home administration itself, which exercises its power autonomously. The transnational effect is therefore particularly incisive in the host country, which is bound to respect the measure. This country must allow the private party to carry out the activities authorised by the act; it cannot review the legitimacy or appropriateness of the act itself,[35] nor can it demand that the private party concerned obtain a new authorisation.[36]

In order to better understand this model, it is important to touch on the distinction put forward by some international law scholars between the direct and indirect relevance of an act of public body (e.g. of a foreign administrative decision) in the legal system of destination. In the first case, the host legal system must take the administrative measure of another State into direct consideration, and must link this to specific juridical effects; this raises the problem of the extension and the finality of powers of verification permitted in the destination country. Indirect relevance occurs, instead, when the host State must take into consideration only a real or legal situation that is produced by the foreign act. In the host State therefore, the act itself is only indirectly relevant and its validity cannot be questioned.[37]

Having said this, when referring to the measure with automatic transnational effects in European law, it is evident that a very similar situation to that of indirect relevance exists in the host country. The authorisation granted in the home State has no relevance in itself for the host legal system, but rather that of the private juridical position which arises as an effect of this. This ensures a high level of continuity in the exercise of the fundamental freedom involved.[38]

It must be emphasised however, that whilst the transnational authorisation produces an indirect effect for the host State, it may nevertheless have a direct effect at the heart of the sectorial union. In particular, here the act can be subject

34 Consolidated version. See however the proposal of the Commission for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM/2012/0511 final. This proposal shows a strong move towards the centralisation of activities relating to banking authorisations.

35 See for example, Commission interpretative Communication 'Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive' (1193 final, 20 June 1997), where ample reference to the rulings of the Court of Justice can be found and in particular to sentence C 11/95 *Commission/Belgium* [1996] ECR I-4115; see also the opinion of the Advocate General Léger in Case C 476/01 *Kapper* [2004] ECR I-5205, § 45; the ruling of the Court of Justice Case C 390/99 *Canal Satélite Digital* [2002] ECR I-607 § 36 ff.

36 See for example, Art. 16 of dir. 2006/48 which states: 'Host Member States may not require authorisation (...) for branches of credit institutions authorised in other Member States'.

37 G. Biscottini, *Diritto amministrativo internazionale*, cit., 71. See also G. Rossolillo, *Mutuo riconoscimento*, cit., 236 ff. and R. Luzzatto, *Stati stranieri e giurisdizione nazionale* (Milano 1972), 251 ff.

38 R. Luzzatto, *Il principio di mutuo riconoscimento*, cit., 186 f.

to legality checks on the part of the destination administration (and at times of the Commission), with, for example, the aim of inviting the office that granted the authorisation to re-examine the case where violations of EU laws may be present.[39]

The indirect relevance of the act in the host legal system does not, moreover, preclude the host authority from being able to identify and qualify the decision of another country in order to allow for its execution. To this end, a series of requirements of an informative nature (e.g. communications, registrations, publications etc.), which do not, however, have any effect on the existence and the validity of the act itself (so-called 'passive mutual recognition') are necessary.[40] Once these have been fulfilled, the act becomes irrelevant for the host administration.

In this decisional model, not only does the home authority have the task of emitting the act, but also the competence for a possible withdrawal of an authorisation already granted.[41] Nonetheless, the host country is not completely powerless and without a means of action, indeed the majority of the EU secondary norms allow them to react in situations where important collective interests are endangered (e.g. health, environment and savings) through the suspension of activities in its own territory authorised by the transnational act (so-called 'safeguard measures'). 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 (e.g. through the modification or the withdrawal of the transnational act by the home administration)[42] at times by the subsequent intervention of the Commission,[43] or of other European bodies.[44]

It is important to emphasise that the object of these powers of the host State is not the transnational authorisation itself (which in fact remains in force and effective in all countries) but solely the activity of private parties connected to this, which is suspended only in the territory of the State which has adopted the safeguard measure.

Ultimately, it has to be underlined that these sectorial unions are based on the full respect of State powers (i.e. the subsidiarity principle), also because the

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39 See for example, Court of Justice Case C 178/97 *Barry Banks et al.* [2000] ECR I-2005 § 43 ss, where it is stated that the State which issued the act must 'reconsider whether it was properly issued and, if appropriate, to withdraw it', in front of such a request made by the host State. See also artt. 17 and 19 of Reg. 1093/10 establishing a European Supervisory Authority.

40 K.A. Armstrong, *Mutual Recognition*, cit., 240 ff.

41 E.g. Artt.17 and 35, Dir. 2006/48 cit. and Art. 9, Reg.1008/08.

42 E.g. see Art. 21, Reg. 1008/08; Articles 30 ff, Dir. 2006/48; Art. 11, Dir. 2009/54

43 See Art. 33, Dir. 2006/48 and Art. 21, Reg. 1008/08

44 See Articles 17 and 19, Regulation no. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority: European Banking Authority: *OJ* 2010 L 331/12-47.

intervention of the Commission (or other EU public bodies), where foreseen, is only a possible rather than a definite outcome.

One of the characteristics of authorisation with automatic transnational effects lies, as has already been said, with the prohibition of the host administration from carrying out any verification of the validity of the act itself. There are however, some cases in which this limit is reduced in order to protect important needs inthe host legal system. One example of this is given by the regulation of driving licenses.[45] Originally these were implicitly qualified by the European Court as authorisations with automatic transnational effects, with the consequent impossibility for the host country to undertake verification as to their legitimacy.[46] Subsequently however, in order to curb the phenomenon of so-called 'driving-licence-tourism', the Court of Justice has modified this approach. A Member State is now allowed, within precise and narrow limits, to refuse to recognise the licence issued in another State if it can be shown that at the moment of the issue of the licence, the licence holder, who had been the subject of a measure withdrawing an earlier licence in the territory of the first Member State, was not normally resident in the territory of the Member State of issue.[47]

Without going into the details of these judgments, it must be observed that they lead to a change in the juridical nature of the licence itself. In fact, it now assumes direct significance in the host country, the respective administrations can take into consideration the act issued by another State and can link specific effects to it (i.e. recognition or refusal). In this way a different decisional paradigm is produced (authorisation with transnational effects subordinated to verification) that presupposes the potential instability of the transnational effect in the face of checks undertaken in the host legal system.[48] This means that more weight is given to the interests of the host country.

2.2 Joint Decisions

The joint decision is a national authorisation which is the result of a composite procedure to which all the State administrations involved, as well as at times the Commission, participatewith a co-decisional role.[49] This

45 Directive No 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licenses. Consolidated version. For an extensive examination of this topic, see M. Szydło, 'EU Legislation on Driving Licences: Does It Accelerate or Slow Down the Free Movement of Persons?' [2012/13] *German Law Journal*, 345 ff.

46 E.g. see Court of Justice Cases C 476/01 *Kapper* [2004] ECR I-5201 and C 246/00 *Commission/Holland* [2003] ECR I-7485.

47 See Court of Justice Cases C 329 and 343/06 *Wiedemann and Funk* [2008] ECR I-4635 and order in Case C 225/07 *Möginger* [2008] ECR I-103.

48 For a general overview of this model, see E. Schmidt-Aßmann, 'Verwaltungskooperation', cit., 300 ff.

49 The name of the model comes from the expression used by the Advocate General Mischo in opinion in Case C 6/99 *Association Greenpeace* [2000] ECR I-1651 § 56.

model is not directly based on the rulings of the Court of Justice, but is a pure legislative invention.

Examples which can be mentioned here are the authorisation for the placing on the market of foods and food ingredients which have hitherto not been used for human consumption to a significant degree (Regulation 258/97 cit.); that of the placing on the market of genetically modified organisms not contained in food substances, following 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 (Articles 13 ff.);[50] and the authorisation for inter-community transport of waste for disposal according to Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (Articles 4 and 7 ff.).[51]

This model represents a further form of balancing between the subsidiarity principle and that of unity and it is justified by the huge importance of the public interests affected by those legal regulations which require the prior involvement of the public bodies concerned in the decision process. Despite having a number of differences, these EU norms provide for cooperation mechanisms within the procedure conducted by one State.[52] Following the investigation of the request and of the documents presented by the applicant at a national level, a multilateral phase takes place in which the administrations affected are called (at times through silent assent) to give their agreement to the issuing of a favourable decision. Only in the absence of opposition of the other administrations, the competent office can grant the authorisation. Regulation 258/97 and Directive 2001/18 stipulate that where there is an objection by one of the Member States (or by the Commission), the matter be returned to the Commission, which must then conduct a procedure according to comitology rules. At times, the Commission decides directly following the request of the private party (see Regulation 258/97), or alternatively, issues a decision specifically for the State of origin that must in turn implement this through a national measure (see Directive 2001/18). This provision makes explicit, in accordance with the subsidiarity principle, the upward movement of the decisional competence in cases where the States are unable to finalise the procedure.

The role of the procedure highlights the similarities and the differences between this model and that analysed previously. In both cases the authorisation produces automatic transnational effects. However, in the joint decision this legal consequence is supported by the prior consent expressed by the national administrations concerned. It thus follows that the measure has direct relevance for the host authorities who hence take into direct consideration the decision

50 Consolidated version.
51 Consolidated version.
52 See for example, Bignami & Cassese (Eds), *The European Union's Mixed Administrative Proceedings*, special issue of *Law & Contemporary Problems*, 2004.

proposed by another State. The national authorities, having contributed to the drawing-up of the act, are on one hand, bound by this and must respect it.[53] On the other hand, they can nevertheless subject it to checks of legitimacy and appropriateness. Any of the States which participated in the procedure can initiate a revision procedure also in conjunction with a safeguard measure for the protection of health and environment (Articles 23, Directive 2001/18 and Article 12, Regulation 258/97) 'indicating whether and how the conditions of the consent should be amended or the consent should be terminated...' (Article 20, Directive 2001/18). It is important to emphasise that here the State offices cannot take unilateral decisions, they can only initiate a second level procedure which has to be conducted jointly with the other Member States (and, at times, the Commission).

This authorisation structure also affects the legal regimen for negative measures. In particular, Directive 2001/18 contains the rule that a rejection (unchallenged) of the authorisation is binding solely for the public bodies that issued the decision itself. The refusal for example, of the request for the placing on the market of a product containing GMO taken by a national administration (that is before the multilateral phase) 'should be without prejudice to the submission of a notification of the same GMO to another competent authority' (whereas no. 36, Dir. 2001/18).[54] The negative decision formulated by the Commission (according to the comitology procedure), in contrast, binds all state administrations, who can therefore reject a new application of the private party related to the same good without having to re-start the multilateral phase.[55]

The sectorial unions related to this model can take on various forms. In the multilateral phase, true negotiations on the content of the act can take place between the authorities involved. The cross-border effect therefore has a reduced capacity to enter into the other legal systems, being subordinate to the prior consent of the States. The paradigm changes however, in the European procedural phase (when foreseen) into a form of centralised execution of EU law.

This does not mean, however, that the Commission is attributed a hierarchical position with respect to the national offices. On the basis of the subsidiarity principle, this body must in fact decide on the issue *ex novo*, keeping the European interest in mind, an interest that is the result of the balancing of conflicting national positions. It must be considered that in these cases the

53 Opinion of the Advocate General in Case C 6/99 cit. § 56.

54 On the irrationality of this discipline see G. Sydow, *Verwaltungskooperation*, cit., 171.

55 It should be noted that according to Reg. 258/97, a national administration cannot issue a negative measure: it can only establish that an additional assessment is necessary; in this case a decision of the Commission is required (see Case C-327/09, *Mensch und Natur AG/Freistaat Bayern* unpublished). The argument is slightly different for Reg. 1008/2006 (on the transport of waste): under this Regulation only the authority of dispatch can issue a refusal; the authorities of destination and of transit can only formulate objections, to which the administrations involved have 30 days to come up with a solution.

comitology procedure for management or regulation were applied in the past.[56] This comitology discipline indicated a willingness of the EU legislator to limit the power of the EU institution, forcing it to share the contents of its decision with the standing committee. This conclusion is reinforced today by Art. 291, para. 2 TFEU and by the new examination procedure provided by article 5 of Regulation No 182/11 which sets down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.[57]

2.3 Authorisations Subject to Recognition

Although the legal regulation of this model is based on the rulings of the Court of Justice on mutual recognition, it presents rather disparate procedural rules.[58] In general, it is made up of two or more interconnected authorisations issued in different State's legal orders. The first has legal effects only in the home country, whereas the second allows effects to be produced in the host country as well. These decisions are a response to the need to emphasise the importance of 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.[59]

Legal norms regarding the recognition of an authorisation and of registrations such as in Directive 98/8 cit. (on the placing of biocidal products on the market), for example, or that of Directive No 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications;[60] or Articles 40 and ff., of Regulation 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;[61] as well as the author-

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56 Articles 4 and 5, Council Decision of 28 June 1999 No 1999/468/CE, laying down the procedures for the exercise of implementing powers conferred on the Commission: consolidated version. On this area see, among others, M. Szapiro, 'Comitology: the ongoing reform', in *Legal Challenges in EU Administrative Law*, cit., 89 ff.; K. Caunes, 'Et la fonction exécutive eurpoéenne créa l'administration à son image ...' [2007/43] *Revue trimestrielle de droit eurpoéenne*, 207 ff.; D. Riedel, 'Die Durchführungsrechtsetzung nach Art. 211, 4. Sp. EG' [2006/41] *EuR* 527 ff.; C.F. Bergström, *Comitology* (Oxford 2005), *passim*; C. Joerges, 'Rethinking European's Law Supremacy', in *Eui working paper* n. 2005/12; C. Joerges & J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' [1997/3] *European Law Journal*, 273 ff.

57 *OJ* L 55/13-18. On the new comitology (reg. 182/11 cit.), see P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', in www.sssrn.com.

58 For an analogous decisional model for international law, see G. Biscottini, *Diritto amministrativo internazionale*, cit., *passim*.

59 See K.A. Armstrong, 'Mutual Recognition', cit., 242, who talked about the '... *domestification of the foreign regulatory process* ...'.

60 Consolidated version. For a general overview see M. Möstl, 'Preconditions and limits of mutual recognition', cit., 423 ff.

61 *OJ* 2009 L 309/1-50.

isation for the commercialisation of pharmaceutical products on the market following the consolidated version of 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 (see Articles 28 ff.),[62] all belong to this group.

The first authorisation, following the request of the recipient, can take on direct significance in the host country, which must issue a decision in this regard. This direct significance, however, is not aimed at subjecting the first authorisation to checks on its legitimacy or to making it effective in the host legal system, but works to allow the host administrations to examine the results of the investigation on which the first act was based and to determine its effects within the margins allowed by EU law. More precisely, such investigation results are imposed on the host authority who must refrain from repeating them and can at best, in given sectors and under given conditions, begin a specific procedure to contest them. The public office in the second legal system must therefore limit itself to evaluating these results according to the parameters established under European law.

Thus, the home administration substitutes that of the host country by carrying out the majority of checks and controls.[63] The transnational effect here has a procedural nature. The recognition measure, which is enacted on the basis of the evaluation of the investigation carried out in the first country, has therefore, a fully decisional nature.[64] As a consequence, once it is issued it is, in principle, independent from the initial act and is not affected immediately by related events. For example, the revocation of the first authorisation does not imply *ipso jure* the nullity of the recognition decision (e.g. see Article 44, paragraphs 3 and 4, Regulation No 1107/2009).[65]

A series of variations can be seen regarding the legal discipline of the recognition measure. At times the refusal of recognition is not expressly provided for (e.g. Directive 2005/36) and the host administration must limit itself to identifying and qualifying the act of another country and, in the presence of the conditions established by secondary law, must proceed with the recognition. In case of refusal, the applicant may challenge the unfavourable decision in the

62 Consolidated version.

63 G. Biscottini, *Diritto amministrativo internazionale*, cit. 117.

64 See, amongst others, Court of Justice Cases C 260 and 261/06 *Escalier and Bonnarel* [2007] ECR I-9717 § 24 ff, C 201/06 *Commission/France* [2008] ECR I-735 § 24 ff. and C 400/96 *Harpegnies* [1998] ECR I-5121 § 25 ff.

65 A slightly different legal dynamic is set out by dir. 2001/83, regarding pharmaceutical products. In the case of a revocation (a modification or a suspension) of one the authorisations granted under the mutual recognition mechanism, a procedure at European level regarding all the authorisations enacted for the same product in the different member States must be initiated (Art.35 and 36); this shows a greater emphasis on the unitary principle in this area. On this directive see, amongst many, the General Court Case T 273/03 *Merck Sharp & Dohme Ltd and others/Commission* [2006] ECR II-141. See now also Regulation No 528/12 cit.

national court. In these legal norms the sectorial unions can only ensure a collaboration of an informative nature which takes place along the horizontal dimension, given that no decisional function is attributed to the Commission, nor is any form of balancing or negotiation foreseen (e.g. Article 56, Directive 2005/36; Article 39 Regulation 1107/09).

Other legal norms expressly provide for the refusal of recognition. However, this refusal can only be adopted in the presence of certain pre-determined conditions.[66] In this case, at times a negotiation phase between the home and host authorities, regardless of the willingness of the private party, is foreseen (e.g. see Article 4, paragraph 3, Directive 98/8). In other cases a Commission decision, taken according to comitology rules (e.g. Articles 29 ff., Directive 2001/83), is required.[67] Even where a Commission decision is necessary, there is no contrast between national interests and those of the European Union; the comitology procedure must ensure that the best possible balance is reached between the conflicting needs. Ultimately, under these regulations, the host country cannot refuse the recognition but simply has the power to initiate a further procedural phase. The rejection here is treated as a conflict that spreads inside the sectorial union, allowing for a margin of negotiation between the public entities involved.[68]

All the above explains the similarities and the differences that exist between this model and the joint decision. In both situations the investigation is concentrated in one national administration and each State maintains its decisional power. In the second however, there is only one administrative measure and the unitary principle therefore has greater weight thanks to the joint exercise of power. In authorisations subject to recognition, the differences between the Member States are amplified and the protection of the unitary principle, at least at the beginning, is confined to the recognition procedure itself and entrusted to the host country. In this way space is made for the need for differentiation.

3 Inter-administrative Ties and the Nullity of the Transnational Act

As has already been seen, the transnational act consists of different forms of division of tasks between national administrations, made effective by one constant component: the fact that 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 es-

66 See e.g. Court of Justice Case C 452/06 *Synthon* [2008] ECR I-7681.
67 See now Reg. 182/11 cit.
68 L. De Lucia, 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris)' [2012-1/5] *REALaw*, 43 ff.

tablished by European laws. This outcome, which can be called an 'inter-administrative tie',[69] represents an essential part of the transnational effect, but operates in different ways in the models analysed. Its scope is wider when the act has indirect significance for the destination legal system, i.e. when the country of origin has decisional autonomy (in authorisation with automatic transnational effects). Its scope is more limited, on the other hand, when the measure has direct relevance in the host country (i.e. in joint decisions and in authorisation subject to recognition). 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: one 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 is represented by the limits to investigation that the host authority faces. These limits are always set up to safeguard the private freedom, although this protection occurs within the recognition procedure itself, however.[70]

The inter-administrative tie is thus a tool to ensure, aside from the effective division of administrative tasks, the exercise of the fundamental freedoms connected with the transnational measure. It is for this reason that when expected to yield to the interests of the host country, there is a different decisional model (e.g. an act with transnational effects subordinated to verifications).

This concept allows some matters of legal discipline to be settled. For instance, the inter-administrative tie precludes the host administration from contesting a measure with transnational effects, even if the State of origin issued the act on the basis of a European directive that was transposed in an incomplete

69 Regarding the conceptual relationship between the inter-administrative tie and the Tatbestandwirkung (a characteristic of the administrative measure identified by German scholars), see L. De Lucia, *Amministrazione transnazionale*, cit. 47.

70 Some scholars, however, maintain that the host country can always oppose the effectiveness of the transnational measure, in exceptional cases such as when it is found to be contrary to public order: M. Ruffert, 'Der transnationale Verwaltungsakt', cit., 475 f; ID, 'Recognition', cit.; H.C.H. Hofmann, G.C. Rowe & A.H. Türk, *Administrative Law and Policty of the European Union*, cit., 647, who base their arguments on some sentences of the Court of Justice regarding the recognition of national jurisdictional decisions: e.g. Cases C 126/97 *Eco Swiss* [1999] ECR I-3055 § 29, C 7/98 *Krombach* [2000] ECR I-1935 § 35 and C 38/98 *Renault* [2000] ECR I-2973 § 29. Cfr. for an opposite opinionsee L. De Lucia, *Amministrazione transnazionale*, cit., 242 ff.

or incorrect way or was not transposed at all.[71] In fact, if the inter-administrative tie prevents the destination authority from checking the legitimacy of the transnational authorisation, there is all the more reason to rule out any verification on the conformity of the national transposition norms of EU directives.[72]

To give another example, the issue has been raised as to whether the host administration can prevent the execution of the transnational act due to its nullity (i.e. in presence of an act 'which exhibits particularly serious and manifest defects'), as in most European legal systems, nullity causes the ineffectiveness of the administrative measure (e.g. § 43 Verwaltungsverfahrensgesetz). Aside from the difficulty that is encountered in formulating a common definition of 'nullity' in the various European legal orders, scholars have given contrasting answers to this question. Some authors maintain that the host administration can ascertain the nullity of the decision for two reasons: First, because as the void act is ineffective, an inter-administrative tie (which is part of the transnational effect) would not arise allowing the host institution to carry out a legitimacy check on the act itself; Second, because if the host administration were not allowed to assess the grave illegality of the act, this would lead to the paradoxical result in which the measure itself would be ineffective in the home county and effective, by contrast, in the other legal systems.[73] Other scholars state that the *raison d'êtreof the transnational measure itself* precludes the host country from verifying the validity of the act, despite the fact that nullity is merely a more serious defect than other legal pathologies.[74]

Two contrasting principles need to be reconciled here: to prevent an evaluation of validity of the administrative measure from being carried out by the host country (guaranteeing the effectiveness of the relative fundamental freedom) and to ensure the respect for the principle of legality and legal certainty. The best method to balance these interests may be that linking the inter-administrative tie back to the existing transnational authorisation (even if this is null and void). Once the host administrationis able to identify and qualify the act, it cannot plead its nullity. The tie is produced therefore, by the existence of the act itself. This conclusion demonstrates in addition, that these forms of legal regulation place particular emphasis of the exercise of the fundamental freedoms.

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71 On this subject, see e.g. J. Becker, 'Der transantionale Verwaltungsakt', cit., 861; V. Neßler, 'Der transantionale Verwaltungsakt', 864; M. Ruffert, 'Der transnationale Verwaltungsakt', cit., 461.

72 It must be considered that, according to the Court of Justice, one country (the host) cannot refuse to conform itself to the obligations arising from European Law (e.g. allowing the execution of a transnational measure) for the reason that another country (that of origin) has violated a directive: e.g. Case C 5/94 *The Queen/Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas* [1996] ECR I-2553 § 20.

73 G. Sydow, *Verwaltungskooperation*, cit., 149 ff.

74 M. Ruffert, 'Der transnationale Verwaltungsakt', cit., 475 f.; ID, 'Recognition', cit.

Nonetheless, two points should be made with respect to this. First, it must be remembered that the event occurs within a sectorial union. This implies the obligation for national authorities to cooperate with each other not only in the ways set down by the law, but also informally. As a consequence, the home office that becomes aware of the nullity of a measure must immediately inform the other administrations involved. Alternatively, if the destination State has doubts over the nullity of an authorisation, it must consult the authority of origin, if it then receives a communication confirming that this is null and void, it can act accordingly. Second, this reconstruction does not affect the fact that the transnational measure has, in specific cases, direct significance for the host legal system (the joint decision and the measure subject to recognition). As we have seen, direct significance translates into the possibility, when appropriate, to initiate review procedures or to issue new decisions. It does not however, allow for a unilateral evaluation by offices in the host country of the legitimacy of the authorisation already granted.

4 Issues Concerning Judicial Protection

The transnational measure can raise issues of jurisdictional protection, as administrative pluralism corresponds to a plurality of potentially competent courts.[75]As the topic is highly complex only a few essential aspects of this area will be mentioned here. Concerning this theme, a distinction should be made between the position of the recipient (with regards to a negative or unfavourable decision), from that of third parties.[76]

The main difficulty for the recipient arises when the decision is the result of a composite procedure (i.e. a procedure in which different national and at times also European authorities take part). According to the general rule laid down by the Court of Justice the recipient must challenge the unfavourable act in the court of the legal system to which the issuing administration belongs. This same legal order has jurisdiction on claims for damages. However, when a European decision has to be implemented through an administrative act of a Member State (e.g. a Commission decision on one State's objection to the joint decision: e.g. Directive 2001/18), these rules have to be adapted. In this case, if the recipient can be considered directly and individually concerned by

75 See F. Shirvani, 'Haftungsprobleme im Europäischen Verwaltungsverbund' [2011/46] *EuR*, 619 ff.; A.M. Keessen, *European Administrative Decisions*, cit., 141 ff; A.H. Türk, 'Judicial review of integrated administration in the EU', in *Legal Challenges in EU Administrative Law*, cit., 218 ff.; J. Hofmann, 'Rechtsschutz und Haftung im Europäischen Verwaltungsverbund', in *Der Europäische Verwaltungsverbund*, cit., 354 ff; ID, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund* (Berlin 2004), *passim*.

76 For a different point of view see, M. Gautier, 'Acte administratif transnational', cit.; J. Hofmann, *Rechtsschutz und Haftung*, cit., 61.

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.[77]

In principle, this legal regulation does not create serious problems to the effectiveness of the judicial protection of rights, despite there being some room for improvement. Some difficulties may arise however, relating to a claim for damages where there are many interlinked administrative decisions which could obscure the clarity of the responsibilities of the single authorities involved.[78]

The position of third parties is more complex. Recent studies on this have highlighted the fact that such authorisations 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).[79] This could expose them, in addition to problems of language, to economic costs that could constitute a real limit to their access to the courts as well as to situations where the legal systems do not recognise the *locus standi* of third parties in the same terms.[80] This is a very serious issue, the solution to which would presuppose an in-depth analysis of the subject in each legal system.[81]

Essentially, to better understand the subject, it is important to distinguish between a) controversies in which the third party (who lives or is established in the host country) must ask the administrative court in the home country to invalidate the transnational act; b) those in which the third party asks the ordinary court in their own country for protection towards the beneficiary of the transnational authorisation and c) controversies in which the third party claims for damages in face of the national authority which issued the act considered to be harmful.

In the first case (a), aside from questions of a concrete nature (such as linguistic difficulties and economic costs), problems of access to protection could arise even if only with regards to the *locus standi;* a standing right which probably exists only for some competitors of the beneficiary of the authorisation or for

77 See e.g. Court of Justice Cases C 188/92 *TWD/Bundesrepublik Deutschland* [1994] ECR I-833 and C 178/95 *Wiljo/Belgische Staat* [1997] ECR I-585; see, however, Cases C 133 and 136/85 *Rau/BALM et al./Commission* [1987] ECR 2289 and C 216/82 *Universität Hamburg* [1983] ECR 2771. Third parties, on the other hand, can only challenge the national act that implements the European decision: this is where the issue of parallel judicial prcedures can arise (A.M. Keessen, *European Administrative Decisions*, cit., 154 ff. and 230 ff.).

78 E. Schmidt-Aßmann, 'Europäische Rechtsschutzgarantien auf dem Weg zu einem kohärenten Verwaltungsrechtsschutz', as well as in *Aufgaben und Perspektiven verwaltungsrechtlicher Forschung* (Tübingen 2006), 86 and 103; for rulings, see e.g., General Court T Case 429/05 *Artegodan/Commission* [2010] ECR II-491.

79 E.g. N. Bassi, *Mutuo riconoscimento*, cit., 69 ss; M. Ruffert, 'Der transnationale Verwaltungsakt', cit., 476.

80 A.M. Keessen, *European Administrative Decisions*, cit. 183 ff.

81 E.g. M. Eliantonio, *Europeanisation of Administrative Justice* (Groningen 2008), *passim*.

associations involved in the protection of collective interests (e.g. the environment or consumers).

b) These limits are however, compensated by the fullness of the protection in front of an ordinary court. During a civil process in which the applicant asks to be safeguarded in the face of the private activity authorised by the transnational measure enacted abroad, the national court must not question the legitimacy of the authorisation, but must focus its attention solely on the conduct of the party causing the alleged damage in order to verify whether it is effectively harmful. In the judgment, the act itself is therefore insignificant and cannot serve as a justification for the detrimental conduct. This statement is valid also for measures subject to recognition, as in the example of a consumer association asking the ordinary court to prohibit the sale of a biocide (authorised by recognition) on the grounds that it is noxious to the environment or to public health. The ordinary court can in this case decide on the question, regardless of the (technical) verification carried out by the home State, by undertaking an autonomous evaluation of the product and of the relevant facts.

This conclusion was confirmed, for example, by the Italian administrative court, when a pharmaceutical company challenged the Italian recognition measure for the authorisation for the placing on the market of a pharmaceutical product issued by another country, as in their opinion the beneficiary of the authorisation had used an active ingredient to which the applicant had the exclusive patent rights. The administrative court dismissed the application due to the fact that, amongst others, the Italian Health Authority (Ministero della Salute) did not hold the legal competence to deal with patent rights. The Italian Council of State however, clarified that such an interpretation does not damage the principle of full jurisdictional protection, but only 'has the effect of shifting the relative issues to the State where the first authorisation was granted, or in front of the competent judicial authority' (i.e. the civil court).[82] This confirms that the ordinary court can ensure full and effective protection of the third party.

These EU regulations place the burden of responsibility of conduct above all on the beneficiary of the 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 those prescribed in the authorisation and must report the need to revoke or modify this act to the competent authority.[83] The transnational measure in the host country is therefore characterised by bipolarity, as in principle it only guarantees the protection of specific public interests, yet it does not govern private relationships and does not ensure the correct functioning of the social dynamics.

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82 Council of State sez. IV, no. 3993 of 2004.

83 See e.g. Art. 20, para. 2, Dir. 2001/18; Art. 25 Dir. 2001/83; Art. 31, Dir. 98/8. In general, J. Barnes, 'Reform and Innovation in Administrative Procedure', in: *Transforming Administrative Procedure*, cit., 15 ff.

It is worth noting here that this particular responsibility of the enterprise also stems from the fact that many of these EU laws regard the protection of interests of primary concern in the face of potentially dangerous private activities founded on complex scientific knowledge and characterised by a high degree of uncertainty. This in itself calls for an increased involvement of enterprises, which often have more rapid access to significant information, in the protection of the public well-being.[84]

c) All of the above do not exclude, at least in principle, the concurrent liability toward third parties of the administration (in particular that of another State) that issued the transnational act. A liability which can arise under the conditions laid down by the Francovich judgement of the Court of Justice.[85] This responsibility leads to numerous difficulties however. First, the fact that the public body responsible belongs to another State can cause problems for the third party in claiming for damages in a foreign court. Second, in order to ascertain the effective liability of the host administration, the court must also take into account the conduct of other authorities (including that of the claimant legal system) entitled to exert vigilance power over the private activity authorised by the transnational act or to enact safeguard measures.

5 Sanctions Enacted by a National Competition Authority under Regulation 1/03

The considerations which have been made up to this point have been focused on authorisations with transnational effects. Nevertheless, some of the concepts and principles investigated can also be applied to other types of transnational measure. This is the case for instance, for the sanctions imposed by the National Competition Authorities under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on

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84 For a general overview of this interesting and challenging issue see for example, G.F. Schuppert, 'Verwaltungsorganisation und Verwaltungsorganisationsrecht als Steuerungsfaktoren', in: *Grundlagen des Verwaltungsrechts*, cit., 1067 ff., spec. 1104 ff.: K.H. Ladeur, 'The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law', in www.ssrn.com; R.B. Stewart, 'Administrative Law in the Twenty-First Century' [2003/78] *N.Y.L. Rev.*, 437-460. For a perspective which is crucial, see W. Brown, 'Neoliberalism and the End of Liberal Democracy' [2003/7] *Theory & Event*; T. Lemke, 'The Birth of Bio-Politics – Michel Foucault's Lecture at the Collège de France on Neo-Liberal Governmentality' [2001/30] *Economy & Society*, 190 ff.

85 Court of Justice Cases C 6/90 *Francovich* [1991] ECR I-5357, C 46/93 and C 48/93 *Brasserie du pêcheuret al* [1996] ECR I-1029; see also, *inter alia*, Cases C 472/00 *Commission/Fresh Marine* [2003] ECR I-7541and C 424/97 *Haim* [2000] ECR I-5123; F. Shirvani, *Haftungsprobleme im Europäischen Verwaltungsverbund*, cit. In general, J.H. Jans, R. de Lange, S. Prechal, & R.J.G.M. Widderhoven, *Europeanisation of Public Law* (Groningen 2007), 321 ss.

competition laid down in Articles 81 and 82 of the Treaty.[86] Given that the subject is quite vast and complex, this section will concentrate on a few essential points.

As is well known, this regulation has changed the legal framework of European competition law from a number of points of view.[87] For the purposes of this paper it is sufficient to mention that the task of applying Articles 81 and 82 TCE (now Articles 101 and 102 TFEU) to individual cases now lies with the Commission and the National Competition Authorities. Hence, parallel competences between these bodies have been provided for in the law. The national authorities, in particular, can require that an infringement be brought to an end, order interim measures, accept commitments proposed by undertakings[88] and impose fines, periodic penalty payments or any other penalty provided for in their national law (Article 5);[89] they cannot however, take a decision stating that there has been no breach of articles 101 and 102 TFEU.[90]

Regulation 1/03 and the subsequent 'Commission notice on cooperation within the Network of Competition Authorities'[91] contain some criteria for the division of tasks between national administrations and regulate a series of instruments both for coordination and for the exchange of information. In addition, according to Article 11, para. 6 of this Regulation, 'the initiation by the Commission of proceedings for the adoption of a decision ... shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty'.[92]

In substance, every national authority can (in principle and excluding situations in which the case is re-allocated to another national authority or where

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86 *OJ* 2003 L 1/1-25.

87 For all of these see: W. Weiß, 'Europäisches Wettbewerbsverwaltungsrecht', in *Verwaltungsrecht der Europäischen Union*, cit., 751 ff; A. Andreangeli, 'The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings' [2006/31] *ELR*, 342 ff.; S. Brammer, 'Concurrent Jurisdction under Regulation 1/2003 and the Issue of Case Allocation' [2005/42] *CML Rev.*, 1383 ff.; A. Burnside & H. Crossley, 'Co-operation in competition: A new era?' [2005/30] *ELR*, 234 ff.; A. Fuchs, 'Kontrollierte Dezentralisierung der europäischen Wettbewerbsaufsicht', in *EuroparechtBeiheft 2*, 2005, 77 ff.; L. Idot, 'Le nouveau système communitaire de mise en oevre des articles 81 et 83 CE' [2003/39] *Cahiers des droit europeen*, 283 ff.; J.S. Venit, 'Brave New World: the Modernization and Decentralization of Enforcement Under Aricles 81 and 82 of The EC Traty' [2003/40] *CML Rev.*, 545 ff.

88 F. Wagner-von Papp, 'Best and Even Better Practices in the European Commitment Procedure after Alrosa: The Dangers of Abandoning the "Struggle for Competition Law"', [2012/49] *CML Rev.*, 929 ff.

89 For an overview on administrative sanction in EU legal order, cfr. A. de Moor-van Vugt, 'Administrative Sanctions in EU Law' [2012-1/5] *REAlaw*, 5 ff.

90 Court of Justice, Case C 375/09 *Tele2 Polska* unpublished, see the comment of S. Brammer [2012/49] *CML Rev.*, 1163 ff.

91 *OJ* 2004 C 101/43-53.

92 It should be noted that in this norm, the subsidiarity principle does not act as a protection for State competences, but for the Commission which – having been lightened of the burden of work attributed to national authorities – can concentrate on the most important issues.

the Commission intervenes) issue sanctions for violations of European competition law committed in any part of the European Union, even when the undertaking is established in another State.[93] Given that these punitive measures have in many national legal systems an administrative nature, the issue of administrative sanctions with transnational effects arises. In particular, in this context the transnationality of the national administrative sanction can take on two characteristics.

The first characteristic is only a possibility and occurs when the national competition authority which issues the measure and the recipient are in two different Member States. The sanction here becomes a type of 'administrative act by correspondence':[94] The act crosses the State borders and reaches the juridical sphere of a subject established in another legal system. This kind of transnational effect is one which has particularly incisive consequences on the host legal order as the relative authority is not called upon to give its consent to the issuing of the sanction. However, it should be borne in mind that Regulation 1/03 and the Communication from the Commission regulate a series of mechanisms that require all the competition authorities involved in a case be informed.

The second characteristic has wider significance and concerns the existence of a legal effect similar to the inter-administrative tie deriving from the sanctions imposed by one of the national competition authorities.

This feature can be understood by considering, in particular, the problem of double sanctions for the same violation of the norms regarding competition. Regulation 1/03 does not contain any provisions dealing with this area. Consequently, some scholars retain that the issuing of a sanction (or fine) by one national competition authority does not have limiting effects for the Commission or the other authorities of the network who can therefore ignore a sanction already imposed.[95] This argument is not very convincing, however. It should in fact be deemed that in these cases the principle of *ne bis in idem* should be applied, as confirmed moreover in the wording of the Regulation itself. In particular it refers to the Charter of Fundamental Rights of the European Union (see whereas no 37), which includes the principle under examination (Article 50 CFR)[96] that precludes the same violation from being sanctioned more than

93 E.g. M.F. Portincasa, 'Il principio *ne bis in idem* nel diritto antitrust comunitario' [2007/12] *Il diritto dell'Unione europea*, 110 f.; *contra* E. Paulis & C. Gauer, 'Le règlement n 1/2003 et le principe du *ne bis in idem*' [2005] *Concurrence*, 33 ff.

94 For an overview see M. Ruffert, 'Der transnationale Verwaltungsakt', cit., 465 ss.

95 E.g. W. Weiß, 'Europäisches Wettbewerbsverwaltungsrecht', cit., 778.

96 For an overview on the *ne bis in idem* principle see M. Luchtman, 'Transnational Law Enforcement in the European Union and the *Ne Bis In Idem* Principle' [2011-2/4] *REALaw*, 5. In competition law, cfr., *ex multis*, G. Di Federico, 'EU Competition Law and the Principle of *Ne Bis in Idem*' [2011/17] *European Public Law*, 241-260; F. Louis & G. Accardo, '*Ne Bis in Idem*, part *"Bis"*' [2011/34] *World Competition*, 97-112; M.F. Portincasa, 'Il principio *ne bis in idem*', cit., 110 ff.; E. Paulis & C. Gauer, 'Le règlement n 1/2003 et le principe du *ne bis in idem*', cit., 33 ff;

once. In this regard it is also worth mentioning that, according to the rulings of the Court of Justice, the application of the *ne bis in idem* (in European competition law) 'is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under this principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset'.[97]

As a consequence, if the same conduct of an undertaking which violates Articles 101 or 102 of the Treaty can be subject to more than one repressive procedure, (see Article 13, Reg. 1/03),[98] following *ne bis in idem* it cannot be subject to more than one sanction on the part of different authorities which act according to Regulation 1/03. If this conclusion is correct, the imposition of a sanction on behalf of one national authority limits the others in the network (including the Commission), who can no longer punish the same infringement. This interpretation, it has to be emphasised, is also instrumental to the efficient implementation of Regulation 1/03.[99]

In order to be effective, the prohibition of double sanctioning obviously relies on the fact that the authorities outside of that which issued the measure cannot carry out checks on the legitimacy or merit of the sanction itself. Effectively, the principle of *ne bis in idem*, when analysed from the point of view of the relationship between the various public players involved in the network, generates the same consequences as the inter-administrative tie. In fact, these measures have both substantial effects (e.g. affecting the legal sphere of the sanctioned enterprise) and at the same time organisational effects, limiting the punitive powers of the administrations of the other Member States.

A significant structural analogy thus emerges between these sanctions and authorisations with automatic transnational effects. In the latter, the inter-administrative tie exists in the fact that it is prohibited for the host administration to demand that the interested private party obtain a further authorisation from the host legal system, as well as the impossibility of carrying out verifications on the validity or appropriateness of the transnational act. All of these occur in order to guarantee the effective exercise of the relative fundamental freedom. In Regulation 1/03, on the other hand, the principle of *ne bis in idem* brings with it the preclusion of double sanctions and the prohibition for the destination authority (or the Commission) to perform checks once the sanction has been imposed. In conclusion, in both cases the inter-administrative tie and the principle of *ne bis in idem* coordinate (either positively or negatively) the exercise

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W.P.J. Wils, 'The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' [2003/26] *World Competition*, 131 ff.

97 Court of Justice, Cases C 204/00 *Aalborg Portland et al./Commission* [2004] ECR I-123 § 338 and C 17/10 *Toshiba Corporation* unpublished § 97.

98 A possibility allowed by § 12 ff. of the Communication from the Commissione cit.

99 See W.P.J. Wils, 'The Principle of *Ne Bis in Idem*', cit.

of parallel administrative competences. This confirms that one of the main functions of the transnational act is to ensure effective forms of division of labour between national administrations and hence to regulate the relationship between the public and the private spheres.

6 Final Remarks

The research conducted demonstrates above all that the transnational act, which plays an important role in the EU legal system, constitutes an essential tool in balancing unitary needs with the subsidiarity principle. For this reason, the transnational measure represents a significant evolution with respect to the traditional concept of the administrative act in light of the marked institutional pluralism characterising the European Union.

In particular, authorisation with transnational effects are expressly in favour of the exercise of fundamental freedoms, for example by exempting the beneficiary from the respect of some of the legal norms of the host country. They are, in essence, instruments that aim to simplify and liberalise the European internal market. The characteristics of these decisions explain the specific legal regulation for null and void authorisations and the system of responsibility that lies in particular with the company authorised. This moreover highlights a crisis (or at least a partial crisis) in the principle of legality in this area. It has been seen that some of these characters are present also in the administrative sanctions regarding competition law, where the principle of *ne bis in idem*, which protects the legal sphere of the undertakings involved, plays an important role.

The transnational measure is surrounded by sectorial unions, i.e. public arenas in which numerous public bodies establish negotiation procedures regarding the decision to be enacted or already enacted. The cross-border effects (and the related fundamental freedoms) in fact concern not only the administration that issued the measure, but also other States and at times, European bodies. This clarifies why in many EU norms these effects can be questioned by one of the host authorities (e.g. through a safeguard measure) or by the Commission (or by the European Supervisory Authority). In these legal norms therefore, 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 the sectorial union. For this reason, such measures result in a limited stability of private rights[100] which can lead to a high degree of uncertainty for private parties.[101]

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[100] In general, E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Berlin-Heidelberg 2004), 335.

[101] E.g. G. Teubner, '"And if I by Beelzebub cast out Devils, ...": An Essay on the Diabolics of Network Failure' [2009/10] *German Law Journal*, 395 ff.

To sum up, whilst the transnational authorisation in the host legal system works to protect private freedom, sectorial unions and the components of these, by contrast, can intervene in order to protect important public interests. Accordingly, these legal disciplines can be seen as administrative techniques aimed at favouring the exercise of fundamental freedoms but which at the same time continue to protect important collective interests.

Finally, it must be noted that these innovative decision-making models, even given the delicate equilibrium on which they are founded, raise some important political and legislative issues. Three of these can be mentioned here.

In the first place as mentioned previously, in the legislation on transnational measures a central role is played by administrative (horizontal) cooperation. However, there is the impression that, in reality, in many areas the quality of this cooperation has not yet reached an acceptable level. The Treaty of Lisbon contains an important novelty in this regard. Article 6, let. g), TFEU gives the Union the competence to support, coordinate or supplement the actions of the Member States in the area of administrative cooperation. Moreover, according to Article 197 TFEU the effective implementation of Union law by the Member States shall be regarded as a matter of common interest. To such an end the Union may support the efforts of the States themselves to improve their administrative capacity to implement Union law; this EU action may include facilitating the exchange of information and of civil servants as well as supporting training schemes.[102]

In essence, the new Treaty has finally taken into consideration the existence of the 'administrative question' in the European Union. One of the conditions for success of these policies however, will probably be in not neglecting the fundamentally sectorial nature of European integrated administration. It is important that such programmes be focussed also on bridging gaps in administrative implementation, especially in those areas where transnational cooperation presents the biggest difficulties.[103] This is an objective that therefore presupposes an in-depth analysis of the various sectorial unions and the relative fragility of each one.

The second problem concerns the tendency towards centralisation present in recent legislation and is partially linked to the previous issue. There are in fact important economic areas in which, following the recent financial crisis, the model of horizontal cooperation, where the subsidiarity principle is balanced

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[102] A. Natalini, 'Dopo Lisbona: un programma per le pubbliche amministrazioni', in: Chiti & Id (Eds), *Lo spazio amministrativo europeo* (Bologna 2012); M. Macchia, 'La cooperazione amministrativa come "questione di interesse comune"', ivi; in general, H.C.H. Hofmann, 'Mapping the European administrative space' [2008/31] *West European Politics*, 662 ff.

[103] See e.g. J. Trondal, 'Administrative Fusion: Less Than a European "Mega-administration"' [2009/31] *Journal of European Integration*, 237 ff.

with the unitary principle, has been abandoned in favour of a centralised system, at the expense of national competences.

Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[104] is worthy of mention. In the original version, the Regulation was based on a subsidiarity view regarding the registration of the credit rating agencies (Articles 14 ff.). It was in fact an administrative act with transnational effects very similar to the joint decision but involving greater autonomy for the individual Member States. With the modifications made in 2011 to Regulation 1060/09, the authorisation function has been handed to the European Securities and Markets Authority,[105] depriving the States of any role. This occurred largely due to the fact that there was 'insufficient cooperation and information exchange between national supervisors' (whereas no 8, Regulation 1095/10).[106]

This solution is not without its advantages, considering the greater stability which is derived from the reinforcement of the unitary principle. However, some doubts must be raised in this regard on the compatibility of this organisational choice (in part common to the banking, finance and insurance markets) with the Treaty, which does not consider the possibility of attributing such important functions to European bodies who are considered as being higher on a hierarchical level than national authorities.

In any case, the fortune of the community experience comes from the ability to combine unity and pluralism through original forms of institutional dialogue and the idea of integrated administration itself embodies this conceptual structure. The hope is therefore that no indiscriminate concessions will be made to the centralist logic and the subsidiarity principle will always be rigorously respected by the EU legislator. This is especially the case given that it is doubtful whether a generalised process of centralising important administrative decisions would have positive effects either from the point of view of democratic principles or on the social acceptance of public decisions.

Third, transnational acts (as with other forms of horizontal cooperation) raise questions regarding the effective judicial protection of rights and more widely, that of the dialogue between national courts. This dialogue is necessary both to prevent possible gaps in legal protection that these (and other) decision-making models could generate, as well as to avoid a situation in which different judgments are issued by different legal systems concerning the same event.[107]

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104 Consolidated version.

105 See 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 (*OJ* 2011 L 145/30-56).

106 The same can be said with reference to the prospective reform of banking vigilance regulation: cfr. the proposal of the Commission COM/2012/0511 final cit.

107 E. Schmidt-Aßmann, 'Kohärenz und Konsistenz des verwaltungsgerichtlichen Rechtsschutzes. Eine Forschungsskizze' [2011/44] *Die Verwaltung*, 117.

This is not the place to reflect at length on such a complex theme, which would in all probability require some amendments to the Treaties. However, it must be observed that if the legislator does not take this issue into account it runs the risk of weakening horizontal administrative cooperation and favouring forms of centralisation at European level, alongside the absorption of some aspects of the protection of private parties into cooperation techniques between national and EU administrations, or even that of the fragmentation of such protection at national level.[108]

It is of course no coincidence that judges from the Member States have already understood the necessity of communicating with each other. There are many associations in fact that bring together administrative judges, amongst others, with the aim of exchanging information and experience within the various legal systems, in particular with regards to issues relating to European law and the formulation of proposals to solve common problems.[109] This should serve as an aid to the EU Legislator when confronted with these delicate issues.

All these questions demonstrate the complexity of administrative issues in the European legal area and provide scholars with an interesting and challenging field of study for the future.

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[108] Cfr. L. De Lucia, 'Amministrazione europea e tutela giurisdizionale', in: *Lo spazio amministrativo europeo*, cit.

[109] For example the 'Association of the Councils of State and Supreme Administrative Jurisdictions of the EU' (made up of the highest level of national administrative courts and the Court of Justice) or the 'Association of European Administrative Judges. (which brings together the national associations of administrative judges).