TRANSNATIONAL ACTS BETWEEN ENVIRONMENTAL PROTECTION AND THE FUNCTIONING OF THE SINGLE MARKET. THE TREATY MATTERS

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Abstract

This article aims to highlight how transnational acts provided for in legislative measures issued in the context of the European Union's environmental policy have significantly different features from those provided for in legislative measures enacted in the context of policies aimed at the establishment and functioning of the internal market. To illustrate this, reference is made primarily to a number of EU provisions on the circulation of goods, taking into consideration the following types of acts: a) administrative authorisations that allow the movement of goods in the territory of several Member States or in the entire territory of the European Union; b) certifications issued by national authorities and private bodies attesting that a good meets specific requirements. This analysis brings to the fore an additional finding that is noteworthy: the concept of transnational acts, far from being unitary is in fact highly complex and must necessarily also be looked at in the light of the relevant provisions of the Treaty. This is even more important when dealing with new EU legislative competences, such as energy. This circumstance consequently raises the question of the constitutionalisation of EU transnational administrative acts and the role of legal scholarship in this field.

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1. Introduction

This article aims to highlight how transnational acts provided for in legislative measures issued in the context of the European Union's environmental policy (Articles 191, 192 and 193 of Treaty the on the Functioning of the European Union: TFEU) have significantly different features from those provided for in legislative measures enacted in the context of policies aimed at the establishment and functioning of the internal market (Article 114 TFEU). To illustrate this, reference is made primarily to a number of EU provision on the circulation of goods, taking into consideration the following types of acts: a) administrative authorisations that allow the movement of goods in the territory of several Member States or in the entire territory of the European Union; b) conformity assessments (and the connected certifications, labels and markings) carried out by national authorities and private bodies attesting that a good meets specific requirements. This analysis also brings to the fore an additional finding that is noteworthy: the concept of transnational acts is far from being unitary but is in fact highly complex and must necessarily be looked at also in the light of the relevant provisions of the Treaty. In turn, this circumstance raises the question of the constitutionalisation of EU transnational administrative acts and the role of legal scholarship in this field.

The starting point of the reasoning is that although transnational acts under the legislation on the functioning of the single market and those under environmental protection legislation may have two elements in common (i.e., environmental protection, on the one hand, and the movement of goods, on the other), they perform different functions depending on whether the legal basis for the relevant legislative act is that of Article 114 TFEU or Article 192 TFEU. As a consequence, two alternative models of transnational acts can be identified: the first is aimed at facilitating the functioning of the single market and the second is primarily aimed at protecting the environment. However, examples of transnational acts in which these two models partially merge can

be found in the secondary legislation based on the EU legislative competence on energy (Article 194 TFEU). These types of acts have not yet received sufficient attention from legal scholars, but their importance is bound to grow, also in view of the European Green Deal and the role that the energy policy plays in this context.

In the following discussion, the issue of the legal basis for EU legislative acts is first touched upon by recalling some statements of the Court of Justice (Section 2). Next, the main characteristics of transnational acts (authorisations, certifications, labels and markings) issued within the framework of approximation of laws (Section 3) and environmental policies (Section 4), respectively, are outlined and compared. Finally, some remarks are made on the complexity of the concept of transnational acts and the need to give appropriate weight to the Treaty in the study of the subject matter; this is even more important when dealing with new EU legislative competences, such as energy (Section 5).

2. On the legal basis for legislative acts

The European Union has several competences regarding environmental matters.[1] On the one hand, Articles 191-193 TFEU are dedicated to environmental policies; on the other hand, according to Article 11 TFEU, "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".[2] This principle – known as the Integration Principle –[3] obviously also applies to legislative measures intended for the establishment and

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[1] In general, on environmental protection in the Treaty, see, e.g., J.H. Jans & H.H.B. Vedder, *European Environmental Law* (3rd edn, 2008); G. Van Castler & L. Reins, *EU Environmental Law* (2017); H. Tegner Anker, *Competences for EU Environmental Legislation: About Blurry Boundaries and Ample Opportunities*, in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law* (2020), 7-21.

[2] See also Article 37 of the Charter of Fundamental Rights of the European Union.

[3] On this principle, see, e.g., N.M.L. Dhondt, *Integration of Environmental Protection into other EC Policies - Legal Theory and Practice* (2003); J.H. Jans, *Stop the Integration Principle?*, 33 Fordham Int'l L. J. 1533 (2011).

the functioning of the internal market.[4] The importance of this can be seen in the fact that under Article 114(3) TFEU, the Commission in its legislative proposals concerning, inter alia, environmental protection "will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective" (see, e.g., the legislation on the deliberate release into the environment of genetically modified organisms).[5] Similarly, according to Article 194(1) TFEU, the Union's energy policy must take due account of "the need to preserve and improve the environment".[6]

However, this by no means implies that the legal basis[7] for a legislative measure is insignificant. In this respect, the Court of Justice has repeatedly clarified that "the choice of the appropriate legal basis has constitutional significance",[8] and that this choice "may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review, such as the aim and the content of the measure. If an examination of an EU measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main or predominant purpose or component".[9] In essence, in case of doubt, the Court of Justice, in order to verify the correctness of

[4] See, e.g., Court of Justice, C-336/00, *Huber*, EU:C:2002:509, para. 33.

[5] See, e.g., Consolidated Version of Directive 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 and repealing Council Directive 90/220/EEC [2001] OJ L 106/1.

[6] See Section 5 below.

[7] On the choice of the legal basis of EU legislative acts, see recently A. Engel, *The Choice of Legal Basis for Acts of the European Union* (2018), chap. I and previously, e.g., H. Cullen & A. Charlesworth, *Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States* 36 Common Mkt. L. Rev. 1243 (1999). With specific reference to environmental law, see, e.g., J.H. Jans & H.H.B. Vedder, *European Environmental Law*, cit. at 1, chap. 2 and N. de Sadeleer, *Environmental Governance and the Legal Bases Conundrum*, 31 Y.B. Eur. L. 373 (2012).

[8] Opinion of the Court of Justice of 6 December 2001, 2/00, *Cartagena Protocol*, EU:C:2001:664, para 5.

[9] See, e.g., Court of Justice, C-348/22, *Autorità Garante della Concorrenza e del Mercato (Comune di Ginosa)*, EU:C:2023:301, para 52.

the legal basis for a legislative act, needs to look at its "centre of gravity".[10] However, exceptionally, "if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases".[11]

On several occasions, the Court of Justice has had to decide on the correct legal basis of legislative measures aimed at both protecting the environment and ensuring the functioning of the internal market. Although the subject is highly complex (since the delimitation of the two EU policies is sometimes blurred) and the case law is not always consistent in this respect,[12] in brief, for the Court, the European legislator may resort to Article 114 TFEU to enact measures for the approximation of national legislation concerning, for example, environmental product standards or environmental protection rules on the production of certain goods. In other words, the European legislator can turn to Article 114 TFEU when the aim of ensuring the free movement of goods and eliminating regulatory differences (which "give rise to obstacles in trade or appreciable distortions in competition")[13] is predominant. On the contrary, when the overriding objective of the legislative act is the protection of the environment, it must be based on Article 192 TFEU, despite the fact that it may have an accessory harmonising effect.[14]

More specifically, with reference to the movements of environmentally harmful goods (i.e., waste),[15] the Court of Justice has clarified that while measures based on Article 100 A EEC Treaty (now Article 114 TFEU) must pursue the aim of defining those

[10] On the "centre of gravity" test in the case law of the Court of Justice, see, e.g., H. Cullen & A. Charlesworth, *Diplomacy by Other Means*, cit. at 7; A. Engel, *The Choice of Legal Basis*, cit. at 7, 13-16.

[11] Court of Justice, C-348/22, cit. at 9, para 52, where other references to case-law.

[12] See, e.g., A. Engel, *The Choice of Legal Basis*, cit. at 7, ch. 2.

[13] R. Schütze, *An Introduction to European Law* (2012), 67.

[14] See in general J.H. Jans & H.H.B. Vedder, *European Environmental Law*, cit. at 1, chap. 2; also H. Somsen, *Discretion in European Community environmental law: An analysis of ECJ case law*, 40 Common Mkt. L. Rev. 1413 (2003), 1415-1418; N. de Sadeleer, *Environmental Governance*, cit. at 7, 381-385.

[15] Court of Justice, C-155/91, *Commission v Council*, EU:C:1993:98; A. Wachsmann, 30(5) CML Rev. (1993), 1051–1065 and D. Geradin, *The Legal Basis of the Waste Directive*, 18 Eur.L.Rev. 418 (1993); Court of Justice, C-187/93, *Parliament v Council*, EU:C:1994:265. On this, see H. Cullen & A. Charlesworth, *Diplomacy by Other Means*, cit. at 7, 1247.

characteristics (including environmental compatibility) of a good "which will enable it to circulate freely within the internal market", those based on Article 130 S of the EEC Treaty (corresponding to Article 192 TFEU) are aimed instead at providing "a harmonized set of procedures whereby movements of waste can be limited in order to secure protection of the environment".[16] Consistent with this approach, for instance, Directive 2019/904,[17] while having effects on the internal market, essentially aims at the reduction of the impact of certain plastic products on the environment and is therefore based on Article 192(1) TFEU.[18]

The choice of legal basis is important for numerous reasons, one of which is central to this paper: that the approach of the Court of Justice outlined above has important implications from the point of view of the regulation of transnational acts.

3. Transnational acts and the establishment and functioning of the single market

The issue of transnational administrative acts has been studied mainly with reference to the approximation of laws for the establishment and functioning of the single market[19] and, more specifically, in connection with the principle of mutual recognition.[20] Indeed, the creation of the single market (and thus the effectiveness of the free movement of goods) is based, to a large

[16] C-187/93, cit. at 15, para 26; see also Court of Justice, C-187/93, *Parliament v Council*, EU:C:1994:203, Opinion of Advocate General Jacobs, paras 44 and 45; C-411/06, *Commission v Parliament and Council*, EU:C:2009:518, para 72; more recently, C-292/12, *Ragn-Sells*, EU:C:2013:820, para 49 and C-315/20, *Regione Veneto (Transfert de déchets municipaux en mélange)*, EU:C:2021:499, Opinion of Advocate General Rantos, para 55.

[17] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L 155/1.

[18] On this Directive, see also H. Tegner Anker, *Competences for EU Environmental Legislation*, cit. at 1, 13.

[19] There are obviously some exceptions which include, for example, EU immigration law: on this issue, see. e.g., J. Bast, *Transnationale Verwaltung des europäischen Migrationsraums: Zur horizontalen Öffnung der EU-Mitgliedstaaten*, 46 Der Staat 1-32 (2007).

[20] See, in general, K.A. Armstrong, *Mutual Recognition*, in C. Barnard & J. Scott (eds.), *The Law of the Single European Market* (2002), 225-267; F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (2005).

extent, on regulatory harmonisation and pursues the objective of eliminating the duplication of administrative controls at state level. This is pursued, inter alia, through the provision of transnational authorisations and conformity assessments.[21] The subject is well known, and it is therefore unnecessary to address the matter in-depth here.[22] Some brief references are therefore sufficient.

3.1. Transnational authorisations

The legislation on the movement of goods provides for various models of transnational authorisations,[23] all of which are based on administrative cooperation, i.e., a complex set of tools aimed at governing administrative pluralism. The concept of

[21] On the different tools used by the European legislator to implement the principle of mutual recognition, see, e.g., L. De Lucia, *One and Triune – Mutual Recognition and the Circulation of Goods in the EU*, 13 Rev. Eur. Admin. L. 7 (/2020).
[22] On the transnational administrative acts see, e.g., E. Schmidt-Aßmann, *Deutsches und Europäisches Verwaltungsrecht*, Deutsches Verwaltungsblatt, 924 (12/1993), 936; S. Galera Rodrigo, *La aplicación administrativa del derecho comunitario* (1998), 108 ff.; J. Becker, *Der transnationale Verwaltungsakt*, Deutsches Verwaltungsblatt, 855-866 (11/2001); M. Ruffert, *Der transnationale Verwaltungsakt*, Die Verwaltung 453-485 (4/2001); G. Sydow *Verwaltungskooperation in der Europäischen Union* (2004), part II; L. De Lucia, *Amministrazione transnazionale e ordinamento europeo* (2009); A.M. Keessen, *European Administrative Decisions. How the EU regulates Products on the Internal Market* (2009); H.C.H. Hofmann, G.C. Rowe & A.H. Tϋrk, *Administrative Law and Policy of the European Union* (2011), 645-648; C. Ohler, *Europäisches und nationales Verwaltungsrecht*, in J.P. Terhechte (ed.), *Verwaltungsrecht der Europäischen Union* (2011), 331, 345 ff.; M. Gautier, *Acte administratif transnational et droit communautaire*, in J-B Auby & J. Dutheil de la Rochère (eds.), *Traité de droit administratif européen* (2nd edn, 2014), 1303-1316; L. De Lucia, *From Mutual Recognition to EU Authorization: A Decline of Transnational Administrative Act*s, 8 IJPL 90 (2016); 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* (2016); J. Ortega Bernardo, *El acto administrativo transnacional en el derecho europeo del Mercado interior*, in L. Arroyo Jiménez, A. Nieto Martìn (eds.), *El reconocimiento mutuo en el Derecho español y europeo* (2018).
[23] On the different models of transnational administrative acts, see, e.g., S. Galera Rodrigo, *La aplicacìon administrativa del derecho comunitario*, cit. at 22, 108 ff.; G. Sydow, *Verwaltungskooperation*, cit. at 22, 126 ff.; H.C. Röhl, *Procedures in the European Composite Administration*, in J. Barnes (ed.), *Transforming Administrative Procedure* (2008).

cooperation has several implications,[24] two of which should be mentioned here.

First, cooperation takes shape through forms of division of administrative tasks.[25] In short, the EU legislator in these cases stipulates that a national administration may carry out certain activities (e.g., environmental control, authorisation) in place of the administrations of other Member States. In order to ensure the effectiveness of the division of administrative work, the issuance of transnational authorisations usually entails limitations in the activities of the administrations of destination. This is the so-called inter-administrative tie that is part of the transnational effect and operates differently in the various models of transnational acts.[26] For example, in certain cases (e.g., the authorisation for marketing of mineral waters),[27] all controls are carried out by the administration of origin, which is also tasked with issuing an authorisation that has automatic transnational effects (i.e., allowing the circulation of a good in all Member States); in turn, other administrations must allow this authorisation to be executed (by its recipient) in the respective legal orders and cannot contest or subject the authorisation to legality checks. In other cases (e.g., the recognition of a marketing authorisation for a biocidal product),[28] all scientific/technical analysis and tests are carried out by the administration of origin when it issues the first marketing authorisation for a good (which is only valid for the territory of the state of origin). The administration of destination must accept (and evaluate) the results of these analyses and tests (without being able to question them autonomously) when it issues the authorisation for its own jurisdiction.[29] The inter-administrative tie works here

[24] See E. Schmidt-Aßmann, *Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*, 31 Europarecht 270 (1996).

[25] See, e.g., G. Sydow *Verwaltungskooperation in der Europäischen Union*, cit. at 22, 7 f.

[26] On this see L. De Lucia, *Amministrazione transnazionale e ordinamento europeo*, cit. at 22, ch. 6 and L. De Lucia, *Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts*, 5 Rev. Eur. Admin. L. 17 (2012), 32-35.

[27] Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters [2009] OJ L164/45.

[28] Chapter VII of the Consolidated Version of 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 [2008] OJ L 167/1.

[29] See, e.g., L. De Lucia, *Administrative Pluralism*, cit. at 26.

within the administrative proceedings carried out by the destination authority.

Second, cooperation is based on mechanisms of information and dialectical confrontation between the national authorities involved: the greater the impact the product has on the environment (or other public interests), the more complex the decision-making process will be, sometimes resulting in truly intertwined decision-making. This explains the provision of procedures for resolving conflicts between the different administrations involved.[30] It should be noted that, in many cases, administrative conflict resolution mechanisms can be traced back to the safeguard measures provided for in Article 114(10) TFEU for the protection of non-economic values.

These brief remarks show that transnational authorisations in these cases pursue the aim of facilitating the movement of goods (i.e., a fundamental freedom guaranteed by the Treaty) through the coordination of the administrative pluralism that characterises the European Union, while at the same time ensuring the protection of certain values (e.g., environment, health).

3.2. Conformity assessments and CE marking

As is well known, the EU legislator has also turned to techniques other than transnational authorisations to ensure the functioning of the single market, namely those of the "New Approach" to harmonisation.[31] These include, inter alia, the conformity assessments and examination certificates issued by private entities - the so-called notified bodies - which attest the conformity of a product (or a product type) with the safety requirements set out in the relevant legislative acts, as well as with harmonised standards, if approved.[32] In this context, when

[30] On this, see, e.g., L. De Lucia, *Conflict and Cooperation within European Composite Administration (Between Philia and Eris)*, 5 Rev. Eur. Admin. L. 43 (2012).

[31] Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards [1985] OJ C136/1.

[32] On this issue, see J. McMillan, *La «certification», la reconnaissance mutuelle et le marché unique*, 1 *Revue du marché unique européen* 181 (1981); H.C. Röhl, *Akkreditierung und Zertifizierung im Produktsicherheitsrecht* (2000); H.C. Röhl, *Conformity Assessment in European Product Safety Law*, in O. Jansen, B. Schöndorf-Haubold (eds.), *The European composite administration* (2011); J.-P. Galland, *The difficulties of Regulating Markets and Risks in Europe through Notified Bodies*, 4 Eur. J. Risk Regul. 365 (2013); Commission Notice, "The 'Blue Guide' on the implementation of EU products rules 2016" [2016] OJ C272/1.

products have been placed on the market of a Member State in accordance with the essential safety requirements (and bear the CE marking), the other Member States can no longer restrict their circulation in their territory.[33] Since conformity assessments are the result of a fully harmonised verification procedure and produce (relative) certainty as to the safety of a certain product, they must then be accepted by all Member States. In this respect, the Court of Justice has repeatedly stated that products which have been certified as conforming with the essential requirements of the relevant Directive and "which bear a CE marking […] must be allowed to move freely throughout the European Union, and no Member State can impose a requirement that such a product should undergo a further conformity assessment procedure".[34] This is of course without prejudice to the powers that national market surveillance authorities may exercise with respect to products that do not comply with harmonised standards or that present a risk to the safety or health of users.[35]

There are many differences between transnational authorisations and conformity assessments.[36] One of these should be mentioned here. While transnational authorisations remove a legal obstacle to free movement posed by EU legislation in order to protect overriding public interests (e.g., the environment), on the contrary, the conformity assessments are aimed at providing evidence that a given product meet the conditions for free movement – i.e., they concern the legal status of the goods. However, as in the case of transnational authorisations, the

[33] See, e.g., Court of Justice, C-220/15, *Commission v Germany*, EU:C:2016:815, paras 36 ff.

[34] Court of Justice, C-277/17, *Servoprax*, EU:C:2016:770, para. 37 and, previously, C-6/05, *Medipac-Kazantzidis*, EU:C:2007:337, para. 42.

[35] Chapter V of Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 [2019] OJ L 169/1.

[36] Obviously, intermediate forms can be found between the model of the transnational act and that of certification; this occurs, for instance, when certificates of conformity can only be issued by public administrations: see, e.g., Consolidated Version of Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1.

conformity assessments for goods also limit the control powers of the destination administrations (other than those entrusted with market surveillance);[37] therefore, also these forms of acts can be described as acts with transnational effects.[38]

4. Transnational acts in EU environmental protection legislation

Transnational acts and certificates are also provided for by secondary legislation that has Article 192 TFEU as its legal basis. However, these types of acts are far fewer in number than those based on Article 114 TFEU and are quite different from the latter. A look at some pieces of legislation may clarify this diversity.[39]

4.1. Transnational administrative authorisations

With regard to transnational acts, the explanation needs to be slightly more detailed. First, authorisations issued by national authorities of origin, transit and destination and relating to the transboundary shipment of waste should be mentioned. According to Regulation 1013/2006,[40] whoever intends to ship waste must submit a notification to the competent authority in the State from which the waste will be despatched, complying with the requirements laid down in the Regulation. This authority must then transmit the notification to the competent authority of destination and to any competent authority (or authorities) of transit. At this point the dispatch and destination authorities can take one of the following decisions: (1) consent without conditions; (2) consent with conditions (Article 10); (3) raise objections (Article 11 and 12).

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[37] See in general De Lucia, *One and Trune*, cit. at 21, 21 ff.

[38] At most, one could perhaps also speak of a de-nationalised legal effect, since with these regulations the European legislator has set up private (i.e., de-nationalised and de-politicised) systems for product conformity verification: see, e.g., H.C. Röhl, *Conformity Assessment*, cit. at 32, 218 ff. and J.-P. Galland, *The difficulties of Regulating Markets*, cit. at 32, 368.

[39] On the following, see L. De Lucia & M. C. Romano, *Transnational Administrative Acts in EU Environmental Law*, in M. Peeters & M. Eliantonio (eds.), *Research Handbook on EU Environmental Law* (2020). In general, on waste EU legislation see, e.g., G. Van Castler & L. Reins, *EU Environmental Law*, cit. at 1, ch. 15.

[40] Consolidated Version of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [2006] OJ L 190/1. On the legal basis of Regulation 1013/2006, see Court of Justice C-411/06, *Commission v Parliament and Council*, EU:C:2009:518.

In the first case, the consent given by all the administrations involved represents an example of an authorisation with transnational effects. From a structural point of view, the decision consists here of many simultaneous national authorisations, which concurrently condition the undertaking of the cross-border shipment of waste. However, each national authority can individually withdraw its consent in the presence of any potentially harmful effects for the environment (Article 9(8)). In the third case, if the notification concerns a shipment of waste destined for disposal and recovery, the competent authorities of destination and dispatch may raise reasoned objections based on one or more of the grounds provided for in the Regulation (Articles 11 and 12, respectively). If the problems giving rise to the objections have not been resolved within the 30-day time limit, the notification ceases to be valid (Articles 11(5) and 12(4)). On the other hand, in the case of shipments for the disposal of hazardous waste in small quantities, if the competent national administrations cannot find a satisfactory solution, either Member State may refer the matter to the Commission for decision in accordance with the examination procedure (Articles 11(3)(2) and 59a(2)). If none of the states have asked for the intervention of the Commission and the problem remains, the notification ceases to be valid.

Mention must also be made of licences and certificates for the import and export of species of wild flora and fauna regulated by Regulation 338/97.[41] This Regulation aims to protect endangered species of fauna and flora, applying the principles of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[42] and regulates separately the introduction of a protected species into the EU, and the export or re-export of a species from the EU. The introduction of a specific species[43] into the EU is subject to the prior presentation, at the border customs office, of an import permit issued by a management authority of the Member State of destination on the basis of a complex series of conditions (Article 4). In turn, the Regulation lays

[41] Consolidated Version of Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L 298/70. On this issue, see, e.g., J.H. Jans, H.H.B. Vedder, *European Environmental Law*, cit. at 1, 463 ff.

[42] Convention on International Trade in Endangered Species of Wild Fauna and Flora Signed at Washington, D.C., on 3 March 1973.

[43] See Annexes A, B, C, D of the Regulation 338/97.

down the conditions necessary for the Member States in which the specimens are located to issue an export licence or re-export certificate (Article 5). These conditions partly overlap with those for the granting of the import licence. The variation of the prerequisites and the type of act required (permit, certification, notification) responds to the need to graduate the level of protection of the flora and fauna through the varying levels of control on the import and export of the various protected species, to and from third-party countries. Moreover, in line with Article 193 TFEU, the Regulation also allows Member States to take stricter measures (Article 11(1)).

The permits and the certificates issued by one Member State have transnational effects as they are valid within the whole territory of the EU (Article 11(1)). However, a permit or a certificate is deemed void if a competent authority or the Commission, in consultation with the competent authority which issued the permit or certificate, establishes that it was issued on the false premise that the conditions for its issuance were met; in the same way these acts are not considered valid when specimens situated in the territory of a Member State and covered by such documents are seized or confiscated by the competent authorities of that Member State (Article 11(2)).[44] Also the rejection of an application produces transnational effects, since this must be recognised by the other Member States (Article 6(4)(a)), except when the circumstances have significantly changed or where new evidence to support an application has become available (Article 6(4)(b)).

At this point, it is possible to dwell briefly on the features that differentiate these transnational authorisations from those based on Article 114 TFEU. Evidently, these two Regulations establish prior authorisation and notification systems that are a "typical instrument of environmental policy",[45] the aim of which is to restrict the circulation of the goods in question.[46]

This is reflected in the legal framework of the transnational acts provided for in these Regulations. If their predominant objective is to limit the movement of certain goods, this means allowing (if not encouraging) the multiplication of administrative controls at national level. It is no coincidence that in both cases, a

[44] Court of Justice, C- 532/13, *Sofia Zoo*, EU:C:2014:2140, para. 38.
[45] Opinion of the Court of Justice, 2/00, cit. at 8, para 33; see also Court of Justice, C-94/03, *Commission v Council*, EU:C:2006:2, para 44.
[46] For protected species, this is implicit in Regulation 338/97; for waste, see the judgments of the mentioned at 16 above.

marked autonomy of individual national administrations is ensured, as they are hardly ever completely bound by decisions or procedural acts taken by other national administrations. In fact, the transnational effect (i.e., the inter-administrative tie) operates in these cases only as an orientation and can be questioned (or blocked) by the administrations of destination. In addition, each state authority can intervene unilaterally in its own territory without, as a rule, having to initiate conflict resolution procedures with other national administration: The absence of conflict mechanisms clearly leads to a more incisive protection of the environment, as this key interest cannot, in fact, be subject to the negotiation and the balancing of interests that normally characterises conflict resolution procedures. In reality, these regulations, rather than forms of division of administrative work, essentially provide for forms of administrative coordination, in the sense that they regulate a set of techniques aimed at giving a certain order to the activities of public actors from different jurisdictions.[47]

To sum up, in the legal provisions analysed here, the overriding priority of protecting the environment coincides with the weakening of procedural forms of administrative cooperation and with the strengthening of the decisional autonomy of all national administrations. This essentially means that in this field, the EU legislator believes that each individual state administration can protect the environment in a more appropriate way than through a deliberative decision-making process.

4.2. Environmental labels and certifications

European legislation contains numerous provisions on environmental certification.[48] Of these, few have Article 192 TFEU (or its predecessors) as their legal basis and even fewer regulate

[47] G. Sydow, *Verwaltungskooperation in der Europäischen Union*, cit. at 22, 8.
[48] See, e.g., the list contained in Article 1 of the Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM(2023) 166 final.

certifications that can produce transnational effects.[49] Transnational effects occur instead in the EU Ecolabel Regulation.[50]

According to Regulation 66/2010, the use of this label is awarded by the competent national authority, following the assessment and verification that a product complies with the production requirements set out in the relevant European provisions.[51] The awarding of the label provides evidence of the low environmental impact of a certain good. This certainty is transnational in nature since it is valid throughout the entire territory of the EU; moreover, the validity of the EU Ecolabel cannot be contested by the administrations of other Member States, but at most can be reported by the competent national administration to that which issued it in order to carry out the relevant checks and to order the possible prohibition of use (Article 10(5)). As a consequence, for example, in the context of tenders for the purchase of goods, the EU Ecolabel (even if awarded in another Member State) must be duly taken into account.[52]

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[49] Among the legislative measures based on Article 192 TFEU that provide for environmental certification but do not have transnational effect, see, e.g., the Consolidated Version of Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars [2000] OJ 12/16.

[50] Consolidated Version of Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2010] OJ L 27/1. On the EU Ecolabel, see, e.g., A. Barone, *L'Ecolabel*, in F. Fracchia & M. Occhiena (eds.), *I sistemi di certificazione tra qualità e certezza* (2006); A. Redi, *L'Ecolabel al crocevia tra ambiente e sviluppo*, in 3 Rivista quadrimestrale di diritto dell'ambiente 135 (2020).

[51] See, e.g., Commission Decision (EU) 2016/1349 of 5 August 2016 establishing the ecological criteria for the award of the EU Ecolabel for footwear [2016] OJ L214/16.

[52] See, e.g. Recital 74 and Article 43, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65. On this issue, see Court of Justice, C-368/10, *Commission v Netherlands*, EU:C:2012:284; and C-368/10, *Commission v Netherlands*, EU:C:2011:840, Opinion of Advocate General Kokott; see also V. Ihamäki, E. van Ooij & S. van der Panne, *Green Public Procurement in the European Union and the Use of Eco-Labels*, Maastricht University, State aid & Public procurement in the European Union IER 4014 (maastrichtuniversity.nl/sites/default/files/2023-03/green_public_procurement_in_the_european_union_and_the_use_of_eco-labels.pdf).

The main features of this legislation are clearly conditioned by Articles 191 and 192 TFEU.[53] The EU Ecolabel scheme is voluntary and aims to "promote products with a reduced environmental impact throughout their life cycle and to provide consumers with accurate, non-deceptive and science-based information on the environmental impact of products" (recital 1).[54] As with many other environmental protection regulations, it therefore focuses on consumer awareness[55] and "is intended to direct consumers' attention to those products".[56]

In short, compliance with the environmental production criteria set out by European legislation is not a condition to market a product, but the result of a business choice of the producer. On the other hand, if in order to place a product on the market, manufacturers had to demonstrate (through harmonised techniques) that it has little or no impact on the environment or that it complies with certain environmental standards, the primary objective of the legislative measure would be to ensure the circulation of the good in question in an environmentally compatible manner - that is, there would be a mechanism that

[53] A similar reasoning can be followed for the EU Eco-Management and Audit Scheme (EMAS): Consolidated Version of Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L352/1. Public or private organisations can participate in this scheme on a voluntary basis and its purpose is to promote the improvement of the environmental performance of organisations through the establishment and implementation of environmental management systems, the evaluation of the performance of such systems, and the provision of information on environmental performance. The transnational effect in these cases may come into play, for instance, in the context of tenders for the purchase of services.

[54] On this, see also General Court, T-573/14, *Polyelectrolyte Producers Group and SNF v Commission*, EU:T:2015:365, para 4.

[55] The centrality of consumer awareness in these regulations also explains the need to counter the phenomenon of so-called Greenwashing, on which see, in addition to the Green Claims Directive Proposal, cit. at 48, S. Szabo & J, Webster, *Perceived Greenwashing: The Effects of Green Marketing on Environmental and Product Perceptions*, 171 J. Bus. Ethics 719 (2021).

[56] Court of Justice, C-281/01, Commission v Council, EU:C:2002:486, Opinion of Advocate General Alber, para 61.

affects the functioning of the single market not very differently from that envisaged by the Directives of the New Approach.[57]

5. Final remarks

These brief considerations should have shown that transnational act is not a unitary concept. In fact, if the transnational act is understood as one that produces legal effects in countries other than that to which the issuing body belongs, it is clear that the transnational effect may be connected to an authorisation, an act of procedure (as scientific analysis and tests in the case of authorisations subject to recognition), or information on a good (e.g., its safety or its environmental quality). In addition, the transnational effect may derive from an act of a public administration or a private entity (e.g., examination certificates issued by notified bodies). Finally, the transnational effect may be more or less robust in the different fields.

All this calls for reflection on the relationship between the Treaty and the regulation of transnational acts in general and more specifically with reference to the new legislative competences of the EU.

5.1. The constitutionalisation of EU transnational administrative acts

In the cases examined above, the type of transnational effect and its strength are directly linked to the legal basis chosen by the EU legislator. As the case law shows, the decision to prioritise the protection of the environment or the circulation of a good in a given sector, is the result of a political choice, which is reflected in the administrative tools used to govern that sector. The fact that the Court of Justice demands consistency between the legal basis of a legislative act, its content and objectives, means that the judiciary is implicitly imposing, among other things, the constitutionalisation

[57] More complex is the reasoning for those legislative acts that, while establishing the obligation of certification or labelling with regard to the environmental impact of a product, do not affect the related production techniques. In these cases, both the protection of the environment (by raising consumer awareness) and the circulation of the good (given the mandatory nature of the label or certificate) come into play. Hence, according to the case law of the Court of Justice, the legal basis of these legislative measures must probably be chosen in consideration of their main or predominant purpose or component: see Section 2 above, and footnote 75 below.

of transnational administrative law, i.e., the "adaptation, alignment and reshaping of the ordinary legislation to the guidelines of the constitution, which are not exhausted in strict and simple commands and prohibitions".[58] With all its variants, the transnational act thus represents an instrument of public authority action that must be placed harmoniously within the EU constitutional framework.

On this point, however, there is one important issue to consider. The differences between transnational acts enacted in the context of environmental policy and in the context of the approximation of laws have emerged for a specific reason: they stem from the difference, envisaged in the past, between the legislative procedures in the two areas (or more specifically from the different roles of Parliament). In other words, litigation between the Parliament, the Commission and the Council on the legal basis of legislative acts (and thus on the legislative procedure to be followed) led the Court of Justice to identify the interpretative criteria mentioned above.[59] However, since these legislative procedures are now regulated in an essentially uniform manner, disputes between the institutions on the legal basis of legislative

[58] G. Schuppert & C. Bumke, *Die Konstitutsionalisierung der Rechtsordnung* (2000), 57. On the constitutionalisation of administrative law in general, see L. Heuschling, *The Complex Relationship between Administrative Law and Constitutional Law. A Comparative and Historical Analysis*, in A. von Bogdandy, P.M. Huber & S. Cassese (eds.), *The Max Planck Handbook in European Law. The Administrative State*, vol. I (2017). For the German legal order, see e.g., F. Wollenschläger, *Constitutionalisation and Deconstitutionalisation of Administrative Law in View of Europeanisation and Emancipation* 10 Rev. Eur. Admin. L. 7 (2017); for the French legal order, see e.g., P. Delvolvé, *L'actualité de la théorie des bases constitutionnelles du droit administrative*, Ius Publicum Annual Report 2015 (June 2015) <www.ius publicum.com/repository/uploads/14_07_2015_14_54-Delvolve.pdf> accessed 3 June 2023; for the Italian legal order, see e.g. S. Cassese, *La costituzionalizzazione del diritto amministrativo*, in A. Ruggeri (ed.), *Scritti in onore di Gaetano Silvestri* (2016). On the constitutionalisation of European administrative law, see e.g., M. Ruffert, *The Constitutional Basis of EU Administrative Law*, in S. Rose-Ackerman, P.L. Lindseth, B. Emerson (eds.), *Comparative Administrative Law* (2nd edn, 2017); E. Schmidt-Aßmann & B. Schöndorf-Haubold, *Verfassungsprinzipien für den Europäischen Verwaltungsverbund*, in A. Voßkuhle, M. Eifert & C. Möllers (eds.), *Grundlagen des Verwaltungsrechts*. I, (2nd edn, 2022); previously P. Craig, *The Constitutionalization of Community Administration*, Jean Monnet Working Paper No 3/03; with reference to the Constitutional Treaty, see E. Nieto-Garrido & I. Martín Delgado, *European Administrative Law in the Constitutional Treaty* (2007).

[59] See A. Engel, *The Choice of Legal Basis*, cit. at 7, ch. 4.

acts have diminished considerably and the Court of Justice now has fewer opportunities to exercise its checks on this matter.[60]

The legal basis of legislative acts is of course still important today; for instance, since the case-law of the Court of Justice on this issue continues to apply, Article 192 TFEU can justify minimum and not full harmonisation of product-related measures, and Article 193 TFEU allows individual Member States to maintain and introduce stricter protective measures.[61] However, it is undeniable that the alignment of legislative procedures has induced the three institutions to pay less attention to this issue. An example may clarify the point. Regulation 842/2006 on certain fluorinated greenhouse gases[62] had a dual legal basis: Article 175(1) TEC (now 192(1) TFEU) and Article 95 TEC (now 114 TFEU) for *product-related* provisions, i.e., those rules regarding the labelling, the control of use and the placing on the market of certain products. This solution - which was in line with the criteria identified by the Court of Justice -[63] was then abandoned by Regulation 517/2014,[64] which, while also providing for legal norms on the labelling, the control of use, the placing on the market and the mandatory declaration of conformity (issued by independent auditors) of certain products,[65] has only Article 192(1) TFEU as its legal basis.

[60] Of course, the correctness of the legal basis chosen by the legislator can always be questioned, for instance, by a national court through a request for a preliminary ruling on the validity of a legislative act of the Union: see, e.g., C-348/22, cit. at 9, paras 50-59.

[61] See, e.g., H. Tegner Anker, *Competences for EU Environmental Legislation*, cit. at 1, 11-13, where further references and L. Reins, *Where Eagles Dare: How Much Further May EU Member States Go under Article 193 TFEU?*, in M. Peeters & M. Eliantonio (eds.), *Research Handbook on EU Environmental Law* (2020), 22-35; in a different perspective, see N. de Sadeleer, *Environmental Governance*, cit. at 7.

[62] Regulation (EC) No 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases [2006] OJ L 161/1.

[63] See Section 2 above.

[64] Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006 [2014] OJ L150/195.

[65] Article 14 of Regulation 517/2014 and Commission Implementing Regulation (EU) 2016/879 of 2 June 2016 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, detailed arrangements relating to the declaration of conformity when placing refrigeration, air conditioning and heat pump equipment charged with hydrofluorocarbons on the market and its verification by an independent auditor [2016] OJ L146/1.

5.2. Transnational acts in the context of the European Green Deal: the case of renewables

In the face of these developments, an even more important (and partially compensative) role can then be played by legal doctrine, which, precisely based on the interpretation of the Treaty provisions that envisage legislative competences of the Union, can contribute inter alia to a better understanding of the various regulations of transnational act and therefore to their constitutionalisation.[66] This could be particularly useful with regard to new EU legislative competences, notably those on energy policy (Article 194 TFEU).[67] The Lisbon Treaty has made important innovations in this area, which is also characterised by significant transnational elements: in this respect it was stated that "settled case law on the choice of a legal basis seems to preclude using Article 192 TFEU as a legal basis for direct action in the energy sector after the adoption of Article 194 TFEU",[68] and that "with Article 194 TFEU, measures aiming at ensuring the functioning of the energy market can now be based on the energy competence provided in that Article".[69]

It is probably for this reason that typologies of transnational acts can be found in current EU energy legislation that are partially different from those mentioned above. The issue is very complex and cannot be explored in depth here. An example of regulations based on Article 194(1) TFEU may however help to clarify this point.

For several years now, the European legislator has established guarantees of origin from renewable sources, that is, an "electronic document" issued by public or private entities "which

[66] See, e.g., E. Schmidt-Aßmann, B. Schöndorf-Haubold, *Verfassungsprinzipien*, cit. at 58, 248 ff.

[67] On Article 194 TFUE, see, e.g., A. Johnston & E. van der Marel, Ad Lucem? *Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU*, 22 Eur. Energy Env'l L. Rev. 181 (2013); K. Talus, *EU Energy Law and Policy: A Critical Account* (2013); R. Leal-Arcas & J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy* (2017); K. Huhta, *The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector*, 70 Int'l & Compar. L. Q. 991 (2021).

[68] K. Huhta, *The Scope of State Sovereignty*, cit. at 67, 999.

[69] K. Talus, P. Aalto, *Competences in EU energy policy*, in R. Leal-Arcas & J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy* (2017), 20. See also Court of Justice, C-490/10, *Parliament v Council*, EU:C:2012:525. On this issue, see, e.g., A. Johnston & E. van der Marel, Ad Lucem?, cit. at 67.

has the … function of providing evidence to a final customer that a given share or quantity of energy was produced from renewable sources" (Article 2(2)(12) Directive 2018/2001).[70] Guarantees of origin have many elements in common with environmental certifications,[71] since their primary purpose is to provide information to final customers, guiding them in their choices (Recitals 55-59). They also have transnational effects, as all Member States must recognise them (Article 19(9)). In this regard, Directive 2018/2001 establishes a procedure - which is similar to that provided for the circulation of goods -[72] for resolving conflicts between national administrations: in the event of non-recognition by a Member State, the Commission may, if it considers the national decision to be unfounded, require the Member State in question to recognise the guarantee (Article 19(9) and (10)).

In the past, guarantees of origin were regulated by legislative acts whose legal base was Article 175(1) TCE.[73] Nevertheless, this legislation clearly went far beyond environmental protection and directly interfered with the functioning of the single market: as noted by Advocate General Bot, "far from merely introducing minimum standards, the Union legislature made several aspects of this area subject to harmonisation, hand in hand with the principle of mutual recognition. In particular, it established a uniform definition throughout the Union, of the guarantee of origin, … also conferring on it scope … uniform at EU level".[74] Moreover, the legality of certain national laws transposing Directive 2001/77, as regards guarantees of origin, were scrutinised by the Court of Justice in light of Article 28 TEC;[75] and the question arose as to

[70] Consolidated Version of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82.
[71] See Section 4.2. above.
[72] See Section 3.1. above.
[73] Article 5 of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L 283/33 and Article 15 of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16.
[74] Court of Justice, C-66/13, *Green Network*, EU:C:2014:156, Opinion of Advocate General Bot, para 56; see also Court of Justice, C-66/13, *Green Network*, EU:C:2014:2399.
[75] See, e.g., Court of Justice, C-204/12, *Essent Belgium*, EU:C:2014:2192.

whether these guarantees were to be considered as "goods" within the meaning of Article 28 TEC.[76] This shows that Article 175(1) TEC was a rather fragile (and perhaps insufficient) legal basis for the regulation of guarantees of origin.

In summary, on the basis of Article 194(1) TFEU, Directive 2018/2001 now provides for a transnational act in which instruments inspired by both single market and environmental legislation converge. This is clearly different from those examined in the previous Sections. And it is likely that European energy legislation contains other examples of transnational acts with peculiar features,[77] which, especially in the light of the European Green Deal, would deserve to be duly investigated. This could in fact offer new insights into EU transnational administrative law.

To conclude, the field of administrative transnationality is extremely broad and varied and it is an area that still poses many complex challenges to legal scholars.

[76] For an answer in the affirmative, see Court of Justice, C-204/12, *Essent Belgium*, EU:C:2013:294, Opinion of Advocate General Bot, para 76; on the other hand, Court of Justice, C-204/12 cit., para 81, did not consider it necessary to rule definitively on the question.

[77] Consider, for instance, the Consolidated Version of Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU [2017] OJ L198/1. Regulation 2017/1369, whose legal basis is again Article 194 TFEU, provides for the labelling of energy-related products and the provision of information regarding energy efficiency, the consumption of energy and of other resources by products during use, "thereby enabling customers to choose more efficient products in order to reduce their energy consumption" (Article 1(1)). It does not establish the characteristics that energy-related products must have, but merely states that labelling containing information on energy efficiency is a condition for their circulation in the single market (Article 7(1)). Furthermore, it recognises that Member States may provide incentives for the use of the most energy-efficient products (Recital 34 and Article 7(2)). But above all, it envisages harmonised labelling rules (Article 13(1)) that are, however, destined to be incorporated into the conformity assessment of these products (Article 13(2)). Here again, environmental protection rules overlap with those on the functioning of the energy market, resulting consequently in the convergence of administrative instruments typical of the New Approach with those typical of environmental certification.