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Enforcement of administrative decisions between Member States under EU law From *exequatur* to automaticity?

Draft version

1. Introduction

In a growing number of areas, EU law enables administrative decisions adopted by any Member State to display effects amongst any other Member States. Such decisions, called transnational (European) administrative acts, are common in the fields in which the EU has an exclusive or a strong competence (like customs or the internal market) but also in those in which Member States still retain a important role as in the *ex* third pillar.

The Schengen visa is an example of this kind of decision. Once issued to a third country national by a member State (or more exactly a State member of the “Schengen system”), called an “issuing Member State”, it enables its holder to freely circulate on the territory of all the Member States (or more exactly the States which are members of the “Schengen System”). In other words, it displays its effects amongst these States called “enforcing member States”¹.

1.1 The problem

¹ As stated by article 2 of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, “For the purposes of this Regulation, ‘visa’ shall mean an authorisation issued by a Member State or a decision taken by such State which is required with a view to: entry for an intended stay in that Member State or in several Member States of no more than three months in total, (...)”.

The aim of the proposed paper is to focus on a very specific and challenging legal aspect of the transnational administrative acts:² does the enforcement of “foreign” Member States administrative decisions need a prior recognition or authorization from the enforcing Member States, in other words an administrative “*exequatur*” to borrow a jurisdictional term. If not, are the enforcing States nevertheless enabled to use discretion in order to enforce them?

In the past, only a few administrative acts were issued by a State with a view to being enforced by another State. These acts, mainly related to the personal status, needed to be recognized by the competent authorities of the State on which they were supposed to be enforced. This was the *exequatur* mechanism mainly used towards foreign judiciary acts but also in some cases towards administrative acts.

However, later on, the increase in relations of any kind between the States asked for a higher circulation of administrative decisions amongst them. The *exequatur* mechanism permitted to address the issue only at a very limited and slow pace. For this reason, international conventions have been developed in two directions, first, in order to smooth the recognition step in some fields like the Council of Europe convention on the service abroad of documents relating to administrative matters³ and second to cancel the recognition step in very specific fields like the Council of Europe convention on mutual administrative assistance in tax matters⁴.

EU integration radically altered the situation. It is not possible for the internal market and for the area of freedom, security and justice to function properly without the circulation of an astoundingly high number of administrative decisions. In other words, European integration requires administrative transnationality. Consequently, EU law enabled many national

² Enforcement of EU decisions, i.e. the decisions adopted by the Commission or by an EU agency is not under consideration here. On this topic, see P.C. Adriansee and others, “Implementation of EU enforcement provisions: between European control and national practice”, *REAL*, vol. I, 2008/2, p. 83-95.

³ 24 November 1977 CETS n°094. It didn't meet a high number of ratifications.

⁴ Convention n°127 of 1988.

administration acts to display their effects amongst other Member States. That said, logically, enforcement of such acts should no more rely upon *exequatur* or recognition mechanisms, disproportionately time consuming and phased out in the framework of increased integration.

Nevertheless, EU law sends signals according to which at least some transnational decisions formally granted with transnational effects are still facing recognition from enforcing Member States. Lets for example consider the case of the directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources. It is based on the circulation amongst Member States of energy produced from renewable sources: the origin of such energy being granted by guarantee of origin issued by a competent authority of the member State where such production occurs. Nevertheless, article 15 of the directive states that a member State may refuse to recognize a “foreign” guarantee of origin when it has well-founded doubts about its accuracy, reliability or veracity. The council framework decision 2005/214/JHA of February 2005 on the application of the principle of mutual recognition to financial penalties. It enables the decisions requiring a financial penalty to be paid by a person to be transmitted to other Member States in which the person against whom such a decision has been passed has property or income. The framework decision distinguishes between grounds for non recognition and grounds for non execution.

We argue that the logic of the EU integration in the administration field should lead to the relinquishment of the *exequatur*/recognition and the adoption of a automatic enforcement principle. The precise purpose of this paper is to check how it is taken into account in EU law.

It has to be noticed that this question is only a part of a broader picture related to the circulation of legal decisions of any kind as a consequence of the development of the EU internal market and the area of freedom, security and

justice. Same issues rise also in the case of the enforcement of “foreign” court decisions⁵ and of “foreign” private and commercial law decisions⁶ to which it will be referred to for limited analogy reasoning if pertinent.

1.2 The scope of the question: enforcement of the transnational administrative acts

Before going to the core of the developments, it is necessary to make some preliminary remarks related to the scope of the transnational administrative acts enforcement.

First, the enforcement of administrative decisions under consideration here is different to what is called enforcement of administrative decisions under national administrative legal orders, where administrative decisions have to be enforced by the final recipients of the decisions (either public or private persons or bodies). It is nevertheless true that, in some cases, the public authorities issuing authorization or even other authorities may be involved in enforcement activities by issuing sanctions or proceeding to forced enforcements in case of non or late or partial enforcement by the final recipients, precisely because the enforcement abroad of administrative decisions is not natural administratively speaking and in some cases obliges the EU law to distinguish separated and dedicated steps to it. In the cases we are dealing with, we focus on enforcement made by enforcing Member States and not on the enforcement made by the final recipients. The further phase of enforcement of a transnational administrative decision by final recipients, i.e. the “classical” enforcement phase under national

⁵ Marmisse (Anne), *La libre circulation des décisions de justice en Europe*, Presses universitaires de Limoges, 2000. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (art. 33 “1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required”; art. 38.1. “A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there” by the means of “declaration of enforceability”);

⁶ Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

administrative legal orders, will be considered in the following developments only in terms of questioning which national law applies to these activities.

Second, for the sake of clarity, we have to distinguish between situations in which the action to be taken by a Member State enforcing an administrative decision adopted by another Member State and situations in which a Member State participates in the last stages of the adoption of an administrative decision started by another Member State. EU law provides for a growing number of composite decisions making process where more than a single national administration or even the Commission or an European agency may intervene⁷. The two situations are often not obvious to distinguish because the use of discretion by an enforcing Member State, i.e. whether or not to enforce a “foreign” decision, is in its effects very near to the decision adopted by a participating member State to decline its final approval to the adoption of a transnational administrative decision initiated by another member State as far as it is enabled to do so (as for example, in the case of transEuropean circulation of dangerous goods requiring the authorizations of all the Member States concerned⁸). To our view, even if it is not always clearly distinguishable in practice, it nevertheless makes sense to maintain a distinction between “mere” enforcement of an act and participation to the adoption of an act, following a consolidated approach shared by many of the Member States administrative legal orders⁹.

Third, enforcement abroad of transnational administrative decisions has also to be distinguished from transnational requests for information. Mechanisms of requests for information are by now accompanying many EU legislations. They are largely developed especially in the fields of tax

⁷ Hofmann (Herwig C. H.), ‘Composite decision making procedures in EU administrative law’, in Herwig C. H.) Hofmann and Alexander H. Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar, 2009, pp. 136-167.

⁸ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

⁹ Acte administratif / décision exécutoire.

cooperation. According to more or less detailed proceedings, they enable the administration of a Member State to ask an “homologue” administration of another Member State to provide it with information necessary to achieve its (enumerated) tasks. Requested administrations are usually bound to answer by European law but they can nevertheless put forward some derogation to not comply with the transfer of the information requested. The specificities of the requests for information is that they have no final recipients (in the meaning seen above) as there is no externalization of the administrative act toward recipients outside the administrations asking for or answering information and, even, according to some administrative law national traditions, there is no administrative act at all in such cases. But there are border cases: for example, in the framework of the Customs information system¹⁰, executing member States may be requested to act toward potential final recipients, as they also may be under the Schengen information system, but only in a passive way, i.e. to observe them and share the data collected with the requesting State (and the other Member States). Under the Schengen information system, requested member States may be asked to actively act towards final recipients, by example, by forbidding the entry of third countries nationals on the Schengen territory if so requested. Even if in some cases the distinction is slight, we prefer to stick to it and exclude transnational request for information to the present study as far as they do not have concrete final recipients.

1.3 Method: analyse of EU laws

The method we have considered as appropriate to tackle the question formulated in 1.1 is to analyse some EU laws enabling administrative decisions adopted by any member State to display effects amongst the other Member

¹⁰ Convention Drawn up on the basis of Article K.3 of the Treaty on European Union, on the use of information technology for customs purposes and Council regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

States. For each of the laws selected, attention is dedicated on how the related provisions deal with the “enforcement abroad” of them.

Consequently, a panel of EU laws was constituted according to three criteria. First, the number of laws under consideration should be manageable, i.e. not too high, but at the same time high enough to take into account a significant number of the main matters in which transnational administrative acts exist (circulation of persons, of services, of goods). Nevertheless, the panel itself doesn't pretend to be representative of all the EU legislations providing for the transnationality of administrative acts.

Second, the ways these acts are processed have also to be taken into account. The growing importance of electronically processed acts, through the Schengen information system for example, respectively to the classical paperwork proceedings, implies that the former category has to be rightly represented and may create specific legal issues.

Third, administrative decisions having an effect on liberties and broadly speaking on human rights like the European arrest warrant or the alerts entered into the Schengen information system are, from a technical point of view, interesting respectively to decisions having not such an effect (customs decisions for example). This is due to the fact that we can reasonably expect them to be accompanied by added specific guarantees, translated in a complex step process. This makes their enforcement (rightly) more complex and more legally challenging. This is the reason why, alongside with administrative decisions, some judicial decisions and administrative sanctions are also included in the panel.

As a result, our panel is composed of the EU laws related to: the European arrest warrant, the decisions requiring a financial penalty to be paid, the decisions on the expulsion of third country nationals, the customs decisions, the requests for notification of certain documents relating to claims and requests for claims recovery, the alerts entered into the Schengen information system, the

Schengen visas, the national professional qualifications and the accreditations of conformity assessments bodies. Each of these transnational administrative acts are shortly described below.

The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order¹¹.

The decisions requiring a financial penalty to be paid by a person are adopted by a Member State and are transmitted to the competent authorities of another Member State in which the person against whom such a decision has been passed has property or income, is normally resident or, in the case of a legal person, has its registered seat¹².

The decisions on the expulsion of third country nationals¹³ are issued by a competent authority in one Member State, against a third country national present within the territory of another Member State. It remains for this last Member State to execute the decision on the behalf of the issuing Member State.

The customs decisions (the customs decisions strictly speaking and also the decisions granting the status of economic operator and the binding customs information) are transnational decisions valid throughout the European custom territory, whichever is the adopting Member State and whichever is the enforcing Member State according to the modernized customs code¹⁴.

Requests for notification of certain documents relating to claims adopted by an applicant authority are notified to the addressee by the requested authority. As a second step, if the previous step was fruitless, at the applicant authority

¹¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

¹² Council framework decision 2005/214/JHA of February 2005 on the application of the principle of mutual recognition to financial penalties.

¹³ Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.

¹⁴ Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code)

request, the requested authority recovers claims which are the subject of an instrument permitting enforcement in the applicant Member State¹⁵.

The Schengen information system (SIS) was created by the 1990 Schengen convention in order to deal with the rules governing the entry of people into the ‘Schengen space’ and the rules governing the free circulation of people between the territories of the participating States. The SIS is a database managed according to two different EU rules as some of its purposes fall within the Community provisions of the European treaties¹⁶ and some others fall within the intergovernmental provisions of the treaties¹⁷. Things may change under the Lisbon treaties. Alerts are data related to people entered into the SIS by any member State providing all others with instructions to act towards the “registered” people if identity controls lead to a “hit”, i.e. if there is data into the SIS related to the person under control (a person bared from entering into the Schengen territory, a missing person, ...).

The Schengen visa is one of the conditions requested by the 562/2006 regulation for the entry on the “Schengen territory” of the national of third countries whose nationals must be in possession of visas when crossing the external borders¹⁸.

Consolidating an innovative ECJ case law, a 2005 directive set up different regimes on the recognition of professional qualifications between member States¹⁹. In non harmonized sectors (Chapter one of the directive), it states a principle that professional qualifications issued by a member State grant

¹⁵ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

¹⁶ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

¹⁷ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) both not fully in force, as the migration from Sis I to SIS II is longer than foreseen for technical reasons

¹⁸ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

¹⁹ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

their holders of the same rights as the people qualified in the member State they wish to work.

Member States are authorized to check if any good submitted to EU legislation meet harmonized criteria through national conformity assessments bodies. But national conformity assessments bodies must in turn be accredited to run their activities by national accreditation bodies. National authorities recognise the equivalence of the services delivered by those accreditation bodies which have successfully undergone peer evaluation, and thereby accept the accreditation certificates of those bodies and the attestations issued by the conformity assessment bodies accredited by them. In other terms, EU law authorizes cross border accreditation of national conformity assessment bodies and cross border assessments²⁰.

1.4 Findings

The analyse of our panel of EU laws leads us to three major findings.

First, there is a general principle of enforceability of transnational administrative acts under EU law witch thereby means that recognition is not needed.

Second, the transnational acts analysed may be divided into two main categories: the acts the enforcement “abroad” may be derogated by the enforcing Member State and the acts the enforcement “abroad” cannot be derogated by the enforcing Member State²¹(2).

Third, most of the transnational administrative acts are also accompanied by conditions governing their validity. Enforcing Member States are often in charge to check if such conditions are present. Distinction between derogatory

²⁰ 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

²¹ Moreover, as we will see, the few remaining cases may nevertheless not considered as giving the member States full power to recognize the foreign administrative acts before enforcing them.

conditions and “simple” validity conditions will be questioned and, we hope, clarified (3).

2. Enforceability and derogations

As said, according to the findings of our panel analyses, there is a principle of enforceability “abroad” of transnational administrative acts under EU law. But the principle applies in two different ways: without derogations (2.1) or with derogations (2.2).

2.1 Enforcements without derogations

Enforcement without derogations, in other terms automatic enforcement, means that no margin is left to the enforcing authority due to transnationality.

Two, out of nine, transnational administrative acts, or more exactly two categories of transnational administrative acts governed by the same EU regulation, fall within the category of the acts enforced without derogation left open by EU law to the enforcing member States: the customs decisions and the accreditations of conformity assessment bodies and the conformity assessments issued by such bodies.

As to the customs decisions, automatic enforceability is crystal clear. The title of article 17 of the customs modernized code is “Community-wide validity of decisions” and this article states explicitly that “Except where otherwise requested or specified, decisions taken by the customs authorities which are based upon or related to the application of customs legislation shall be valid throughout the customs territory of the Community”.

As to the accreditations of conformity assessment bodies and the conformity assessments issued by such bodies, automatic enforceability is based on article 11 of the Regulation (EC) No 765/2008 of 9 July 2008 setting out the

requirements for accreditation and market surveillance relating to the marketing of products. The title of article 11 is “Presumption of conformity for national accreditation bodies” and it states that “National accreditation bodies that demonstrate conformity with [European] harmonised standard, are presumed to fulfill the requirements laid down [in the regulation] and national authorities recognise the equivalence of the services delivered by those accreditation bodies [...] and thereby accept [...] the accreditation certificates of those bodies and the attestations issued by the conformity assessment bodies accredited by them.”

Some elements can be put forward in order to explain how such a radical solution, very incisive towards administrative sovereignty of the Member States was selected in both cases. EU competencies at stake are a first clue. Customs matters is an exclusive competence of the European Union and accreditations of conformity assessment bodies and the conformity assessments issued by such bodies is a key element of the free circulation of many factored goods, in other words a part of the internal market, a “near to exclusive” EU competence. Second, customs decisions are electronically processed and fill up huge digital databases. This is due to a legal obligation contained in the modernized customs code itself: electronic customs decisions are the principle and paper decisions are the exception and should be justified. Third, both customs decisions and accreditations of conformity assessment bodies and the conformity assessments issued by such bodies are not challenging human rights.

2.2 Enforcements with derogations

Seven out of nine laws of our panel, although stating that the acts they provide for are enforceable in principle, grant nevertheless the Member States the possibilities to derogate to them.

We consider first the formulation of the principle (2.2.1) and second the accompanying derogations (2.2.2). We also observe a trend to derogatory restraint (4.3).

2.2.1 The enforceability principle

The enforceability principle is enunciated by almost all the EU laws analysed. Formulation changes from one law to another. It may even be more or less explicit. But we argue that even if formulation is not explicit, principle applies.

The enforcement principle is stated explicitly in the EU laws related to the EAW, the claims related to taxes and to duties and to the financial penalties. The title of article 1 of The Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States is, “Definition of the European arrest warrant and *obligation to execute it*”²². The second paragraph of the same article is also very clear: “Member States *shall execute* any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision” (our italics). Under Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, the principle is that “at the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the applicant Member State” (art. 10.1). The principle is stated even more clearly and strongly by art. 13.1: “For the purpose of the recovery in the requested Member State, any claim in respect of which a request for recovery has been made (is) treated as if it was a claim of the requested Member State”. The Council framework decision 2005/214/JHA of February 2005 on the application of the principle of mutual recognition to financial penalties puts also very clearly that financial penalties

²² Our italics.

decisions adopted in the issuing State are recognized by the competent authorities in the executing State if it has been transmitted in accordance with the requested formalities²³ “without any further formality being required”. Moreover, “The competent authorities in the executing State take all the necessary measures for its execution” (art. 6).

In other regulations or directives, formulation is less obvious at first glance but there are no doubts either. Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications states that “If access to or pursuit of a regulated profession in a host Member State is contingent upon possession of specific professional qualifications, the competent authority of that Member State shall permit access to and pursuit of that profession, under the same conditions as apply to its nationals, to applicants possessing the attestation of competence or evidence of formal qualifications required by another Member State in order to gain access to and pursue that profession on its territory” (art. 13.1).

Lastly in some directives or regulations, formulation may be only implicit but, other clues leave no uncertainty the purpose of the directive or of the regulation itself, the recitals. The purpose of the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, is, “to make possible the recognition of an expulsion decision issued by a competent authority in one Member State (...) against a third country national present within the territory of another Member State (...)” (art.1.4). Despite the formulation, which seems to leave some openness for non recognition of expulsion decisions, use of both teleological interpretation (the general scheme of the directive) and to the recitals are likely to make the recognition/enforcement of the decision an obligation for the requested

²³ Being accompanied by a harmonised certificated as financial penalties decisions are not harmonised.

administration. Same demonstration should be made about the alerts entered into the SIS²⁴ and the Schengen visa²⁵.

2.2.2 Derogatory provisions to the enforceability principle

Derogations are “clauses” introduced into the EU laws granting the enforcing Member State the possibility not to enforce the transnational administrative acts received from another Member State. At first glance, optional derogations seem to be somewhat respectful of the Member States administrative sovereignty, but our panel analysis shows that the situation is less favorable to them than may seem.

There are two main categories of derogatory provisions: the mandatory derogatory provisions and the optional derogatory provisions.

The mandatory derogatory provisions doesn't seem to be very numerous. The Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States distinguishes between two main categories of derogation to the principle of execution. One of them are mandatory derogatory provisions. In some enumerated situations the enforcing authority is obliged to decline the execution: amnesty in the executing state, definitive sentence already issued, conditions of age (article 3 *Grounds for mandatory non-execution of the European arrest warrant*).

Optional derogatory provisions are, at least empirically, much more numerous and cover a wide array of situations ranking from full national discretion to more or less restricted discretion.

There is full national discretion when a Member State is granted with derogatory powers it may implement without or almost without conditions.

²⁴ Recital (10) of the 1987/2006 regulation “SIS II (contains) alerts for the purpose of refusing entry or stay”.

²⁵ Article 5.1.b of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

Three cases can be quoted. The Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, provide for three limits to the requested authority's obligations. Amongst them, "The requested authority is not obliged to grant the assistance provided for" [...] if recovery of the claim would, because of the situation of the debtor, create *serious economic or social difficulties in the requested Member State*" (art. 18, our italics)²⁶. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders also provides for three derogations to the obligation to turn down third country nationals to enter the Schengen territory if they don't bear a Schengen visa. Amongst them "third country nationals [...] may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of *national interest* [...]" (article 5.4.c, our italics)²⁷. The SIS decision grants any Member State the possibility to flag an alert enter by another member State. That means that the former Member State will not enforce the alert on its territory. A flag may be issued for three reasons. Amongst them, a Member State may consider "that to give effect to an alert entered is incompatible with [...] its *national interests*" (art. 24.1, our italics)²⁸. It has to be observed that these three cases are dealing with situations regarding national *ordre public* that the EU traditionally leaves to the national competences.

Apart from the cases of full national discretion, EU law more often provides for conditional discretion. The two main grounds are the protection of

²⁶ In so far as the laws, regulations and administrative practices in force in that Member State allow such exception for national claims.

²⁷ Where the third-country national concerned is the subject of an alert [...] the Member State authorising him or her to enter its territory shall inform the other Member States accordingly (article 5.4.c).

²⁸ Under the 2007 decision, the "enforcing" States may only "require that a flag be added to the alert to the effect that the action to be taken on the basis of the alert will not be taken in its territory". This provision of the 2006 / 2007 is of difficult interpretation as the verb "to require" may have different intensities ("to ask for" or to" "). French version of the same provision uses both "demander" and "exiger". Anyway, and this is perhaps the most important issue, "all Member States are notified automatically about any new alert of the category by the exchange of supplementary information" (24.2).

national legal order (including international obligations) and the protection of common European principles. EU law contains clauses that enable enforcing member States to derogate the enforcement of transnational administrative acts if they consider that it is incompatible not only with their national law but also with their international obligations. Ascertaining the presence of an incompatibility is entirely left to the appreciation of the enforcing Member State. Under the SIS decision, a flag may be issued for three reasons. Amongst them, a Member State may consider “that to give effect to an alert entered is incompatible with [...] its national law [or] its international obligations” (art. 24.1). According to the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals enforcing, the Member State has the obligation to “examine the situation of the person concerned to ensure that neither the relevant international instruments nor the national rules applicable conflict with the enforcement of the expulsion decision” before starting enforcement (art. 6). The Schengen border code provides for three derogations to the obligation to turn down third country nationals to enter on the Schengen territory if they don’t bear a Schengen visa. Amongst them “third country nationals [...] may be authorised by a Member State to enter its territory [...] because of international obligations” (article 5.4.c).

Another set of optional derogatory clauses is based on the protection of common European principles. By common European principles, we only mean that the grounds for derogation are set at the European level. Most of them are related to procedural issues and defense rights. The Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, provide for three limits to the requested authority’s obligations. Amongst them, “the requested authority is not obliged to grant the assistance provided for” [...] if the initial request for assistance is made in respect of claims which are more than 5 years old [or] if

the total amount of the claims [...] is less than EUR 1500” (art. 18). The Council framework decision 2005/214/JHA of February 2005 on the application of the principle of mutual recognition to financial penalties also contains derogatory provisions the competent authorities of the executing State may invoke on enumerated grounds for non recognition or non execution: decision already delivered elsewhere, immunity under the law of the executing State, the person concerned did not appear in person at the trial, decision adopted... (art. 7.2). The Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States also provides for optional non-execution grounds, left to the discretion of the executive judicial authority: the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State (art.4.4), the requested person has been finally judged by a third State in respect of the same acts (art. 4.5)...

Member States are free to consider whether or not the grounds of optional derogation are fulfilled. This can anyway lead to different interpretations of the same common European principles.

2.2.3 Restrictions to derogations

We argue that there is a tendency in EU law to restrain the use of derogation and to restrain also the scope of the category itself. First of all, the above mentioned grounds for derogation, excepted those based on full national discretion exist in the sake of the relationships between legal orders (nationals and European). Most of them may be considered as preventive ways to avoid systemic collisions or to speak a more traditional legal language to avoid conflicts of laws.

Then, at least in one case, the flags under the SIS decision, EU law allows an overriding mechanism. Highlighting “urgent and serious cases” an alerting Member State may request the execution of the action to be nevertheless taken

by the “reluctant” flagging Member State and in this case the latter has to examine whether the flag may effectively be withdrawn (art. 24.3).

Finally, in the case of successive versions of the same law, the last version always contains fewer grounds for derogation than the previous. It could be demonstrated for the alerts entered into the SIS (comparing the 2007 decision to the 1990 Convention on implementation of the Schengen agreement) and for the Council framework decision on the application of the principle of mutual recognition to financial penalties (comparing the 2009 version to the 2005 version²⁹)³⁰.

2.3 Conceptual consequences: no more recognition please, we are European.

One of the main findings of our panel analysis is that EU law grants the enforcing Member States no room left for the recognition (or not) by the enforcing member State, previously to the enforcement and conditioning the enforcement. What is left to them is the possibility to use derogations in order not to enforce the said decision, but not even for all cases. Analysis of the transnational administrative acts should consequently be lead in terms of *ex lege* European effect. Mutual recognition regulations, directives or case law are expressions conceptually overtaken by the mechanisms they contain.

Another consequence is that it constitutes a major argument for the existence of a true European administrative space where some administrative decisions may freely circulate, at least in principle.

²⁹ Council framework decision 2005/214/JHA of February 2005 on the application of the principle of mutual recognition to financial penalties

³⁰ After the 2009 version, the rules governing the principle of mutual recognition to financial penalties are very near to the rules governing the undisputed claims (regulation 805/2004 creating a European Enforcement Order for uncontested claims) and the acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable (article 299).

Lastly, national administrations are enforcing authorities on each other. This leads to a new way of looking at the executive function in the EU.

3. Conditions to enforcement

Conditions to enforcement have to be distinguished from derogations to enforcement even if in some cases distinction is not always obvious. The difference is that, if a derogation is activated by an enforcing Member State, the act cannot be executed on the territory of this State but if the conditions are fulfilled, the act cannot be not executed anywhere.

The main common characteristic of the conditions under which transnational administrative acts may be submitted is those which are set at the European level. Conditions have to be fulfilled by the issuing Member State. Enforcing Member States have only the capacity to check whether or not they are fulfilled. Most of the conditions are only formal, a few others are more substantial. In the framework of this paper we consider only substantial conditions that could have an impact on enforcement. Other substantial conditions laid down under European public law, like necessity, proportionality and individual assessment, are not taken into consideration.

3.1 Conditions accompanying the release of the transnational administrative decisions to be fulfilled by the requesting Member State

According to our findings, the main distinction here depends on the “enforcing power” granted to the act itself by EU law. Some acts needs an accompanying document to be enforced (3.1.1), other don’t (3.1.2).

3.1.1 Acts needing an accompanying document

Some transnational administrative acts need to be accompanied by a compulsory European common document in order to be enforced. This is the case of the financial penalties under the Council framework decision 2005/214/JHA of February 2005 on the application of the principle of mutual recognition to financial penalties (article 7) and the case of the requests for recovery under the 2010/24 directive of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures³¹.

3.1.2 Acts enforceable by themselves

Other transnational administrative acts don't need an accompanying document. Some must nevertheless be presented according to a standard format like the European arrest warrant (paper format) and the alerts entered into the SIS (electronic format).

More generally, issuing member States are requested to provide the issuing Member States with all the documentation or the evidence necessary for enforcement. This is especially true in non harmonized fields or in situations in which human rights are involved. The grounds for which an alert has been entered into the SIS must be communicated to the enforcing State through a special network created *ad hoc*, the Sirene mechanism. According to the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, the issuing Member State has to provide the enforcing Member State “with all documents needed to certify the continued enforceability of the decision by the fastest appropriate means” (art. 6). Under the 2005/36/EC directive of 7 September 2005 on the recognition of

³¹ The request has to “be accompanied by a uniform instrument permitting enforcement in the requested Member State” which reflects “the substantial contents of the initial instrument permitting enforcement, and constitute the sole basis for the recovery and precautionary measures taken in the requested Member State. It is not subject to any act of recognition, supplementing or replacement in that Member State” (art. 12.1).

professional qualifications, attestations of competence or evidence of formal qualifications must satisfy formal conditions(art. 13)³².

3.2 Appreciation of the conditions left to the enforcing Member States

In one case, the EU law left the appreciation of the conditions to the enforcing member State. Under the 2005/36/EC directive of 7 September 2005 on the recognition of professional qualifications, enforcing Member States may ask the holder of a professional qualification (i.e. the transnational administrative act) to ask for a “compensation measure”. The determination of whether it is necessary to ask it is left to the host Member State under EU both formal and substantial conditions, to which the most important is that the training the holder has received covers substantially different matters than those covered by the evidence of formal qualifications required in the host Member State (art 14. 4. b.). The directive contains only a general definition of the expression “substantially different”³³ But the choice around how this measure can be implemented, adaptation period or aptitude test, must be left to him/her. The choice may be denied, at the discretion of the host Member State, but two conditions have to be fulfilled: first, the derogation must be applied with due regard to the principle of proportionality (art.14.5) and second, the host Member State has to inform the other Member States and the Commission in advance and provide sufficient justification for the derogation (art.14.2). If, after receiving all necessary information, the Commission considers that the derogation is inappropriate or that it is not in accordance with Community law, it asks, within three months, the Member State in question to refrain from taking the envisaged

³² (a) they shall have been issued by a competent authority in a Member State, designated in accordance with the legislative, regulatory or administrative provisions of that Member State;

(b) they shall attest a level of professional qualification at least equivalent to the level immediately prior to that which is required in the host Member State, as described in Article 11

³³ ‘substantially different matters’ means matters of which knowledge is essential for pursuing the profession and with regard to which the training received by the migrant shows important differences in terms of duration or content from the training required by the host Member State”

measure. In the absence of a response from the Commission within the three months, the derogation may be applied (art. 14.2).

Member States are encouraged to waive of compensation measures on the basis of common platforms (art.15)³⁴.

4 Implementation of enforcement

Not all the regulations and directives included in the panel contains provisions related to the implementation of enforcement. If some are present, contains may be either vague or instead very precise like those in the Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

But the main legal question here regards the rules governing the implementation of enforcement measures. Which of these laws are applicable: the laws of the enforcing State witch seems the most logical, the EU laws or even the laws of the issuing Member State?

The findings of our panel analysis, far from being univocal, show that often the rules of the enforcing State applies but in some cases implementation measures are provided for by EU law and in some other cases, even the issuing Member State law applies.

We consider first the enforcement measures (4.1) second the precautionary measures (4.2) and third the judicial review of both (4.3). Finally, as we don't pretend to exhaust all the issues of the implementation of

³⁴ Common platforms is defined as a set of criteria of professional qualifications which are suitable for compensating for substantial differences which have been identified between the training requirements existing in the various Member States for a given profession. These substantial differences shall be identified by comparison between the duration and contents of the training in at least two thirds of the Member States, including all Member States which regulate this profession. The differences in the contents of the training may result from substantial differences in the scope of the professional activities.

enforcement, some others points are only formulated and not properly addressed. (4.4).

4.1 Enforcement measures

According to the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, “Any decision taken pursuant to paragraph 1 shall be implemented according to the applicable legislation of the enforcing Member State.” (art. 1.2). Under Council Directive 2010/24/ of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, implementation of enforcement is the competence of the requested member State and its law applies to such ends. “The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State applying to claims concerning the same or, in the absence of the same, a similar tax or duty” (art. 13.1)³⁵. But it is not always clearly stated in EU law that implementation of enforcement measures is made according to the applicable legislation of the enforcing State.

Could we draw up a general conclusion according to which implementation is governed by enforcing law? It is certainly congruent with national and European legal orders. But it is nevertheless necessary to precise that in some cases, EU law provide the enforcing Member States for the implementation tools to be used ³⁶. For example, the 2007 Sis II decision related to the alerts on persons and objects for discreet checks or specific checks doesn't define what is a discreet check or a specific check (it is left to the Member State

³⁵ By derogation “If the requested authority considers that the same or similar taxes or duties are not levied on its territory, it shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State which apply to claims concerning the tax levied on personal income (art.13.1).

³⁶ This remedies to the vagueness of actions requested by alerting member states. This also narrow the room for maneuver left to the implementing States.

appreciation), but it provide the kind of information the Member State executing such checks has to deliver (totally or partially) to the alerting member State (art.37).

4.2 Precautionary measures

Adoption and implementation of precautionary measures is usually done according to the applicable legislation of the enforcing State. But there is a further element of complexity. In at least one case, precautionary measures can be asked by the issuing member State. Directive 2010/24 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures allows such possibility to the enforcing Member State to ensure recovery where a claim or the instrument permitting enforcement in the applicant Member State is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the applicant Member State, in so far as precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the applicant Member State (art. 16.1). In this case, the requested authority takes precautionary measures, if allowed by its national law and in accordance with its administrative practices (art. 16.1).

The request for precautionary measures, i.e. the document drawn up for permitting precautionary measures in the applicant Member State and relating to the claim for which mutual assistance is requested, if any, is attached to the request for precautionary measures in the requested Member State. This document is “not be subject to any act of recognition, supplementing or replacement in the requested Member State” (art.16. 2).

The rules governing the request for precautionary measures are close to the rules governing the main claims (art.17).

4.3 Reviews

The reviews of the transnational administrative acts is not under consideration here. But, it has to be mentioned that, as argued elsewhere, there is a general principle according to which disputes concerning these acts are brought before the competent body of the enforcing Member States.

Disputes concerning both enforcement measures and precautionary measures follows this principle. For example, the above mentioned 2010/24 directive states that “Disputes concerning the enforcement measures taken in the requested Member State or concerning the validity of a notification made by a competent authority of the requested Member State shall be brought before the competent body of that Member State in accordance with its laws and regulations” (art. 14.2). Accordingly, the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals states that proceedings for a remedy against any measure have to be ensured to the third country national concerned according to the enforcing Member State’s legislation (art. 4).

4.4 Further difficulties

Further difficulties may arise. EU law prevent some of them, for example the priority to be given between similar claims made by different Member States, under Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures and the questions on limitation which under the same directive are “governed solely by the laws in force in the applicant Member State”.