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Internal Market Preventive Controls of National Technical Standards and Their Impact on Environmental Measures

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Abstract
With a view to overcoming the shortcomings of "negative harmonisation", the EU lawmaker has been adopting different directives requiring the Member States to notify to the Commission their draft regulations setting technical standards before their enactment. The aim of this article is to shed the light on two internal market preventive procedures: Directive 98/34 on the provision of information in the field of technical standards and regulation and Regulation 764/2008/EC relating to the application of certain national technical rules to products lawfully marketed in another Member State. In particular, the paper assesses the manner in which the directive and the regulation are likely to impinge on the enactment of national environmental measures.

Keywords
free movement of goods, measures having equivalent products, environmental product policy, assessment of the impact of national technical standards on the internal market, notification procedures, European Commission

1. Introductory Comments

Products have an effect on the environment. Depending on their composition, their production method and how they are used or consumed, they can either become a source of pollution, or they can be conceived in such a way as to avoid negative secondary effects. For instance, regulations set out the sulphur or lead content of petrol, the list of chemical substances which may not be retailed, as well as they impose restrictions related to the composition of packaging, the phosphate content of detergents and the maximum noise level for some types of appliances. Most of these standards are still set at

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national level, though most of them are derived from EU law. For some, a neo-protectionnist policy underlies national and regional measures regulating products and services for the protection of the environment. Indeed, a better protection of the environment through limiting the importation of hazardous products and substances might constitute a plausible alibi for reinforcing competitiveness of national firms. Such a strategy can be made all the more insidious by the use of measures that apply without distinction to both domestic and imported goods. Should such domestic rules be swept aside by the free movement of goods and services, considered by the CJEU as 'one of the fundamental principles of the Treaty'[1] and by most academic authors as a major component of the European integration process?

There are two ways in which to ascertain the compatibility of environmental measures taken by Member States with economic freedoms, such as free movement of goods and services: positive and negative harmonisation. Either the measure will be assessed only in the light of secondary legislation as in the case of complete harmonisation, or it will be observed that the measure goes beyond the scope of existing directives and regulations, and its lawfulness will be assessed directly in the light of Treaty law.

First, in the absence of harmonisation through directives or regulations, or if harmonisation by EU measures adopted usually on the basis of either Articles 192, either Article 114 TFEU (former Articles 175 or 95 EC) is not deemed to be complete, the provisions of the TFEU on free movement of goods (Art. 28, 30, 34, 35 and 110 TFEU; former Art 23, 28, 29 and 90 EC) and of services (Art. 56 TFEU; former Art 49 EC) are applicable. These provisions prohibit Member States from restricting free movement (*negative harmonisation*)[2]. The scope of these rules tends to differ according to the legal category

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1) See, e.g. Case 265/65 *Commission v. France* [1997] ECR I-6959.

2) As regard the consistency of national environmental measures with Articles 34-35 TFEU, see N. de Sadeleer, *Le droit communautaire and les déchets* (Brussels, Bruylant, Paris, L.G.D.J., 1995) 73-162; IB., 'Les limites posées à la libre circulation des déchets par les exigences de protection de l'environnement' (1993) 5: 6 *Cah Dr Eur* 672-696; IB., *Environmental Principles* (Oxford, O.U.P., 2002) 341-354; IB., *Commentaire Mégret. Environnement et marché intérieur* (Brussels, ULB Press, 2010) 363-412; D. Geradin, *Trade and the Environment. A Comparative Study of EC and US Law* (Cambridge, Cambridge U.P., 1997); L. Krämer, 'L'environnement et le Marché unique' (1993) 1 *RMC* 48; IB., 'Environmental Protection and Article 30 TFEU' (1993) *CMLRev.* 111-143; D. Misonne and N. de Sadeleer, 'Is There Space in the EU for National Product-Related Measures?' in M. Pallemarets (ed.), *EU and WTO Law: How tight is the Legal Straitjacket for Environmental Product Regulation* (Brussels, VUB Press, 2006) 45-82; A. Notaro, *Judicial Approaches to Trande*

to which they belong: to each barrier to the free movement of goods and services corresponds a prohibition governed by specific rules. Moreover, the TFEU provisions on free movement are mutually exclusive of one another[3].

However, the review of the compatibility of national measurers hindering the free movement of goods in the light of Treaty law is governed by a reactive approach. In addition, judicial intervention has mainly a corrective effect: it can only remove particular obstacles to free trade[4]. As a result, the regulation of products has often been governed by rules adopted by the EU institutions (*positive harmonisation*), in the framework provided for in the TFEU. In such a case, the free discretion of national authorities will be limited as harmonisation deepens. If secondary law is not necessary to the implementation of free movement within the internal market, it remains complementary to it. For instance, harmonisation on the basis of Article 114 TFEU of rules on the marketing of many products, such as dangerous substances, fertilizers, insecticide, biocides, GMOs, cars, trucks, aircrafts or electric and electronic equipments, creates a precise legal framework limiting Member States' ability to lay down their own standards. The advantage of such harmonisation is

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and Environment. The EC and the WTO (London, Cameron & May, 2003); J. Scott, 'On Kith and Kine: Trade and Environnement in the EU and WTO' in J.H.H. Veiler (ed.), *The EU the WTO and the NAFTA* (Oxford, OUP, 2000) 126-133; H. Temmink, 'From Danish Bottles to Danish Bees: The Dynamics of Free Movement of Goods and Environmental Protection - a Case Law Analysis' *Yb Eur Env L* (2000) I 61-102; G. Van Calster, *International & EU Trade Law. The Environmental Challenge* (London, Cameron & May, 2000); C. Vial, *Protection de l'environnement et libre circulation des marchandises* (Brussels, Bruylant, 2006); J. Wiers, *Trade and Environment in the EC and the WTO. A Legal Analysis* (Groeningen, Europa Law Publishing, 2002); A.R. Ziegler, *Trade and Environmental Law in the European Community* (Oxford, Clarendon, 1996).

3) For instance, it is settled case law, as regard the free movement of persons, that any restriction on individual economic freedom must be justified whereas the case law on goods does not require the justification of any market rule. The question whether or not to bring the case law on free movement on goods with case on free movement of persons has been dogged by controversy, as much as about the reasoning as about the concrete results. Several authors are taking the view that these freedoms should be harmonized. See C. Barnard, 146-148; Opinion AG Poiares Maduro in Joined Cases C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I–8153. According to other authorities, there are limits to the suggestion to merge these freedoms into a single concept. See A. Rosas, 'Life after *Dassonville* and *Cassis*: Evolution but not Revolution' in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversery of the Treaty of Rome* (Oxford, Hart, 2010) 433 and 444; P. Oliver, *Oliver on Free Movement of Goods in the European Union*, 5th ed. (Oxford, Hart, 2010) 11.

4) C. Barnard, *The Substantive Law of the EU,* 3rd ed. (Oxford, OUP, 2009) 70-192; D. Geradin, above, 199.

undeniable for producers and distributors since it allows the setting, on the scale of the internal market, of environmental standards which then govern the marketing of products and their free circulation within that market. Given that positive harmonization determines more precisely the room for manoeuvre left to the Member States than a changeable adjudicatory approach, it has been preferred to negative harmonisation.

Nonetheless, despite the impulse of secondary law, a large number of products are not subject to EU harmonised measures. Yet if legislation in the recipient State is less permissive than that of the exporting State, the former will hinder free circulation of goods, even if it does not provide for any difference of treatment between domestic and imported products. That being said, though it constitutes 'one of the fundamental principles of the Treaty', the free movement of goods is not absolute[5]. Accordingly, Articles 34 and 35 TFEU do not enshrine a general freedom to trade or the right to the unhindered pursuit of one's commercial activities[6]. These provisions are aiming at removing restrictions on imports and exports of goods rather than deregulating the national economy[7]. Therefore, they must not be confused with Article 16 EUCHR which recognises 'the freedom to conduct a business in accordance with Community law and national laws and practices'. It is therefore necessary to constantly examine the justification and proportionality of the domestic measure that differs from others[8].

With a view to overcoming the shortcomings of negative harmonisation, the EU lawmaker has been adopting different acts requiring the Member States to notify to the Commission their draft regulations setting technical standards before their enactment. The aim of this article is to shed the light on two internal market preventive procedures and assess the manner in which they impinge on the enactment of national environmental measures.

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5) Case C-51/93 *Schmidberger* [2003] ECR I-5659, para. 78.

6) Case C-292/92 *Hünermund* [1993] ECR I-6787, 6813.

7) Opinion AG Poiares Maduro in Case C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-8135, paras. 37 and 41.

8) If a Member State provides for less restrictive rules than those in another Member State this does not imply by itself that more restrictive rules will be disproportionate or therefore incompatible with EU law (Case C–294/00 *Gräbner* [2002] ECR I–6515, para. 46; Case C-277/02 *EU-Wood-Trading* [2004] ECR I-11957, para. 47). Indeed the choice by one Member State of a system of protection different from that of another Member State may not have any influence on the evaluation of the necessity and proportionality of the contested provisions (Case C-67/98 *Zenatti* [1999] ECR I-7289, para. 34 and *Gräbner,* para. 47).

First, with the goal of ensuring as full a protection as possible to the free movement of goods, which is one of the foundations of the EU[9], directive 98/34/EC[10] completes the prohibition on 'measures having equivalent effect' (hereinafter referred as MEEs) to 'quantitative restrictions' on imports (Article 34 TFEU) and on exports (Article 35 TFEU), as well as the harmonisation of national regulations through secondary law[11]. Its goal consists in preventing the re-emergence of technical obstacles to trade between the Member States[12].

Its impact on a preventive basis on the adoption of product standards by the national authorities is undeniable: so far, more than 12.300 drafts have been notified[13]. Thanks to the standstill period, both the Commission as well as the other Member States may request that proposed legislation be adapted in order to reduce the risks of restrictions on the free movement of goods. Unparalleled in other fields, this procedure for creating an *ex ante* control over drafts of national technical regulations today exercises a considerable influence on the product standard policies implemented by certain Member States. Having regard to the specialist nature of this paper, we shall not comment on the directive's obligations on information society services.

Second, the EU lawmaker has been adopting in 2008 additional regulations furthering the original preventive approach.

In sharp contrast to the directives and regulations regulating the placing on the market of several hazardous products, the acts commented on in this section are procedural and not substantive in nature.

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9) Case C-13/96 *Bic Benelux* [1997] ECR I-1753, para. 19.

10) [1998] OJ L 24/37. Repealing directive 83/189/EEC of 28 March 1983, directive 98/34/CE was amended short after its adoption by directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 ([1998] OJ L 207/18). See S. Lecrenier, 'Le contrôle des règles techniques des Etats et la sauvegarde des droits des particuliers' (1997) 35 *JTDE* 1; W. Vogel, 'L'obligation de marquage des produits soumis à écotaxe au regard du droit communautaire' (1988) 1 *Amén.-Envt.* 38; P. Debandt et K. Baekelandt, 'Le contrôle préventif, au regard du droit communautaire, des règles techniques introduites par les autorités nationales' (2008) 147 *JDE* 69-76; F. Herlitz, 'La politique de prévention des obstacles aux échanges de marchandises et de services de la société de l'information' (2008) 3 *RDUE* 403-460; D. Voinot, 'Le droit communautaire et l'inopposabilité aux particuliers des règles techniques nationales' (January-March 2003) 39/1 *RTDE* 91-112; C. Barnard, above, 127-135.

11) Case C-1949/94 *CIA Security International* [1996] ECR I-2201, para. 40; Case C-13/96 *S.A. Bic Benelux* [1997] ECR I-1753, para. 19.

12) Case C-1949/94 *CIA Security International* [1996], see above, para. 40.

13) F. Herlitz, above, 405.

2. Directive 98/34 on the Provision of Information in the Field of Technical Standards and Regulation

2.1. *Scope of Ambit*

The directive' scope is particularly broad. Within its scope are measures relating to industrially manufactured products, agricultural products, including fish products, and information society services.

Constituting the linchpin of the directive, the notification (Article 8) and stand-still (Article 9) procedures apply to the adoption of any "draft technical regulation", that is defined as a function of its effects and not of its objective. In spite of the fact that the measures apply indiscriminately to domestic products and to imported products and that pursue the objective of environmental protection, they are liable to be subject to the obligation to communicate to the Commission[14]. Similarly, the procedure also applies to rules falling under the area of criminal law[15].

Given that it can include legislation as well as any form of secondary legislation, the concept of "draft technical regulation" is extremely broad. It can also include measures such as administrative circulars, departmental guidelines, codes of practice, voluntary agreements etc., if such documents recommend the use of given specifications or standards[16].

According to a highly complex definition, the concept of "draft technical regulation" must satisfy three prerequisites.

First, the drafts must be imputable to State authorities[17]. Though the directive may embrace draft regulations adopted only in part of a Member State, such as a region or a Land, drafts adopted by local authorities are falling outwith its scope.

Second, the observance the national draft must be "compulsory, *de jure* or *de facto*".

Third, the national draft must fall within the scope of one of the various categories of measures that are defined under Article 1(11): "technical specifications", "other requirements", "national regulations prohibiting specific uses of a product", and "rules on services". Since the three first categories are likely to

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14) Case C-13/96 *S.A. Bic Benelux* [1997], seen above, para. 20.

15) Case C-226/97 *Lemmens* [1998] ECR I-4405, para. 20.

16) DTI, *Avoiding New Barriers to Trade. Directive 98/34/EC. Guidance for officials* (2002) 1.

17) The directive applies to all member States, the members to the European Economic Area (Norway, Iceland and Liechtenstein), EFTA (Switzerland) as well as Turkey.

encompass a great number of environmental rules, we will endeavour to explicit their scope.

2.1.1. *Technical Specification*

Defining "the characteristics required of a product", the "technical specification" is thus referring pursuant to Article 1(3) to "levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures". The specification must therefore apply to the characteristics of the product or its packaging. Technical specifications abound within environmental law. The following are examples of environmental measures that will be considered as "technical specifications": maximum permitted thresholds of toxic substances in products with a risk profile, obligation to use specific substances in the production of goods, composition, dimensions, tonnages, resistance, etc… Accordingly, a national draft requiring that bottles intended to contain mineral water comply with certain specifications regarding the characteristics of their packaging will fall within the ambit of the concept of technical specifications. The scope of "technical specifications" can also be illustrated by the communication made by the British authorities of a variety of draft environmental measures regarding the use or the placing on the market of products and waste: lead in petrol, marine anti-fouling paints containing organo-tin products, anglers lead fishing weights, pesticides, hazardous substances to health, materials containing volatile substances including organic solvents, labeling to be placed on furs, asbestos, waste disposal, refrigerants in non-refillable containers, pesticides, plant protection products, animal by-products, hook size restrictions, oil storage, water quality, use of PVC-U water supply pipes containing lead-based compounds, catering waste, sludge, packaging waste, and end of waste criteria for the production and use of tyre-derived rubber materials[18].

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18) 1985/0014/UK; 1985/0015/UK; 1986/0040/UK; 1986/0056/UK; 1986/0081/UK; 1987/0015/UK; 1988/0039/UK; 1988/0139/UK; 1989/0052/UK; 1991/0218/UK; 1991/0291/UK; 1993/0226/UK; 1995/0066/UK; 1996/0343/UK; 1997/0104/UK; 1997/0105/UK; 1997/0383/UK; 1997/0384/UK; 1998/0525/UK; 1998/0564/UK; 1999/0056/UK; 1999/0190/UK; 2000/0159/UK; 2000/0310/UK; 2000/0318/UK; 2001/0054/UK; 2001/0080/UK; 2001/0190/UK; 2001/0197/UK; 2001/0199/UK; 2001/0266/UK; 2002/0264/UK; 2002/0452/UK; 2002/0485/UK; 2004/0171/UK; 2005/0439/UK; 2006/0260/UK; 2009/0252/UK.

Underscoring the importance of the preventive control introduced by the notification regime in the area of technical standards and regulations, the Court of justice has interpreted the different categories of "technical specifications" broadly[19]. Accordingly, as far as environmental measures are concerned, it subjects several types of regulations to the preventive regime among which one encounters regulations concerning the quality of waters and the production and marketing of some molluscs[20], the composition, classification, packaging and labelling of pesticides[21], and the prohibition of the extraction, importation, processing, use, marketing, treatment and disposal in the national territory, as well as the exportation, of asbestos, asbestos products and products containing asbestos[22].

Moreover, the Court has held that national measures requiring that special signs, markings or labels be placed on goods must be classified as technical regulations[23]. The following environmental measures have been classified as technical specifications:

- distinctive signs affixed to products which are subject to a tax levied on them on account of the environmental damage which they are deemed to cause[24];
- the obligation of "marking or labeling" imposed on producers and importers of products marketed in packaging in order to determine which packagings will be taken care of by an organism responsible for their recycling[25].

That being said, a distinction must be drawn between, on the one hand, enabling measures which are not subject to the requirement of notification on the grounds that they do not constitute a new specification and, on the other hand, implementation measures which are taken on the basis of these enabling provisions. Such measures must be notified[26]. By way of illustration,

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19) The case law is mainly related to the definitions of directive 83/189/EEC now replaced by directive 98/34/EC.

20) Case C-61/93 *Commission v. Netherlands* [1994] ECR I-3607.

21) Case C-289/94 *Commission v. Italy* [1996] ECR I-4405.

22) Case C-279/94 *Commission v. Italy* [1997] ECR I-4743, para. 30.

23) Case C-317/92 *Commission v. Germany* [1994] ECR I-2039, para. 25; Case C-443/98 *Unilever* [2000] ECR I-7535; Case C-145/97 *Commission v. Belgium* [1998] ECR I-2643; Case C-65/05 *Commission v. Greece* [2006] ECR I-10341, para. 61.

24) Case *S.A. Bic Benelux* [1997], seen above, paras. 25 & 26.

25) Case C-159/00 *Sapod Audic* [2002] ECR I-5031, para. 46.

26) Case *Commission v. Germany* [1994], seen above, para. 26.

a provision which obliges the producer or importer of packaging to "identify", without however requiring it to place a marking or label on this packaging, does not specify the characteristics required of a product and, accordingly, will not be classified as a technical specification[27]. Nonetheless, the national court may arrive at the conclusion, having regard to all the factual and legal evidence, that the enabling provision to identify the packaging must be interpreted as amounting a technical specification. This is not precluded by the fact that the detailed rules regarding the marking or the labelling remained to be defined[28].

2.1.2. *Other Requirements*

Considered as "technical regulation", the "other requirements" cover pursuant to Article 1(4) 'all requirements, other than a technical specification, imposed on a product for the purpose of protecting … the environment and which affect [a product's] life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing'. Accordingly, drafts of environmental measures which impose specific obligations regarding the conditions for using a product—labels on packaging, obligation to reuse the discarded product, consumer notices, etc.—must be notified to the European Commission. Similarly, draft versions of rules on the disposal of waste may also fall within the reach of the concept of "other requirements" where they have the effect of determining technical specifications for goods destined for disposal. For instance, a draft regulation requiring the collection of medical waste falls within the ambit of this concept. By the same token, noise insulation requirements, producer responsibility obligations (Packaging Waste) and restriction on use of Lead shot are conditioning the use of products and, as a result, significantly influence their composition or their nature[29]. A national plan for shipments of waste and a vehicle recycling and recovery "scrapping" scheme have also to be considered as "other requirements"[30].

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[27] Case C-278/99 *Vandenburg* [2001] ECR I-2015, para. 20; Case *Sapod Audic* [2002], seen above, para. 30.

[28] Case C-159/00 *Sapod Audic* [2002], seen above, paras. 33-34.

[29] See for instance, the submission by the British authorities of a draft regulation on restriction on use of Lead Shot (1999/0190/UK) and various drafts on Producer Responsibility obligations regarding packaging waste (1999/0250/UK; 2000/0496/UK; 2001/0396/UK-0399/UK; 2001/0454/UK; 2003/0278/UK; 2003/0279/UK; 2003/0342/UK; 2010/0151/UK).

[30] 2007/0182/UK; 2009/0259/UK.

2.1.3. *National Regulations Prohibiting Specific Uses of a Product*

In virtue of Article 1(11), national authorities responsible for environmental protection must take particular account of a third category of technical regulations that encompass: 'laws, regulations or administrative provisions … prohibiting the manufacture, importation, marketing or use of a product …', which are particularly numerous in the areas of waste management and chemical substances. These state measures are supposed to '…leave no room for any use which can reasonably be made of the product concerned other than a purely marginal one'[31]. It follows that draft regulations prohibiting the manufacture of a substance (DTT, asbestos) would appear in any case to be subject to the obligation to notify, even though the planned measures would not hinder the free movement of goods.

As far as the directive 98/34/EC does not apply to the national measures aiming at "the protection of persons, in particular workers, when products are used, provided that such measures do not affect the products" (Article 1(12) *in fine*), a national draft regulation restricting the use of devices considered as dangerous to some categories of qualified workers is exempt from the notification procedure.

2.1.4. De facto *Technical Regulations*

In addition to the three categories mentioned above, the directive provides examples of various "*de facto* technical regulations". This category covers in virtue of Article 1(11) 'voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services…'. Generally speaking, whereas a technical specification is mandatory, compliance with a voluntary agreement is optional. For instance, imported goods which do not comply with technical requirements cannot be placed on the market, whilst a good that does not comply with the requirements of a voluntary eco-label is not prevented from entering the domestic market. That said, voluntary agreements could hinder the access to the domestic market. Indeed, the domestic undertakings that are able to bear the extra-costs induced by the voluntary certification of their environmentally friendly products might overpower foreign undertakings not endowed with such resources. Under Article 1(11), the voluntary agreements must provide 'for compliance' with technical specifications or other requirements. To the contrary of technical product standards

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[31] Case C-267/03 [2005] *Lindberg* ECR I-3247, para. 77.

that focus on the intrinsic qualities of a product, voluntary agreements promoting the labeling of environmentally friendly products may require the compliance with a number of "other requirements" such as a life cycle analysis of the environmental impacts of the product, and in particular the assessment of the environmental impact of process and production methods[32].

Since the obligations to collect and recover waste provided for under secondary law are increasingly often contained in voluntary agreements concluded between public authorities and certain branches of industry, where they have not been notified to the Commission, such agreements may be deemed inapplicable. Moreover, the failure to notify or the non-compliance with the standstill period are liable—in accordance with the *Unilever* case law, confirmed in the area of waste management by the *Sapod Audic* judgment—to affect contractual relations between private individuals.

Furthermore, attention should also be drawn to the fact that, in virtue of Article 1(11), "technical specifications or other requirements or rules on services which are linked to fiscal … measures affecting the consumption of products … by encouraging compliance with such technical specifications or other requirements or rules on services" are also considered as *de facto* technical regulations. In other words, where they promote the respect for technical standards, fiscal measures also amount to *de facto* technical regulation. In this connection, a few examples will suffice. A draft regulation providing for an environmental fee on plastic bags is likely to be considered as a "*de facto* technical regulation". Confronted with the issue of a mandatory marking of products subject to environmental tax, in order to ensure that the collection of environmental tax was monitored, the Court of Justice held in *Bic Benelux* that this obligation could in no way be regarded as exclusively a fiscal accompanying measure, which was at that time subject to a derogatory notification regime. Accordingly, an obligation 'to affix specific distinctive signs to products which are subject to a tax levied on them on account of the environmental damage which they are deemed to cause', constitutes a "technical regulation".[33] However, pursuant to Article 8(1)(vi)), the observations and the detailed opinions regarding the technical specifications or other requirements relating to fiscal or financial measures which may be issued by the Commission and by the other Member States may concern 'only the aspect which may

[32] See in particular Article 2(2)(b) of Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme, [2000] OJ L 37/1.

[33] Case C-13/96 *S.A. Bic Benelux* [1997], seen above, paras. 25 & 26.

hinder trade and not the fiscal or financial aspect of the measure'. It follows that neither the Commission nor the Member States can contend with the tax basis of the fax rates. Only the aspects of the draft fiscal regulation which might hinder trade in goods are subject to the assessment.

Last but not least, "financial measures affecting the consumption of products … by encouraging compliance with such technical specifications or other requirements" are also considered as *de facto* technical regulations. Therefore, the public subsidies encouraging the purchase of energy-saving devices—photovoltaic power generation, wind turbines to produce electricity—are subject to the notification and stand-still procedure.

2.1.5. *Concluding Remarks*

The instruments deployed on at national level to limit the environmental impact of goods whether upstream in their conception ("specification" of their characteristics), or downstream in their production ("other requirements imposed on the product for the purpose of environmental protection") are subject to these preventive arrangements. What is more, in contrast to the TBT agreement, the directive does not contain any *de minimis* rule and does not operate any differentiation based on the value of the goods at issue or the importance of the market concerned. Therefore, even draft technical rules with a negligible economic impact are accordingly subject to the requirements for notification and stand-still.

To conclude with, draft technical regulation can cover a flurry of environmental measures including bans, quotas, import and export permits, prior informed consent procedure, mandatory labelling schemes, certification procedure, testing procedure, warning notices, labelling requirements and emission thresholds that are likely to determine which product can be placed on the market. Nonetheless, the concept of "draft technical regulation" is narrower than the general case law on the concept of MEE.

2.2. *Prior Notification and Suspension of the Draft Technical Rules*

In order to prevent the adoption of technical regulations from giving rise to measures having an equivalent effect to a quantitative restriction on trade in goods, directive 98/34/EC establishes a procedure for prior notification to the Commission for any "draft technical regulation" planned by the Member States.

Since the objective of Article 8(1) of the directive is to permit the Commission as well as the other Member States that could be affected by the proposed

regulation to obtain information that is as complete as possible in order to enable them to exercise their powers as effectively as possible, the Member States must provide a complete communication of the text containing the draft technical rule,[34] accompanied, depending on the circumstances, by a statement of the reasons and the basic legislative or regulatory provisions. Thus, the Court judged that only a throughout communication of an Italian law on asbestos could allow the Commission to evaluate the exact scope of the technical rules it eventually contained[35]. However, in virtue of Article 8(5), compliance with these formalities releases the Member State from the requirement to notify the draft a second time within the context of other regulatory procedures.

Of particular importance regarding environmental protection, the communication of draft technical regulations which seek to limit the marketing or use of substances, preparations or chemical products on the grounds of public health or the protection of consumers or the environment must also include the scientific evidence justifying their adoption, including an analysis of the risks (Article 8(1)(4)). This assessment must be carried out in accordance with the general principles for risk assessment enshrined in the REACH regulation.

The draft brought to the attention of the Commission is subsequently transmitted to the other Member States. The Member State which has notified the draft is required to suspend its adoption for the time necessary in order for it to be examined by the Commission and the other Member States (standstill obligation).

If neither a member State nor the Commission takes any action on the notification in the three-month standstill period, the Member State is free to adopt the draft technical regulation at the end of the three-month period.

Following the example of the EU executive, Member States may state their opinion that the planned measure may constitute an obstacle to the free movement of goods. If another Member States or the Commission comment on the draft, the originating member State is required pursuant to Article 8(2) to take such comments into account as far as possible in the subsequent preparation of the regulation.

If the draft is considered as a barrier to trade, a detailed opinion[36] may be submitted by the Commission or another Member State and this will extend

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[34] Case C-289/94 *Commission v. Italy* [1997], seen above, para. 41.

[35] Ibid., paras. 39 & 40.

[36] It is not at all clear what is meant by "detailed opinion" under Article 9(2).

the standstill period for a further three months[37]. During that period, the originating Member State must report to the Commission on the action it proposes to take.

If the Commission announces its intention of proposing a directive on the matter, the Member State is then called on to postpone the adoption of the draft for twelve months. The freezing of the national draft may facilitate the adoption at EU level of an harmonisation measure that is likely to hinder to a lesser extent the functioning of the internal market. By way of illustration, the draft regulation on prohibition of imports of furs of animals caught by leg-hold traps, notified by the UK under former directive 83/189/EEC, met much resistance. As a result, this submission led the Commission to submit its own proposal on the matter, that became Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leg-hold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards[38].

That being said, on conclusion of the procedure the Member State is still entitled to adopt its draft technical regulation even though it has been subject to a detailed opinion. A copy of the definitive text must be sent to the Commission without further justification[39]. Indeed, in virtue of Article 8(2), the Member State is merely required 'to take such comments into account in the subsequent preparation of the technical regulation'. In that respect, the notification and suspension procedure provided for under directive 98/34/EC is quite distinctive from the authorisation procedure provided for under Article 114(6) TFEU[40]. Moreover, the hurdles to overcome are not as high than under Article 34 TFEU. Indeed, the Member State notifying its draft is not required to justify the measure in the light of Article 36 TFEU or the rule of reason.

In spite of the fact that they are scattered over various provisions and drafted without particular concern for consistency, limits have nevertheless been placed on the obligation to notify the draft immediately. We will only discuss

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[37] Article 9(2).

[38] [1991] OJ L 308/1. See L. Gromley, 'Free Movement of Goods and the Environment' in J. Holder (ed.), *The Impact of EC environmental Law in UK* (Wiley, 1992) 301.

[39] Article 8(3).

[40] N. de Sadeleer, 'Procedures for derogations from the principle of approximation of laws under article 95 EC' (2003) 40/4 *CMLR* 889-915.

Stand-still obligations related to the notification of draft regulation on products

Notification	**Initial stand-still period of 3 months**
Comments from the Commission or other MS	No further stand-still
Detailed opinion from the Commission or other MS	Further stand-still period of 3 months
Intention of the Commission to propose an harmonised measure	Extension of the stand-still period to 12 months
Adoption of a common position by the Council during the 12 months stand-still period	Extension of the stand-still period to 18 months

the extent of the limits which affect national policies on environmental matters.

In accordance with Article 9(7), the notification of the draft regulation is not required in cases where there are 'urgent reasons, occasioned by serious and unforeseeable circumstances relating to the protection of public health or safety, the protection of animals or the preservation of plants' or 'occasioned by serious circumstances relating to the protection of the security and the integrity of the financial system, notably the protection of depositors, investors and insured persons'[41]. Likewise, under Article 8(1), the notification does not take place if it 'merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice'.

Besides, pursuant to Article 10(1), 1st indent, Articles 8 (notification requirement) and 9 (stand-still requirement) are not applicable in cases of 'compliance with binding [EU] acts which result in the adoption of technical specifications or rules on services'. The wording of this provision without doubt raises several interpretative difficulties. The term "*comply*" must be interpreted as to "*act in accordance with*"[42]. According to the case law, whenever the harmonisation measure offers a sufficiently substantial margin of

[41] As far as the emergency proceeding is concerned, the Court of Justice implicitly indicated that the existence of motives allowing invoking this proceeding did not exempt the Member States from their obligation to notify their technical rules. Case *Commission v. Italy* [1996], seen above, para. 26.

[42] Shorter Oxford English Dictionary, vol. 1 (Oxford, OUP, 2002).

appreciation to the national authorities, the transposing legislation cannot copy it in full. Accordingly, the national measure could not benefit from this exemption[43]. In *Sapod Audic,* the ECJ rejected the argument according to which the French obligation to identify by way of appropriate labelling packaging destined to be collected and processed by an approved waste management undertaking did not fall within the ambit of the former directive 83/189/EEC on the grounds that the national arrangements were intended to transpose the waste framework directive 75/442/EEC. According to the Court, inasmuch as this directive leaves Member States "a significant degree of freedom", the quarreled national measure did not have for purpose to conform to the EU secondary law on waste[44].

Finally, in virtue of Article 10(1), 3rd indent, where Member States 'make use of safeguard clauses provided for in binding [EU] acts', Articles 8 and 9 are not applicable.

2.3. *Enforceability of Technical Regulations not Notified to the Commission Prior to Their Adoption*

Given that directive 98/43 is promoting 'a regulated dialogue' between the Member State proposing the draft, the Commission, and the other Member States',[45] one could wonder whether the failure to make the notification required under that directive 98/43 can be invoked by an individual in order to render the technical regulation in question inapplicable. Indeed, according to the *Enichem Base* case law, individuals may not derive any right from the fact that the Member State has not respected the procedures laid down by the directives for communicating draft regulations prior to their adoption[46].

The situation is however different for the notification procedure in the area of technical standards and regulations. The breach of the requirement to notify,[47] as well as the adoption of a national technical rule during the period

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43) Case C-289/94 *Commission v. Italy* [1996], seen above, paras. 36, 43 & 44.

44) Case C-159/00 *Sapod Audic* [2002], seen above, paras. 43 to 46.

45) C. Barnard, above, 129.

46) Case C-380/87 *Enichem Base* [1989] ECR 2491. The Court recently confirmed that the obligation that the directive 75/442/EEC on waste imposes on the Member States to inform the Commission of planned implementation measures did not give individuals any right which they may enforce before national courts (Case C-159/00 *Sapod Audic*, paras. 58-63).

47) Case C-194/94 *CIA Security International* [1996], seen above, para. 48; Case C-226/97 *Lemmens* [1998], seen above, para. 33.

of suspension,[48] constitute 'a substantial procedural defect'[49] of such a nature as to entail two consequences.

First, all state bodies are under an obligation not to apply not only technical rules which were not communicated during the drafting stage to the European Commission, but also any technical rule adopted without respecting the standstill period imposed by the directive. Secondly, the defect will result in the non applicability of the technical rules to individuals, and will therefore not be open to challenge on account of the prohibition on horizontal direct effect. However, according to *Lemmens* case law, this requirement of non-application only applies where the technical rules "hinder the use or the marketing of a product which was not in conformity" with these rules[50]. It follows that the mere qualification of a measure as a technical specification is not sufficient to render it inapplicable to private persons. Its inapplicability depends on the extent to which the measure restricts the free movement of goods.

The invalidity or unenforceability of a contract which was purportedly concluded in accordance with a technical rule affected by such a defect is governed by national law, subject to compliance with the principles of equivalence and effectiveness. In *Sapod Audic*, a dispute involving a packaging waste management company and one of its affiliates, the Court of Justice followed its judgment in *CIA Security International*, holding that it was for the national court to refuse to apply a technical regulation, in accordance with directive 83/189, concerning the identification of the packaging concerned[51]. Moreover, the severity of the action to be applied in such case, such as nullity or unenforceability of the contract, has to be governed by national law[52].

3. Other Preventive Procedures

3.1. *The 2008 Internal Market Package*

Although for more than half a century the EU institutions of have committed themselves to guaranteeing the free movement of goods by dismantling all state tariff or non tariff measures, the balance of this action remains mixed,

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48) Case C-443/98 *Unilever* [2000] ECR I-7535, para. 34.

49) Case C-194/94 *CIA* [1996] ECR I-2201, para. 48; Case C-443/98 *Unilever* [2000] ECR I-7535, para. 45; Case C-226/97 *Lemmens* [1998], seen above, para. 33.

50) Case C-226/97 *Lemmens* [1998], seen above, para. 35.

51) Case C-159/00 *Sapod Audic* [2002], seen above, para. 51.

52) Case C-159/00 *Sapod Audic* [2002], seen above, para. 52.

especially due to technical shortcomings (harmonisation of national regulations in different forms). In order to maintain the dynamic of the internal market, three legislative texts were adopted by the European Parliament and the Council on 9 July 2008. These three texts aim at setting out:

- a common framework for the marketing of products,[53]
- the requirements for accreditation and market surveillance relating to the marketing of products,[54]
- procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State.[55]

Despite their technical differences, these three regulations make up a coherent set in the service of the same goal, the free movement of goods in the internal market and the principle of mutual recognition.

In *Cassis de Dijon*, the Court clarified that MEEs, not limited to measures directly affecting imports and exports, were encompassing measures that are 'applicable without distinction' to foreign and domestic goods, as a foreign producer may find it more difficult to respect these rules than the national producer. According to settled case law, 'in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods' constitute measures of equivalent effect prohibited by Article 34 TFEU[56]. The condition that the goods were 'lawfully manufactured and marketed in another Member State' reflects 'the obligation to comply with the principle of mutual recognition of products'[57]. Mutual recognition can be defined as 'a principle whereby the sale of goods lawfully produced and

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53) Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC ([2008] OJ L 218/82).

54) Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 ([2008] OJ L 218/30).

55) Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC ([2008] OJ L 218/21).

56) Case C-120/78 Cassis de Dijon [1979] ECR 649.

57) Case C-110/05 *Commission* v. *Italy* [2009] ECR I-519, para. 34 and the case law cited; Case C-108/09 *Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete* [2010], para. 48.

marketed in one Member State may not be restricted in another Member State without good cause'[58]. It follows that the importer can reckon upon a single regulation by the home state instead of having to overcome the hurdle to cope with both the home state and the domestic regulation[59].

By facilitating the implementation of the principle of mutual recognition, this body of legislation reinforces the framework for the policing powers vested in the Member States in absence of harmonisation[60]. This means that the competences of the Member States in matters concerning the regulation of products which do not fall within the reach of a directive or a harmonisation regulation will be significantly more controlled than they were in the past. Accordingly, this new legislative framework contributes to reinforcing a construction which originated from judge made law.

3.2. *Regulation 764/2008/EC Relating to the Application of Certain National Technical Rules to Products Lawfully Marketed in Another Member State*

Regulation 764/2008/EC relating to the application of certain national technical rules to products lawfully marketed in another Member State is of special interest for the national administrations responsible for health and the environment. This regulation is complementing Directive 98/34/EC that lays down a preventive control for the adoption of any draft technical regulation concerning any product, in ensuring that, following the adoption of such a technical regulation, the principle of mutual recognition is correctly applied in individual cases to specific products. In contrast to the directive that applies to regulatory measures, the regulation applies in individual cases.

In enhancing the correct application of the principle of mutual recognition by the Member States, Regulation 764/2008/EC aims at minimising the possibility of technical rules' creating unlawful obstacles to the free movement of goods between Member States'[61]. Its principal goal is to improve the information of economic operators regarding the decisions taken by the national authorities relating to their products.

The administrative decision must be directed to an economic operator. It must concern a product lawfully marketed in another Member State which is

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[58] Case C-120/78 Cassis de Dijon [1979] ECR 642, para. 14.

[59] A. Rosas, above, 440.

[60] R. Kovar, 'Le législateur communautaire encadre le régime de la mise des produits dans le marché intérieur' (2008) 44/2 *RTDE* 289 – 311.

[61] Recital n°4.

not subject to harmonised EU law. Pursuant to Article 2, the direct or indirect effect of that decision must be the prohibition of a product, the modification or additional testing of that product and its withdrawal. Moreover, the decision must be based on a technical rule. In addition to the requirements regarding the intrinsic properties of the product, such as levels of quality, performance or safety, the "technical rule" includes 'any other requirement which is imposed on the product or type of product for the purposes of protecting consumers or the environment, and which affects the life-cycle of the product after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition, nature or marketing of the product or type of product'[62]. As discussed above, these "other requirements" are likely to encompass a number of waste management and environmental producer responsibility rules. However, a requirement that the placing of a product on the market be subject to prior authorisation should, as such, not constitute a technical rule within the meaning of this Regulation. Accordingly, a decision to exclude or remove a product from the market exclusively on the grounds that it does not have valid prior authorisation should not constitute a decision to which the regulation applies[63].

Before regulating the product or its placing on the market, the national authority is required to issue to the economic operator concerned a written notice of its intention, specifying the technical rule which will act as a basis for its decision and providing the technical or scientific information which will justify its decision. In addition, the national authority is called on to communicate the operator the overriding reasons of public interest for imposing national technical rules on his product and that less restrictive measures cannot be as effective. Thus, as stressed by Barnard, the burden of proof has been shifted from the trader to the State of destination that must justify on which grounds the product cannot be marketed[64]. In case of failure to notify within the period laid down in the regulation, the product is deemed to be lawfully marketed in the Member State. The economic operator concerned must be allowed to present its observations within a time limit of twenty days. The decision, which must contain reasons, specifies the procedure which the operator may follow to challenge it, should it decide to do so. Moreover, in order to improve the information provided to businesses, the Member States must establish "Product Contact Points".

[62] Article 2(2)(b)(ii).

[63] Recital n°12.

[64] C. Barnard, above, 136.

4. Concluding Remarks

Given the shortcomings of negative harmonisation, the EU lawmaker has been adopting different procedural acts aiming at improving the free movement of goods that fall outside the scope of EU harmonisation. In laying down a procedure for the provision of information in the field of technical standards and regulation, Directive 98/43/EC is intended to help avoid the creation of new regulatory barriers to trade within EU. In addition, the notification and stand-still procedures increase transparency, since national draft regulations are brought to the attention of the authorities and interested parties before being enacted. More recently, Regulation 764/2008/EC is framing how national authorities monitor compliance with national technical rules on goods not covered by harmonised EU law. Member States who prohibit access for these goods to their market are obliged to make contact with the enterprise and to produce detailed objective reasons for refusal. Given that the objective of both Directive 98/43/EC and Regulation 764/2008/EC is to strengthen the internal market by improving the free movement of goods, these acts may be seen as additional deterrent to the development of a national environmental product policy.