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Jaime Rodríguez-Arana Muñoz *Editor*

Recognition of Foreign Administrative Acts

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Recognition of Foreign Administrative Acts

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Prologue

The topic we had to confront today is unusual to public law scholars, because it is somehow both old-fashioned and postmodern, as sometimes happens.

It is old-fashioned because from its origin administrative law is obviously a domestic branch of law: therefore since the very beginning of its history administrative acts have traditionally been interpreted as strictly circumscribed in terms of force, efficacy and binding effects, to the national territory or, in a few cases, to national citizens living or occasionally finding themselves abroad, or at most to colonial territories subject to national sovereignty, though colonies used to have special regimes, including peculiar administrative law rules applicable to their individual territories (for instance, according to Spanish, English and Italian laws). Therefore, since the earliest season of its life, administrative law excluded any influence of foreign administrative acts inside its own sphere.

It is, though, a very recent issue due to globalization, because this cluster of phenomena has made more and more frequent the circulation of persons all over the world and made borders less and less important, more and more permeable and osmotic. Administrative law has necessarily had to open itself to the recognition of at least some effects of non-national administrative acts, even though they are expression of the sovereignty of other countries or even of international or anyhow supranational authorities.

Not occasionally, from this viewpoint, the new branch of administrative law, born and grown up in the last 20 years or so, is global administrative law, concerning networks of independent authorities and other phenomena of this same kind.

The national reports and the general one, as of a consequence, have tried to move in the space remaining between these two extremes: the historical local-territorial-sovereign nature of administrative law and the rising of a new star whose dimension and capacity of diffusing light is not yet clear: global administrative law.

National and general rapporteurs have started from the classical formulations of the notions of force, effects, publication, service of the administrative act, in other words from the sphere of the external efficacy of the act; then, they have moved to some extraterritorial or super-national forms of administrative act, like

those of Mercosur and the EU, and to their relevance or execution in domestic administrative laws.

In this field some relevant aspects had to be underlined: first, the balancing between national parameters like, e.g. public order and supranational principles imposed by the supremacy of EU law (though some of them, like proportionality or the ends/means relationship were already active in the national context of many member states, such as Germany); secondly the enduring importance of mutual recognition according to EU law itself (the Italian experience of 1865 was overturned by the 1942 code); third, the existence of transnational administrative acts, viz of acts adopted in a member state that are declared automatically applicable in the others, like in the pharma sector, while others, similar in nature (such as in the agricultural and OGM sector) are left to rigorously individual decisions of every state; fourth, the peculiar issue of administrative sanctions, becoming more and more important with the growing circulation of persons (mostly in the road traffic sector, due to the increasing number of persons travelling abroad).

Finally, the focus has been put on international treaties on the recognition and execution of international administrative acts: which proves beyond any evidence that the topic still deserves much attention and is still subject to much elaboration at the domestic level before being considered "mature".

The scholarly condition of the topic, yet, is not satisfying at the moment. Much work has to be done still. We hope that this session will significantly contribute to the development of this part of administrative law.

Milano, Italy Giuseppe Franco Ferrari

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Chapter 1
Foreign Administrative Acts: General Report

Jaime Rodríguez-Arana Muñoz, Marta García Pérez, Juan José Pernas García, and Carlos Aymerich Cano

Abstract Most countries recognise the notion of "administrative act" as an individual decision taken by a public authority to rule a specific case, submitted to public law and immediately enforceable and, in general, they also identified a foreign administrative act as the one issued by a foreign or international authority and submitted to foreign or international law. However, the existence of a international legal framework does not prevent the existence of broad differences on service, recognition and execution of these foreign administrative acts. It is necessary, to deepen the study of the transnational administrative act, paying special attention to how it affects the conception of the administrative act in different legal cultures and its potential impact on procedural rights and judicial guarantees of the recipients of such acts.

The Concept of an Administrative Act and Its Classification as 'Foreign'

In Brazilian, Estonian, Finnish, French, German, Greek, Hungarian,[1] Norwegian, Spanish, Portuguese, Swedish, Swiss and Turkish law, an administrative act—either "unilateral" or "individual"—could be defined as an individual decision taken by a public authority to rule a specific case, submitted to public law and immediately executed without judicial intervention, understanding that, except in the case of a specific statutory reserve, it refers to the decision, the final act—the one that ends a process—and not to the intermediary ones. Even without its formal legal recognition, this concept is also known in the laws of Russia—as the administrative class of the general category of "legal acts"—Australia—under the form of "administrative action" or, more exactly, "non statutory administrative action"—and US—where

[1] The Hungarian Administrative Procedure Code (APC) uses the term "administrative affaire".

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the US federal law concept of "order" largely operates as equivalent of the "administrative act" even though in this case judicial review, if any, is restricted to the record made by the administrative authority that issued the order. Usually, the concept of "administrative act" is equated with "decision", the act that ends a procedure. However, law tends to expand the concept to include—at least for the purpose of judicial review—intermediate acts that harm individual rights and interests and could be, for this reason, directly challengeable.

Many countries differentiate between administrative and state, political or cabinet acts that are not—or, at least, not entirely—submitted to judicial review due to their political nature. Other countries, like Hungary, differentiate the acts produced by public institutions, i.e., in the educational field, from the ones issued by the general administration, submitting the former to specific review systems and not recognizing them as enforceable.

It can be said that, in general, administrative decisions enjoy the presumption of validity and have immediate enforceability since they are published or notified to the addressees, at least those whose efficacy does not depend on the assistance of a judicial authority which is, in countries like Australia or Norway, the general case.

Another relevant issue is the scope of judicial review, considering that the very concept of administrative act was built in response to this question. From this point of view, Europe has a broadly accepted definition for administrative act, contained in the Recommendation Rec (2004) 20 of the Committee of Ministers of the Council of Europe on the judicial review of administrative acts, including both individual and normative administrative acts, an identification not shared in many countries' laws for which only the former ones can be considered properly as administrative acts. According to this Recommendation, judicial review, conducted by an impartial tribunal of judicial or administrative nature, should be available at a reasonable, non-discouraging cost, through adversarial and public proceedings.

In general, administrative acts issued by (and on behalf of) a foreign administrative authority and/or submitted to a foreign law are considered to be foreign administrative acts. However, it should be stressed that the conceptual and practical differences between transnational or trans boundary acts—an administrative act issued by the authority of one country which aims to have effects in the territory of a different country—and international or global act—an administrative act produced by an international, regional or global, organisation—are commonly recognised.

General Considerations on the Usual Administrative Procedure for Adopting an Administrative Act

Taking into account the great diversity between them, a general regulation of administrative procedure exists in most countries except Australia, France[2] and Turkey. However, this general regulation has very different scopes depending on the legal tradition and the Unitarian or federal form of State.

[2] Where, however, an Administrative Procedure Act is, currently, being drafted.

Expressing what can be defined as universal principles, often recognized at a constitutional level ("due process", "fair procedure" or "good administration"), those procedure statutes are used to guarantee the parts' rights to initiate a procedure, to be heard, to be informed, to make submissions, to propose evidences, to access files and documents, to express themselves in their native language, to get a reasoned decision, to be personally notified and to challenge the decision before impartial judicial or administrative courts. Addressees of an administrative act are usually considered parts as well as any other person whose interest is "direct" or, in any case deemed to be legally protected. Some countries' laws, like the Finnish, Norwegian and Swedish ones, recognize the rights of non-direct interest holders to intervene, in a limited way, in the procedure, enjoying inter alia, the right to be heard or even to appeal the decision.

In relation to the international gathering of evidence in penalty procedures, this possibility is generally not regulated by internal law but through international agreements of mutual recognition and enforcement of decisions in the field of traffic licenses and offences.

The Service of Administrative Acts: Special Consideration for Their Service in Other Countries

The service of administrative acts is, normally, regulated as part of the administrative procedure in the corresponding general administrative procedure, acts or, less often, in specific acts on service and notification of administrative acts. There are also countries where this issue is indirectly treated, by remission or analogy, through judicial procedure statutes.

It can be said that, generally, notification does not affect the validity and existence of administrative acts but its effectiveness, especially with regard to periods in which challenges can be filed. Most countries provide personal (through police officers or agents, depending on the nature of the matter), or postal (regular or registered mail) notification or, though less often, by electronic means and, when all the other means are impracticable, through the publication of edicts in an official journal.

As regards the service of administrative acts abroad, it is necessary to take into account different assumptions:

Notification to an addressee who lives abroad in case of procedures initiated by him or herself: in this case, most countries' laws require the indication of a domicile of a representative inside the country or, when this is not possible, proceed to the publication of an edict in an official journal. When it comes to nationals who live abroad, the service of administrative acts use to be made through diplomatic or consular means. It is also the normal means of notification when the addressees are public agents from the State that issued the act.

Apart from those cases, national laws do not normally regulate the service of administrative acts abroad. This issue is regulated, more frequently, in international

agreements like the European Convention on the Service Abroad of Documents relating to Administrative Matters (CETS no. 094), the agreement on legal assistance concerning service and testimony between Nordic countries (SopS 26/75) or the aforementioned one regarding the field of traffic licenses and offences.

However, those agreements have a limited scope due to the scarce number of countries that have ratified them[3] or to the limited range of materials covered by them.[4] This reality contrasts with the wide scope enjoyed by international agreements on the service of documents in judicial matters[5] which point the way forward in many fields, especially in relation with the language—or the translation—of the documents serviced.

On the Recognition and Execution of Administrative Acts

In the majority of legal systems that the national reporters refer to, National Law does not regulate in general terms, the issues related to validity, efficacy and execution of foreign administrative acts. Hungary is the only country with general regulations on matters related to validity, efficacy and execution of foreign administrative acts, this is included in articles 137 and 138 of the *Code Général de la Procédure Administrative*, of 2014 (hereinafter CPA).

In many cases, the recognition of foreign administrative acts is supported by the standards of international agreements.

In the USA, recognition depends first and foremost on whether the foreign administrative act is subject to mutual recognition agreements (MRAs) that the United States enters into with its trading partners. In the absence of an MRA or a treaty like an MRA, recognition depends on the common law, which does not provide as clear a basis for recognition.

In Russia, the *Code of Administrative Offenses* (CAO) regulates in its chapter 29.1, issues related to legal assistance in cases of administrative infractions.

Also, the Federal Law of 22.07.2008, n° 134-F3 has ratified the convention on the mutual recognition and enforcement of judgments in administrative traffic violation cases.[6]

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[3] The European Convention on the Service Abroad of Documents relating to Administrative Matters has only been ratified by eight countries (Spain, Belgium, France, Germany, Austria, Italy, Estonia and Luxembourg).

[4] That is the case, for example, of the Schengen Convention of 1990 that supplies the former Schengen Agreement, in the field of free movement of persons.

[5] Inter alia, Council Regulation (CE) 1348/2000, of 29 May 2000, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and Council Directive 2003/8/CE of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

[6] Signed on March 28, 1997 (Moscow). The contracting parties were: Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia and Tajikistan. Russia ratified the Convention with the proviso that it shall, in accordance with Article 3 of the Convention, receive

The opinions and positions held by the reporters regarding the convenience of incorporating a national law that regulates the validity, efficacy and execution of foreign administrative acts, are many, even in cases where the proposed legislation is considered to be convenient, and they also differ in regard to the type of rule that should contain those provisions.

The majority of reporters express the convenience of the law regulating this issue. In many cases, regulations of International Law are alluded to, even though it is pointed out that it will be an excessively general and principal regulation, if it aspires to adapt to the different internal rules, in which the concepts of the foreign administrative acts may turn out to be very different. In the case of Switzerland, over the presented adversities that approving this regulation of International range, this country considers as a realistic alternative, the implementation of a system based on reciprocity.

In the case of France there is no national rule referring to the validity, efficacy or execution of foreign administrative acts. There is a principle that envisages that foreign administrative acts are not applicable or able to be executed directly in French territory, unless an internal rule foresees this situation, a practically nonexistent hypothesis; except in the case of the EU, or in the case of a forecast included in that sense in a special regulation. Norway adopts a similar position.

Some reporters alluded to the existence of non general rules on the recognition of sectorial administrative acts that are also specified in another section of the report. For example, in the field of education, there are national rules for the recognition of diplomas, degrees, foreign professionals, and driver's licenses (Finland); or the authentication processes and apostilles for foreign acts that must be taken into account in national notary documents (Estonia).

As a general consideration, the reporter from Switzerland emphasizes that the process of globalisation has given rise to an even higher number of requests and a diversification of cases. Particularly, the developments in the financial sector following the financial crisis of 2007–2009, the increasing role of administrative assistance both in the fields of finance and taxation represent important economic issues. Thus, on the one hand, the sovereign position of the state should be reinforced, and on the other hand the country should be in a position to cooperate with other countries, particularly when handling transnational matters.

In general basis, the reports in which the existence of a forecast about the competent authority to recognize and execute administrative acts to other states is denied or for the processing of applications for recognition and enforcement from other states. In some cases, the reporters are inclined to base the response on the subject matter on which the application for recognition and enforcement is about.

In some States there is a specific provision in this regard. Thus, in the case of Hungary, where there is a law that directly addresses this issue, it provides that the Government shall designate an authority (Art. 137 CPA), but this designation has not been done yet.

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and consider materials concerning violations of traffic rules provided in the Annex to the Convention.

In Russia, issues of legal assistance in the case of administrative offenses regulated by the CAO are provided via the Supreme Court of the Russian Federation, the Supreme Arbitration Court of the Russian Federation, the Ministry of Justice of the Russian Federation and via the Ministry of Internal Affairs, the Prosecutor General's Office and the Federal Service.

In Brazil, competence is attributed to the Ministry of Justice to mediate and enforce the requirements of other states, and the Ministry of Foreign affairs is authorized to submit requests to another state. In the case of MERCOSUR, the Protocol of "LAS LEÑAS" envisages the designation for each State of a "central authority" to receive and follow up on requests for judicial assistance in civil, labor, commercial and administrative matters.

In the case of Estonia, a Minister of Justice is appointed as the competent authority to receive and process applications before requests from other states, under the Convention on the Service Abroad of Documents relating to Administrative Matters[7] (art. 2), but it does not indicate who is competent to make requests to another State. The reporter deduces that any administrative authority holds that competence.

In Switzerland, the competent authorities for requesting the recognition and execution of administrative acts in other countries are either the Federal Department of Justice and/or the specialised competent authorities based on the application of the federal statutes they are in charge of. The competent authorities for handling requests from other countries are determined by the subject matter.

In any cases where competence is not attributed, the reporter proposes formulas for this attribution. For example, in the case of Finland, it is understood that the Council of State is the competent authority to whom domestic law attributes by default all powers not constitutionally attributed to the President of the Republic.

Generally, all the reports refer to the general requirements to provide validity and effectiveness of national administrative acts: with respect to certain formal matters, jurisdiction of the court, motivation, signature or signatures of the competent authority, service of process….

Brazil refers to four conditions that a foreign administrative act should accomplish in order to have effect in the national territory; the act shall be issued by the competent authority; according to the required form specified in the law of the venue; it should be authenticated in the Brazilian Embassy or Consulate of the country where the act was signed; and it shall be registered by a Brazilian notary.

In the report from France a "presumption of authenticity" of foreign acts in the absence of a specific regulation about this matter is invoked. So, unless there is doubt about its authenticity, an apostille to give validity to a foreign act cannot be demanded. This statement, included in the French Civil Code related to acts of private law (art. 47), could be applied by analogy to administrative acts.

In the case of Hungary, Article 52 CPA requires the authentication by the agent of the Hungarian diplomatic mission in the country where the act was issued.

[7] It was signed in Strasbourg on November 24, 1977, and entered into force on November 1, 1982. The Contracting parties were Austria, Belgium, Germany (FRG), Greece, Spain, Italy, Luxembourg, Malta, Portugal, France, Switzerland, and Estonia.

Russia has specific provisions on requests for legal assistance in cases of administrative offenses directed to a foreign country: the request and the annexed documents must be accompanied by a certified translation into the official language of the requiring State.

Regarding the role that the EU could play in this area, the answers are diverse.

In some cases, it is considered that the EU has problems to manage these issues, because of the major differences between the various countries that are members of this organization, as well as on the very concept of administrative acts; probably its role does not go beyond developing simple recommendations. For other reporters, the EU could regulate these issues on the basis of Article 298 of the TFEU (Poland), and there is evidence that there have already been some legislative initiatives to develop a law on administrative procedures for the EU.

Possible actions that could be undertaken by the EU include adopting measures oriented toward standardizing procedures and facilitating simplification, by introducing defined criteria to establish the authenticity of administrative acts, for example. In one case it goes one step further and states that the EU may be provided with competence for the certification of administrative acts of authorities corresponding to the countries considered members of this entity, competence that could be exercised even by an on line procedure in favour of a rapid response to requests for certification.

A reporter (Switzerland) proposes that the standardization and coding of these issues should come from an international instrument, while recognizing some important fields of action that could be undertaken within the EU.

In a few cases the law of the countries that have been reviewed does not establish substantial requirements for foreign administrative acts to have an effect in the national territory.

Some reports allude to certain limitations that must be considered: respecting public policies, the defence of national sovereignty, decency or morality (Brazil); respecting fundamental rights (Sweden); respecting the law and international treaties, the sovereignty and national security (Russia); among others.

In the case of Switzerland, the basic requirement is compliance with the criterion of double criminal liability. However, there are some rare exceptions to its application such as in the case of an embargo.

In the case of France, on a theoretical level because it does not exist and having a general rule in that sense is not even considered. Two conditions are established for the recognition of foreign acts: first, the authenticity of the act, ruling in its favor a presumption of authenticity that would, only in case of doubt, and by the French authorities, require certification by the public authorities of the State of origin; second, respecting the "*règles impératives du droit public français*", and of course, including those contained in the constitutional law, general principles of law, fundamental rights guaranteed by international treaties to which France is party and other rules that may be included, depending on the affected sector.

Public order is recognized, not only as unique but as an important limit for the recognition of the effects of a foreign administrative act.

Although only one report recognizes that respect of public policies is a legal requirement for the recognition of foreign administrative acts (Brazil), in almost all cases public order is declared as an enforceable limit, even in the absence of a legal forecast for it. The act shall not contravene the public order of the state where it should be enforced (Switzerland).

The report from the USA defines this issue, maintaining that the recognition of foreign court judgments is universally subject to an exception for judgments that violate the enforcing state's public policy (*ordre public*), so of course the same rule should apply to the recognition of foreign administrative acts. International systems of obligation for nations generally provide some kind of escape valve so that nations can protect their most vital interests. Thus the exception for public policy is necessary and reasonable as long as it is construed narrowly so that it applies only to matters that are so important that recognition of the foreign administrative act would effectively frustrate the host jurisdiction's protection of its most fundamental values, like basic aspects of democracy and environmental protection and other fundamental human rights.

Now, as the U.S. reporter states, the public policy exception is a limit on the doctrine of the State Acts: the exception for public policy (ordre public) applies only in those cases where there is a true conflict of law, but this exception is itself subject to the important exception created by the Act of State doctrine, which in effect eliminates the exception of public policy for the cases to which it applies. As the Supreme Court held in Banco Nacional de Cuba v. Sabbatino, "[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law". It is the executive branch, not the courts, that should have control of conducting relations with other countries, and the point of the doctrine is to prevent litigants from pursuing lawsuits in the United States that might hinder the executive branch in its conducting of foreign affairs. The effect of the doctrine is to remit litigants who claim to be harmed by illegal acts by foreign governments to their remedies either in the courts of the foreign country or through the U.S. executive branch's diplomats. The chief effect of the doctrine applied to foreign administrative acts is thus to override the public policy defence and related defences that challenge the legality of the foreign administrative act, such as the lack of jurisdiction or competence. If the doctrine is not a constitutional requirement, then it is a prudential limitation that the federal courts have adopted as part of the federal common law.

Under the proposals de lege ferenda, the reporter from Turkey proposes that the legislator is inspired by a law that is already in force (Act No. 5718) where it is stated that for the Turkish court to recognize a foreign judgment, the judge must verify that it is does not clearly disagree with the public order. The jurisprudence of the Turkish Court of Cassation whereby to reject a demand of recognition it requires that the judgment contains an order of execution or enforcement that is "clairement inconven-

able par les règles fondamentales juridiques, morales et consciencielles qui sont à respecter obligatoirement pour que la vie de la société soit harmonieuse et béat".

In the case of foreign administrative acts with punitive effects, in some of the reports Recommendation No. R (91) of the Committee of Ministers of the Council of Europe concerning repressive administrative sanctions, which has been adopted all European states is cited.

The precepts of various national constitutions in which guarantees are established for the infringement procedure and particularly the defence rights are also cited. This is, for example, the case of the Brazilian Constitution (Articles 5 and 37) and the Swiss Constitution (art. 29).

Among the principles and procedural guarantees to be respected in relation to the administrative act, the following are invoked: legality, morality, impersonality, publicity, efficiency (Brazil); fairness, participation, right to present evidence, reasons for decisions, right to appeal (Poland); etc.

International Conventions on the Recognition and Execution of International Administrative Acts and on the Legalization of Public Documents

International conventions develop different models for recognizing administrative acts in supranational fields of interest. Along this line, there are agreements that establish standard procedures for the recognition of administrative acts, and other models that foresee mutual recognition.

However, as highlighted by the USA report, not all the mutual recognition agreements of foreign administrative acts involve recognition. On the one hand, the conformity assessment bodies (CABs) are not considered administrative acts by private bodies whose actions may be performed under the law of the country where they operate. On the other hand, mutual recognition agreements may require the exchange of mutual data gathered by inspections, not the recognition of the assessment that the foreign regulator makes on the basis of that data.

In the European region, a number of international conventions that develop systems of mutual recognition for acts or administrative documents have been approved. Beyond the European setting, some countries have signed and ratified international agreements on limited recognition and enforcement of administrative measures, as pointed out in the report from Brazil, while others deployed intense international cooperation in this field, as seems to be the case of Australia.

Institutionally, the work of the Council of Europe is highlighted. Also noteworthy is the role of other international organizations such as the North American Free Trade Area (NAFTA), the World Trade Organization (WTO) and the Asia-Pacific Economic Cooperation (APEC) that have driven and even pressured——as it is stated in the US report related to the activity NAFTA and WTO——the States to negotiate mutual recognition agreements (MRAs).

In the USA, recognition depends first and foremost on whether the foreign administrative act is subject to mutual recognition agreements (MRAs) that the United States enters into with its trading partners. MRAs may include for each participating nation the commitment to recognize, with respect to goods and services imported from partner nations, the partner nations' inspections and certifications with regard to various standards, including, most importantly, matters of health and safety and environmental or consumer protection, in lieu of its own inspections. Some of these inspections or certifications may constitute administrative acts. By entering into MRAs to minimize duplicative inspections and certifications in foreign trade, the United States thus agrees to recognize certain kinds of foreign administrative acts, a commitment that is usually implemented by domestic legislation and regulation, thereby providing a clear legal basis for recognition.

The US report emphasizes issues that condition the MRAs to a resource, such as the reluctance of the agencies to accept foreign regulations or conformity assessments instead of their own, to share information with other national regulators. Also, the adoption of internal regulations derived from the MRAs can represent a loss of legitimacy in the administrative action because of the limitation or elimination of the participation paperwork or regulatory proceedings.

There are some significant examples of international conventions on the recognition and/or enforcement of certain foreign administrative acts, which are listed below:

Convention on Road Traffic, Vienna, 8 November 1968.
European Convention on the Academic Recognition of University Qualifications, Paris, 14 December 1959; Convention on the Recognition of Qualifications concerning Higher Education in the European Region, Lisbon, 11 April 1997.
Convention on Mutual Administrative Assistance in Tax Matters, Strasbourg, 25 January 1988.
European Agreement on the abolition of visas for refugees, Strasbourg, 20 April 1959.
European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe, Paris, 12 December 1957.

As highlighted by the Italian reporter, some of these agreements foresee mutual recognition models, such as the case of the Road Traffic Convention (Vienna, 8 November 1968). According to the self-scheme of the regulatory model the member States admit the validity and efficacy in their territory of the permits issued by other parties in the agreement. They cannot submit these acts to recognition procedures. However, the states can reject the recognition of licenses, for reasons such as age or the violation of the rules of national traffic. As mentioned when speaking of Community secondary legislation, this agreement provides the possibility to except the automatic recognition system when overriding reasons of general interest are at risk, such as the protection of road safety.

Also highlighted at a regional level is the recognition of agreements of administrative acts signed between the Nordic countries, on tax matters, higher education, or driver's licenses. Also in the APEC group several initiatives have been developed in areas of mutual recognition, for example, of electronic and telecommunications

equipment. These foresee the automatic recognition of the assessment reports and the certificates of conformity of the products for export, by the national bodies of conformity assessment. The aim is to avoid duplication of controls and reduce export costs.

The recognition of foreign administrative acts is also evidenced through bilateral agreements between States, as expressed profusely in the national reports from Germany, Australia, Poland, Portugal, Russia, Turkey and the USA. These agreements are projected on the same topics covered by international conventions of regional scope: foreigners; free movement of persons; recognition and enforcement of sanctions; mutual administrative assistance, consumer protection; recognition of registration certificates; product approvals; social security; decisions on the stock market, etc.

The Australian national report provides information on the agreements or mutual recognition agreements between Australia and the EU, which apply to administrative acts for the verification of conformity of products. These bodies verify the compliance at source of the target regulation by certain products that are exported. In this case the transnational element of the acts does not only bring us to the efficacy of the act in the country or countries of destination but also the fact that the foreign administrative act itself applies the proper regulation of the country or market of destination.

The USA report alludes, among other things, to the bilateral agreement with Australia, adopted in 2008 which involves a mutual equivalency regime for stock brokers and stock exchanges. Australian and USA exchanges and brokers are exempt from the usual national registration requirements. The national report mentions that this type of agreement allows the recognition of foreign administrative acts, also they show the difficulty of sustaining or expanding such programs of mutual recognition.

Besides the issue of recognition of foreign administrative acts, the questionnaire that has been the basis for this comprehensive report has raised issues about the level of implementation of international conventions that legalize administrative documents. There are multiple international agreements that eliminate the requirement of the legalization of administrative documents, highlighting among them the role of the Apostille Convention.

There are also international agreements that eliminate the requirement of legalizing certain administrative documents, such as the documents executed by the diplomatic—European Convention on the Abolition of the System of Legalization of Documents Executed by Diplomatic Agents or Officers, London, June 7, 1968—; requests for notification of foreign administrative acts—European Convention on the Service Abroad Documents relating to Administrative Matters,, 24 November 1977—; or requests for administrative assistance from other States—European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, of 15 March 1978.

Most of the countries analyzed have joined the Hague Convention abolishing the requirement of legalizing foreign public documents, concluded on 5 October 1961 in The Hague (Apostille Convention). As noted, the agreement eliminates the requirements of legalization of administrative documents, which is replaced by the Apostille authentication. This certifies the authenticity of the signature of the public

document and the capacity of the person signing it, but it does not prove the authenticity of the content of the document.

Administrative documents are authenticated by an Apostille, depending on the country and the nature of the document, by a notary, judicial authority or administrative body. In any case, the allocation of the power to grant the Apostille is linked to the legal nature of the documents to be annotated and the nature of the authority or institution of origin (courts, notaries or public administrations). The Australian report notes that Apostille service may, in addition to public authorities, be provided by private companies.

Some States that have been analyzed, as is the case of Spain and France, have an electronic procedure to issue the Apostille and electronic records for its register. In Spain the implementation of the electronic Apostille procedure is gradually spreading among the different administrative authorities with competence to issue them. Other States have foreseen this possibility in their internal regulation of the Convention but they have not developed the system yet. In general, we can conclude that the development of electronic procedures is not widespread in this field, as shown by the fact that most of the reports warn that this is not foreseen in their national legislation.

In accordance with the acts issued by states that are not considered party to the Apostille Convention for public documents that fall outside its scope, the States foresee specific procedures of legalization designed to ensure that the act has been issued by the competent authority of the foreign transmitting State of the decision, as emphasized, for example, in the reports from Australia, Finland, Greece and Portugal. In these processes the consular authorities of the state of destination or ad hoc national certification authorities are involved. Some national reports consider that these legalization proceedings are expensive and slow, but of great importance for countries with special ties with regions or countries adhered to the Apostille Convention. This is the case of Portugal, since most of the Portuguese-speaking countries are not party to the Apostille Convention.

National reports also describe procedures and rules for the certification of translations of foreign public documents, as the Portuguese or Swedish reports indicate. Furthermore, there are procedures oriented to certify documents or the signing of national acts that aim to produce effects abroad, as is credited in the Finnish report.

Doctrinal Treatment of the Subject of Foreign Administrative Acts

In general, the specific matter of the transnational administrative act has been poorly treated by the administrative doctrine of the countries that have been analyzed, except in some countries like Germany or Sweden. Professors of private international law have addressed this issue further, as indicated in the reports from France or Portugal.

In recent years, a progressive development of the doctrine in related matters, such as the issue of global public law (Spain, France, Greece, Poland, Portugal) has

been appreciated. Also, the administrative doctrines of different countries that have been analyzed is paying increasing attention to the European administrative law and its implications for the general dogma on the act and the administrative procedure.

The development of the questionnaire and the findings of the national reports allows us to conclude that it is necessary to deepen the study of the transnational administrative act, paying special attention to how it affects the conception of the administrative act in different legal cultures and its potential impact on procedural rights and judicial guarantees of the recipients of such acts. It is also necessary to give greater impetus, in some countries, to legal research on the impact of Community law in the characterization and extraterritorial effects of national administrative acts.

Chapter 2
The EU's Role in the Progress Towards the Recognition and Execution of Foreign Administrative Acts: The Principle of Mutual Recognition and the Transnational Nature of Certain Administrative Acts

Juan José Pernas García

Abstract The EU has promoted the mutual recognition of national administrative acts and therefore helped provide extraterritorial effectiveness to the administrative decisions of the Member States. This phenomenon has been carried out in the EU through secondary legal norms, in areas where the EU has intense competence or powers. These community norms of secondary legislation are an expression of the principle of mutual recognition, which has been the axis around which the EU internal market has been built.

General Considerations About the Principle of Mutual Recognition

The principle of mutual acknowledgement allows the free circulation of goods and services in the EU resulting from a lack of harmonized legislation within the EU. In general terms, the member States cannot prohibit the sale of a product legally manufactured or sold in another Member state, even when the technical or qualitative conditions are different from the national technical norms, provided that it guarantees an equivalent level of protection of the legitimate interests.

The regulations and administrative decisions of the State or origin prevail. This prevents the establishment of a detailed community norm and guarantees that the principle of subsidiarity is respected. The European Commission has stated that the mutual recognition constitutes a pragmatic and powerful means of economic integration.[1] However, exceptionally, as we will see later, States can adopt administrative decisions that restrict the import of products or the rendering of services,

[1] Communication from the Commission "Mutual recognition in the context of the follow-up of the action plan for the single market" (COM (1999) 299 final).

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based on imperative decisions of general interest and provided that the principle of proportionality is respected.[2]

The EU has promoted the mutual recognition of national administrative acts and therefore helped provide extraterritorial effectiveness to the administrative decisions of the Member States. This phenomenon has occurred in the EU through secondary legal norms, in areas where the EU has intense competence or powers. These community norms of secondary legislation are an expression of the principle of mutual recognition, which has been the axis around which the EU internal market has been built.

The content and significance of this principle has been developed by the Court of Justice of the European Union, which has played an essential role in the development of a mutual recognition model of the European Union. Particularly, its origin is in the sentence *Cassis de Dijon*, of 20 February 1979. This sentence acknowledged the Right to sell a product legally traded in a Member State in the remaining EU Member States.

The EU has focused its initial efforts on implementing the model of mutual recognition in some sectors identified as priority due to their importance for the execution and proper functioning of the domestic market. Thus, the Council, in 1999, indicated that it was necessary to make efforts in the field of products (particularly food products, electromechanics, construction and motor vehicles), services (particularly financial services) and professional qualifications (recognition of degrees).[3]

On the other hand, the EU has entered into mutual recognition agreements with third countries to reduce, and even eliminate, hurdles on international trade.[4] At the end of the twentieth century, the European Commission decided to boost the signing of agreements for mutual recognition in the framework of the General Agreement on Tariffs and Trade (GATT), as well as with regard to goods in the context of the World Trade Organisation (WTO).[5] Its aim is to guarantee the effective access to markets throughout the territory of the parties for all the products covered by the agreements.[6]

Premises for a System of Mutual Recognition for Administrative Acts

The Co-existence of a High Level of Harmonization

The principle of mutual recognition presupposes a high level of legal harmonization or agreement between national rules governing the administrative actions with a transnational potential effect, such as authorizations of economic activities or the placing on the market of goods or wares.

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[2] Ibidem.

[3] Council Resolution of 28 October 1999 on mutual recognition [Official Journal C 141 of 19/5/2000].

[4] Specifically there exist mutual recognition agreements between the EU and Australia, Canada, New Zealand and the United States of America.

[5] Communication from the Commission "Mutual recognition in the context of the follow-up of the action plan for the single market" (COM (1999) 299 final).

[6] Council Resolution of 24 June 1999 on the management of agreements on mutual recognition [Official Journal C 190 of 7/7/1999].

Once a certain level of harmonization or agreement of norms between the EU Member States has been reached, the mutual recognition of the administrative acts dictated in application of the mentioned norm represents a rule whose aim is to speed up legal transactions and administrative simplification.[7] Its purpose is to prevent the duplication of controls in the receiving State with regard to those already executed by the State of origin who issues the administrative act that authorizes a product or service.[8]

As has been shown by some national reports, legal harmonization is essential to ensure mutual trust among States,[9] which is the basis of any system for the mutual recognition of acts,[10] as well as to prevent the harmful effects of this regulatory model as the regulatory dumping. States with a lower level of demand or with simpler administrative procedures will be more attractive for the financial agents who wish to offer goods or services in the European Union. This can generate and encourage a downward levelling of the legal protection of the general interest.[11]

Legal harmonization facilitates the acceptance of reasonable differences between national rules and legal standards, on behalf of the States involved in a mutual recognition model, consequently, the elimination of national barriers for the free international movement of goods.[12]

The community secondary legislation, which is based on models of mutual recognition, should harmonize the material requirements for the adoption of administrative acts, setting a minimum and substantive and common standard.[13] Shortages in this sense are appreciated in the Community secondary legislation establishing systems of mutual recognition of onerous administrative acts, which does not produce a substantive or procedural harmonization.

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[7] Bocanegra Sierra and García Luengo, "Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 15.

[8] Sentence by the Court of Justice of 22 January 2002, Canal Satélite Digital SL, case C-390/99, section 36.

[9] The lack of mutual trust in the acts of the other Member States has been one of the most prominent obstacles for the free rendering of services in the EU (Communication from the Commission "Mutual recognition in the context of the follow-up of the action plan for the single market" (COM (1999) 299 final).

[10] It has been highlighted by the reports of Germany (Stelkens, U., Mirschberger, M., *The recognition of foreign administrative acts: a German perspective*), Italy (Della Cananea, Giacinto, *From the recognition of foreign acts to trans-national administrative procedures*) *or* USA (Reitz, J., *Recognition of Foreign Administrative Acts in the United States*).

[11] Bocanegra Sierra and Sierra Luengo understand, correctly, that regulatory dumping "(…) clearly distorts the principle of equality and the public interests at stake, with the *de facto* result of the establishment of a downward harmonization, by using the processing and regulation of the less demanding State in the protection of public interests" ("Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 27).

[12] Communication from the Commission "Mutual recognition in the context of the follow-up of the action plan for the single market" (COM (1999) 299 final).

[13] It has been highlighted by national reports from Germany (Stelkens, U., Mirschberger, M., *The recognition of foreign administrative acts: a German perspective*.) or Greece (Douga, A. E., *On the recognition of foreign administrative acts in Greece.*).

The Availability of Means and Information Exchange Networks Between National Administrations

The trans-European information exchange systems are essential to ensure transnational effectiveness of administrative acts. Thus, the implementation of systems of mutual recognition of administrative acts through European secondary law makes it necessary for there to be a greater exchange of information between Member States and the implementation of a mechanism of inter-administrative cross-border cooperation. In fact, the mutual recognition of acts poses problems for the States precisely because of the lack of information on legislation or verification processes by other Member States.[14]

This need is clearly reflected in Regulation 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 for products lawfully marketed in another Member State. This norm specifies requirements and procedures that competent authorities of a Member State must follow when making or intending to make a decision, which would hinder the free circulation of a lawfully marketed product in another Member State, and establishes mechanisms of information exchange between Member States through national contact points. These contact points provide information on the products and technical norms applicable to products to the competent authorities of other Member States or to a State member of the AELC signatory of the EEA Agreement

Under the European Economic Area, the Information System of the Internal Market has been launched. It is an electronic tool that supports administrative cooperation in the field of internal market legislation, as per Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, or Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the domestic market. Member States have adopted national procedures for handling requests for administrative assistance and information provided by foreign administrative authorities.

Administrative cooperation and the trans-European exchange of information between administrative authorities play an equally important role in immigration matters. Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals foresees measures to guarantee that the member states exchange information that is crystallized by the second generation Schengen information system (SIS II), developed by Regulation (EC) No. 1987/2006 of 20 December.

[14] Council Resolution of 28 October 1999 on mutual recognition (Official Journal C 141, 19/05/2000).

Models of Mutual Recognition in the EU Secondary Legislation

General Conditions

As noted by the German reporter, the EU secondary legislation[15] developed several models of "transnational administrative acts".[16] First, rules that recognize the extra-territorial effect of national acts and prohibit or limit the need for new mandatory decisions in the State of destination, when the activity or product has been authorized

[15] Without being exhaustive, we quote below a list of Community secondary legislation based on a model of mutual recognition that specifies the conditions of extraterritorial effectiveness of certain administrative acts:

- Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC; Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.
- Directive 1999/5/CE of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity; Directive 2002/46/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to food supplements; Regulation No. 258/97 of the Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients.
- Regulation No 883/2004 on the coordination of social security systems; Regulation No 987/2009 laying down the procedure for implementing Regulation No 883/2004 on the coordination of social security systems; Regulation No. 1231/2010 extending Regulation (EC) No. 883/2004 and Regulation No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.
- Directive 2001/40/CE of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.
- Council Framework Decision 2002/584/JHA of 13 June 2002 on European arrest warrant and surrender procedures between Member States.
- Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
- Directive 2006/126/CE of the European Parliament and the Council of 20 December 2006 on driving licenses.
- 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 implementation of Regulation 1189/2011 of 18 November 2011; Council Directive 2011/16 of 15 February 2011 on administrative cooperation in the field of taxation.
- Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on Access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.
- Regulation No 952/2013, of 9 October 2013, laying down the Union Customs Code.

[16] Bocanegra Sierra and García Luengo informs of the "inevitable need, imposed by reality itself, of the existence of this figure and of its legal delimitation and construction ("Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 13)."

in another Member State.[17] In general, in this case, we could mention a "model of automatic transnational effect".[18]

Second, we find ourselves with community rules that declare the validity of national administrative acts in the remaining member countries of the EU, but also a process of national recognition in the State of destination is envisaged to verify the existence, content and comparability of the measure with national administrative decisions.[19] In this case we would be dealing with a model of recognition of extra-territorial efficiency further to the national verification of conformity. As per these assumptions, the transnational effectiveness of the administrative act is conditioned by an act of national recognition.

Third, there will be the community rules that besides providing the extraterritorial effect of certain administrative acts, materialize its contents and effects.[20] In this case the competent authorities of the State of destination may review the issued administrative act in accordance, as appropriate, with the provisions contained in the applicable Community rules. In this case we would be dealing with a model of recognition of effectiveness and extraterritorial control. The transnational nature of these acts extends to its control. An example of regulation according to this perspective resides in Regulation 810/2009 of 13 July 2009 establishing Community on Visas or the legal norms of the space of Schenghen.

Bocanegra Sierra and García Luengo propose a more complex categorization for transnational administrative acts.[21] Firstly, transnational administrative acts can be considered as such because of their effectiveness beyond the territory of the issuing State and where the act was notified to the receiver. Secondly, the transnational quality would be derived not only from the trans-border production of the effects, but also if the receiver resides in a different State.[22] Thirdly, we can refer to administrative decisions, which in addition to being effective outside the national territory, are adopted by an administrative organ in the territory of a different State.[23]

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[17] Stelkens, U., Mirschberger, M., *The recognition of foreign administrative acts: a German perspective*.

[18] This is the case of the authorisations for credit activities (D. 2013/36), driving licenses (D. 2006/126), the decision for the marketing of food ingredients (R. 258/97) or decisions on the use and marketing of biocides (R. 528/2012).

[19] *Ibidem.*

[20] The German reporter alludes in this case to a real transnational effect (Stelkens, U., Mirschberger, M., *The recognition of foreign administrative acts: a German perspective*).

[21] "Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 20 et seq.

[22] Bocanegra Sierra and García Luengo state that these type of acts "affect the sovereignty of the country that "receives" the act in a more intense manner, whereby it is not easy to find examples of these assumptions". The authors use as an example the transfer of waste (idem, pp. 20 and 21). An example of transnational decisions of this type can be seen in Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on the shipment of waste. This norm establishes a notification procedure that requires that the competent authorities of the countries affected by the shipment (country of dispatch, country of transit and country of destination) give their consent prior to any shipment. The countries of destination and of transit adopt decisions that have effects in other territories and for people who reside in another country.

[23] Under this type of assumption, Bocanegra Sierra and García Luengo point out that it is "(…) difficult to identify assumptions for transnational acts in the strict sense, because the Administration's

As we have seen, EU secondary legislation developed several models of "transnational administrative acts". To explain the different recognition systems envisaged by the community regulations, we consider that they can all be classified under two groups, although we are aware that in each one there are multiple variants: on the one hand, a "model of automatic transnational effect"; on the other hand, a "model of preliminary national recognition".

Model of Automatic Transnational Recognition, with the Right to Control or Veto by the Member State of Destination

The EU, based on legal models of mutual recognition, grants specific national administrative acts automatic effectiveness in other EU Member States. Transnational administrative acts are obligatory for States. The Member States must assume that these foreign administrative decisions are effective in their territory. They cannot submit them to a process of preliminary recognition.

Concerning products not subject to harmonized regulation on a community level, the principle of mutual recognition determines that a destination State cannot prohibit in its territory the sale of a product manufactured or legally marketed in an EEA State[24] or Turkey,[25] even if that product is manufactured following technical or quality norms that are different from those for its own products. The Member States can only move away from that principle and adopt measures that prohibit or restrict the access of those goods to the domestic market under very strict conditions.[26] The only exceptions to the principle of mutual recognition are the restrictions on free circulation based on the motives indicated in article 36 of the TFUE or on imperative reasons of general interest defined by the CJEU.

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trans-border activity usually has a fundamentally material nature (for example, the hot pursuit of a presumed criminal by the State's police within the territory of a neighbouring State) or because they are procedural activities to be carried out for the adoption of an administrative act within the State itself (such as information activities or as proof that they are performed abroad as part of an administrative file)" (idem, pp. 21 and 22).

[24] The Regulation on mutual recognition was included in the EEA Agreement by virtue of the Joint Committee Decision of EEA Agreement No. 126/2912, of 13 July 2012 which modified annex II (Technical regulations, Standards, Testing and Certification) of EEA Agreement (DI L 309 of 8 November 2012).

[25] The obligation to apply the principle of mutual recognition to products lawfully manufactured and/or marketed in Turkey is based on Articles 5–7 of Decision 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (OJ L 35 of 13 February 1996), which provide for the elimination of measures having an effect equivalent to quantitative restrictions between the EU and Turkey. Although the principle of mutual recognition also applies to EU-Turkey relations, the Mutual Recognition Regulation as such does not (Commission Working Document. Guidance document. The concept of 'lawfully marketed' in the Mutual Recognition Regulation (EC) No. 764/2008, COM(2013) 592 final, Brussels, 16/8/2013, p. 5).

[26] Communication from the Commission to the European Parliament and the Council, First Report on the application of 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, COM (2012) 292, 15/06/2012, p. 5.

Therefore, generally, this implies the automatic recognition of the administrative acts which, as applicable, is the basis to understand that a product is being lawfully marketed. It must be taken into account that States use very different means to control the marketing of products. In most cases a product can be marketed legally without the need for previous authorisation, in cases, for example, when the owner of the product is required to inform of his intention of marketing a product. For this reason, the Regulation does not specifically mention the recognition of authorising acts, but of products marketed lawfully, which could imply not only the recognition of authorised acts, but also the recognition of an act of communication by the owner of the product, as a necessary requirement for the introduction of the product into the market.

In spite of this, mutual recognition does not have a full automatic character. The State of destination is only obliged to accept the marketing of a product in its territory when the product guarantees an equal level of protection for the different legitimate interests. The destination State reserves, therefore, the right to control the equivalent level of protection offered by the product that is being examined comparing it to the level of protection established by its own national norms.[27] If the product does not fulfil the demands of the national technical norms, the State of destination may reject the marketing of the product or have it withdrawn from the market, provided there is an imperative general interest reason and that the demands of the principle of proportionality are respected. Regulation (EC) No. 764/2008 of 9 July 2008 lays down procedures to be followed by Member States when they apply national technical norms on products marketed legally in other Member States, with the aim of avoiding unjustified restrictions on the free circulation of products.

On the other hand, the secondary community Law specifically endows certain domestic administrative acts of transnational effect. This is the case of the authorisations for credit activities,[28] driving licenses,[29] the decision on the marketing of food ingredients,[30] or decisions on the use and marketing of biocides.[31]

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[27] Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition [C/2003/3944- Official Journal C 265 of 4/11/2003].

[28] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, establishes a system for mutual recognition for national authorisation to financial institutions and of the supervision systems. This norm enables "the granting of a single licence recognised throughout the Union".

[29] Directive 2006/126/CE of the European Parliament and the Council of 20 December 2006 on driving licenses. Article 2 establishes that "driving licences issued by Member States shall be mutually recognised".

[30] Regulation (EC) No. 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients envisages that, **if there is no opposition by another Member State or** by the European Commission, or if a complementary evaluation is not necessary, the decision regarding the marketing of these products by a Member State will be effective in the entire EU territory (Art. 4). See article 4 et seq. of Regulation (EC) No. 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients

[31] Regulation (EU) 528/2012, of 22 May, on the marketing and use of biocides establishes that the biocides authorised by a Member State, as per the procedure envisaged by this norm, "may be marketed in all the Member States without the need for mutual recognition", provided that the

However, these secondary legal norms establish that Member States can limit or remove the extraterritorial effect of the administrative acts, prohibiting or restricting the marketing of certain products to protect overriding reasons of general interest.[32] Thus, Regulation (EU) 528/2012, of 22 May, regarding the sale and use of biocides safeguards the possibility for the Member State to "restrict or provisionally prohibit the sale or use of this product in its territory" (art. 27.3), of certain requirements concerning the product's suitability and safety. Also, in certain cases, Member States may contest the decision for authorisation by a Member State with transnational effect, with the result that the power to adopt the final decision is withdrawn from the States involved and is undertaken by the European Commission.[33] This is what is envisaged in the authorisation system of Regulation (EC) No. 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients (art. 7).

Model for Mutual Recognition Subject to the Condition of Prior Verification by the Member State of Destination

The "model of preliminary national recognition", which is established in certain community rules, declares the validity of national administrative acts in the remaining Member States, but also stipulates a process of national recognition in the State of destination to verify the existence, content and comparability of the acts with national administrative decisions. Under these assumptions the transnational effectiveness of the administrative act is conditioned by an act of national recognition. For this reason, we are not before transnational administrative acts in a *strict sense*.[34] This is the case of the general regulation for the recognition of professional qualifications.

Professional qualifications or degrees are subject to recognition procedures to verify the equivalence of the courses taken with those required by the State or origin.[35] The general system for the recognition of professional qualifications, considered by Directive 2005/36/EC, of September 2005, on the recognition of professional

owner fulfils the requirement of communicating his intention of marketing the product in the domestic market, and uses the official languages in the labelling (Art. 27.1).

[32] Therefore, this is the case of Regulation (EU) 528/2012, of 22 May, on the trading and use of biocides.

[33] This is what is contemplated by Regulation 258/97 concerning novel foods and novel food ingredients (Art. 7).

[34] Bocanegra Sierra, R., García Luengo, J., "Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 16.

[35] Bocanegra and García Luengo consider that it is "hard to believe that these degrees constitute transnational acts in the strict sense, given the general need to subject the degree to a recognition process as a prior requirement to be able to exercise the profession" ("Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 18).

qualifications, establishes that when access to or pursuit of a profession is regulated in the host Member State, the competent authority in the said Member State is to allow access to the profession in question and pursuit thereof under the same conditions as for its nationals.[36] Nevertheless, the applicant must hold a training qualification obtained in another Member State that attests to a level of training that is at least equivalent to the level immediately below that required in the host Member State. Although national degrees are subject to national verification procedures, the Directive specifies, to a certain extent, the conditions for the recognition and consequently reduces the margin of discretion of the national administrations when recognising degrees and establishing future countervailing measures.[37]

Directive 2001/83/CE, of 6 November 2001, which establishes a community code for medicinal products for human use envisages a recognition procedure of national authorisations for the marketing of these products, where both the national authorities that receive the application, as well as the competent community authorities intervene.

Once the authorisation for a medicinal product in a Member State, the owner can apply for recognition before the competent authorities of the State or of the corresponding Member States (Art. 28.2). The initial authorisation must be accepted by the competent authorities of the other Member States where the corresponding application for recognition is presented (Art. 28.4), unless, exceptionally, if there are reasons to believe that the marketing of the medicinal product can be harmful for the public health (Art. 29.1).In the case of opposition of the State or Member States where the application for recognition was presented, the community norm envisages a process that is solved by the European Commission. The Member States authorise or withdraw the marketing authorisation or introduces the necessary modifications to adapt to the decision (Art. 34) in the authorisation.

Regulation (EC) No. 1107/2009, of 21 October 2009, concerning the placing of plant protection products on the market likewise establishes a national recognition procedure for products already authorised in another Member State. Legal reason number 29 of the Regulation provides that the recognition of the foreign act in question "should be accepted by other Member States where agricultural, plant health and environmental (including climatic) conditions are comparable". With the purpose of facilitating the recognition of acts, the legal reason cited points out that "the Community should be divided into zones with such comparable conditions in order to facilitate such mutual recognition."

> However, environmental or agricultural circumstances specific to the territory of one or more Member States might require that, on application, Member States recognise or amend an authorisation issued by another Member State, or refuse to authorise the plant protection product in their territory, where justified as a result of specific environmental or agricultural

[36] Nevertheless, the applicant must hold a training qualification obtained in another Member State that attests to a level of training at least equivalent to the level immediately below that required in the host Member State.

[37] On the other hand, it must taken into account that the Directive considers specific automatic recognition systems for degrees for specific professions, such as doctor, nurse, dentist, veterinary surgeon, midwife, pharmacist and architect, or qualifications attested by professional experience in certain industrial, craft and commercial activities.

> circumstances or where the high level of protection of both human and animal health and the environment required by this Regulation cannot be achieved. (Legal reason 29)

As we can see, the State that received the application for recognition, reserves, as appropriate, a margin of discretion for its rejection, although its decision must be motivated on the basis of the imperative reasons of general interest cited and respect the demands for the use and necessity of the principle of proportionality.

The reference of legal reason 29 draws attention to the possibility that the States who receive recognition applications can "amend an authorisation issued by another Member State". This seems to open the doors to the partial recognition of administrative acts, such that the recognition decisions consider new conditions devoted to guaranteeing the protection of imperative reasons of general interest.

These directives are built on the premise that the authorities of the member States, which receive requests for recognition of authorisations, should accept the recognition of these foreign acts. Therefore, these rules establish procedures and conditions that limit or restrict the possibilities of denial of recognition. However, Member States may, exceptionally, deny or oppose this recognition in the case of concurrency of overriding reasons of general interest, primarily to protect health and environment. However, as we have seen, Directive 2001/83/CE which establishes a community code on medicinal products for human use establishes that the Commission, prior processing of a procedure for the resolution of discrepancies, can grant the authorisation for marketing to the States that are against recognising a foreign authorising act.

These Directives constitute a procedure for the recognition of foreign acts with the aim of reducing administrative hurdles and the business costs for the marketing of products, as well avoiding administrative duplicity. In short, these procedures are simplified authorising procedures whose aim is to avoid administrative duplicity on a community level, that is, the processing of full administrative procedures for evaluation and decision, when this has already been carried out by the State that has issued the authorising act subject to recognition. For this reason, it does not seem that in this case we are before transnational administrative acts in the strict sense.[38]

Exceptions and Limits to the Principle of Mutual Recognition: The Possibility That States Adopt Restrictive Decisions to the Free Circulation of Products and Services

The European secondary legislation based on mutual recognition models are closely linked to the internal market. They are designed to ensure the goods freedom of movement (Article 34 et seq. TFEU) and services (Articles 49 et seq., 56 et seq., TFEU). As we have seen, to this end, the secondary legislation obliges to the

[38] Bocanegra Sierra, R., García Luengo, J., "Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 16.

member states to recognize foreign administrative acts and to limit their objecting capacity to goods circulation or authorized services by the Member States.

This model of mutual recognition eliminates or limits, in consequence, the wide margin of discretion that characterizes the national recognition procedures of administrative acts, in those areas where the internal market is pursued. As noted by the Italian reporter, "there is (…) to change in the way to conceive structure and limit the discretionary powers of public administration".[39] Also, as noted by the same author, this model can reduce or eliminate the costs, delays and uncertainty arising from the national recognition procedures.[40]

Yet the EU rules recognize to a certain extent a space for the States to limit the effects of mutual recognition, refusing the recognition of administrative acts when overriding reasons of general interest are at risk, such as security or public health. Nevertheless, States are bound by the obligation to respect the principle of proportionality. Administrative control requirements that are repetitive or overlapping with the ones already established by the State cannot be recognized, also the ones that disproportionately limit the freedom of communitarian movement.[41]

The Administrative and Judicial Control of Transnational Administrative Acts

The control of transnational administrative acts raises, therefore, doubts and practical difficulties for ensuring effective judicial protection of third affections -for example, damages suffered from a defective product authorized in another Member State-, to the extent in which the judicial review of administrative acts must be exercised by courts of the country of origin of the targeted act.[42]

As Stelkens and Mirschberger[43] have pointed out, EU law does not question the monopoly of a State in the judicial review of administrative acts. Judicial review is only possible by the courts of the State of the administrative decision-making organ.[44] Member States "(…) may not consider themselves authorised to unilaterally adopt corrective or defensive measures to guard itself against a possible breach,

[39] Della Cananea, Giacinto, *From the recognition of foreign acts to trans-national administrative procedures.*

[40] Idem.

[41] Douga, A. E., *On the recognition of foreign administrative acts in Greece.*

[42] Ibidem. Also *Reitz, J. Recognition of Foreign Administrative Acts in the United States. See also* Bocanegra Sierra, García Luengo, "Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 25.

[43] Stelkens, U., Mirschberger, M., *The recognition of foreign administrative acts: a German perspective.*

[44] Ibidem.

by another Member State, of the community Law regulations".[45] According to the jurisprudence of the CJEU, only if there is *obvious illegality* the recognition of foreign administrative acts can be rejected.[46] If the State of destination considers that the administrative act violates a Community rule, of general application, a proceeding for the breaching of Community law may be initiated before the CJEU, according to the provisions of Article 258 TFEU.[47]

Bocanegra and García Luengo point out that the Administration or the Judicial Courts of the State of destination of the transnational act can ignore it in the event that it is rightfully null "because it seriously and manifestly contravenes applicable Law", "(…) as to being rightfully null it is a minimum limitation to the effectiveness imposed by the principle of Rule of Law itself, strongly maintaining a series of principles that are common to democratic States and, particularly, to the Member States of the European Union".[48]

However, EU law foresees mutual recognition systems that give administrative acts of States a transnational character, not only because of its effects, but also because of its jurisdictional review. These rules allow the national courts of the State of destination to control the legality of administrative acts issued by public authorities of other Member States of the EU.[49] The transnational nature of these acts extends to its control. An example of regulation by this perspective can be seen in Regulation 810/2009 establishing Community on Visas.

Some authors have warned of the risks of transnational administrative acts for the constitutional Law on effective judicial protection, to the extent that its effective execution is in the hands of foreign courts. The States that participate in the framework of a mutual recognition system must offer an equivalent level of warranty of the right of judicial protection.[50] In this sense the role of international courts as the ECHR or the ECJ is to ensure the reinforcement and gradual approximation of the national jurisdictional rights and guarantees of the European states.[51] The issue of

[45] STJUE of 10 September 1996, Commission/Kingdom of Belgium, case C-11/95, note. 37. This sentence includes a settled case-law of the Court. See the following sentences cited in the mentioned case: of 13 November 1964, Commission/Luxembourg and Belgium, joined cases 90/63 and 91/63; of 25 September 1979, Commission/France, 232/78, note 9; and of 23 May 1996, Hedley Lomas, C-5/94, section 20.

[46] Stelkens, U., Mirschberger, M., *The recognition of foreign administrative acts: a German perspective.*

[47] Stelkens, U., Mirschberger, M., *The recognition of foreign administrative acts: a German perspective.*

[48] Bocanegra Sierra, García Luengo, "Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 24.

[49] In this case the competent authorities of destination may review the issued administrative act in accordance with its case with the provisions contained in the applicable Community rules.

[50] Bocanegra Sierra and Garcia Luengo point out "(…) given that the figure of transnational administrative act satisfies the demands of various fundamental liberties, it is reasonable to permit a certain modulation of the effective judicial protection, although, in all circumstances, the essential content of the Law in question, must be respected, in such a way that its satisfaction is fully ensured in those countries whose resolutions susceptible of affecting third countries must have immediate effectiveness in Spain" ("Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 24).

[51] Idem, p. 20 et seq.

judicial control derived from the transnational administrative act illustrates the need to achieve higher levels of harmonization of national procedural rules (in administrative matters), and the urgent necessity to progress towards a European administrative law.[52]

To conclude, we must mention the ex officio review, or the revocation of acts as per the norms of the administration itself. Basically, we reach the same conclusion as for the judicial control of administrative acts. The administrative review corresponds, in this case, to the administrative authorities of the State where the administrative act originates.[53]

However, some secondary legislation rules consider exceptions to this general rule. Directive 2006/126/CE of the European Parliament and the Council of 20 December 2006 on driving licenses establishes that "subject to observance of the principle of territoriality of criminal and police laws, the Member State of normal residence may apply its national provisions on the restriction, suspension, withdrawal or cancellation of the right to drive to the holder of a driving license issued by another Member State and, if necessary, exchange the license for that purpose" (article 11.2).

Directive 2013/36/EU, of 26 June 2013, on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, foresee, in certain cases, that the host Member States may adopt measures against the breach of national norms by credit institutions:

> If, despite the measures taken by the home Member State or because such measures prove inadequate or are not provided for in the Member State in question, the credit institution persists in violating the legal rules referred to in paragraph 1 in force in the host Member State, the latter may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or to punish further breaches and, in so far as is necessary, to prevent that credit institution from initiating further transactions within its territory. Member States shall ensure that it is possible to serve the legal documents necessary for those measures on credit institutions within their territories. (art. 153.4)

The Incidence of the Principle of Mutual Recognition in Compound States: The Extraterritorial Effectiveness of Regional Administrative Acts

The acts dictated by federated States or by regional institutions, in application of a common norm, can be effective beyond the territorial boundaries of the region of competence and in the whole State territory. Problems similar to those analysed so far arise with regard to transnational administrative acts. We can speak in this case

[52] Idem, p. 26.

[53] Bocanegra Sierra and García Luengo consider that "this is so because if the act could be arraigned by each national legislation and the organs of each State, the actual purpose of the transnational effectiveness (avoid the multiplication of procedures and contradictory resolutions) could become completely blurred if the act is declared effective by certain judicial systems and ineffective by others" (idem, p. 23)

of trans-territorial administrative acts,[54] which are directed basically to the uniform application of the State regulation and to guarantee the freedom of financial circulation within the State.

The problem laid out by trans-territorial administrative acts, is smaller than the one analysed so far for transnational acts. As Bocanegra Sierra and García Luengo point out, "[] the general existence in this type of State of one system for jurisdiction and administrative procedures that is similar if not identical in all federated States, considerably reduces the density of problems regarding the judicial and administrative responsibility for the interests of parties affected by this type of trans-territorial acts".[55]

The Community principle of mutual recognition has also had an internal effect in federated states. In the case of Spain, directly influenced by the approach of this principle, recent Law 20/2013 on Warranty of the Spanish Market Unit has endowed "trans-territorial"[56] character to personal authorizations of economic activities granted by regional administrations. We can speak, in this case of "trans-territorial administrative acts". This has raised doubts in the doctrine about the compatibility of the principle of extraterritorial effectiveness of administrative acts and the constitutional distribution of powers between the State and the Autonomous Communities (regions).

As stated earlier when dealing with transnational administrative acts, endowing extraterritorial effects to regional of federated State acts could give way to regulatory and procedural dumping, questioning decentralized legislative competencies for the protection of the general interest. To reduce the risk of dumping and the reduction of the level of protection of the general interest established by the regions or federated States, it is important that the State adopting a rule of this type establishes sufficient normative bases to guarantee an adequate level of protection of general interest. Likewise, it is necessary to consider cooperation mechanisms between the different territorial administrations to reach sector agreements on the levels of judicial protection on general interest to be reached.

Similarly, the Australian national report[57] signalizes the issue of extraterritoriality of administrative acts that also arises internally. This country has been raising the

[54] On this matter see Bocanegra Sierra and García Luengo, "Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 28 et seq. In Spain, although the issue of transnational administrative act has not been analysed in depth by the doctrine, a debate has arisen by the analysis of the extraterritorial efficiency of the administrative acts of the Autonomous Regions, particularly after the approval of Law 20/2013 on Warranty of the Spanish Market Unit. On this matter see Alonso Mas, M. J., *El nuevo marco jurídico de la unidad de mercado, Comentario a la Ley de Garantía de la unidad de mercado*, La Ley, 2014.

[55] "Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 28.

[56] Bocanegra Sierra and García Luengo distinguish between transnational and trans-territorial administrative acts, the latter in the area of federated States ("Los actos administrativos transnacionales", *Revista de Administración Pública*, No. 177, Madrid, September–December, 2008, p. 11).

[57] Griffiths, J., *Recognition of foreign administrative acts: report from Australia*.

need to give extraterritorial effect to administrative acts by the public authorities of the various states or territories that comprise it, for which efforts have been made to achieve a greater harmonization of the economic regulation.

The Model of International Administrative Co-decision, as Another Manifestation of the Transnationality of Administrative Acts

The principle of mutual recognition gives transnational effectiveness to the administrative acts that require a cross-border approach, such as the safety of the products or the completion of the internal market. However, this is not the only possible approach to the cross-border perspective that the administrative action must have in the market. As noted by Della Cananea, the transnational nature of a certain act not only can be derived from the recognition of its extraterritorial effect, but also because of its joint adoption by administrative authorities of different states or international organizations.[58]

In this sense, beyond the outline of the models of direct recognition or of mutual recognition, in the EU a new transnational manifestation is perceived, one that is affecting the standard concept of an administrative act, as a unilateral act issued by the national competent administration. Administrative acts derived from this model are the result of an international adoption process in which various community authorities and also the ones from different countries intervene. Stelkens and Mirschberger[59] refer to "composite administrative acts". Its distinctive characteristic is that acts are adopted through a transnational process.[60] These cooperative adoption processes are a way to create trust between states members, and to legitimise transnational administrative decisions.

This "model of international administrative co-decision" is embodied in certain Community rules that establish authorization regimes, trading or the cross-border movement of goods.[61]

Della Cananea has highlighted that the adoption of these "composite administrative acts" requires constant international intergovernmental cooperation in the adop-

[58] Della Cananea, Giacinto, *From the recognition of foreign acts to trans-national administrative procedures.*

[59] Stelkens, U., Mirschberger, M., *The recognition of foreign administrative acts: a German perspective.*

[60] Lopes, Dulce, *Report on the recognition of foreign administrative acts*.

[61] We quote the following: Regulation (EU) No. 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the marketing and use of biocides; Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms; Directive 2009/54/EC of 18 June 2009 of the European Parliament and of the Council on the exploitation and marketing of mineral waters; Regulation No. 1013/2006 of the European Parliament and the Council of 14 June 2006 on the shipment of waste.

tion and enforcement of administrative decisions. In the words of the Italian reporter, "mutual trust, in other words, concerns not only the moment when a common rule of recognition is established, but extends to the entire administrative processes of adjudication". This new transnational model, the Italian reporter goes on to say, "implies the mutation not only of rules and techniques, but also of legal theories and conceptual categories."[62]

Bibliography

Bocanegra, Sierra and García Luengo, "Los actos administrativos transnacionales", Revista de Administración Pública, No. 177, Madrid, September–December, 2008.

National Reports

Della Cananea, Giacinto. From the recognition of foreign acts to trans-national administrative procedures.
Douga, A. E., On the recognition of foreign administrative acts in Greece.
Griffiths, J., Recognition of foreign administrative acts: report from Australia.
Lopes, Dulce, Report on the recognition of foreign administrative acts.
Reitz, J. Recognition of Foreign Administrative Acts in the United States.
Stelkens, U., Mirschberger, M. The recognition of foreign administrative acts: a German perspective.

[62] Della Cananea, Giacinto, *From the recognition of foreign acts to trans-national administrative procedures.*

Chapter 3
The Incorporation of the Acts of the Andean Community of Nations into Internal Legal Systems

Libardo Rodríguez-Rodríguez and Jorge Enrique Santos-Rodríguez

Abstract This work studies the effects of Andean communitarian law over the domestic administrative laws of the State members of the Andean Community of Nations. Specifically, it deals with the increase of sources of legality applicable to internal decisions. For this purpose, the work analyzes the reception of primary and secondary Andean communitarian law in Colombia, Ecuador, Peru, and Bolivia; and the status in which that communitarian law is embodied in such countries.

Introduction

Even though administrative law is part of the internal law of each State, it is evident that it shares traditional relations with international law. In fact, the practical application of conventions and international treaties in each of the party States, frequently requires the expedition of internal or national rules that develop them, both from the legislative organ as from the administrative authorities, which constitute a source of administrative law.

Notwithstanding, it could be stated that those relations between administrative law and international law, traditionally were limited to the orthodox concept of sovereignty and because of the weakness of the binding character of many of the treaties and conventions that are limited to establishing directional principles in the respective fields, at the same time lack effective means or instruments to guarantee the application of their rules.

Today, these relationships have acquired greater importance, keeping in mind that phenomena such as the globalization of the economy and the internationalization

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of the law have resulted, as in other branches of the law, in administrative law feeding more and more from sources that come from international law, as is the case, for example, of international treaties and conventions of human rights, on the regulation of the use of public property in the fields of telecommunications and the environment; on free trade agreements and on bilateral international treaties, thus, strengthening the relationship between these two branches of the law.[1]

In the last few decades, the relationships in between States have begun to show a particular evolution, especially due to economic matters, giving rise to the emergence of the so called "economic communities". These kinds of communities have recently developed a tendency towards communities of a political nature, progressively advancing towards solidifying relations between party States, thus evidencing the consolidation of true *suprastates*.

The consolidation of these economic communities has given birth to a new branch of law (with characteristics of its own that differentiate it from the rest), known as "communitarian law"; different from traditional international law, which tends to be recognized as a legal subsystem, with a proper source system and particular relations with the different branches of traditional law, but at the same time, based on the recognition of international treaties.[2] This branch of law is configured in a particular way in each of the communities, giving rise to specific communitarian law systems such as the European,[3] the Andean,[4] the one found in Mercosur,[5] SICA,[6] CARICOM,[7] etc., logically with different levels of development in each of the those communitarian systems.[8]

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[1] On this topic, see Gordillo, Agustín. "La creciente internacionalización del derecho". In Fernández Ruíz, Jorge (coord.). *Perspectivas del derecho administrativo en el siglo XXI*. México: Universidad Nacional Autónoma de México, 2002. p. 71 et seq.; González-Varas Ibáñez, Santiago. *El derecho administrativo privado*. Madrid: Montecorvo, 1996. pp. 15–16, and López Guerra, Luis, et al. *Derecho constitucional*, Vol. I, 7th ed. Valencia: Tirant Lo Blanch, 2007. p. 113.

[2] See Isaac, Guy. *Manual de derecho comunitario general*. 4th ed. Barcelona: Ariel, 1996. p. 111.

[3] On European communitarian law, see, inter alia, García De Enterría, Eduardo and Muñoz Machado, Santiago (dir.). *Tratado de derecho comunitario europeo*. 2 Vols. Madrid: Civitas, 1986, and Mangas Martín, Araceli and Liñán Nogueras, Diego J. *Instituciones y derecho de la Unión Europea*. 5th ed. Madrid: Tecnos, 2005.

[4] Regarding Andean communitarian law, see Quindimil López, Jorge Antonio. *Instituciones y derecho de la comunidad andina*. Valencia: Universidad de La Coruña and Tirant Lo Blanch, 2006; Tangarife Torres, Marcel. *Derecho de la integración en la Comunidad Andina*. Bogotá: Baker & McKenzie, 2002, and Sáchica, Luis Carlos. *Introducción al derecho comunitario andino*. Quito: Tribunal de Justicia del Acuerdo de Cartagena, 1985.

[5] On Mercosur Community Law see: Alterini, Atilio Anibal (dir.). *El sistema jurídico en el Mercosur*. 2 vols. Buenos Aires: Abeledo-Perrot, 1994, and Dromi, Roberto, Ekmekdijian, Miguel and Rivera, Julio. *Derecho comunitario*. 2nd ed. Buenos Aires: Ciudad Argentina, 1996.

[6] Regarding the "Sistema de Integración Centroamericana (SICA"), see Álvarez, Gonzalo. "Sistema de Integración Centroamericana (SICA) Subsistema de Integración Económica Centroamericana (SIECA)". in Negro, Sandra (dir.). *Derecho de la integración. Manual*. Montevideo: B. de F., 2010. pp. 151 et seq

[7] On "Comunidad del Caribe", see López Bravo, Alfredo. "Comunidad del Caribe: CARICOM". in Negro, Sandra (dir.). *Derecho de la integración. Manual*. Montevideo: B. de F., 2010. pp. 169 et seq.

[8] For a general introduction to the juridical regimes of the communitarian systems, see Díez De Velasco, Manuel. *Las organizaciones internacionales*. 16th ed. Madrid: Tecnos, 2010, pp. 499 et seq.

In this context, it must be stated that the acknowledgement of the existence of communitarian law implicates diverse consequences regarding administrative law, such as: the displacement of internal administrative authorities for that of the communitarian authorities; the displacement of the internal administrative law judge for the communitarian judge, and the increase of sources of legality applicable to the internal decisions.[9]

Regarding those diverse consequences, the doctrine has highlighted that perhaps the most relevant for administrative law is the one that has to do with the increase in the legal system and the creation of new sources of law.[10] In this sense, it has been stated that "*national law is limited*, *displaced and complemented by communitarian law*, *which is directly applicable*, *thus superposing itself*, *whilst the national norm is still in force and continues being binding*, *although only where the other rules aren't applicable*", conclusion that can be qualified as such "*particularly true in relation to administrative law*, *preferential object of communitarian law*".[11]

In accordance with the previous statement, in the present research we will analyze the way in which the traditional view of administrative law is affected by the appearance of a communitarian law in general, but especially of an Andean communitarian law, specifically the system of sources of law. Consequently we will study, on one hand, the reception of Andean communitarian law in individual legal systems (I) and, on the other, the normative status that communitarian rules have in each of the individual legal systems (II).

The Reception of Andean Community Law in the Domestic Legal Systems

To adequately understand the way Andean communitarian law is accepted in the legal systems of its members, it is essential to state that the analysis of the existing relations between communitarian law and national law has been traditionally based on the doctrine for the conceptions of monism and dualism of the relations in between internal law and international law.[12]

In accordance with the dualist point of view, both internal and international legal systems coexist and are perfectly separable and independent, in such a way that for

[9] On these influences, see Rodríguez Rodríguez, Libardo. "El derecho administrativo frente a la internacionalización del derecho y en particular frente al derecho comunitario". In Restrepo Medina, Manuel Alberto (ed.). *Retos y perspectivas del derecho administrativo*. Bogotá: Universidad del Rosario, 2009, pp. 19 et seq.

[10] See Brewer–Carías, Allan R. *Derecho administrativo*. Vol. I. Caracas – Bogotá: Universidad Central de Venezuela – Universidad Externado de Colombia, 2005, p. 47.

[11] Maurer, Hartmut. *Derecho administrativo*, *parte general*. 17th ed. Madrid: Marcial Pons, 2011. p. 74.

[12] Regarding these two conceptions and particularly, regarding the application of the relationships between European communitarian law and domestic laws, see Isaac, Guy. *Manual de derecho comunitario general*. cit., pp. 190 et seq.

international law to be applicable it is necessary to incorporate it via a formal act of an internal authority. Whereas, the monist conception believes in the existence of a unity between both legal systems, to the extent of considering that international rule is applicable in an immediate fashion in the internal legal system, thus stating that it is prevalent.[13]

Regarding those two conceptions, as has been established by the doctrine, the different members of the European Union, since the first treaties and until the most recent treaties, have had to make constitutional amendments to enable and permit initial treaties or modifications to those treaties, to be incorporated and be effective in the internal legal system, especially those that specifically transfer legal powers to the communitarian organs.[14]

The previous would confirm that, with regard to the primary communitarian law, in other words, the constituent treaties and their modifications, the applicable conception was dualism, mainly because of the need for the expedition of internal acts to achieve the application of the treaties. On the other hand, there is another sector of doctrine that believes that because of the Constitutional transformations that the State members have been subject to, there has been room for the application of the monistic conception: this being the case for both the constituent treaties of the European Union as for its modifications (primary communitarian law), and for the norms of communitarian authoritative production (secondary communitarian law).[15]

In the specific case of the relationship between Andean communitarian law and the internal law systems of its member States it is essential to comprehend whether there is a monistic or a dualistic application of the Andean norms. In order to do so, it is necessary to establish the various differences between primary and secondary communitarian norms.[16]

Primary norms refer to the type of norms which the member States have directly manifested their will to accept, like the "Acuerdo de Cartagena", by which the Andean Pact or Group was created (later to be transformed into the Andean Community of Nations), and the Treaty of Creation of the Justice Tribunal of the Andean Community, along with its protocols, additions and modifications (A).

On the other hand, the secondary or derivative norms refer to those rendered by the different communitarian authorities that have normative powers inside the orga-

[13] About this topic, see Santaolalla López, Fernando. "Los tratados como fuente del derecho en la Constitución". *Revista de Administración Pública*. September-December 1979, No. 90. Madrid: Instituto de Estudios Políticos, p. 9.

[14] See Brewer-Carías. Allan R. *Las implicaciones constitucionales de la integración económica regional*. Caracas: Editorial Jurídica Venezolana, 1998, pp. 23 et seq.

[15] Regarding this matter, see Mangas Martín, Araceli and Liñán Nogueras, Diego J. *Instituciones y derecho de la Unión Europea*. cit., pp. 332 et seq.; Isaac, Guy. *Manual de derecho comunitario general*. 4th. ed., Barcelona: Ariel, 1996, pp. 192 et seq. and Muñoz Machado, Santiago. "Los principios de articulación de las relaciones entre derecho comunitario y el interno y las garantías jurisdiccionales para su aplicación efectiva". In *Tratado de derecho comunitario europeo*, Vol. I. Madrid: Civitas, 1986, pp. 509 et seq.

[16] For the difference between primary and secondary Andean communitarian law, see Sáchica, Luis Carlos. *Introducción al derecho comunitario andino*. cit., pp. 129 et seq.

nization of the Andean Community of Nations, as do the Andean Ministry of Exterior Relations Council (*Consejo Andino de Ministros de Relaciones Exteriores*), the Community Commission (*Comisión de la Comunidad Andina*) and the General Secretary (*Secretaría General*) (B).

The Reception of the Original or Primary Norms of Andean Communitarian Law

In Colombian law, the preamble and article 227 of the Political Constitution of 1991 promote the integration of the Latin-American community and the creation of supranational organisms with those goals. More concretely, regarding the primary Andean norm, articles 150-16, 224 and 241-10 of the Constitution shed light on the application of the dualist conception, in such a way that these primary norms can only be part of the internal legal system if they abide by the procedure for incorporation, of which the law of approval forms an essential part and thus, must be obligatorily analyzed for its constitutionality by the Constitutional Court.

As a proof of this statement, in the period of applicability of Political Constitution of 1991 there has been production of laws, such as the following, regarding the incorporation of Andean primary norms to the internal legal system: Law 323 of 1996, by which the Trujillo Protocol was approved, modifying the "Acuerdo de Cartagena"[17]; and Law 457 of 1998, that approved the Cochabamba Protocol, which modified the Treaty of Creation of the Justice Tribunal of the Andean Community.[18]

In Ecuadorian law, article 416-11 of the 2008 Political Constitution dictates, as a principle of Ecuador's international relations, that the State "*promotes with priority the political*, *cultural and economic integration of the Andean region*". Also, articles 419-6 and 419-7 of Ecuador's Constitution state that previous approval is required from the National Assembly for the ratification of international treaties that compromise the country in integration agreements and those that give internal jurisdictional competence to an international or supranational organ. In other words, the Constitution envisions that for international treaties to have internal validity in Ecuador, it is necessary for there to be an act by the National Assembly, meaning that they accept the application of the dualist conception for Andean primary law.

In turn, in Peru, for community-based organizations, article 44 of the Constitution stipulates that "*it is the duty of the State to establish and implement the policy of borders and to promote integration*, *particularly Latin America*". Specifically, with regard to the integration of the primary Andean norm in the Peruvian domestic law, in accordance with article 55 of the Constitution, according to which "*the treaties celebrated by the State and in force are part of national law*", thus the monist con-

[17] See Constitutional Court, decision C-231 of 1997. This decision and others from Colombian Constitutional Court quoted in this work, may be consulted in this web page: www.corteconstitucional.gov.co

[18] See Constitutional Court, decision C-227 of 1999.

ception applies, since, as stated by the doctrine, as a general rule "*once international conventional norms*, *have entered into force internationally*, *they are automatically incorporated into domestic law without requiring any subsequent act of internal conversion or incorporation into the domestic legal order*".[19]

Finally, with regard to Bolivia, it should be noted that it was the only country in the Andean Community of Nations whose Constitution did not contain any mention of principles or rules related to the economic integration or Communitarian law.[20] However, this situation changed with the Political Constitution of 2009, which reveals various standards related to the Latin American integration, such as article 265 that fully promotes integration and article 410-II regarding the status of the treaties of the Andean legal system in Bolivian domestic law. Also, from other constitutional rules, one can conclude that with regard to the primary Andean norms, the dualistic conception applies, since article 158-I-14 points out that it is the function of the Congress to ratify international treaties, articles 257-II-3 and 257-II-4 state that international treaties involving "*structural economic integration*" or "*assignment of institutional powers to international agencies or supranational in the framework of integration processes*" require approval by popular referendum, and article 410-II establishes that the block of constitutionality is integrated by the standards of the community law ratified by the country, which clearly shows the need for special procedures for incorporation of primary communitarian law to the Bolivian domestic law.

The Reception of Secondary or Derived Norms of Andean Communitarian Law

Unlike the case with primary Andean regulations, secondary Andean regulations enjoy immediate and direct effectiveness in the different legal systems of the member States. That is to say, that once issued by the competent Andean organ, its application becomes mandatory for the member countries, without the need for issuing an act of incorporation. This means the application of the monist conception on this kind of norm. This conclusion can be derived from article 3 of the Protocol of Cochabamba (that modified the Treaty of Creation of the Justice Tribunal of the Andean Community), according to which "*the decisions of the Andean Council of Foreign Ministers or of the Commission and the resolutions of the General Secretariat shall be directly applicable in the Member Countries*".

[19] Danós Ordóñez, Jorge. "Los tratados internacionales y la jurisprudencia como fuentes del derecho administrativo en el ordenamiento jurídico administrativo peruano". In *Fuentes del derecho administrativo*, *Memorias del IX Foro Iberoamericano de Derecho Administrativo*. Buenos Aires: Ediciones RAP, 2010, pp. 623–624.

[20] See Chahín Lizcano, Guillermo. "Fundamentos constitucionales del derecho comunitario andino", In *Testimonio Comunitario*, available at http://www.tribunalandino.org.ec. [consulted on 21 November, 2013]

The same conclusion has been expressly recognized by the jurisprudence of the Court of Justice of the Andean Community, though with a vague wording that would seem to indicate that the solution is equal to primary and secondary law, in the following terms: "*The rules that make up the Andean Legal System*, *whatever its form* (*treaties*, *protocols*, *agreements*, *agreements or Resolutions*) *are*, *by rule*, *of effective and direct application in all the Member Countries since its publication in the Official Gazette of the Cartagena Agreement*, *which means that they are compulsory and of immediate compliance by Member Countries*, *the bodies of the Agreement and individuals*".[21]

Likewise, the jurisprudence of the member countries has also acknowledged the effectiveness of direct and immediate secondary Andean standards. For example, the Constitutional Court of Colombia has stated the following:

> The upholding of the Colombian State to supranational bodies involves, necessarily, that its provisions be directly applicable in the domestic legal system, as article 3 of the Treaty establishes. Particularly, in the judgment for Case C-231/97 the Court accepted the doctrine of the Supreme Court of Justice on the matter: […] On that occasion, the Supreme Court of Justice ruled the unconstitutionality of the statutory provision (subparagraphs (2 and 3 of article 2 of the Act 8 of 1973) on the basis of the following arguments: " … the treaty establishes mechanisms under which the signatories are subject to the rules that dictate the constituent bodies of the international institution thus created. Such rules issued by the Andean entity governing the conduct of the countries involved and their inhabitants on such fundamental issues of economic activity in a straightforward manner, without the need to undergo procedures prior to admission to each of the States that make up the territorial area of the covenant; only when it is set or the nature of the materials require it, will the development of national procedures be required (…) is as well as orders of the organs of the agreement are effective with respect to the nations whose compliance is intended. From this point of view the regional provisions within States that have to implement them, are often confused, by its result, with the requirements of domestic law, which are differentiated by their origin: while the first derived itself from a supranational entity, the latest came from the domestic authorities. But dealing with similar subjects. The acquisition of regulatory powers by the community agencies, in the right of economic integration, comes from a transfer of competencies that the contracting parties make, thus voluntary and initially in the treaty. And this is the way it operates, because, according to current terminology, a change, an assignment, a transit of privileges from national to supranational. Whatever the appropriate designations, in the economic integration of several countries constitutes note relevant and differential that these lost legislative powers that exercised with exclusivity through provisions of domestic law on specific subjects and that the gain in favor of the regional agencies".[22]

In the same way, the Peruvian Constitutional Court[23] and the then Ecuadorian Supreme Court of Justice (called National Court of Justice in the Constitution of

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[21] Court of Justice of the Andean Community, decision of 12 November, 1999, record 07-AI-99, case INDECOPI. This decision and others from the Court of Justice of the Andean Community quoted in this work, may be consulted at this web page: www.tribunalandino.org.ec

[22] Colombian Constitutional Court, decision C-227 of 1999. In the same sense, see Colombian State Council, Full Chamber of Administrative Justice, decision of 29 June 2012, record 2010-00651-00. This decision and others from the Colombian Council State quoted in this work, may be consulted at this web page: www.consejodeestado.gov.co

[23] See, as an example, Peruvian Constitutional Court, decision of 18 May 2005, record 0044-2004-AI/TC. This decision was based on the application of Decision 351 of the Andean Community on author's law and connected rights.

2008)[24] have recognized that the secondary Andean regulations, once it is adopted and meets all the formalities for the effectiveness, enjoys full effect in the respective domestic legal systems.

From the foregoing, it can be concluded that, unlike what happens with primary Andean law, for which there is not a uniform position of the member States of the Andean Community of Nations, the implementation of secondary or derived Andean law has been accepted in the various legal systems of the member countries under the figure of monism and, accordingly, with the application of the principles of direct and immediate effectiveness.

The Normative Status of Andean Community Law in the Legal Systems of the Member Countries

Now that the mechanisms of incorporation of both primary and secondary Andean law have been examined, it is time to analyze the normative status with which the incorporation of Communitarian law is rendered within the domestic legal system of the member countries.

In the first place, it should be noted that this analysis is primarily based on the concept of primacy, which is one of the most important features that is attributed to Community law, which is also identified by jurisprudence and doctrine as prevalence or preeminence of communitarian law, based on the principle of distribution of powers[25] (A). However, the application of that attribute does not exclude, as it appears to result from some jurisprudential and doctrinal positions, the implementation of the hierarchical approach or the status with which incorporation of communitarian rules to the domestic legal systems take place (B).

The Primacy of Communitarian Law Over Domestic Law

The attribute of the primacy of communitarian law has been built by the jurisprudence of the European Court of Justice decisions Van Gend & Loos of 5 February 1963 and Costa/ENEL of 15 June 1964.[26] Based on those decisions, European doc-

[24] See Ecuador Supreme Court of Justice, Third Chamber on Civil Law, decision of 5 October, 1999, quoted by Tremolada Álvarez, Eric. *El derecho andino en Colombia*. Bogotá: Universidad Externado de Colombia, 2006, p. 81.

[25] On the principles of inter-normative relationships and the difference between hierarchy, primacy or prevalence and distribution of powers, see Muñoz Machado, Santiago. *Lecciones y materiales para el estudio del derecho administrativo*. vol. I. Derecho administrativo y sistema de fuentes. Madrid, Iustel: 2009, pp. 82 et seq., and Santamaría Pastor, Juan Alfonso. *Principios de derecho administrativo*. Vol. I. 3rd ed., Madrid: Centro de Estudios Ramón Arcés, 2000, pp. 176 et seq.

[26] The text of this decision may be consulted in Muñoz Machado, Santiago. *Tratado de derecho administrativo y derecho público general*. Vol. II. El ordenamiento jurídico. Madrid: Iustel, 2006, p. 477.

trine has expressed that the principle of primacy "*consists of the preferential application of communitarian law* (*primary and secondary*) *over domestic law in case of conflict of norms of one and another source*"[27] and that, therefore, the communitarian rule enjoys "*priority application over any national norm*, *thus in consequence it is to be displaced by it*".[28] As a practical consequence derived from this principle, the doctrine has stated with respect to communitarian law that it "*does not apply the principle of lex posterior*, *nor the hierarchical organization by status of domestic legislation*, *since the primacy determines the preferential application of communitarian law over any internal text*, *previous or subsequent to the European standard*, *and independently from the kind of domestic standard that it is*".[29]

The principle of primacy also has application in the relations between Andean communitarian law and the internal legal systems of the member countries of the Andean Community of Nations. In this regard, it should be noted that article 4 of the Protocol of Cochabamba, amendment of article 5 of the Treaty on Creation of the Court of Justice of Andean Community, establishes that "*member countries are obliged to take the measures that are necessary to ensure compliance with the rules that make up the Andean Community legal order*", rule that has allowed for the Andean jurisprudence to establish the prevalence of Andean communitarian law both primary as derivative.[30]

Specifically related to the relationship between Andean communitarian law and the Colombian legal system, the implementation of the above-mentioned principle of primacy has been recognized by the Colombian Constitutional Court, who, although using the designation of "prevalence" instead of "primacy", has stated the following:

> …The concept of supranationality—within which the *Acuerdo de Cartagena* is part—implies that the member countries forfeit certain powers and attributions that, through an international treaty, are assumed by the supranational body, which acquires the powers to regulate in a uniform manner, for all member countries, the specific subjects for which jurisdiction was relieved. All of this, with the purpose of achieving an economic integration processes of sub-regional character. The supranational rules deploy special and direct effects over the domestic laws of the member countries of the integration treaty, which cannot and are not derived from the common international law. […] Secondly, the legislation issued by the supranational body enjoys an effect of prevalence over the national laws regu-

[27] Garrido Falla, Fernando. *Tratado de derecho administrativo*. Vol. 1. 14th ed. Madrid: Tecnos, 2005, p. 357.

[28] García De Enterría, Eduardo and Fernández, Tomás-Ramón. *Curso de derecho administrativo I*. 15th ed. Madrid: Civitas, 2011, p. 160.

[29] Muñoz Machado, Santiago. *Lecciones y materiales para el estudio del derecho administrativo*. Vol. I. cit., p. 115.

[30] See Court of Justice of the Andean Community, decision of 30 October 1996, record 1-AI-96, Junta Directiva del Acuerdo de Cartagena against Ecuador Republic. In *Gaceta Oficial del Acuerdo de Cartagena* 234, 21 November 1996. In this decision, the Andean Court of Justice makes a summary of the decisions that to that date have referred to the direct application and prevalence of Andean communitarian law over domestic law of the State members.

> lating the same subject and, therefore, in the event of conflict, the supranational rule displaces—within the effect known as preemption—the national rule.[31]

However, as is understood by the doctrine, the application of the principle of primacy is based on the criterion of distribution of powers, because with the conformation of the communities, member countries forfeit or concede part of their regulatory powers to the communitarian organs.[32]

On the basis of this idea of transfer of powers, in relation to the specific effect that generates the primacy of Andean communitarian law, the Andean jurisprudence has pointed out that the internal rules are not specifically repealed by the communitarian rules, but that are displaced and, in case of being contrary, are inapplicable. The Andean court of Justice stated as follows:

> Regarding the effect of the integration rules over national standards, doctrine and case-law state that, in an event of conflict, the internal rule is displaced by the communitarian, which should be applied preferably, as the power to produce it corresponds to the Community. In other words, the internal standard is inapplicable for the benefit of the communitarian standard… It is not that the posterior communitarian standard repeals the existing national standard, as occurs at the level of domestic law, which adopts within its own powers unique ways to create and extinguish law, which of course are not interchangeable, since they are two different legal systems, independent and separate. It is, rather, the direct effect of the principle of primacy of immediate application that in any case must be granted to the communitarian rules over the internal.[33]

This conclusion is perfectly applicable in Colombian law, since, under the subscription of the treaties of creation of the Andean Community of Nations, and on the basis of article 150-16 of the Constitution, the regulation of certain materials has become a power of the communitarian authorities and has ceased to be the responsibility of domestic authorities, by which, with respect to such matters, the communitarian rules are applied in a preferential manner with respect to the internal norms, because of their origin in the competent body.[34]

The same conclusion can be reached regarding Ecuadorian law, based on articles 419-6 and 419-7 of its Political Constitution, which authorizes the delegation of powers that correspond to domestic authorities to international or supranational agencies, within the framework of an integration agreement. In the same way,

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[31] Colombian Constitutional Court, decision C-137 of 1996. In the same sense, see Colombian State Council, Full Chamber of Administrative Justice, decision of 29 June 2012, record 2010-00651-00.

[32] See García De Enterría, Eduardo and Fernández, Tomás-Ramón. *Curso de derecho administrativo I*. cit., pp. 160–161, and Muñoz Machado, Santiago. *Tratado de derecho administrativo y derecho público general*. Vol. II. cit., pp. 476 et seq.

[33] Court of Justice of the Andean Community, decision of 21 August 2002, records 34-AI-01, case VIAGRA, Secretaría General against Ecuador Republic. In *Gaceta Oficial del Acuerdo de Cartagena* 835, 25 September 2002. Also see Sánchez Morón, Miguel. *Derecho administrativo. Parte general*. 6th ed. Madrid: Tecnos, 2010, p. 158.

[34] Regarding the delegation of powers and the primacy of Andean communitarian law in Colombia, see Colombian State Council, Third Chamber of Administrative Justice, decision of 9 August 2012, record 43.281. Also see, even though regarding Spanish law, but applicable to Colombian law, De Otto, Ignacio. *Derecho constitucional. Sistema de fuentes*. cit., pp. 85 et seq.

Bolivian law, in article 257-II-4 of the Political Constitution allows making such transfer of powers within the framework of integration processes. In Peruvian law, despite the fact that there is no direct constitutional provision in this regard, the fact that they are a member country of the Andean Community of Nations and that the Andean rules have direct effect in the domestic legal system, leads to this conclusion.

The Hierarchy of Communitarian Rules Within Internal Legal Systems to Which They Are Incorporated

Firstly, it should be noted that the doctrine has focused on the analysis of relations between communitarian law and national law basically on the basis of the distribution of powers and the consequent primacy of communitarian law on the issues assigned to the communitarian organ by virtue of this distribution, without lingering to a great extent on the principle of hierarchy. However, exceptionally, there are some expressions on the difficulty that the incorporation of communitarian law generates from the hierarchical point of view. Thus, the doctrine has stated:

> The hierarchy, in effect, might be recognized, in any case, after a few concrete norms: the treaties or agreements. But it is not easy to apply by extension the same conditions to regulations and community directives and grant them the same status as treaties or, at least, a status superior to that of a law.[35]

Facing this difficulty, the doctrine has limited itself to considering that the principle of hierarchy is not the one that explains in a clear way the relations between communitarian law and national law. It is the principle of distribution of powers or, rather, the assignment of internal constitutional powers to communitarian organs, that best explains the primacy and direct effectiveness that the communitarian law has. Thus, it has been explained that "*the relationship between communitarian law and national law is a relationship of powers*, *not of hierarchy*",[36] because of which the analysis of the normative status with which communitarian norms is incorporated into domestic law has not been a problem to draw particular attention to the doctrine.

However, not only from the legal point of view but also from the perspective of the practical application of communitarian rules in the member states, it is evident that the status or hierarchy of such rules raise issues that have not been sufficiently analyzed. According to the jurisprudence of the Colombian Constitutional Court, the fact that communitarian rules, both primary and derived, are preferably applied over the domestic rules, it does not mean that the abovementioned communitarian

[35] Muñoz Machado, Santiago. "Los principios de articulación de las relaciones entre derecho comunitario y el interno y las garantías jurisdiccionales para su aplicación efectiva". cit. p. 536 (footnote 81).

[36] Ibidem, p. 536.

rules have a superior status to the internal norms and, much less, that they have a constitutional one. In this regard, the Court has said:

> Neither the integration treaties nor communitarian law accommodate themselves to the regulated assumptions set out by article 93 of the Constitution, since without prejudice to respect for the higher principles of the constitutional order in the aforementioned judgment C-231 of 1997, its purpose is not the recognition of human rights, but the regulation of economic, fiscal, customs, monetary, and technical aspects, etc., from which it arises that a predominance of the Andean communitarian law on the internal law, similar to that provided for in article 93 of the constitutional charter, lacks sustenance.

Thus, in view of the things on the basis of article 93, the Andean communitarian law is not a part of the block of constitutionality and, therefore, does not share the supremacy that the Constitution has over the law. However, one might consider the hypothesis that the incorporation of Communitarian law in the block of constitutionality could have a constitutional basis different from article 93. In this sense, it is an issue of merit to note that, for this Court, "the incorporation of a norm to the block of constitutionality must have express foundation in the Constitution" and, in truth, the various higher ranking norms relating to the supranationality and integration, if in fact they do constitute the constitutional basis of these phenomena, do not have nor do they embark on the prevalence of the respective treaties in the internal order, since "One thing is that the rules of international treaties have a constitutional basis, and another, entirely different, is for them to be incorporated into the block of constitutionality and intended to be taken into account when deciding whether a law is or is not in conformity with the precepts of the Constitution".

The above arguments serve to show that there is no superiority of communitarian law over the Constitution, and that it is not true that they share an identical hierarchy. In addition, communitarian law does not constitute an intermediate normative body between the Constitution and ordinary law, since the adoption of treaties by Congress is carried out by means of an ordinary law.[37]

Now, according to the Colombian State Council, the consequence of the Andean Community rules not having prevalence over the Constitution means that "*the rules and decisions of said legal system must obey the guarantees and minimum of norms*".[38] That is to say, that the jurisprudence has admitted that there are certain minimum constitutional limits that communitarian law, despite its prevalence effect, cannot exceed, but the State Council has not specified what those limits are.

Based on the above, from a formal point of view, it is clear that the treaties of primary communitarian law are located within the general rule of international treaties in Colombian law. Once formally incorporated to domestic law they acquire the category of Law of the Republic, precisely for having been adopted in the domestic legal system by means of a norm with this normative category, which implies that hierarchically they are laws of the Republic.

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[37] Colombian Constitutional Court, decision C-256 of 1998. Also, see Colombian Constitutional Court, decisions C-155 of 2007 and C-339 of 2006.

[38] Colombian State Council, Third Chamber of Administrative Justice, decision of 9 August 2012, record 43.281.

It should be noted that although the Colombian Constitutional Court has expressed that the community norms are not part of "an intermediate normative body between the Constitution and ordinary law", in the light of the principle of primacy, explained previously, such an expression should be understood simply from a hierarchical perspective, since the treaties of primary communitarian law enjoy priority over ordinary law by virtue in the same primary treaties and taking into account the transfer of regulatory powers by the State to Andean Community authorities as a consequence of the treaties.

In addition, it should be emphasized that despite the fact that the Colombian Constitutional Court sometimes uses the concept of "prevalence" as a synonym for a norm with constitutional status, specifically under the analysis of article 93 of the Constitution, as explained with regard to the traditional international treaties, this does not mean that when this concept of "prevalence" is used synonymously with the principle of the primacy of communitarian law, the rules of this law can be understood as rules with a constitutional status. In this sense, there are two meanings to the concept of "prevalence" in the jurisprudence of the Colombian Constitutional Court: "prevalence" enshrined in article 93 of the Constitution, which means that the international human rights treaties referred to in this standard are not only superior to law but have the category of constitutional rule, and the "prevalence" of communitarian law, which should be understood as primacy or preeminence, in the terms explained, which entails no constitutional recognition of category.

Something similar happens in Ecuadorian law, as constitutional articles 161-3 and 161-4 simply point out that international treaties are incorporated into domestic law by the creation of a Law by the National Congress, it is equivalent to say that they are incorporated with the category of law, without this meaning, ignoring the principle of primacy applicable to communitarian rules.

The situation is similar in Peruvian law. In fact, doctrine has explained that when it comes to article 200 of the Constitution, it can be interpreted that except for human rights treaties, other international treaties are incorporated with a lower status than the Constitution. That is to say, within the second regulatory category of the legal pyramid, with a hierarchy that is equal to that of laws.[39] In this way, it must be understood that primary Andean communitarian rules are incorporated into the Peruvian domestic legal system with the category of law, of course, without this meaning that in the case of a clash between norms, the primacy that characterizes ordinary domestic laws and other provisions of domestic law should be disregarded.

Finally, under Bolivian law, the situation is unique. Thus, according to article 410-II of the Political Constitution, the rules of communitarian law ratified by the country are part of constitutionality block. That is, unlike what happens in other member countries of the Andean Community of Nations, the Andean primary law (which should be subject to the procedure of ratification, since those of the derivate

[39] Danós Ordóñez, Jorge. "Los tratados internacionales y la jurisprudencia como fuentes del derecho administrativo en el ordenamiento jurídico administrativo peruano". cit., pp. 627 et seq.

law are automatically incorporated) entering the Bolivian domestic law with constitutional status.

Regarding Andean secondary or derived legislation, it is important to note that not all their rules have the same category, even inside the Andean communitarian legal system; in other words, the recognition of the application of the principle of hierarchy inside the Andean system. In fact, according to the sphere of powers of each of the Andean organs that have regulatory powers, its rules may have a different status: the decisions of the Andean Council of Ministers of Foreign Relations (Consejo Andino de Ministros de Relaciones Exteriores) and the Commission of the Andean Community (Comisión de la Comunidad Andina) have a higher status, to the extent that these organs have the regulatory powers in the general community structure, while the resolutions of the General Secretariat (Secretaría General) have a lower status, whilst the regulatory powers of this organ are limited to the regulation for the administrative implementation of the Andean regulations issued by the Council and the aforementioned Commission.[40]

Bearing in mind this distinction in the status of Andean regulations within the same internal normative structure of the Community, it is logical to think that the legal position in which they enact domestic law, from a formal point of view, changes according to the type of secondary Andean rule concerned. This means that, contrary to that which is expressed by the doctrine, previously cited, the relations between the communitarian rules and the domestic legal systems, specifically the enactment to internal law, it cannot simply rely on the principles of supremacy and distribution of powers, but in its incorporation it is also important to analyse the principle of hierarchy.

What is stated does not mean that the principle of primacy should be ignored in the sense that communitarian rules take priority over internal rules, regardless of the hierarchical position in which they are incorporated, but an assimilation to the internal normative status is necessary. This is especially important in order to understand the powers and the way in which the internal execution of communitarian laws will be laid out, as well as to understand the practical effectiveness that each communitarian rule will be given. In this regard, it should be noted that, in the light of the principle of supremacy, the previous could be understood in the sense that it is possible for a lower rank communitarian rule to ignore a domestic law without this making the communitarian rule illegal, except if the first disregards the distribution of powers set out by a primary Andean law or an Andean provision of higher status, all cases which will subject to the jurisdiction of the Court of Justice of the Andean Community, responsible for ensuring the application of the rule of law or principle of legality.

Consistent with the above, it can be said that the primacy of communitarian law does not translate into a "*primacy in the validity*, *but only a primacy in the implementation*", in such a way that "*the* [*internal*] *legal provision inconsistent with a communitarian regulation*, *is not therefore*, *null*, *but only inapplicable to the par-*

[40] On the rules that are part of the Andean juridical system and their hierarchies see Quindimil López, Jorge Antonio. *Instituciones y derecho de la comunidad andina*. cit. pp. 174 et seq.

ticular case".[41] In that order, in absence of absolute primacy of communitarian law, there is no doubt that the principle of hierarchy is important in order to understand how the community rules are incorporated into the domestic legal system.

Within the limits set forth, it must be understood that the decisions of the Commission of the Andean Community (Comisión de la Comunidad Andina) are incorporated into the domestic legal systems of the member States with the category of a formal law, as has been expressly recognized in the Colombian case by the Council of State with regard to the decisions of the Commission.[42]

With regard to the other secondary Andean rules, we do not know of any judicial rulings of the member country's Courts that have analyzed the position in which those acts are embodied. Specifically regarding the decisions of the Andean Council of Foreign Ministers (Consejo Andino de Ministros de Relaciones Exteriores), to the extent that their decisions have the same status than that of the decisions of the Commission of the Andean Community (Comisión de la Comunidad Andina) inside the Andean system,[43] it should be understood that once embodied into the domestic legal systems of the member countries, at least from a formal point of view, its position or status will also be that of a formal law, such as occurs with the decisions of the Commission.

In addition, with relation to the resolutions of the Secretary General Office (Secretaría General), although we do not know the express decisions of internal case law on the formal position in which they enter the respective legal systems, it is necessary to take into account that inside Andean communitarian law they have a lower category than the decisions of the Andean Community Commission (Comisión de la Comunidad Andina) and of the Andean Council of Foreign Ministers (Consejo Andino de Ministros de Relaciones Exteriores).[44] Therefore, in its incorporation to the internal legal systems, the status that will be conceded to them will be equally lower to that of the formal law, because if the decisions of the Commission and Council incorporate it with the status of a formal law, resolutions would have to be incorporated in an inferior position, similar to that of the internal administrative decisions, to preserve the consistency of the internal system with that of the Andean legal system.

However, once again, the normative status with which both primary and secondary Andean norms are integrated, it does not limit itself to the nature of a law or an

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[41] Maurer, Hartmut. *Derecho administrativo*, *parte general*. cit., p. 129.

[42] See Colombian State Council, First Chamber of Administrative Justice, decisions of 28 February 1991, record 83; 5 June 1992, record 2009, and 6 August 1998, record 3409. In accordance to what is stated here, in this decisions Colombian State Council accepted that the Acts of the Commission of the Andean Community (Comisión de la Comunidad Andina) are embodied with the status of law and, may be developed in domestic Colombian law by the president by means of decrees, in the same way as the ordinary laws in Colombia.

[43] See Quindimil López, Jorge Antonio. *Instituciones y derecho de la comunidad andina*. cit. p. 189.

[44] See Court of Justice of the Andean Community, decision of 11 February 1999, records 03-AI-98, Secretaría General against Venezuela Republic. In *Gaceta Oficial del Acuerdo de Cartagena* 423, 31 March 1999.

administrative act, because, in view of the fact that the Andean legal system enjoys primacy over the existing domestic legislation or of that which is subsequently issued and regulates the same subjects, it takes into consideration the transfer of powers made by the member countries to the organs of the Andean Community of Nations for the regulation of these matters.

Conclusions

As a result of the analysis and comments made in the preceding pages, we can express the following conclusions:

> At present, as a result of phenomena such as the globalization of the economy and the internationalization of law, Administrative Law feeds increasingly on sources of international law. Within this context, the consolidation of community-based organizations and the emergence of communitarian law has generated various implications for administrative law, among others: the offset in some cases of internal administrative authorities by community authorities; the displacement of the internal administrative judge for the communitarian law judge, and the enlargement of the sources of law applicable to the decisions of domestic authorities. This last result is the most relevant for substantial administrative law and has to do, fundamentally, with the way the Andean norms embody the domestic legal systems of the member countries and the normative status with which such incorporation is produced.

The reception of the primary norms in the Andean communitarian law implies a legal dualism, to the extent that it requires an act of incorporation into domestic law, this occurs in the majority of the countries that make up the Community of Andean Nations, Thus, the Constitution of Ecuador requires an act of the legislature, the Constitution of Colombia requires the intervention both of the legislature and the judiciary, and the Constitution of Bolivia requires a popular referendum approving such a motion. In contrast, in the case of Peru, being that the monist conception applies, the treaties, once signed and in force, are parts of domestic law without need of any act of incorporation.

On the other hand, the secondary norms of the Andean Communitarian law, according to various primary Andean rules and its interpretation by the Court of Justice of the Andean Community, enjoy direct and immediate effectiveness in the various legal systems of the member countries; that is to say, that once issued by the competent body of the Andean community, they become mandatory for the member countries, without the need for the incorporation act, applying thus the monist conception, a conclusion that has been expressly accepted by the jurisprudence of some of the member countries.

As for the normative status of the Andean communitarian law within internal law, its main attribute is the supremacy, prevalence or preeminence of communitarian law, both primary as secondary, over domestic law, in the sense that the Andean Community rules enjoy a priority in their application in respect to any domestic rule. This attribute can be understood from the mandates of the treaties that are part of primary law, and by the interpretation that the Court of Justice of the Andean

Community has given. It is based on the application of the principle of distribution of powers in the sense that with the formation of supranational communities, member countries forfeit and concede part of their regulatory powers, assignment that is authorized by the various Constitutions of the member countries.

However, the application of the principle of the primacy of communitarian law does not preclude the application of the principle of hierarchy in the incorporation of the Andean law to domestic law, since in some cases it is necessary to determine the degree to which incorporation of communitarian rules takes place in domestic legal systems. In this regard, without ignoring the attribute of the primacy, the rules of primary law in Colombia, Ecuador and Peru are embodied with the rank of a law, while in Bolivia, it is with constitutional status. In turn, in relation to the norms of secondary nature, as not all have the same category in the interior of the Andean legal system, its incorporation into domestic law, will occur in some cases within the category of a law, such as the decisions of the Andean Council of Foreign Ministers (Consejo Andino de Ministros de Relaciones Exteriores) and the Andean Community Commission (Comisión de la Comunidad Andina), and, in other cases with the category of an administrative act, such as the resolutions of the General Secretariat (Secretaría General).

Bibliography

Alterini, Atilio Anibal (dir.). 1994. *El sistema jurídico en el Mercosur*, 2 vols. Buenos Aires: Abeledo-Perrot.

Álvarez, Gonzalo. 2010. Sistema de Integración Centroamericana (SICA) Subsistema de Integración Económica Centroamericana (SIECA). In Negro, Sandra (dir.). *Derecho de la integración*. Manual. Montevideo: B. de F.

Brewer–Carías, Allan R. 2005. *Derecho administrativo*, vol. I. Caracas/Bogotá: Universidad Central de Venezuela/Universidad Externado de Colombia.

Chahín Lizcano, Guillermo. Fundamentos constitucionales del derecho comunitario andino. In *Testimonio Comunitario*. Available at http://www.tribunalandino.org.ec.

Danós Ordóñez, Jorge. 2010. Los tratados internacionales y la jurisprudencia como fuentes del derecho administrativo en el ordenamiento jurídico administrativo peruano. In *Fuentes del derecho administrativo, Memorias del IX Foro Iberoamericano de Derecho Administrativo*. Buenos Aires: Ediciones RAP.

De Otto, Ignacio. 1988. *Derecho constitucional. Sistema de fuentes*, 2nd ed., Barcelona: Ariel.

Díez De Velasco, Manuel. 2010. *Las organizaciones internacionales*, 16th ed. Madrid: Tecnos.

Dromi, Roberto, Miguel Ekmekdijian, and Julio Rivera. 1996. *Derecho comunitario*, 2nd ed. Buenos Aires: Ciudad Argentina.

García De Enterría, Eduardo, and Tomás-Ramón Fernández. 2011. *Curso de derecho administrativo I*. Madrid: Civitas.

García De Enterría, Eduardo, and Santiago Muñoz Machado (eds.). 1986. *Tratado de derecho comunitario europeo*, 2 Vols. Madrid: Civitas.

Garrido Falla, Fernando. 2005. *Tratado de derecho administrativo*, vol. 1, 14th ed. Madrid: Tecnos.

González–Varas Ibáñez, Santiago. 1996. *El derecho administrativo privado*. Madrid: Montecorvo.

Gordillo, Agustín. 2002. La creciente internacionalización del derecho. In Fernández Ruíz, Jorge (coord.). *Perspectivas del derecho administrativo en el siglo XXI*. México: Universidad Nacional Autónoma de México.

Isaac, Guy. 1996. *Manual de derecho comunitario general*, 4th ed. Barcelona: Ariel.

López Bravo, Alfredo. 2010. Comunidad del Caribe: CARICOM. In Negro, Sandra (dir.). *Derecho de la integración*. Manual. Montevideo: B. de F.

López Guerra, Luis, et al. 2007. *Derecho constitucional*, vol. I, 7th ed. Valencia: Tirant Lo Blanch.

Mangas Martín, Araceli, and Diego J. Liñán Nogueras. 2005. *Instituciones y derecho de la Unión Europea*, 5th ed. Madrid: Tecnos.

Maurer, Hartmut. 2011. *Derecho administrativo, parte general*, 17th ed. Madrid: Marcial Pons.

Muñoz Machado, Santiago. 1986. Los principios de articulación de las relaciones entre derecho comunitario y el interno y las garantías jurisdiccionales para su aplicación efectiva. In *Tratado de derecho comunitario europeo*, Vol. I. Madrid: Civitas.

Muñoz Machado, Santiago. 2006. *Tratado de derecho administrativo y derecho público general*, El ordenamiento jurídico, vol. II. Iustel: Madrid.

Muñoz Machado, Santiago. 2009. *Lecciones y materiales para el estudio del derecho administrativo*, Derecho administrativo y sistema de fuentes, vol. I. Madrid: Iustel.

Quindimil López, Jorge Antonio. 2006. *Instituciones y derecho de la comunidad andina*. Valencia: Universidade da Coruña and Tirant Lo Blanch.

Rodríguez Rodríguez, Libardo. 2009. El derecho administrativo frente a la internacionalización del derecho y en particular frente al derecho comunitario. In *Retos y perspectivas del derecho administrativo*, ed. Manuel Alberto Restrepo Medina. Bogotá: Universidad del Rosario.

Sáchica, Luis Carlos. 1985. *Introducción al derecho comunitario andino*. Quito: Tribunal de Justicia del Acuerdo de Cartagena.

Sánchez Morón, Miguel. 2010. *Derecho administrativo. Parte general*, 6th ed. Madrid: Tecnos.

Santaolalla López, Fernando. 1979. *Los tratados como fuente del derecho en la Constitución*. Revista de Administración Pública. September–December 1979, No. 90. Madrid: Instituto de Estudios Políticos.

Tangarife Torres, Marcel. 2002. *Derecho de la integración en la Comunidad Andina*. Bogotá: Baker & McKenzie.

Tremolada Álvarez, Eric. 2006. *El derecho andino en Colombia*. Bogotá: Universidad Externado de Colombia.

Chapter 4
Recognition of Foreign Administrative Acts in Australia

Justice John Griffiths

Abstract This chapter describes the recognition of foreign administrative acts in the Australian context. The models available to determine how administrative acts of one state can be given effect by other states are considered, including mutual recognition, harmonisation and uniformity of requirements. A key issue is whether the enforcement of another state's administrative acts should require a prior recognition or authorisation. The chapter analyses the recognition and enforcement of specofoc administrative acts within the federation of Australia as well as Australia's recognition and enforcement arrangements with different countries.

Introduction

This subject may have been inspired by topical issues in the European Union (EU) concerning how administrative acts of one member state should be given effect to in other member states (i.e. transnational administrative acts).[1] Various models are available, including mutual recognition, harmonisation and uniformity of requirements. A key issue is whether the enforcement of another member state's administrative acts should require a prior recognition or authorisation from the enforcing member state i.e. an administrative "exequatur". If not, should the enforcing state have a discretion whether or not to enforce such an administrative act? A regime which requires registration or recognition of another jurisdiction's administrative acts before they can be enforced (similar to the requirements for registering and enforcing a foreign court judgment) presents problems where there is voluminous administrative decision-making. Those problems include a heavy demand on resources, cost and delay.

[1] See, e.g., Lafarge, F., Marin, L. 2010. *Enforcement of Administrative Decisions between Member States under EU Law: From Exequatur to Automaticity?* [online] Published 2010. Accessible from http://www.utwente.nl/mb/pa/staff/marin/Marin_Lafarge.pdf [cited 24 March 2014].

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An alternative approach asks whether preconditions for recognition should be abolished and replaced by an automatic enforcement principle under EU law. Negotiating such an outcome can be costly, time consuming and diminish individual state sovereignty and innovation.

Similar issues arise in Australia at both a national and international level. Australia is a federation comprising six separate States and two internal Territories. Australia's federal structure means that the issue of recognition of "foreign" administrative acts arises not only in the context of Australia's interaction with other countries, but also in the interaction within Australia between its constituent States and Territories. For more than a century Australia has sought solutions, with varying degrees of success, to the issues which confront the EU. As Professor Henry Ergas recently concluded in a report to the Queensland Competition Authority:

> The Australian Federation is today characterised by formal monetary union, highly centralised fiscal coordination, and, with fewer and fewer exceptions, the unimpeded movement of goods, services, labour and capital across state boundaries. This level of seamlessness has not always been thus, but since Federation, Australian governments have moved, albeit erratically and intermittently, *towards* greater harmonisation of economic regulation. (Emphasis in original).[2]

As will emerge below, Australia is a party to numerous national and international arrangements involving mutual recognition, some of which have a domestic statutory foundation and are therefore part of Australia's domestic law, while others are to be found in treaties and other bilateral arrangements which may only be binding as part of international law. Under Australian law, treaties are not binding domestically unless they have been ratified by legislation. Current developments in Australia indicate that, in some areas, mutual recognition arrangements have been or are being replaced or supplemented by stronger models based on harmonisation or uniformity of requirements. That is the case with mutual recognition within Australia of particular occupations, which will soon be governed by a national occupational licensing scheme.

How the issues of recognising and enforcing administrative acts made in other jurisdictions can most effectively and efficiently be resolved is complex. It is not surprising that different jurisdictions have adopted a range of measures which reflect their individual political and legal structures. The Australian experience necessarily reflects its own constitutional arrangements, including its common law based legal system.

[2] Ergas, H. Queensland Competition Authority. 2012. *An Assessment of National Harmonisation*. [online] Published 11 December 2012. Accessible from http://www.qca.org.au/ getattachment/b09563a9-2a12-49a1-935a-d68415ea9b9f/Ergas-Report-An-assessment-of-national-harmonisati.aspx [cited 24 March 2014].

The Concept of "Administrative Act" and Its Classification as "Foreign"

Domestic and Foreign Administrative Acts in Australian Law

The definition in Australian law of the concept of an "administrative act" arises at various levels. First, the doctrine of the separation of powers, which is entrenched in the Australian Constitution, requires a distinction to be drawn between legislative, judicial and administrative (or executive) powers and actions. This can have important constitutional ramifications. For example, under the Australian Constitution judicial power can only be exercised by courts which are specifically mentioned in s 71 of the Constitution. By the same token, such courts cannot exercise legislative or executive powers which are non-judicial. The position is different in the various States of the Commonwealth of Australia which do not have the doctrine of the separation of powers entrenched in their individual constitutions. As might be imagined, there has been considerable case law in Australia directed to defining the limits of legislative, judicial and executive power.[3]

Secondly, the distinction between legislative and administrative acts may have a bearing on the grounds of review which are available to challenge the validity of those acts. Although there is some overlap in the grounds upon which the validity of subordinate legislation and administrative actions or decisions may be challenged, the scope of review is arguably broader in the case of administrative acts. The validity of both primary and secondary Commonwealth legislation may be challenged on constitutional grounds (as may administrative actions). Secondary legislation, such as regulations and rules, may also be challenged on the basis that they are *ultra vires* or beyond the power under which they were made (see Brennan J's description of the ambit of judicial review of subordinate legislation in *South Australia v Tanner* (1989) 166 CLR 161 at 173). Although Australian courts have generally rejected attempts to review administrative acts or decisions on the ground of lack of proportionality, it is well-established that that head of review is available to challenge the validity of subordinate legislation.

Most domestic administrative actions or decisions are amenable to judicial review in Australia, particularly if they are made in the exercise of a legislative power (somewhat different and complex issues arise if an administrative decision is made in the exercise of a non-legislative power, as to which see further below). At the Commonwealth level, judicial review of administrative action may be either constitutional or statutory in its source. In the former case, judicial review is confined to jurisdictional error or error of law on the face of the record. What constitutes jurisdictional error is a fertile source of litigation. Recent Australian jurisprudence counsels against adopting a formulaic approach to the question which merely seeks

[3] See generally in the context of administrative actions, Campbell, E. and Groves, M. 2006. Enforcement of administrative determinations. In *Australian Journal of Administrative Law*, 2006, Vol. 13, No. 3, pp. 121–134.

to rely on well-established individual heads of judicial review or other formulas or categories (see *Kirk v Industrial Relations Court of New South Wales* (2010) 239 CLR 531 at [64] and [71–73] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ and *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [77] and [98] per Robertson J). The current emphasis is very much on a close and careful examination of the subject matter, scope and purpose of the statutory basis for the making of a particular administrative decision with a view to identifying whether an alleged error in the making of that decision involves jurisdictional error and therefore produces invalidity.

Judicial review of Federal administrative action may also be sought under the *Administrative Decisions* (*Judicial Review*) *Act 1977* (Cth) (the ADJR Act) (many Australian states or territories have similar systems of statutory judicial review alongside their traditional common-law judicial review systems). The ADJR Act identifies the various heads of judicial review under which administrative decisions or conduct may be challenged. They include procedural unfairness, exercising a power for an improper purpose, failing to take into account relevant considerations and taking into account irrelevant considerations or unreasonableness. The ambit of judicial review under the ADJR Act is not confined to either jurisdictional error or error of law on the face of the record. Significantly, however, this statutory judicial review jurisdiction is generally confined to review of decisions of an administrative character made under an enactment (or conduct related thereto). This jurisdictional limitation has given rise to a vast body of case law directed to three primary issues. First, what is a "decision". Secondly, whether a decision has an administrative character as opposed to a judicial or legislative character. Thirdly, whether a decision which has an administrative character was made under an enactment.

As to the first of those issues, it is now generally accepted that action only constitutes a decision for the purposes of the ADJR Act if it is an ultimate or operative determination of an issue (or is an intermediate decision made under a specific statutory provision), as distinct from the determination of issues arising in the course of making such an ultimate decision (see *Australian Broadcasting Tribunal v Bond* (1990) 171 CLR 321).

As to the second issue, which focuses on the classification of functions, it is evident that the categories overlap and the characterisation of any particular decision as legislative, judicial or administrative turns substantially on the context in which the issue arises (see *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573 and *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582). The following factors may be relevant to characterisation:

(a) legislative decisions determine the content of rules in general and are usually prospective in application, whereas administrative decisions apply rules to particular cases;
(b) Parliamentary control of the relevant decision (as in a power of disallowance) is indicative of it having a legislative character;
(c) a requirement of broad public consultation indicates that the decision is one of a legislative rather than an administrative character;

(d) provision for review of the decision on the merits, such as by the Federal Administrative Appeals Tribunal (the AAT), is indicative of an administrative decision; and
(e) the fact that a decision has a binding legal effect also suggests that it is legislative.

For completeness, it might also be noted that many Commonwealth administrative decisions may also be amenable to merits review by the AAT. Under the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) the AAT conducts a merits review (i.e. not confined to a consideration of the legality of an administrative decision) of a wide range of Commonwealth administrative decisions. Such review involves the AAT stepping into the shoes of the primary decision-maker and deciding on the basis of all the material which is placed before it what is the correct or preferable decision. The AAT's jurisdiction is not at large in the sense of applying to every Commonwealth administrative decision. It only has jurisdiction to review statutory administrative or executive decisions which the Commonwealth Parliament has determined by legislation to bring within its jurisdiction.

An issue which is bound to receive closer attention in Australian administrative law is the extent to which the courts can review administrative action taken in the exercise of non-statutory powers. Although that issue has arisen in some cases, the current legal position in Australia is not settled. The leading decision currently is that of the Full Court of the Federal Court in *Minister for Arts*, *Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218 where judicial review was sought of the Federal Cabinet's consideration of whether or not to nominate a national park (in which the applicant had mining and exploration rights) for inclusion in the World Heritage List. The company wished to argue that it had been denied procedural fairness in the processes leading up to Cabinet's decision. Two of the three judgments of the Full Court expressed serious reservations on the grounds of non-justiciability about Cabinet decision-making ever being susceptible to judicial review. Wilcox J also suggested that even if a matter was justiciable, judicial review might be inappropriate in a particular case where, for example, issues of national security or international relations were prominent.

In other contexts, judicial review of non-statutory administrative action has been held to be available. An example is the decision of the Full Court of the Victorian Supreme Court in *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, where the Court held that judicial review was available in respect of a non-statutory blacklist of allegedly corrupt builders which had been collected and maintained by a Victorian government agency. The Court held that procedural fairness was owed and had been denied to builders whose names appeared on the blacklist.

There is little jurisprudence in Australia on the specific issue of what is a "foreign administrative act". Presumably that is because the issue is only likely to arise in particular legal contexts, such as the meaning of that or a similar phrase in a statute, regulation or treaty. The resolution of the question will ultimately turn on the proper construction of the relevant legal instrument. For example, the identification or enforcement of a foreign administrative act or decision may arise in the context of a bilateral agreement between Australia and a partner country on social security benefits (see below). The issue may also arise under the *Extradition Act*

1988 (Cth). Under that legislation, the process of extraditing a person from Australia is commenced by an extradition country invoking the powers of a magistrate under s 12 and of the Attorney-General under s 16. Those processes will normally involve the requesting extradition country providing supporting documentation which specifies particulars of the offences alleged and the proceedings taken in respect of them in the extradition country. It appears that the normal practice is for such supporting documentation to be certified by the Australian Embassy in the extradition country (see, for example, *Director of Public Prosecutions v Kainhofer* (1995) 185 CLR 528).

Similar issues have arisen in the context of legislation and treaties relating to mutual assistance in criminal matters, as is illustrated by the decision of the Full Court of the Federal Court in *Dunn v Australian Crime Commission* (2009) 174 FCR 336. A delegate of the Commonwealth Attorney-General made a request to Switzerland for assistance and information in relation to an extensive investigation in Australia into the conduct of certain persons suspected of having committed serious offences against Australia's taxation laws. The request was made under the *Mutual Assistance in Criminal Matters Act 1987* (Cth), the *Mutual Assistance in Criminal Matters* (*Switzerland*) *Regulations 1994* (Cth) and the *Treaty between Australia and Switzerland on Mutual Assistance in Criminal Matters 1991*, signed 25 November 1991, [1994] ATS 7 (entered into force 31 July 1994) (MACM Treaty). The regulations provided that the Act applied subject to the MACM Treaty. The MACM Treaty provided that a request for assistance had to include a description of the essential acts or omissions alleged or sought to be ascertained. There was also a discretion under the MACM Treaty to refuse assistance if the request concerned a fiscal offence. Mr Dunn brought judicial review proceedings challenging the validity of Australia's request. His argument that the request insufficiently identified the suspected offences and did not contain an adequate description of the essential acts or omissions alleged or sought to be ascertained failed at first instance and also on appeal. It is notable that the proceedings focused on the lawfulness of the steps taken in Australia to enlist Switzerland's assistance. In rejecting the appeal, the Full Court emphasised at [53] that the question whether there was compliance with the treaty was to be determined as a matter of substance and not mere form.

Before dealing at greater length with the recognition of foreign administrative acts generally it is convenient to pause and briefly discuss what might be described as a narrow and special sub-category of foreign administrative acts, namely those which involve high level acts of state and, under Australian law, may attract what is known as the "act of state doctrine".

Act of State Doctrine in Australian Law

The act of state doctrine has been developed and applied in many common law countries as a means of dealing with the issue of the interaction between the actions of a foreign state and domestic legal proceedings. The doctrine is said to

be founded upon the fundamental principles of the separation of powers, state sovereignty and the comity of nations. The doctrine is discussed at some length by the Full Court of the Federal Court in *Habib v Commonwealth* (2010) 183 FCR 62 (Habib). The doctrine has a long history. It was recognised many years ago in the Supreme Court of the United States in *Underhill v Hernandez* 168 US 250 (1897), where Fuller CJ said:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The effect of the doctrine is that, where it applies, Australian courts will not examine the legality of certain acts performed overseas by a foreign state in the exercise of sovereign authority. At the heart of the doctrine lies a recognition that certain high level matters of foreign affairs are not justiciable.

In *Habib*, the Commonwealth argued that the Court should dismiss a major part of a civil case brought by the applicant against the Commonwealth. The applicant was a dual Australian-Egyptian citizen. He alleged that during October 2001 he was arrested in Pakistan by the Pakistani government with the assistance of US agents. He claimed that during his detention he was repeatedly tortured and that one or more Australian officials were involved in his interrogations in Pakistan. He alleged that the presence of Australian officials constituted the torts of misfeasance in public office and the intentional infliction of harm by aiding and abetting his torture. He sought damages.

The Commonwealth argued that Mr Habib's case should be struck out because its resolution in his favour would require the Court to find that the acts of agents of foreign states outside Australia were illegal. This was said to be contrary to the act of state doctrine. In rejecting the Commonwealth's argument, the Full Court was agreed that the common law doctrine could not operate to bar the determination by the Court of the question whether Australian officials had acted beyond the lawful scope of the Commonwealth's executive power. In addition, Jagot J (with whom Black CJ agreed) stated that the doctrine did not apply in the particular circumstances of the case. Her Honour drew attention to the significance of the fact that torture was contrary to international law and that any concern for the sensibilities of Australia's military partners needed to be weighed against those partners being signatories to a Convention against torture. It was also significant that the claim was brought by an Australian against Australian officials and, while findings of fact concerning foreign officials may need to be made, none of those officials would be subject to Australian jurisdiction involuntarily. Another relevant consideration was that the alleged actions could not be justified by any foreign government on the basis that they were in the public interest. That suggests that the Court recognised that there is an exemption to the act of state doctrine where there is an allegation that clear international law rules have been violated. In effect, there is a public policy or public interest exemption to the doctrine.

Enforcement of Domestic and Administrative Acts in Australia

Enforcement of an administrative act or decision in Australia normally requires judicial involvement and the obtaining of appropriate relief, which may involve the giving of a sanction for non-compliance with the administrative decision or the making of a court order which compels compliance.[4] However, there are various areas where compliance with an administrative act can be achieved through the issuance of administrative penalties, known as infringement notices. An infringement notice is a pecuniary penalty that is issued by the administrative authority which must be paid by the person to whom it is issued, usually within 28 days.[5] The amount of the penalty is dependent upon the particular infringing conduct[6] and the statute under which the infringement notice is issued. These penalties are significantly lower than the penalties under court processes. In some schemes the infringement notice is 80 % lower than the maximum penalty.[7]

Under the *Competition and Consumer Act 2010* (Cth), if the regulator (the Australian Competition and Consumer Commission) has reasonable grounds to believe that a person has infringed certain provisions of that Act, the Commission may issue an infringement notice.[8] Conduct which attracts an infringement notice under that Act includes engaging in unconscionable conduct, engaging in unfair practices and prohibited consumer transactions.[9] Notably, it does not include more complex matters related to market manipulation, such as cartel behaviour, the enforcement of which must involve court proceedings.

A person can make written representations to the regulator to have an infringement notice withdrawn.[10] Failing to pay an infringement notice can result in the regulator choosing to prosecute the alleged prohibited conduct in court.[11]

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[4] See generally, Campbell and Groves, above n 3; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

[5] See, e.g., *Competition and Consumer Act 2010* (Cth) s 134F.

[6] See, e.g., *Competition and Consumer Act 2010* (Cth) s 134C.

[7] *Clean Energy Act 2011* (Cth) s 267.

[8] *Competition and Consumer Act 2010* (Cth) s 134A(1). Infringement notices may only be issued in relation to offences under the *Australian Consumer Law*, which is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

[9] *Competition and Consumer Act 2010* (Cth) s 134A(2).

[10] Ibid s 134G.

[11] Ibid s 134E.

Infringement notices are available under a number of Australian regulatory schemes, both Federal and State, including telecommunications,[12] companies,[13] and energy and climate change schemes.[14]

In addition to infringement notices, some Australian regulators also achieve compliance with administrative acts outside the courts through the proferring of voluntary undertakings from the person who is in contravention. A regulator cannot compel the giving of an undertaking as a punitive measure. Under various legislative schemes a regulator can accept a written undertaking from a person that the person will undertake certain actions or refrain from undertaking certain actions to comply with legislative requirements. If the undertaking is not complied with, the regulator can apply to a court for appropriate relief. In these circumstances the regulator does not need to show that the person failed to comply with the substantive provisions of the Act, it need only show that the undertaking has not been honoured.

General Considerations on Taking Administrative Action in Australia

There is no general Administrative Procedure Act in Australia as there is, for example, in the United States. Hence there is no general statute which prescribes detailed procedures for the making of all administrative decisions. There are, however, common law and statutory requirements which apply to the making of particular administrative decisions. Probably the most important of those requirements relates to procedural fairness, which is sometimes referred to as natural justice. It has two elements. First, there is the hearing rule. In a leading case in the High Court, *Kioa v West* (1985) 159 CLR 550 at 584, Sir Anthony Mason stated that the law had developed in Australia to a point where it could be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. That does not mean, however, that the contents of procedural fairness are the same in every case. Rather, they fluctuate according to a range of matters which include, where relevant, the statutory context in which the issue arises, the stage of administrative decision-making involved, the nature of the rights and interests affected, the nature

[12] *Do Not Call Register Act 2006* (Cth) Sch 3; *Spam Act 2003* (Cth) Sch 3; *Telecommunications Act 1997* (Cth) s 572E; *Broadcasting Services Act 1992* (Cth) s 205Y.

[13] *Australian Securities and Investments Commission Act 2001* (Cth) s 12GXA; *Corporations Act 2001* (Cth) s 1317DAC.

[14] *Clean Energy Act 2011* (Cth) s 265; *National Electricity* (*NSW*) *Law No 20a* s 74 as applied by the *National Electricity* (*New South Wales*) *Act 1997* (NSW); *National Gas* (*NSW*) *Law No 31a* s 277 as applied by the *National Gas* (*New South Wales*) *Act 2008* (NSW); *National Greenhouse and Energy Reporting Act 2007* (Cth) s 39.

of the administrative functions etc. In *National Companies and Securities Commission v The News Corporation Limited* (1984) 156 CLR 296 at 326, Brennan J said:

> The terms of the statute which creates the function, the nature of the function and the administrative framework in which the statute requires the function to be performed are material factors in determining what must be done to satisfy the requirements of natural justice.

Thus a wide range of factors may need to be taken into account in determining what practical steps are required to satisfy procedural fairness in a particular case. Those practical steps include such matters as the timing, service and content of any prior notice or allegation which needs to be given before an adverse administrative decision is made; whether or not the person potentially affected is entitled to an oral hearing as opposed to a hearing on the papers; whether or not there is an obligation to disclose copies of documentary materials to be considered or whether it is sufficient to provide a summary; whether there is a right to cross-examine witnesses; whether a hearing is to be conducted in private or in public and whether there is a right to legal representation.

Given the uncertainty which can be presented by the operation of the common law principles of procedural fairness, especially in determining the content of procedural fairness in a particular case, it is unsurprising that it has been seen as desirable to specify the necessary practical steps in primary or secondary legislation. Indeed, in some areas, the legislature has gone to some lengths to indicate that the procedural requirements set out in legislation are exhaustive and leave no room for supplementation or modification by common law creativity. That is well illustrated by the history of the attempts in Australia's migration legislation to displace common law procedural fairness principles with a statutory code of procedural requirements. For example, detailed amendments were made to Australia's *Migration Act 1958* (Cth) (*Migration Act*) in 1992 with the stated intention of creating an exhaustive procedural code for determining asylum seeker applications. The explanatory memorandum to those amendments expressly stated that it was intended to "replace the codified principles of natural justice with clear and fixed procedures". In *Re Minister for Immigration and Multicultural Affairs*; *ex parte Miah* (2001) 206 CLR 57 the High Court held that the Parliament had not manifested a sufficiently clear intention to exclude procedural fairness.

The other limb of procedural fairness relates to bias. The Australian test for bias as it applies to administrative decision-makers exercising public power is whether, having regard to all relevant circumstances, a fair-minded and informed member of the public might entertain a reasonable apprehension that a decision-maker may lack impartiality (see, for example, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337).[15] Australian courts have recognised that the test for bias is flexible and takes into account such matters, for example, as the role and function of the particular decision-maker. So in *Minister for Immigration and Multicultural*

[15] See generally, Griffiths, J. 2010. Apprehended Bias in Australian Administrative Law. In *Federal Law Review*, 2010, Vol. 38, p. 353.

Affairs; *ex parte Jia* (2001) 205 CLR 507, the High Court held that the rules against bias had to accommodate the political environment in which a Minister operated. By a majority the Court held that statements made by the Minister in a radio interview about the law governing character requirements in these decisions and explaining his own views on how these requirements should operate did not indicate pre-judgement on his part so as to disqualify him from determining a particular visa application.

If further illustration is required to demonstrate how the bias principles as they apply to administrative decision-makers operate very differently to the principles governing judicial officers, it is to be found in another High Court decision, *Re Minister for Immigration and Multicultural Affairs*; *ex parte Epeabaka* (2001) 206 CLR 128. In that case, a member of Australia's Refugee Review Tribunal kept a personal website which included frank and candid comments about the Tribunal's operation, his duties and the applicants who appeared before the Tribunal. The High Court held that the information did not give rise to a reasonable apprehension of bias.

Procedural Requirements in Making Subordinate Legislation

As a general statement, Australian law rarely recognises any non-statutory obligation to consult in the making of subordinate legislation (see, for example, *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404). Although Australia does not have a general statute which details procedures applying to the making of administrative decisions, it does have legislation which applies at both a Federal and state level relating to public consultation in the making of subordinate legislative instruments.[16] For example, the *Legislative Instruments Act 2003* (Cth) (the LIA) applies to all Federal instruments made in the exercise of the power delegated by the Parliament that are of "a legislative character". The difficulty of classifying functions as legislative, administrative or judicial was alluded to above. Section 5 of the LIA seeks to overcome that difficulty by providing its own definition of "legislative character", which focuses on whether an instrument determines the law or alters the content of the law, as opposed to applying the law in a particular case; as well as asking whether the instrument has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right or varying or removing an obligation or right.

Part 3 of the LIA also contains provisions requiring public consultation in the making of subordinate legislation. Where the person creating the subordinate legislation considers that the proposed legislative instrument is likely to have a direct, or substantial indirect, effect on business, or restrict competition then the person creating the subordinate legislation must be satisfied that any appropriate

[16] At a state level, see, e.g., *Subordinate Legislation Act 1989* (NSW); *Statutory Instruments Act 1992* (Qld) and *Subordinate Legislation Act 1992* (Tas).

consultation that is reasonably practicable has been undertaken.[17] Making the determination that sufficient consultation has occurred can include considering whether the consultation drew upon expert knowledge and whether the consultation ensured that those likely to be affected by the subordinate legislation had an adequate opportunity to comment on its content.[18] It is significant to note, however, that the LIA expressly provides that non-compliance with public consultation requirements does not affect the validity or enforceability of the relevant instrument.[19] The requirements are therefore merely aspirational.

In many particular areas of administrative decision-making there are subject-specific statutes or regulations which prescribe relevant procedures. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) creates a number of mandatory consultation processes, not only with the public and interested parties but also with representatives of state governments. For example, before the Minister can declare a property to be a World Heritage property,[20] designate a property as a wetland,[21] create a civil penalty,[22] and suspend a bilateral, or multilateral environment protection agreement,[23] there must be consultation with the appropriate Minister of the relevant State and a reasonable opportunity must be given to him or her to comment on the proposal. Consultation with members of the public is also normally required. Before the Minister can designate that a particular action is a "controlled action", which is an action which would be prohibited without specific approval,[24] he or she must seek public comment which must then be taken into account when reaching a decision.[25] In relation to threatened species, the Minister must ensure that there is an approved form of conservation advice in relation to each species of flora and fauna. Furthermore, before approving a document as approved conservation advice, the Minister must consult with the scientific committee which is set up under the Act.[26]

Some of Australia's mutual recognition arrangements also impose procedural requirements, including obligations to consult with partner jurisdictions on particular matters. For example, under the *Trans-Tasman Mutual Recognition Act 1997* (Cth) (TTMRA) the exclusions listed in Schedule 1 (customs controls and tariffs, intellectual property, taxation and business franchises and the implementation of international obligations) cannot be amended unless all participating jurisdictions have been consulted and have endorsed the amendment (s 44). Similar obligations apply to amendments to the list of permanent exemptions in Schedule 2 (s 45).

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[17] *Legislative Instruments Act 2003* (Cth) s 17(1).

[18] Ibid s 17(2).

[19] Ibid s 19.

[20] *Environment Protection and Biodiversity Conservation Act 1998* (Cth) s 14(2).

[21] Ibid s 17A(2).

[22] Ibid s 25(3).

[23] Ibid s 58.

[24] Ibid s 67.

[25] Ibid ss 74(3), 75(1A).

[26] Ibid s 266B.

Under the *Agreement on Mutual Recognition in Relation to Conformity Assessment, Certificates and Markings between Australia and the EU* (see further below), procedural matters have generally been left to a joint committee made up by representatives of the two parties. The joint committee is responsible for such matters as amending the sectoral annexes and for exchanging information in relation to the operation of the agreement.

Specific provision is also made under some Australian statutes for foreign public administrations to participate in Australian court proceedings. As noted above, for example, the *Extradition Act 1988* (Cth) provides for a foreign state to make an application in a particular statutory form to have a magistrate issue an arrest warrant for a particular person and to make a request to the Attorney-General for a person to be extradited.

Provision is made under both rules of court and the *Foreign Evidence Act 1994* (Cth) (*Foreign Evidence Act*) for evidence to be taken overseas for the purposes of Australian court proceedings. There is no comparable across the board provision for the taking of evidence overseas for the purposes of administrative decision-making. However, specific provision is made for that to occur in particular areas. For example, Part 7 of the *Migration Act* contains provisions which permit the Refugee Review Tribunal to take evidence on oath or affirmation overseas in the course of determining an application to review an adverse asylum seeker decision (s 428(2)).

Extradition Between Australia's States

Due to the division of responsibilities between the State and Federal governments in Australia, as well as the independent nature of the States, the criminal law systems of each jurisdiction are independent. If a crime is committed in one State it does not mean that a person can be charged, tried and incarcerated in another State for that offence. However, the process of domestic extradition has been significantly simplified by Commonwealth legislation, namely the *Service and Execution of Process Act 1992* (Cth) (SEPA). Once an arrest warrant has been issued a person can be arrested by any member of any State's police.[27] After arrest, the warrant must be produced before a magistrate in the same state where the arrest occurred, who must order that the person either be taken to where the warrant was issued, or released on bail to go to that place, unless the magistrate is satisfied that the warrant is invalid.[28] The magistrate's decision is reviewable in the Supreme Court of the relevant State or Territory and is in the nature of a rehearing.[29]

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[27] *Service and Execution of Process Act 1992* (Cth) s 82.

[28] Ibid s 83.

[29] Ibid s 86. It should be noted that there is some controversy regarding both the scope of such a review as well as the concept of "validity", see, e.g., *Rogers v Chief Commissioner of Victorian Police* (2012) 263 FLR 478; [2012] VSC 305 (Pagone J). See generally Campbell and Groves, above n 3.

The SEPA also deals with the service of process and subpoenas in both civil and criminal legal proceedings, as well as similar matters in the context of adjudication by administrative tribunals.

The Service of Administrative Acts

There is no general law in Australia governing the "service" of administrative decisions. Some individual statutory regimes specifically provide for notification of particular administrative decisions. A good example is to be found in Part 7 of the *Migration Act* which contains detailed provisions relating to matters such as the methods by which decisions of the Refugee Review Tribunal or other relevant documents can be provided to a visa applicant. Those methods include service by hand to the applicant personally, handing a document to another person at the applicant's last residential or business address, dispatch by prepaid post or transmission by fax, e-mail or other electronic means (see s 441A). The legislation goes on to provide that if a document is served by one of the specified methods, it is deemed to have been received. Such certainty is important, not the least because it impacts upon the time periods within which review rights must be exercised.

The need for certainty is also evident in other aspects of Australia's migration laws, including the need for certainty in fixing the time when a valid application for a visa has been made. For example, a person's eligibility to be considered for a particular type of visa can depend upon whether at the time the application is made the person also holds another visa. The practical difficulties which can emerge are well illustrated by a recent decision of the Full Court of the Federal Court in *Chen v Minister for Immigration and Border Protection* (2013) 216 FCR 241; [2013] FCAFC 133. In that case, the applicant's eligibility for a particular business skills visa depended upon her also holding another current visa at the time her application was made. The relevant regulation applying to the particular visa required that an application be made at an office of Immigration. A booklet published by the Department advised applicants that they must lodge their applications for the particular visa either by posting the application to a specified post office box or by courier to the street address of the Department in Adelaide. The applicant, through her agent, posted her application by express post on 18 December 2012 to the nominated post office box. The application was delivered to that box the following morning (i.e. 19 December 2012) but was not collected by the Department until the following day. The applicant's existing visa expired on 19 December 2012, meaning that she no longer held a current visa on 20 December 2012. The Department took the view that the application was not valid because it had not been made at an office of Immigration on 19 December 2012 in circumstances where the Department maintained that its nominated post office box was not part of its office. Although that argument was successful at first instance, it was reversed on appeal.

Recognition and Enforcement of Foreign Court Judgments

The recognition and enforcement of foreign court judgments in Australia is dealt with under the *Foreign Judgments Act 1991* (Cth) (*Foreign Judgments Act*).[30] The *Foreign Judgments Act* applies to superior courts and specified inferior courts of various countries who are listed in a schedule to the *Foreign Judgments Regulations 1992* (Cth). There are currently 36 countries so listed.[31] The *Foreign Judgments Act* draws a distinction between money and non-money judgments. In the case of an enforceable money judgment, the judgment must be final and conclusive and given by a superior or inferior court of a listed country to be eligible for registration. Once a foreign judgment is properly registered by the Federal Court or a Supreme Court of a State or Territory in Australia, the foreign judgment has the same force and effect for the purposes of execution of process as though it were a judgment of an Australian court. There is no equivalent legislation in Australia dealing across the board with the recognition and enforcement of foreign administrative acts.

There are also Federal Court Rules which deal with the procedure for seeking registration of a foreign judgment in that Court. The originating application seeking registration must be accompanied by a copy of the judgment which is certified by the original court and, if appropriate, by a translation into English which is authenticated by an affidavit. Provisions dealing with the reciprocal enforcement of judgments are also set out in Part 2 of the *Foreign Judgments Act*, which also specifies the grounds on which a registered foreign judgment may be set aside. They include that the judgment has been wholly satisfied, was obtained by fraud, has been reversed on appeal, was registered in contravention of the *Foreign Judgments Act* or that the foreign court had no jurisdiction. A register of registered judgments is maintained by the Registrar of the relevant Australian Court.

The Federal Court Rules also contain detailed provisions concerning the service overseas of Australian court documents. An originating application in respect of Australian proceedings can only be served on a person in a foreign country if the Court has granted leave. A person may apply for such leave in accordance with a relevant convention[32] or the law of a foreign country. Leave to serve an originating application overseas will only be given if the Court is satisfied that it has jurisdiction in the proceedings, that the proceedings are of a kind specified in r 10.42 (which sets

[30] See also, the *Cross-Border Insolvency Act 2008* (Cth) which adopts into Australian law the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, which contains extensive provisions dealing with the recognition of foreign judicial or administrative proceedings relating to insolvency. The Model Law is generally regarded as reflecting a universalist approach, however it is essentially procedural in nature.

[31] See generally Allsop, J. and Ward, D. 2013. *Incoherence in Australian Private International Laws*, unpublished paper delivered at Sydney Centre for International Law Conference, Sydney Law School, Australia, 10 April 2013.

[32] See, e.g., *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, opened for signature 15 November 1965, [2010] ATS 23 (general entry into force 10 February 1969, entry into force in Australia 1 November 2010).

out proceedings such as those based on a cause of action arising in Australia, breach of a contract in Australia, a tort committed in Australia etc.), and that the moving party must demonstrate that it has a prima facie case for all or any of the relief claimed in the proceedings.

As noted above, the taking of evidence overseas is dealt with in the *Foreign Evidence Act*. Under s 7 of that Act, a superior court may, if it appears in the interests of justice to do so, on an application of a party to the proceedings make an order relating to a person outside Australia giving evidence before a judge of the Court or an appointed officer.

The Federal Court Rules also contain provisions relating to the taking of evidence on commission overseas (see Pt 29, Div 29.2). This rule could be used in a situation where a witness is outside Australia, is unwilling or unable to attend a court hearing in Australia and cannot be compelled to do so. If an order is made under s 7 of the *Foreign Evidence Act*, the Federal Court Rules contain provisions relating to the procedures which must be followed in order to obtain from the Registrar of the Court an appropriate letter of request. Express provision is made for relevant documents relating to the request to be translated if necessary (see r 29.12).

Recognition and Execution of Foreign Administrative Acts

Although there is no general or overarching law in Australia governing matters relating to the validity, efficacy and enforceability of foreign administrative acts, there are various particular statutory and non-statutory schemes dealing with mutual recognition under which these issues can arise. It is convenient to deal in this part of the paper with two important Australian statutory regimes relating to mutual recognition, namely the *Mutual Recognition Act 1992* (Cth) (*Mutual Recognition Act*) and the TTMRA. Both schemes relate to goods and occupations. Although there is no requirement under either scheme for a prior administrative exequatur in respect of goods, the position is different when it comes to occupations. It is also important to note that because both schemes have a statutory basis, the rights and obligations they create are enforceable in the courts. Provision is also made for specific decisions to be reviewed by independent administrative appeals tribunals. The limitations of a mutual recognition model in respect of occupations have resulted in recent moves to introduce in Australia a national licensing scheme for particular occupations which has the hallmarks of a uniformity of requirements model which I will discuss below.

I will also discuss below other mutual recognition arrangements to which Australia is a party as a result of non-statutory agreements, including treaties and conventions.

Mutual Recognition Act

Although this Commonwealth statute does not deal with the recognition of foreign administrative acts in terms of other sovereign countries, it has some relevance as it introduces the principle of mutual recognition within the legislative framework of the Australian Federation. By "mutual recognition" I mean an agreement between two or more participating jurisdictions to transfer regulatory authority from the jurisdiction where a transaction takes place to the jurisdiction from which a product, person or service originates (see K Nicolaidis, *Mutual Recognition of Regulatory Regimes*: *Some Lessons and Prospects*, in OECD 1996, Regulatory Reform and International Market Openness). The stated object of the *Mutual Recognition Act* is to introduce mutual recognition by the States and Territories of Australia of each other's differing regulatory standards regarding goods and occupations. This object is directed to ensuring the goal of freedom of movement of goods and labour in the Australian national market (noting also that s 92 of the Australian Constitution requires that trade, commerce and intercourse among the States shall "be absolutely free"). The national scheme is based on the Commonwealth statute as well as on statutes passed by the individual participating States and Territories.

As noted above, the scheme operates in respect of both goods and occupations. It applies to the sale of goods and to the registration of occupations. In contrast with the principle of mutual recognition in the EU, the Australian mutual recognition scheme does not currently extend to the manner of sale, transport, storage, handling, inspection, or usage of goods, or to the manner of delivery or provision of services. In contrast, mutual recognition in the EU extends to anything which restricts sale, as well as services. The Australian mutual recognition scheme is also to be contrasted with the Canadian scheme, where it is understood that mutual recognition is extended on a case-by-case basis. In Australia, all goods and registered occupations are subject to mutual recognition unless they are specifically excluded or exempted. The intention is that the Australian scheme be less administratively burdensome and avoid time-consuming negotiations.

As to goods, in broad terms, the Australian scheme operates so that, subject to certain exceptions and exemptions, goods produced in or imported into a State or Territory that may lawfully be sold in that State or Territory may also be sold in another State or Territory without having to comply with prescribed further requirements relating to sale under the laws of the second-mentioned State or Territory. Those further requirements include standards relating to the goods themselves (such as requirements relating to their production, competition, quality or performance) or the way the goods are presented (such as requirements relating to their packaging, labelling, date stamping or age). The scheme also has a range of permanent exemptions, such as firearms, gaming machines and endangered species.

The Australian scheme also applies to occupations. A person who is registered in one Australian State or Territory for an occupation is entitled to be registered in another State or Territory for an "equivalent occupation" (s 17). An important exception to the mutual recognition principle is set out in s 17(2) in that it does not

affect the operation of laws which regulate the manner of carrying on an occupation in the second State as long as the laws apply equally and are not based upon a need for qualifications or experience relating to fitness to carry on the occupation. The exemption of conduct requirements from the national scheme has been commented on by the Australian Productivity Commission (Productivity Commission), which has called for increased harmonisation in conduct requirements (see further below).

Section 20 of the *Mutual Recognition Act* provides that a person who lodges a written notice, in which they seek registration with the local registration authority of the second State, is entitled to be registered in the equivalent occupation as if the law of the second State expressly provided that registration in the first State is a sufficient ground of entitlement to registration. The local registration authority in the second State may impose conditions on registration but not conditions that are more onerous than would be imposed in similar circumstances having regard to relevant qualifications and experience if it were a registration being effected otherwise than under the *Mutual Recognition Act*.

A local registration authority may refuse a registration if it decides that the occupation in which registration is sought is not an equivalent occupation and equivalence cannot be achieved by the imposition of conditions. Any such refusal decision can be reviewed on its merits by the AAT. There have also been appeals from decisions refusing registration on the grounds that an applicant is not a fit and proper person to be registered (see, for example, *Agapis v Plumbers Licensing Board* [2013] AATA 187).

Despite the mutual recognition principle embedded in the Act, historically each State and Territory has maintained different licensing regimes. Accordingly, a licence holder who wants to move between jurisdictions is still required to apply for a licence and meet different non-skills requirements as well as pay a separate licence fee for the equivalent licences in any other jurisdiction in which the person wishes to work. There are also some circumstances in which the licence holder may be required to satisfy additional requirements which are not covered by mutual recognition. This can present particular difficulties for workers or businesses who operate in multiple jurisdictions in Australia because they must comply with different licensing and regulatory requirements. These concerns have led to the recent establishment of a national licensing system in Australia, the details of which I will describe below.

The operation and enforcement of the Commonwealth mutual recognition legislation as it applies to goods is illustrated by the Federal Court's decision in *Coca-Cola Amatil (Aust) Pty Ltd v Northern Territory of Australia* (2013) 215 FCR 377; [2013] FCA 154. That case involved the interaction between the *Mutual Recognition Act* and a container deposit and recycling scheme established by the Northern Territory which required wholesalers in the Territory to use recyclable or other approved material in beverage containers. The Northern Territory scheme also encouraged recycling by providing for refunds to be paid on the presentation of empty beverage containers at recycling centres and for information about the refund scheme to appear on the containers themselves. Several beverage wholesalers challenged the Northern Territory legislation on the basis that it conflicted with the

Mutual Recognition Act. They argued that their beverage containers could lawfully be sold in other Australian States without compliance with requirements such as those imposed by the Northern Territory's scheme and that the mutual recognition principle was therefore engaged. They sought to enforce the mutual recognition principle as enshrined in the *Mutual Recognition Act*. The action was successful. The Court rejected the Northern Territory's argument that its recycling scheme was covered by exceptions in the *Mutual Recognition Act* relating to the regulation of the manner of sale of goods (s 11(2)) or the handling of containers (s 11(3)). The Court granted declaratory relief.

TTMRA

The *Mutual Recognition Act* provided a broad model for the mutual recognition agreement between Australia and New Zealand in the subsequently enacted TTMRA. New Zealand has enacted reciprocal legislation (and each of the participating Australian States has also each passed legislation adopting the Commonwealth Act). The Trans-Tasman mutual recognition scheme also applies to both the sale of goods and the registration of occupations and has similar provisions to the *Mutual Recognition Act*. It also provides various exceptions and permanent or special exemptions. There are four broad areas which are excluded from the TTMRA: customs controls and tariffs; intellectual property; taxation and specified international obligations. Permanent exemptions relate to such areas as pornographic material, gaming, quarantine laws and container deposit legislation. The permanent exemptions are based on a belief that an individual jurisdiction's sovereignty should prevail over mutual recognition in respect of matters of public standards of decency, environmental protection and giving precedence to the preferences of local citizens.

A special exemption under the TTMRA is also made in the case of various goods, including road vehicles (the other special exemptions relate to hazardous substances, industrial chemicals and dangerous goods, gas appliances, radiocommunications devices and therapeutic goods). That is because the two countries hold different positions on the acceptability of standards set by other countries affecting road vehicles. All vehicles manufactured or imported into Australia have to be assessed for conformity with Australian Design Rules (ADRs) (which in particular instances accept compliance with overseas standards, including some European Standards). In contrast, New Zealand considers that the standards set by certain specified countries satisfactorily safeguard vehicle safety, which relieves New Zealand of the need to have its own separate standards.

The Supreme Court of New South Wales recently dealt with the operation of the ADRs (and related Commonwealth and State legislation dealing with vehicle registration) and their interaction with relevant European Standards in *Exclusive Imports Pty Ltd v Roads and Traffic Authority of NSW* [2009] NSWSC 603 in the context of the registration in New South Wales of German-manufactured Burstner caravans. The local regulator had refused to register the imported caravans on the basis that

their gas cylinders did not comply with State regulations dealing with gas installations. The Court held that such compliance was unnecessary because eligibility for registration simply depended upon compliance with the ADRs and, under the ADRs, the European Standard (EN 1949) applied. The case did not involve the TTMRA.

As to mutual recognition applying to occupations, like the national mutual recognition scheme, the TTMRA is predicated on the notion that the regulatory requirements of one jurisdiction meet community expectations and should be acceptable in another jurisdiction insofar as the right to be registered to carry on an occupation is concerned. Thus no administrative exequatur is required. By the same token, however, neither scheme interferes with a jurisdiction's capacity to regulate the conduct of an occupation post registration according to its own laws. Accordingly, applicants who obtain registration for their occupation under either scheme must still comply with any requirements in the second jurisdiction with regard to such matters as insurance, fidelity funds, trust accounts and discipline. Only one registered occupation is not covered by the TTMRA, namely medical practitioners.

In common with the *Mutual Recognition Act*, decisions made under the TTMRA are able to be reviewed by the AAT in Australia (and by the Trans-Tasman Occupations Tribunal in New Zealand). Judicial review is also available in an appropriate case to ensure that the participating jurisdictions comply.

Both the Commonwealth and Trans-Tasman mutual recognition schemes have periodically been evaluated by the Productivity Commission. Some individual States have also conducted their own reviews of the Trans-Tasman scheme (for example, Western Australia published its review of that scheme in June 2012). The first review conducted by the Productivity Commission resulted in a report dated 8 October 2003. In broad terms it found that both schemes had been effective in achieving their objectives of assisting the integration of the Australian and New Zealand economies and promoting competitiveness. The Productivity Commission conducted a further review 5 years later which resulted in another report in 2009. It found that both schemes had increased the mobility of goods and labour around Australia and across the Tasman Sea. Mutual recognition had led to lower regulatory compliance costs for firms in the goods industry. The Productivity Commission also found that increased labour mobility and reduced wage dispersion had occurred which was consistent with the expected effects of mutual recognition of occupational registration.

The Productivity Commission also concluded that the schemes were less effective on the occupations side than on the goods side. This was attributed to differences in occupational standards between jurisdictions and a concern that deficient standards could produce harm. The Productivity Commission noted that conduct requirements can act as a greater impediment to the mobility of service providers than having to re-register and obtain a second occupational licence in the other jurisdiction. The Productivity Commission also noted that, while it had expressed reservations in its 2003 report about the benefits of mutual recognition of conduct requirements, the question ultimately turned on which level of government is best placed to regulate such activities. The Productivity Commission seems to favour a

case-by-case assessment of the issue. Some progress has been made in harmonising conduct requirements through a working group of Ministers working under the auspices of the Consumer Affairs Forum Conduct Harmonisation Project. The Productivity Commission recommended in 2009 that allowing ongoing professional development and criminal record checks for mutual recognition registrants, which already applied to local registrants, would mitigate some of the risks created by inter-jurisdictional differences in standards. On the goods side, the Productivity Commission also recommended that a range of goods which were currently exempt ought to be brought within the coverage of the schemes.

A substantial part of the Productivity Commission's 2009 report examined overseas models of mutual recognition with a view to identifying potential improvements for Australia. The report contained an extensive analysis of the operation of mutual recognition arrangements in Europe, Canada and the Asia Pacific Economic Cooperation (APEC) region. Specific reference was made to EU mutual recognition arrangements and in particular to the capacity of member states to continue to impose national product requirements as long as they meet particular criteria (non-discrimination, a legitimate regulatory objective, proportionality to that objective and not necessarily trade restrictive). It was also noted that, in contrast with the Commonwealth and Trans-Tasman schemes, the European model includes a form of mutual recognition of services.

The 2009 report also addressed various models which are available to deal with regulation of goods and occupations across national or international borders. It described the attractions of mutual recognition of regulatory requirements as cost-related because such a model normally involves less negotiating and administrative costs on regulators and stakeholders. In circumstances where existing regulatory requirements are capable of meeting the objectives of regulation, including protecting the public or the environment, jurisdictions may prefer to agree mutually to recognise compliance with each other's regulatory requirements in order to lower the costs associated with mobility and transactions across their borders. Moreover, under this model, while regulatory outcomes are maintained, a degree of jurisdictional independence is also preserved.

The Productivity Commission also discussed other models. One such model is based on the harmonisation of requirements and involves aligning different requirements within participating jurisdictions. One of its attractions was said to be the greater certainty such a model could produce for stakeholders. On the other hand, difficulties could arise where regulatory requirements of the individual participating jurisdictions are far apart and the costs of negotiating alignment might be high. Attention was also drawn to the fact that harmonisation could produce regulatory requirements which are more burdensome for some stakeholders than the pre-existing position.

As to a model based on uniformity of requirements involving a single standard applying across all jurisdictions, the Productivity Commission commented that such a model would remove any doubt concerning the quality of goods or practitioners from other jurisdictions which is likely to promote trade and labour mobility. But it recognised that implementing such a model could involve high negotiating

costs and could also be handicapped if one or more relevant jurisdictions declined to cooperate (as is the case at present with attempts to harmonise Australia's occupational health and safety laws, which are being resisted by both Victoria and Western Australia). An additional problem is that a uniform requirement may not be readily achievable in all participating jurisdictions. While acknowledging these difficulties, the Productivity Commission supported the introduction of a national licensing scheme for occupations in order to promote labour mobility. It saw one of the advantages of a national licensing system as removing differences in standards which are the source of friction under a mutual recognition regime.

Australia's National Occupational Licensing Law

In 2008, the Council of Australian Governments (COAG) agreed to implement regulation and competition reforms under the banner of a "National Partnership Agreement to Deliver a Seamless National Economy". Under this agreement, 36 separate reforms were identified, comprising 27 deregulation priorities, 8 areas of competition reform and reform to regulation making and review processes. In July 2008, COAG agreed to introduce a national occupational licensing scheme as part of the program aimed at increasing Australia's productivity. This led to the enactment of a national law in 2010 (National Law) (see, e.g. the *Occupational Licensing National Law Act 2010* (Vic)) which, to date, has been adopted by all Australian States and Territories apart from Western Australia and the Australian Capital Territory. The new scheme was to be fully operational in 2014, but was recently abandoned. Initially, it would only have applied to certain occupations, namely those relating to the property (e.g. real estate agents and property managers), electrical, plumbing and gas fitting, air-conditioning and refrigeration sectors.

The proposed scheme was intended to overcome some of the limitations of the mutual recognition regime under the *Mutual Recognition Act* as it applied to occupations. The objective was to develop a national occupation licensing system, remove inconsistencies across State and Territory borders and facilitate a more mobile workforce within Australia. A national licence would have been available for persons practising in specified occupations, the eligibility of which would be the same for all States and Territories. The holder of a national licence would be able to work in multiple jurisdictions without having to apply for a new licence when relocating. In contrast with the scheme under the *Mutual Recognition Act*, the new scheme would not have involved recognition of an existing licence in order to obtain an equivalent licence in the other jurisdiction. Rather, a national licence would have been introduced. The new scheme would also have removed the risk that the grant of an equivalent licence in the second jurisdiction may involve having to obtain multiple licences in order to equal the scope of work of the original licence. The national licence would also have removed the need for a licensee who wished to

work in various jurisdictions from having to obtain and renew multiple licences and pay the relevant fees.

Other COAG Reforms

As noted above, since 2008 Australian governments have been working through COAG to implement regulation and competition reforms with a view to achieving a seamless national economy. In May 2012, the Productivity Commission published a report which assessed some of the reforms up until that time. The report is entitled "Impacts of COAG Reforms: Business Regulation and Vocational Education and Training". One of the major reforms relates to recording personal property securities. A national system of registration, involving one national register, has been introduced by the *Personal Property Securities Act 2009* (Cth). That single piece of legislation unifies 70 different Commonwealth, State and Territory laws and 40 different registers dealing with personal property securities.

Other key COAG reforms relate to improving the efficiency of transport regulation by establishing national standards and national regulators for heavy vehicles, rail and maritime safety. A National Construction Code 2013 (Construction Code) has also been formulated which consolidates building and plumbing regulations into a single code and eliminates overlapping regulations. The Construction Code provides a uniform set of technical provisions for the design and construction of buildings and other structures nationally and is given legal effect by legislation in each State and Territory.

Environmental Regulation in Australia

An area of ongoing concern and analysis in Australia is environmental regulation and protection. The undertaking of projects with environmental implications may require approvals to be obtained at a Federal, State and local government level, which can cause significant cost and delay. For example, in a research paper published in June 2012 entitled "COAG's Regulatory and Competition Reform Agenda: A High Level Assessment of the Gains", the Productivity Commission noted the need for further reform in the area of environmental regulation. It said that many large scale investment projects in Australia are required to undergo environmental assessment and approval processes under both Commonwealth and State or Territory environmental legislation. It cited the example of a mining resource proponent who obtained approval for a major resource project following an environmental assessment which took in excess of 2 years, involved more than four thousand meetings, briefings and presentations and produced a 12,000 page report.

Australia's primary national environment law is the EPBC Act. Under the EPBC Act certain matters are designated as matters of national environmental significance for which the Federal government has primary responsibility to manage and protect. Those matters include world heritage properties, national heritage places, the Great Barrier Reef Marine Park, approval of nuclear matters and nationally threatened species and ecological communities. The interaction between Commonwealth and State environmental regulations in the context of the proposed expansion of a uranium mine was discussed by the Full Court recently in *Buzzacott v Minister for Sustainability*, *Environment*, *Water*, *Population and Communities* (2013) 215 FCR 301; [2013] FCAFC 111.

The EPBC Act makes provision for the Commonwealth to enter into bilateral agreements with a State or Territory as a means of streamlining environmental regulation. An *assessment* bilateral agreement enables State or Territory processes to be used to assess the environmental impacts of a proposed action while still requiring an ultimate approval decision to be made under the EPBC Act (as well as possibly under State or Territory legislation). An *approval* bilateral agreement obviates the need for further assessment or approval under the EPBC Act and effectively substitutes a relevant State or Territory regime. For example, there is an approval bilateral agreement in place between the Commonwealth and NSW governments to protect the national heritage and world heritage values of the Sydney Opera House under which the NSW government assumes responsibility for both assessment and approval decisions. Under that 2005 bilateral agreement, approval under relevant provisions of the EPBC Act relating to world heritage and national heritage are not required for actions approved by the relevant NSW decision-maker in accordance with the terms of the agreement and the management plan applicable to the Sydney Opera House.

Concerns have been expressed about some aspects of the operation of bilateral assessment agreements. Some argue that the bilateral process is used solely to streamline assessments and not to create a higher standard of impact assessment. An independent review of the EPBC Act in 2009 conducted by Mr Allan Hawke referred to the view of some critics that bilateral agreements were seen as simply encouraging accreditation of the process that was the "lowest common denominator", or a "race to the bottom".[33] Other concerns were expressed that such agreements derogate from transparency and accountability when contrasted with assessments undertaken under the EPBC Act. Another main issue with such bilateral assessment agreements was identified as "the breakdown in relations between State and Territory agencies and Commonwealth assessors", with the NSW government complaining that implementation of bilateral assessment agreements had been characterised by complexity and delay. The independent review recommended that steps be taken to promote cooperation between Commonwealth and State agencies and that greater effort should be made to standardise process and information requirements. The review also found that structural and procedural differences between the impact

[33] Hawke, A. 2009. *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Canberra.

assessment regimes of the States and Territories, as opposed to the Commonwealth, created inefficiencies and delays. Recommendations were made, including that the Commonwealth should make greater use of accredited State and Territory processes of assessment where they meet appropriate standards.

Where an assessment bilateral agreement is in place, the EPBC Act assessment and approval process usually involves the following steps:

projects that may have a significant impact on a matter of national environmental significance or on the environment in a Commonwealth area are still required to be referred to the Commonwealth Minister;
the Commonwealth Minister decides whether a referred project requires approval under the EPBC Act;
if approval is required and the project is to be carried out in a State or Territory covered by an assessment bilateral agreement, the Commonwealth Minister notifies the appropriate State or Territory Minister that the project requires approval under the EPBC Act;
the relevant State or Territory Minister then informs the Commonwealth Minister whether the project will be assessed under one of the assessment processes specified in the bilateral agreement;
the EPBC Act assessment procedure will not apply if the project is to be assessed under the specified State or Territory process;
the relevant State or Territory agency must provide the Commonwealth Minister with a report on impacts of the project on the matters that triggered the need for approval under the EPBC Act; and
the Commonwealth Minister then decides whether or not to approve the project under the EPBC Act, including any conditions.

The Federal government recently announced its intention to negotiate strengthened bilateral agreements with Queensland and New South Wales to establish what is described as "a one stop shop" for environmental approvals for certain classes of project and to remove duplication and regulation between the Commonwealth and those States. Under these proposed arrangements, only one approval will be required for particular classes of projects, rather than separate approvals under both Commonwealth and State legislation. Detailed negotiation of the proposed bilateral agreements is expected to take up to a year, highlighting the complexity of the issues involved. Public submissions have been sought on the proposed draft agreements.

The proposed bilateral agreement with NSW has the following relevant features:

reliance on NSW environmental assessment processes for approvals under the EPBC Act in respect of classes of action set out in a schedule, which include actions which are classified as state significant development under the *Environmental Planning and Assessment Act 1979* (NSW);
requirements additional to those arising under State environmental legislation are imposed, including the need to issue guidelines or directions to proponents of controlled actions aimed at ensuring that adequate information is provided to enable proponents to submit full assessment documentation;

the Commonwealth Minister has an opportunity to provide input to the guidelines; additional requirements are also imposed in respect of public consultation; and detailed provisions also regulate the required content of the assessment report of classes of action covered by the bilateral agreement.

The EU's Role in Recognising and Executing Foreign Administrative Acts

In its 2009 report, the Productivity Commission discusses mutual recognition arrangements in Europe as they apply to harmonised and non-harmonised goods, as well as occupations and services. It noted how, at that time, harmonised goods represented approximately 75 % of goods traded in the EU, with the balance the subject of the mutual recognition principle. The Productivity Commission also noted the more recent approach to harmonisation in the EU whereby the new directives for each product sector specify mandatory essential requirements and voluntary harmonised standards applicable to that sector. Also noted were EU directives which require products to have third-party certification by conformity assessment bodies (CABs) before being placed on the market.

Although recognising that mutual recognition generally operates successfully for many products in the EU, the Productivity Commission also noted that some businesses still faced barriers to trade in the form of national technical regulations and conformity assessment. Reference was also made to a review carried out in 2006 which drew complaints of over-regulation and "gold plating" at the national level, with claims that member states frequently add national product requirements to EU standards under the cover of meeting additional environmental and social concerns. The Productivity Commission also referred to findings made in 2008 to the effect that: (a) there was a widespread lack of awareness among businesses and national authorities of the principal of free movement of goods; (b) there was legal uncertainty about the burden of proof where a member state refuses entry to a product; and (c) businesses experienced difficulties in determining whether they could lawfully sell products in another member state with different technical requirements. Reference was made to reforms announced in mid-2008 aimed at addressing some of these problems affecting mutual recognition of goods in the EU.

In its 2009 report, the Productivity Commission separately addressed occupations and services in the EU. It noted that, following public consultation, the country of origin principle was removed from the draft Services Directive, permitting member states to continue to impose local regulations on service providers from other jurisdictions but only where those regulations are non-discriminatory; justified for reasons of public policy, public security, public health or environmental protection; and are proportional to their objectives. This was described as a "managed" form of mutual recognition of services regulation whereby host countries retain a significant ability to regulate the provision of services by foreign providers.

International Conventions on the Recognition and Execution of Administrative Acts and the Legalisation of Public Documents

Australia's Non-statutory Arrangements Involving Mutual Recognition

As noted above, Australia presently has two major statutorily-based mutual recognition schemes, one of which operates within the Australian Federation, while the other relates to closer economic ties with New Zealand. Australia has also entered into many other mutual recognition arrangements by way of treaties or conventions. Those treaties or conventions have not been incorporated into Australian domestic law and are therefore binding only at international law. I will now describe some of those arrangements.

Mutual Recognition Arrangements Between Australian and the European Union

Australia and the EU have an agreement on mutual recognition in relation to conformity assessment, certificates and markings. The agreement, which is in the form of the treaty, entered into force on 1 January 1999. According to the Australian government, this was the first fully operational mutual recognition agreement on conformity assessment of its type in the world. The agreement is notably more limited in its scope than either of Australia's two statutorily-based mutual recognition schemes. The treaty with the EU provides for mutual recognition of designated CABs. It does not extend to mutual recognition or harmonisation of standards or regulations. Under the agreement each participating country maintains its own internal standards and regulatory regimes against which compliance is assessed by designated CABs located in the other relevant country. This means that conformity assessment involving testing, inspection and certification of products traded between Australia and the European Union and vice versa can be undertaken in the country of export rather than having to be undertaken in the destination country. From an Australian perspective, this means that Australian exporters can establish compliance with relevant EU regulations in Australia and appropriate markings can be applied to the product before export.

The agreement also provides for domestic regulatory authorities to maintain market surveillance programs to ensure that products continue to meet legal health and safety requirements. Such surveillance may result in a challenge to the competence of particular CABs, which is provided for under the agreement. The agreement is currently limited in scope as it only applies to the following specific product sectors: electromagnetic compatibility, telecommunications equipment, machinery, medical devices, automotive products and pharmaceuticals. The agreement sets out

conditions under which the parties will accept test reports and certifications issued by the other party's designated CABs.

Commencing on 1 January 2013, major amendments were made to that part of the agreement which relates to medical devices. The amendments clarify and narrow the medical devices covered by the agreement. In particular, activities such as repairing, reconditioning, labelling, packaging or conducting quality control inspections alone are specifically excluded from the definition of "manufacture". The list of high risk medical devices which are not able to be assessed under the agreement has been expanded pending the undertaking of "confidence building activities". The high risk items which have been excluded now include implantable devices. Certain other products have been completely excluded from the agreement, including medical devices that contain tissues, cells or other microbiological items which are intended for use in or on the human body.

Prior to the change of government following the Australian Federal election in September 2013, Australia was also involved in negotiations with the EU to link their respective emissions trading schemes. The countries were working towards an agreement for mutual recognition from 1 July 2018. With the change of government the status of those negotiations is unclear.

Another area where the EU and Australia were able to reach agreement and enter into a bilateral arrangement concerns wine. Understandably the French have been concerned to protect the commercial value of the reputations of their winegrowing regions. In 1981 a French wine group unsuccessfully brought proceedings in an Australian court seeking an interlocutory injunction preventing the use of the word "champagne" in Australia to describe sparkling wine not sourced from the Champagne region in France (see *Comite Interprofessionel du Vin de Champagne v NL Burton Pty Ltd* (1981) 38 ALR 664). The proceedings failed at the interlocutory stage on the basis that it was held that there was no reputation in Australia sufficiently associating sparkling wine called champagne with the champagne region in France. That finding had nothing to do with Australia's reputation for beer drinking!

Australia and the EU held discussions about executing a bilateral agreement on trade in wine with a view to protecting each other's wine descriptions using regional names. In January 1994 the parties executed the *Agreement between Australia and the European Community on Trade in Wine*. The agreement prohibits the use of French wine descriptions in Australia and reciprocally provides for specified Australian "geographical indications and traditional expressions" to be protected from misuse in the EU. Under art 6 of the agreement the parties are obliged to provide legal means for interested parties to take steps to prevent the use of a traditional expression or a geographical indication identifying wines for wines originating in the place indicated by the relevant geographical indication. This agreement is enforceable in Australia's courts because the agreement was made part of Australia's domestic law under the *Australian Wine and Brandy Corporation Act 1980* (Cth).[34] A Geographical Indications Committee has been established under that Act to deal

[34] This Act was renamed in 2010 to the *Wine Australia Corporation Act 1980* (Cth).

with applications for the determination of geographical indications for wine in relation to Australian regions. The Committee's determinations are subject to review by the Federal AAT, as is illustrated by the tribunal's decision in *Re King Valley Vignerons Inc and Geographical Indications Committee* (2006) 93 ALD 422.

Other Bilateral Agreements Involving Mutual Recognition to Which Australia Is a Party

Australia has similar mutual recognition arrangements on conformity assessment with Singapore, as well as with Norway, Iceland and Liechtenstein (the EFTA agreement) which covers the inspection of medicinal products, telecommunications terminal equipment, low voltage equipment, electromagnetic compatibility, machinery, pressure equipment and automotive products.

The APEC group, of which Australia is a member, has also introduced various mutual recognition initiatives. For example, there are APEC mutual recognition arrangements on conformity assessment of electrical and electronic equipment as well as telecommunications equipment. They provide for limited mutual recognition of selected goods undertaken at a multilateral level. The agreements do not provide for mutual recognition or harmonisation of standards or regulations but are restricted to conformity assessment.

The APEC arrangement concerning electrical and electronic equipment, which was announced in September 1999, has the following features. It is based on the mutual recognition of test reports and certificates of conformity issued by designated test facilities and CABs in partner countries. The object is to reduce duplicative testing and certification, which adds to the costs of exporting goods. Participation can occur at three levels. The first level involves information exchange so that dissipating countries can familiarise themselves with other countries' regulatory systems. Participants must provide in a standardised format information about their mandatory requirements on regulated electrical and electronic products, to assist exporters of these products in other countries. The second level of participation provides for product testing in the exporting country by designated test facilities, with test reports recognised by the importing country. The third level provides for the certification of products in the exporting country by designated certification bodies, with conformity accepted by the importing country. Participation at the second and third levels requires a country to appoint a designating authority with responsibility for designating, suspending, removing suspension and withdrawing designation of test facilities and/or certification bodies in its jurisdiction. That body also specifies the scope of the testing or conformity assessment activities that may be undertaken.

Limited mutual recognition schemes have also been created by APEC in respect of selected occupations, including engineers and architects. Their object is to facilitate the international mobility of professional engineers and architects within the APEC region by establishing common criteria for the recognition of professional

competence. Mutual recognition is limited in that participating countries are not disabled from requiring additional assessment of registered engineers and architects before they are allowed to practice in their jurisdiction.

Australia has also entered into mutual recognition agreements with other countries on many other topics. For example, it is a party to mutual recognition agreements with countries such as the United States, Hong Kong, Argentina and South Africa dealing with securities and investments. Under the 2008 agreement with the US Securities and Exchange Commission, the parties have agreed to consider providing exemptions to exchanges and securities brokers in each other's countries. This means that Australian stock exchanges and brokers could offer their services to American wholesale investors and financial firms without being subject to regulation by the US Commission. Australia has also entered into 12 separate agreements with various jurisdictions, including the EU, on security and the exchange of classified information. There is also a series of agreements and memoranda of understandings on a range of topics to which Australia is a party, including competition and consumer protection, spam and customs cooperation. In might also be added, that apart from mutual recognition agreements entered into at a government to government level, various Australian professional bodies have also entered into mutual recognition agreements with their counterparts in other countries, such as engineers and accountants.

Claims for Foreign Taxation Debts in Australia

Taxation is a matter which is usually reserved for the domestic jurisdiction of a state. However, when a tax debtor is located in an overseas jurisdiction the administrative act of assessing the taxation debt needs to be effected in a foreign jurisdiction. In Australia, where a foreign administrative authority has assessed a person for a taxation debt, it is possible that such a debt can be recouped on that authority's behalf by Australia's Commissioner of Taxation, as if that debt was owed to the Australian authority. This will depend upon the foreign tax debt meeting the criteria set out in the *Taxation Administration Act 1953* (Cth).

Before the Commissioner of Taxation will seek to collect a debt which an overseas authority claims is owed to it, it must be classified as a "foreign revenue claim". In order to meet such a classification the claim must meet a variety of criteria.

First, the "foreign revenue claim" must be made by or on behalf of an entity that is, under the relevant international agreement, the competent authority.[35] Australia has signed 81 international taxation agreements, 45 of which are concerned with double taxation. [36] These kinds of treaties are frequently supplemented with a document called a "Mode of Application" or "Memorandum of Understanding". Such a

[35] *Taxation Administration Act 1953* (Cth) ss 263-10, 263-15.

[36] The other 36 agreements are tax information exchange agreements, available at: www.eoi-tax.org/jurisdictions/au.

document provides additional information concerning how the particular obligations of the treaty will be implemented. Taxation treaties, whilst expressed in relatively precise terms, do not contain the practical details concerning their implementation, such as the minimum debt required to trigger the obligation to collect a foreign taxation debt, or the time limits for such claims. These kinds of details can be set out in these accompanying documents. It appears that, to date, the Australian Treasury has not published any of these accompanying documents and, presumably, no such document has been published by another party to such an agreement.[37]

Other international agreements contain obligations to assist in the recovery of taxation debts owed to foreign authorities,[38] such as the OECD *Convention on Mutual Administrative Assistance in Tax Matters*, opened for signature 1 June 2011, [2011] ATNIF 28 (entered into force 1 June 2011) to which Australia is a party, along with 57 other states. Australia has also entered into certain special arrangements which relate to particular subject matters, such as the special arrangements in relation to the mining of natural gas signed with East Timor.[39]

The second criterion is that the foreign revenue claim must be made consistently with the provisions of the relevant agreement. This can be particularly important where certain foreign revenue claims are precluded by the terms of the treaty in relation to certain types of business, such as shipping or other carriage,[40] and income from the sale of real property.[41]

The other final criteria are that the foreign revenue claim must be made in an approved form, specify the amount owed by the debtor in Australian currency and be accompanied by a declaration by the competent authority stating that the claim fulfils the requirements of the agreement under which the claim is made.[42] These criteria are important as they are the formal process by which the foreign administrative act is served in Australia. The act is not served on the debtor, but upon the Australian government who is required to take actions to facilitate the execution and fulfilment of the foreign administrative act.

If a claim meets the above criteria, it is registered in Australia on the Foreign Revenue Claims Register and becomes a pecuniary liability owed to Australia by the debtor.[43] The amount owed by the debtor becomes due and payable 30 days after

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[37] CCH Australia Limited. 2013. *Australian Federal Tax Reporter* (*ITAA 1936 & Others*). Sydney: CCH Australia, 2013, 977–859.

[38] *Convention on Mutual Administrative Assistance in Tax Matters*, opened for signing 25 January 1988, [2011] ATNIF 28 (entered into force 1 June 2011) art 11.

[39] See "Annex G – Taxation Code" to the *Timor Sea Treaty*, signed 20 May 2002, [2003] ATS 13 (entered into force 2 April 2003).

[40] *Agreement between Australia and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 13 October 1977, [1986] ATS 25 (entered into force 1 November 1979) art 8.

[41] Ibid art 6.

[42] *Taxation Administration Act 1953* (Cth) s 263-15.

[43] Ibid ss 263-20–263-40.

notice of the particulars of the foreign revenue claim is given to the debtor, or a later day if specified. Once a tax debt is registered, the debtor cannot dispute the tax debt and the Commissioner of Taxation can commence legal proceedings to collect the debt.[44] Furthermore, the Australian Taxation Office has advised that proceedings cannot then be brought in the jurisdiction of the claiming state challenging the tax debt owed to Australia.[45] It seems that proceedings may be brought in the jurisdiction of the claiming state challenging the assessment of the debt, but such a claim has no bearing on Australian tax law. It appears that the only opportunity that a person has to prevent the debt becoming payable is to seek an injunction before the foreign revenue claim is registered. However, it appears likely that a person would not know about a foreign revenue claim until notice is provided to them by the Commissioner of Taxation that the debt has been registered.

Under the *International Tax Agreements Act 1953* (Cth), many specified treaties and agreements with other countries concerning taxes on income and fringe benefits have become part of Australia's domestic law and are therefore enforceable in Australian courts.

Bilateral Agreements on Social Security Entitlements

Perhaps reflecting its strong and diverse multicultural composition (more than 30 % of Australians were born overseas), Australia currently has 29 separate bilateral agreements with various countries relating to social security. Those countries are Austria, Belgium, Canada, Chile, Croatia, Cyprus, the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Latvia, Malta, the former Yugoslav Republic of Macedonia, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Switzerland and the United States of America. Each of those bilateral agreements has been made part of Australia's domestic law by their inclusion in a schedule to the *Social Security* (*International Agreements*) *Act 1999* (Cth). Consequently, the provisions of such agreements are enforceable in Australian courts and tribunals, as is reflected, for example, in a decision of the Federal AAT in *Cerro v Secretary of the Department of Social Security* [1995] AATA 135, where the Tribunal held that a particular pension received by the applicant fell outside of the scope of the bilateral agreement between Italy and Australia. In reaching that conclusion, the Tribunal took into account a letter from the Italian Ministry for Work and Social Security which indicated that, based on its enquiries, the applicant received an Italian pension which was of a type which was not covered by the bilateral agreement.

The bilateral agreements reflect the fact that there are many people in Australia with work or residential connections with other countries, which may entitle them to receive pensions or other social security benefits from those other countries as

[44] Ibid s 255-1.

[45] Australian Taxation Office, *Practice Statement*, PSLA 2011/13 [69].

well as Australia. The agreements are based on the concept of recognising and giving effect to laws and administrative arrangements relating to particular social security benefits in a partner country. Partner countries make concessions against their social security eligibility rules so that people covered by a bilateral agreement may access payments for which they might otherwise not be eligible. Responsibility for certain social security payments is shared between the country where a person has lived during their working years and Australia. Generally, a social security pension, such as an age pension, which is available in one country can be accessed in the other country, however, the paying country generally maintains some discretion in the currency and delivery mechanisms used.

Under these bilateral arrangements, Australia usually equates social insurance periods/residence in the relevant countries with periods of Australian residence in order to meet the minimum qualifying periods for Australian pensions. The partner country generally counts periods of Australian working life or residence as periods of social insurance in order to meet their minimum qualifying periods for payment. Unlike most other countries, Australia does not have a national insurance scheme and social security benefits are paid out of consolidated revenue and not a specific social security insurance fund. Accordingly, Australian pensions are income and asset tested.

An example of such a bilateral arrangement on social security is the *Agreement between Australia and the Hellenic Republic (Greece) on social security*, signed 23 May 2007, [2008] ATS 14 (entered into force 7 August 2007) (Australia-Greece Treaty). That agreement allows a person to lodge a claim for payment of specified social security benefits from either country. It also permits a person to add together their periods of residence in Australia and periods of social security coverage in Greece so as to meet the minimum eligibility requirements. For example, in order to meet the minimum requirements for the Greek age pension the person can add periods of Australian working life residence to their periods of coverage in Greece. The relevant Greek pension authorities make all decisions about repayments.

There are provisions in the Australia-Greece Treaty which deal specifically with administrative matters, such as the lodgement of documents. Such provisions are found in Part V of the agreement. Under art 14, a claim, notice or appeal concerning a benefit may be lodged in either country in accordance with administrative arrangements made by the two countries pursuant to art 18. The details of those arrangements are not spelt out in the Australia-Greece Treaty. Article 17 also deals with the subject of exchange of information and mutual assistance. Subject to their respective national laws, both countries have agreed to communicate with each other any information necessary for the application of the Australia-Greece Treaty or for the purposes of their respective social security laws and furnish assistance to each another with regard to the determination or payment of any benefit affected by the Australia-Greece Treaty. Specific provision is made to emphasise that any disclosure of information about an individual is confidential and can only be used for the purposes of implementing the Australia-Greece Treaty and the domestic legislation to which it relates. Specific provision is also made prohibiting the disclosure of any information concerning a person received from being transferred or disclosed to another country without the prior consent of the relevant partner country.

Finally, it might be noted that, under the Australia-Greece Treaty, specific provision is made for communications to occur in any of the official languages of the two countries.

Below Treaty Level Mutual Recognition Arrangements

Australia has entered into several non-treaty mutual understandings with New Zealand. Some of these agreements have come to have force in Australia by virtue of domestic legislation.

For example, in relation to civil aircraft safety, there are the *Arrangement between the Australian and New Zealand Governments on Mutual Recognition of Aviation-Related Certification*, signed 13 February 2007 (*Arrangement for MRARC*) and the *Operational Arrangement between the Civil Aviation Safety Authority of Australia and the Civil Aviation Authority of New Zealand in relation to Mutual Recognition of Air Operator Certificates*, signed 16 March 2007. Under the Australian *Civil Aviation Act 1988* (Cth) (*Civil Aviation Act*) and its subsidiary regulations, the *Civil Aviation Regulations 1988* (Cth), these mutual arrangements are given legislative force.[46] Various provisions of the *Civil Aviation Act* take advantage of these agreements to facilitate air travel between Australia and New Zealand.

These agreements have recently attracted attention with the development in New Zealand of the "Martin Jetpack". This ducted fan powered personal flying device recently received approval from the New Zealand Civil Aviation Authority for manned test flights and has been categorised in New Zealand as a "micro-light" aircraft. This raises a difficult issue for regulators, as the "ANZA Mutual Recognition Principle" under the Arrangement for MRARC provides that where a person is authorised to carry out a particular aviation activity is authorised in New Zealand, the person may carry out the same kind of aviation activity in Australia.[47] The ANZA Mutual Recognition Principle only applies to aircraft which carry less than 30 passengers and after each party agrees that the safety outcomes of the respective civil aviation safety regimes in relation to a particular aircraft are equivalent. Despite this limitation, reports in relation to the test flights indicate that consultation is already occurring with Australian officials.[48]

[46] The equivalent New Zealand legislation is the *Civil Aviation Act 1990* (NZ) and the *Civil Aviation* (*ANZA Mutual Recognition Agreement*) *Order 2007* (NZ).

[47] *Arrangement between the Australian and New Zealand Governments on Mutual Recognition of Aviation-Related Certification*, signed 13 February 2007 principle 4.

[48] See Howard, R. 2013. No Flight of Fancy, the Jetpack Is Coming – From New Zealand. In *Wall Street Journal.* [online] Published 16 September 2013. Accessible from http://online.wsj.com/news/articles/SB10001424127887323981304579078990245523348 [cited 24 March 2014].

Specific Mutual Recognition Treaties

Another kind of mutual recognition treaty which Australia has entered into is similar to those outlined above, in that it involves the mutual recognition of the capacity of a foreign authority to declare that goods or services meet the standards of another state party. However, instead of covering multiple areas which are outlined in an annex, these treaties tend to relate to a single subject area, as is the case with the *Agreement between the Government of Australia and the Government of Denmark concerning Mutual Recognition of Tonnage Certificates*, signed 15 May 1980, [1984] ATS 7 (entered into force 15 May 1980). That treaty provides for the mutual recognition of the certification of the carrying capacity of cargo ships issued by Australian and Danish authorities in the territory of the other party.

Not all of these treaties are bilateral, for example the *Convention for the Mutual Recognition of Inspections in respect of the Manufacture of Pharmaceutical Products*, opened for signature 8 October 1970, [1993] ATS 2 (general entry into force 26 May 1971, entry into force in Australia 25 January 1993) has 11 state parties, including Australia. These treaties do not provide for sectoral annexes, but can include designating authorities and CABs to provide for future flexibility.

The Apostille Convention

The *Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, opened for signature 5 October 1961, [1995] ATS 11 (concluded on 5 October 1961) (the Apostille Convention) entered into force in Australia on 16 March 1995. Its introduction in Australia has simplified the authentification of public documents and facilitates their cross border use. Before the introduction of the Apostille Convention, a lengthy and expensive process of 'legalisation' had to be undertaken in order to establish the authenticity of a foreign public document. This process, known as 'chain authentification', would require the dispatch of documents from one consulate to another in order to verify their authenticity. The issuing of certificates under the Apostille Convention (Apostilles) by competent authorities greatly reduces the delay that chain authentification would cause as a document which bears an Apostille is exempt from any other process of legalisation.[49] It is important to note that the effect of affixing an Apostille is simply to certify the authenticity of the signature on the public document (including the capacity in which the person signing the document has acted). It does not authenticate the content of the signed document.[50]

[49] *Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, opened for signature 5 October 1961, [1995] ATS 11, (entered into force in Australia 16 March 1995) art 2.

[50] Ibid art 5.

Australian Implementation of the Apostille Convention

Australia has given effect to its obligations under the Apostille Convention through the *Foreign Evidence Act*. Section 37 of the *Foreign Evidence Act* provides that where an Apostille is present on a document, the Apostille is evidence of the authenticity of the signature on the document, as well as the capacity of the person who signed the document. Where an Apostille is present, Courts and decision-makers must not require any other kind of legalisation. Section 46 of the *Foreign Evidence Act* sets out the terms of the Apostille Convention in full, including an example of an Apostille. The Apostille is described there, as it is in the Convention as being "in the form of a square with sides at least 9 centimetres long".

Judicial Consideration of Apostilles in Australia

There have been few instances in Australia of judicial consideration of the Apostille process, however it is worth highlighting one particular example. In *Cabal v United Mexican States* (*No 3*) [2000] FCA 1204; (2000) 186 ALR 188,[51] French J (as his Honour then was) dealt with an application by two Mexican nationals for judicial review of a Federal Magistrate's decision to extradite them. Part of their claim was that the documents which had been relied upon by the Federal Magistrate had not been properly authenticated. Notably, they objected to arrest warrants which bore Apostilles. For present purposes it is sufficient to note that one of the Apostilles objected to was rectangular, rather than square. His Honour stated at [182]:

> An objection was taken that the apostille does not comply with the prescribed form in the Hague Convention and does not certify the warrant. The objection as to form appears to be related to the shape of the apostille being rectangular rather than square. This is not an objection which I regard as affecting its efficacy. [The warrant] is duly authenticated

This represents a flexible, purposive approach to the Apostille Convention, focusing upon the process of certification having occurred, rather than the result of that process being a perfectly accurate certificate. Such an approach appears to accord with the object and purpose of the Apostille Convention.

Legalisation of Documents Outside the Apostille Convention

Not all countries are parties to the Apostille Convention, however the membership of the Apostille Convention has grown substantially in the last 30 years. In circumstances where apostilles were not available, a clause facilitating the legalisation of public documents has been featured in a small number of Australian bilateral treaties

[51] This decision was affirmed in *Cabal v United Mexican States* (2001) 108 FCR 311; [2001] FCA 427.

concerned with extradition,[52] mutual assistance in criminal matters[53] and social security.[54] However in all of these instances, either Australia or the partner nation has ratified the Apostille Convention subsequent to the entry into force of these treaties.

Australia is also a signatory to several multilateral conventions which facilitate the legalisation of documents in respect of their subject matters.[55]

Law Governing the Legalisation and Translation of Foreign Public Documents for the Purpose of Proving Their Existence or Authenticity

The existence and authenticity of foreign public documents, even where there is no Apostille or other legalisation, is governed by the *Foreign Evidence Act*. Section 39 of the *Foreign Evidence Act* leaves the acceptance of a document which has a lesser formality than an apostille to the discretion of the person assessing the document. The effect of this is that evidence of foreign administrative acts can be recognised even without an Apostille and without the process of chain identification, if the Court or decision-maker decides that there is evidence that the document is authentic.

Obtaining an Apostille in Australia

Australia's arrangements for obtaining an electronic apostille are similar to many other nations. The Australian Department of Foreign Affairs and Trade (DFAT) provides in person apostille services at a number of offices across the country.

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[52] See *Treaty on Extradition between Australia and the Republic of Venezuela*, signed 11 October 1988, [1993] ATS 35 (entered into force 19 December 1993) art 9; *Treaty on Extradition between Australia and the Oriental Republic of Uruguay*, signed 7 October 1988, [2011] ATS 2 (entered into force 9 January 2011) art 2.

[53] *Agreement between Australia and Finland on Mutual Assistance in Criminal Matters*, signed 22 June 1992, [1994] ATS 12 (entered into force 30 April 1994) art 16.

[54] *Agreement between Australia and Japan on Social Security*, signed 27 February 2007, [2009] ATS 2 (entered into force 1 January 2009) art 22; *Agreement between Australia and the Federal Republic of Germany on Social Security to Govern Persons Temporarily Employed in the Territory of the other State* ("*Supplementary Agreement*"), *Concluding Protocol and Implementation Arrangement*, signed 9 February 2007, [2008] ATS 13 (entered into force 1 October 2008) art 10.

[55] *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, opened for signature 15 November 1965, [2010] ATS 23 (general entry into force 10 February 1969, entry into force in Australia 1 November 2010) art 3; *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, opened for signature 2 October 1973, [2002] ATS 2 (general entry into force 1 August 1976, entry into force in Australia 1 February 2002); *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, opened for signature 19 October 1996, [2003] ATS 19 (general entry into force 1 January 2002, entry into force for Australia 1 August 2003) art 43.

Forms and documents can also be posted to the relevant DFAT office to receive an Apostille. DFAT does not provide electronic apostilles. Apostille services are also provided by private companies, such as the Apostille Australia Certificate Service. It does not appear that such private services provide electronic apostilles.

Conclusion

The question of how and when to recognise and give effect to foreign administrative acts can arise whenever countries or individual states become members of political or economic unions. That is true of the EU; it is also the case with the Federation of Australia.

Based on the experience of both Australia and the EU there is a trajectory of available models which may assist in determining how and when to recognise and give effect to foreign administrative acts. Speaking broadly, these models can be described in ascending order as mutual recognition, harmonisation and uniformity of regulatory requirements. Each of these models has been tried at various times and in various contexts in Australia, sometimes underpinned by legislation while at other times supported by treaties or conventions in an international law framework. Dissatisfaction with the concept of mutual recognition as the basis for the regulatory regime applying to the mobility of labour across state borders in Australia has provided the impetus for another statutorily-based regime, which would have commenced operation in 2014 but was recently abandoned.

That is not to say, however, that there is universal support in Australia for harmonisation or uniformity of regulatory requirements. Critics point to the cost and time required when adopting these models. That has led to recent calls for any further harmonisation, including strict harmonisation to uniform national standards, being approached on a case-by-case basis with a particular emphasis on the need for there to be robust regulatory impact statements, and rigorous costs-benefit analyses, for any such proposals.

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Bibliography

Allsop, J., and D. Ward. 2013. *Incoherence in Australian private international laws*. Unpublished paper delivered at Sydney Centre for International Law Conference, Sydney Law School, Australia, 10 Apr 2013.

Antomiades, H. 2010. *A preliminary study of the proposed national licensing scheme for property agents' trusts accounts*. Pacific Rim Real Estate Society Conference, New Zealand.

Campbell, E., and M. Groves. 2006. Enforcement of administrative determinations. *Australian Journal of Administrative Law* 13(3): 121–134.

Council of Australian Governments. 2008. *National partnership agreement to deliver a seamless national economy*. Canberra.

Ergas, H. (2012). Queensland competition authority. *An Assessment of national harmonisation.* [online] Published 11 Dec 2012. Accessible from http://www.qca.org.au/getattachment/b09563a9-2a12-49a1-935a-d68415ea9b9f/Ergas-Report-An-assessment-of-national-harmonisati.aspx. Cited 24 Mar 2014.

Griffiths, J. 2010. Apprehended bias in Australian administrative law. *Federal Law Review* 38(3): 353–369.

Hawke, A. 2009. *The Australian environment act: Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999: Final report*, 372 p. Canberra: Department of the Environment, Water, Heritage and the Arts. ISBN 978-0-9806735-2-4.

Howard, R. 2013. No flight of fancy, the jetpack is coming – from New Zealand. *Wall Street Journal.* [online] Published 16 Sept 2013. Accessible from http://online.wsj.com/news/articles/SB10001424127887323981304579078990245523348. Cited 24 Mar 2014.

Lafarge, F., and L. Marin. 2010. *Enforcement of administrative decisions between member states under EU law: From exequatur to automaticity?* [online] Published 2010. Accessible from http://www.utwente.nl/mb/pa/staff/marin/Marin_Lafarge.pdf. Cited 24 Mar 2014.

Nicolaidis, K. 1996. Mutual recognition of regulatory regimes: Some lessons and prospects. In *Regulatory reform and international market openness*. Paris: OECD Publications.

Productivity Commission. 2003. *Evaluation of the Mutual Recognition Schemes*, Research Report, Canberra.

Productivity Commission. 2009. *Review of mutual recognition schemes*. Research report, Canberra.

Productivity Commission. 2012a. *Economy-wide modelling of impacts of The Council of Australian Governments Reforms: Business regulation and vocational education and training*, Canberra.

Productivity Commission. 2012b. *The Council of Australian Governments Regulatory and Competition Reform Agenda: A high level assessment of the gains*, Research Report, Canberra.

State of Western Australia. 2012. *Review of the Trans-Tasman Mutual Recognition (Western Australia) Act 2007*, Perth.

Chapter 5
Foreign Administrative Acts in Brazil

Romeu Felipe Bacellar Bacellar Filho and Tatyana Scheila Friedrich

Abstract The present work deals with administrative acts as studied in Brazil, with particular attention to foreign administrative acts, a subject still little known in Brazilian doctrine and practice. An administrative act in the Brazilian legal system arises when the public administrator expresses a Public Administration declaration of intent. It is always linked to a public purpose. The administrative act is foreign when it has the same elements of a national administrative act and also represents the manifestation of the will of the body or agent who is part of a foreign state. Brazil has no regulations about foreign administrative acts, which creates many problems related to recognition and enforcement of foreign administrative acts. The country has not ratified the Apostille Convention, as will be discussed in this work.

Introduction

The present work deals with the administrative act as studied in Brazil, with particular attention to the foreign administrative act, subject still little known in Brazilian doctrine and practice. For this purpose, it initially handles the administrative act under a general approach, as per Brazilian law, briefly discussing its concept and characteristics and later administrative procedure. Next, the article studies the classification of administrative acts as foreign, dealing with their repercussions. Finally, it focuses on the recognition and enforcement of foreign administrative acts, showing how the procedures work and their limits.

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Administrative Act: Concept and Characteristics Under Brazilian Law

An Administrative act is the manifestation of the will of Public Administration agents for the purpose of having legal effects under the public scheme, in order to serve the public interest. For Marçal Justen Filho, an administrative act is a manifestation of functional will that is capable of having legal effects, produced through the exercise of the administrative function (Justen Filho 2014). It has specific characteristics and procedures, as will be seen below.

Concept and Characteristics

An administrative act in the Brazilian legal system arises when the public administrator expresses a Public Administration declaration of intent. It is always linked to a public purpose. The elements of the administrative act are: (a) competent agent; (b) purpose; (c) manner provided by law; (d) motif; and (e) subject or content. The attributes of the administrative act are: (a) presumption of legality (the burden of proof is on those who claim the illegality); (b) self-enforceability; and (c) imperative nature (coercitivity).

The administrative act may be simple, compound or complex. The act is simple when, for its completion, there is a manifestation of the will of a single organ or agent. The complex administrative act is the result of the combination of the wills of two or more agents or government agencies. Compound acts result from the manifestation of the will of a single agent or public body, but subject to verification by another organ or agent.

The efficacy of national administrative acts requires compliance with the aforementioned requirements and the ability to produce a legal effect. According to the attribute of enforceability ("auto-executoriedade"), internal administrative actions can be executed by the government itself without the intervention of the judiciary to enforce its results, as the public interest requires action. Besides this direct execution, the Public Administration may make use of the police force when there is an opposition from its addressee. The Public Administration practices thousands of administrative acts every day and cannot wait for judicial authorization to do so, as it would render unviable all administrative activities. However, this attribute is not always present in administrative acts. This is the classic case of traffic violation. The Administration writ of infraction transcribing and fine-imposing is self-executable but not the actual payment of the fine, since Brazil has no administrative enforcement or administrative assets pledge. The Administration may create indirect means for the fulfilment of the obligation, as in the previous example, the creation of a registry of debtors. However, if the person resists, the Administration will have to ask the judge to pledge for the debtor's assets.

In Brazil, the principle of the single jurisdiction, referred in Article 5, line XXXV of the Federal Constitution prevails, which establishes the principle of non-obviation

of Judiciary jurisdiction. It means that there is, in any case, the possibility of annulment of an unfavourable administrative act, turning to the judiciary, by various means.

The doctrine classifies this control as legality examination and merit examination. (1) The control of legality is always appropriate; the judge verifies whether or not the act is in accordance with the law. This examination can be performed in relation to: (a) non-discretionary acts, because its elements are linked to what the law determines; (b) non-discretionary elements of the discretionary act (competence, purpose and form); (c) the discretionary elements of the discretionary act (subject and object) when an illegal act is adopted. Discretion is the freedom "within the law", so that the agent cannot exceed its limits. (2) With respect to merits, the classical doctrine meant that the judiciary could not make the analysis, otherwise it could offend the principle of separation of powers. The administrative merit is not subject to control. The freedom of public officials must be respected. Moreover, dissenting doctrines admit the possibility of judicial control, based on the principle of non-obviation of judiciary control and the principle of reasonableness.

Administrative Procedure

Administrative procedure is the means by which the public administration is used to sort the issues experienced within the Administration, both in internal and external relations.

Administrative procedure is wider; it is the way to seek public purpose, since the administrative procedure is the way the process goes; the enchainment of acts, in other words: the rite (Bacellar Filho 2009). The administrative process can be: (a) linked: when there is a law determining the sequence of acts, i.e. bidding process; (b) discretionary: when there is no legal provision for the rite, following only the administrative practice.

In Brazil, the bodies are responsible for executing the concrete will of the law, through a series of actions that will lead to the issue of an administrative act. At the administrative level there is no *res judicata* and a lawsuit can be brought, even after an administrative decision. There is no administrative litigation, therefore cases are not heard by administrative bodies with independence and impartiality.

In Brazil, the law that covers the general administrative procedure for the adoption of administrative acts is *Lei* 9.784/99. Each Brazilian federal entity is free to regulate its own disciplinary administrative proceedings, with exclusive authority, but many states and municipalities are using the federal law through the principle of symmetry, as the aim of the rule is to protect people's rights and to better fulfil the purposes of the administration.

Art. 2 establishes a set of legal principles that affect the procedure, and are presented as rights of citizens in the procedure:

> *Article 2. The PublicAdministration shall comply with, among others, the principles of legality, purpose, motivation, reasonableness, proportionality, morality, legal defence, contradictory, legal security, public interest and efficiency.*

In its Art. 3, Law 9784/99 determines citizens' rights related to the Administration

I – To be treated with respect by the authorities and servers, which should facilitate the exercise of their rights and the fulfilment of their obligations;
II – Be aware of the conduct of administrative proceedings in which they have proved interested, view the case, obtain copies of documents contained therein and know the judgments;
III – Offer oral argumentation and produce documents before the decision, which will be subject to consideration by the competent body;
IV – Be assisted, optionally, by a lawyer, unless mandatory representation is required by law.

It is important to highlight the optional representation by a lawyer, which is a consequence of the principle of informality, and also the permission given to formulate allegations and submit documents even prior to the decision, which is a corollary of the principle of substantive truth, not mentioned, but that prevails in administrative procedure.

In Article 50, the law specifically addresses the occasions when administrative acts must be motivated, in a clear and explicit way:

Article 50. Administrative acts must be motivated, stating the facts and legal fundamentals when:

I – Denying, limiting or affecting the rights or interests;
II – Imposing or increasing duties, charges or penalties;
III – Deciding on administrative cases involving public tender or selection;
IV – Dispensing or declaring the unenforceability of the bidding process;
V – Deciding on administrative appeals;
VI – Resulting from review of office;
VII – Ceasing to apply established case law on the issue or discrepem opinions, reports, proposals and official reports;

Those are the general statements of Law 9784/99.

Service of Administrative Acts

The legislation that governs the disclosure of administrative acts in Brazil is Article 37 of the Constitution of the Federative Republic of Brazil, which includes publicity in the role of Public Administration Principles.

Decree 4.520/2002 establishes standards for the publication of official federal acts:

Article 1 The Executive Power, through the National Press at the Civil House of the Presidency (Imprensa Nacional da Casa Civil da Presidência da República), is in charge of *the publication of*:

I – Laws and other acts resulting from the legislative procedure defined in the Constitution;
II – Treaties, conventions and other international acts adopted by Congress, and
III – Official acts, except for those of an internal character, issued by:

a) *Federal Public Administration*;
b) *Judiciary*, *and*
c) *Court of Audit*

> § *1 The publications referred to in this Article shall be made in the Official Gazette and the Journal of Justice*.
> § *2 The electronic editions of the Official Gazette and the Journal of Justice*, *available at the National Press website and digitally certified by a certification authority of the Brazilian Public Key Infrastructure* (Infra-Estrutura de Chaves Públicas Brasileira – ICP-Brasil), *produce the same effects as in paper*.
> § *3 In the case of major interest for the Federal Public Administration*, *the Chief of Staff of the Presidency may exceptionally authorize an extra edition of the Official Gazette*.

Administrative acts issued in other areas of the public administration are posted in specific locations.

In the case of the administrative procedure, Art. 26 of Law 9784/99 establishes that the competent body that is processing the administrative procedure will determine the summons of the interested person, in order for there to be decision science, or to implement measures.

International notification should be regulated by international treaties, with unification or, at least, standardization purposes. The international notification must be updated, contemplating the contemporary virtual world, in which the Public Administrations are inserted. The European Convention on the Service Abroad of Documents relating to Administrative Matters is an example of this, although it was written in the 1970s

Mercosur should also have a supranational norm that prevails over domestic law, regarding the Service Abroad of Administrative Documents.

Classification of Administrative Acts as Foreign and Their Repercussions

An administrative act is foreign when it has the same elements of a national administrative act and also represents the manifestation of the will of the body or agent who is part of a foreign state. Brazil has no regulations on foreign administrative acts, as will be discussed below.

Concept and Characteristics

Administrative acts issued by a foreign administrative authority or submitted to foreign law are considered to be foreign administrative acts, in general.

Regarding foreign documents, in order to produce internal effects, Brazil requires that they must have been issued by a competent authority; they must be in accordance with the law of the place of celebration; they must be legalized at the Brazilian Embassy or Consulate of the country where the act was signed, and registered by a

Brazilian notary. Such bureaucracy is necessary because Brazil has not ratified the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents (Apostille Convention), although numerous domestic institutions, including government agencies, have advocated for and made efforts to change this (Araújo et al. 2014).

Brazilian legislation does not mention foreign administrative acts. In the abovementioned Law 9784/99 (administrative process), there is neither a provision regarding the intervention of foreign public authorities, interested or third parties in a disciplinary procedure nor a provision about international practice on evidence. It would be useful to have a specific act or a supranational provision on the procedure related to evidence practice abroad.

The country should urgently incorporate rules on procedure, validity, effectiveness and enforceability of foreign administrative acts. It could be regulated in the Law of Introduction to the Norms of the Brazilian Law (Lei de Introdução às Normas do Direito Brasileiro – LINDB/ Decree No. 4.657/1942), next to the rules of private international law, or in the administrative *corpus iuris*. Another option would be a specific regulation.

There are only general rules about recognition and enforcement related to recognition and enforcement of foreign decisions, enforcement of letters rogatory and mutual legal assistance. These rules do not refer expressly to foreign administrative acts, although they could. Administrative cooperation, informal, is new in Brazilian Practice, although not regulated yet.

Within Mercosur, there is the Agreement on Cooperation and Judicial Assistance in Civil, Commercial, Labour and Administrative Matters between the States. Parties to the Mercosur and the Republic of Bolivia and the Republic of Chile, known as "Protocolo de Las Leñas". Article 1 states that "*States Parties undertake to provide mutual assistance and extensive judicial cooperation in civil*, *commercial*, *labor and administrative matters. The judicial assistance in administrative matters shall include*, *in accordance with the domestic law of each State*, *the administrative litigation that permits appeals in the courts*."

It therefore concerns assistance involving jurisdictions, and such assistance is given by the traditional rogatory letter, related to both cooperation activity involving simple procedure and probative and to the recognition and enforcement of foreign judgments.

Classification

The foreign character of an administrative act lies in its origin: it must necessarily arise from an action performed by the administration of a foreign state. However, there are differences between foreign, international, supranational and global administrative acts. The foreign administrative act is an administrative action resulting from the administration of a foreign country. The international administrative act is an administrative act issued by an international organization or other

international subject, created according to the rules of public international law, such as the UN, WHO, etc. The supranational administrative act is an administrative act originating from a process of regional integration, supranational like EU, or intergovernmental, such as Mercosur. Global administrative acts are a precarious notion in Brazil, as there is no global institution, only international organizations that are not global and that are constituted by the rules of public international law, respecting its characteristics, such as voluntarism. However, thanks to recent developments on the concept of global governance and global administrative space (see Global Administrative Law Project, online), this critical approach is changing and Brazil is beginning to speak of global administrative acts. Global administrative law is related to the law of transparency, participation and accountability in global governance and acts resulting therefrom would be regarded as "global administrative acts", a notion not yet developed in Brazil.

Recognition and Enforcement of Foreign Administrative Acts

The recognition and enforcement of foreign administrative acts is an issue that is neglected in Brazil. As a specific law does not exist, rules related to general acts are used.

Ways of Recognition and Enforcement of Foreign Administrative Acts in Brazil

There are four ways to carry out the of recognition and enforcement of foreign administrative acts in Brazil, depending on the circumstances involved.

(a) If the foreign administrative act is also considered administrative in Brazil, it must comply with the rules related to such acts in the country where it was concluded, where the principle "*locus regit actum*" prevails. Cases are usually related to genuine documents or acts issued by foreign countries. In this case, they have to be legalized by the Brazilian Embassy or Consulate in the foreign country (following the Manual on Consular and Legal Service – MSCJ: Operating Manual/Instrução de Serviço 2/200, Ministry of Foreign Affairs of Brazil – MRE); translated into Portuguese (by a special translator authorized by the Chamber of Commerce, which is the "tradutor juramentado registrado na Junta Comercial do Estado, nos termos do Decreto 13.609/42") and registered in Brazil, in the notary: Registro de Título e Documentos (pursuant to Article 129, paragraph 6 of the Brazilian Public Records Act/Lei de Registros Públicos n. 6015/1973). These acts cannot be contrary to public order or Brazilian mandatory rules.

Art 129. Are subject to registration in the Registry of Deeds and Documents, to produce effects against third parties:

(…) *6th*) *all documents of foreign origin*, *together with their translations*, *in order to produce effects in the offices of the Union*, *the States*, *the Federal District and the Territories of Counties*, *or in any instance*, *tribunal or court* […]

(b) In the case of foreign administrative acts that, according to Brazilian law, must be issued by a judge, they must be submitted to the analysis of the Superior Court of Justice (STJ), pursuant to Art. 105 of the Constitution of Brazil

If the foreign administrative act represents a foreign judgment from a Brazilian perspective it must go through the recognition process (homologação) of foreign judgments in accordance with Article 960 of the new Brazilian Code of Civil Procedure.

The procedure for recognition and enforcement of foreign court decisions starts when the interested party pursues legal action before the STJ. Then it is sent to the President to consider the initial report and to verify if all the requirements have been met, otherwise, the applicant has to amend or edit it, subject to the penalty of rejection. As the recognition and enforcement process is limited to the verification of the formal requirements and their alignment with the public order, the defence is also limited to these requirements and cannot refer to the merits of the decision. After pleading, there are 5 (five) days for response, then there begins a period of ten (10) days to appeal to the Attorney General. If there is opposition, there is a redistribution to the Plenary. The President decides. Once approved, the foreign judgment is enforced by the instrument "Carta de Sentença", sent to the competent federal judge in the locality where the judgment is to be enforced.

(c) When a foreign administrative act must produce effects in Brazil and in order to do so, action is required from the Brazilian authorities, it can be processed through the Mutual Legal Assistance (Auxílio Direto). This takes place when the request for international legal cooperation does not require the granting of an *exequatur* by the STJ and can be served by administrative authorities. It depends on the existence of an international treaty between the countries involved and, in general, the Ministry of Justice and its Department of Asset Recovery and International Legal Cooperation (Departamento de Recuperação de Ativos e Cooperação Internacional – DRCI)

In such cases, when Brazil faces passive cooperation, there are two possibilities regarding mutual assistance, as described by Luciano Vaz Ferreira and Fábio Costa Morosini (Ferreira and Morosini 2014). The first is through the "administrative way", which means without judiciary intervention. The central authority itself fulfils the measure or sends it to an administrative unit, which can, for example, issue a notarial notice (notificação extrajudicial). The second form uses judicial intervention and occurs when administrative action is insufficient or the case involves rights that require judiciary appreciation, with warrant issuance, like coercive measures that fall directly on persons or property. As the central authority does not have the capacity to file a lawsuit, access to justice for the fulfilment of the foreign application is made by the General Attorney General (Advocacia Geral da União – AGU) in civil matters and the Federal Public Ministry (Ministério Público Federal – MPF) in criminal ones,

which raises the action to first federal degree. As there is no decision to be complied with, the judgment is not about formal requirements, but it has full cognition, which requires a merit check, like a purely domestic adjudication. This is a new procedure in Brazil and may speed things up because the case does not go to any Superior Courts, which are overloaded with processes.

The new Brazilian Code of Civil Procedure (from art. 28) regulates rogatory letters and mutual legal assistance procedures.

(d) When, for the execution of a foreign administrative act, it is sufficient to have direct contact between public administrations, one can use legal administrative cooperation in an informal manner. In this case, there is no need for any specific national legislation or an international treaty. In general, it concerns a previous cooperation, to exchange information between authorities, widely used in Brazil for councils, regulatory agencies, entities related to monetary and financial agencies. The Council for Financial Activities Control (COAF), the National Agency of Civil Aviation (ANAC), the Central Bank (Bacen) and the Federal Revenue of Brazil, are examples of institutions that offer administrative cooperation.

As it is an informal cooperation, its result cannot be used as evidence in a judicial process.

Article 13 of the mentioned Decree 4657/42 (*Lei de Introdução às Normas do Direito Brasileiro*), on the conflict of laws, provides that the production of evidence abroad is governed by the laws in force in the country of proof of production. However, Brazilian courts do not accept evidence that is foreign to Brazilian law.

The said Mercosur Protocol of Cooperation and Judicial Assistance in Civil, Commercial, Labour and Administrative Matters – Las Leñas Protocol, provides in Article 5 that letters rogatory about evidence must be sent to the State concerned and Article 7 shows the requirements to comply with when letters rogatory are specifically about evidence, such as providing a description of the subject, the names and addresses of the witnesses and other persons or institutions that should intervene, the text for the interrogations and the documents needed.

Limits to the Recognition and Enforcement of Foreign Administrative Acts

Following the rules relating to foreign acts, regardless of whether they are public or not, a foreign administrative act cannot violate public order and mandatory rules (normas imperativas) in Brazil.

Article 17 of LINDB establishes that "Laws, acts and decisions of other countries, as well as any statement, will not be effective in Brazil if they go against national sovereignty, public order and good manners." It means that these acts must respect the human rights described in treaties and the fundamental rights provided in the Brazilian Constitution (Friedrich 2007).

Concluding Remarks

In Brazil, there are no specific requirements for foreign general administrative acts, neither for implementing the acts nor for the denial of its application. Such requirements should be related to the form and substance, and a complete description of the process is also necessary.

As there is no specific procedure for foreign administrative acts, in practice, the rules are drawn from various sources, sometimes through analogy with the general rules of private international law and international cooperation. It would be very important for Brazil to have specific rules or regulations, or, at least, an express extension of the rules of private international law and cooperation over foreign administrative acts. Regional standards are also very important and Mercosur should be inspired by the European Union's role in the progress towards the recognition and execution of foreign administrative acts, adopting the principle of mutual recognition and the transnational nature of certain administrative acts.

The analogy also applies to institutions. In Brazil, those that are competent to execute a foreign administrative act are: The Superior Court of Justice – STJ, the Ministry of Justice – MJ, and the Ministry of Foreign Affairs – MRE, the latter with the function of receiving and forwarding.

Given the lack of practice and doctrine on the recognition and enforcement of foreign administrative acts, judicial mechanisms of Private International Law are an important reference, particularly with regard to mutual legal assistance.

Unfortunately, Brazil has not adhered to any international convention on administrative acts, showing little concern for the international aspect of the matter, as occurs in other areas of Law. The country has not even adhered to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, the "Apostille Convention". Therefore, foreign documents must be legalized to be effective in Brazil.

In view of this practical background, there is no doctrinal approach to the subject in Brazil either. It is mentioned, in a very subtle way, in Private International Law classes by young teachers, but not in any bibliographic production.

If Brazil intends to participate more actively in the international scenario, it urgently needs to change this.

Bibliography

Araujo, Nadia, et al. 2014. *O processo de legalização de documentos*. Accessible at http://www.camarabrasilchina.com.br/noticias-e-publicacoes/noticias/noticias-sobre-negocios-com-a-china/artigo-valor-economico-o-processo-de-legalizacao-de-documentos.

Batista, L.O., T.S. Friedrich, et al. (Orgs). 2014. *Direito Internacional Contemporâneo*. Curitiba: Editora Juruá.

Ferreira, L.V., and F.C. Morosini. 2014. Transgovernamentalismo e Cooperação Jurídica Internacional no Brasil. In *Direito Internacional Contemporâneo*, L.O. Batista, T.S. Friedrich, et al. (Orgs), 185–209. Curitiba: Editora Juruá.

Filho, Bacellar. 2009. *Reflexões sobre Direito Administrativo*. Belo Horizonte: Editora Forum.
Friedrich, T. 2007. *Normas Imperativas de Direito Internacioal Privado*. Belo Horizonte: Editora Forum.
Global Administrative Law Project. Accessible at: http://www.iilj.org/gal/default.asp, 5 Oct 2014.
Justen Filho, M. 2014. *Curso de Direito Administrativo*, 10th ed, 185. São Paulo: RT.

Chapter 6
Foreign Administrative Acts: The Case of Estonia

Vallo Olle and Triinu Rauk

Abstract Problems concerning transnational administrative acts have not yet induced the rise of a subject-related legal-theoretical writings in Estonia. On the practical level, however, Estonia has taken several various steps regarding recognition of foreign administrative acts. This has been done both on the basis of international law as well as within the framework of the EU law. Mutual trust, the principle of reciprocity and respect for the rule-of-law make it possible to move forward towards further actions to be taken in order to develop closer cooperation in this important sphere.

Introduction

As a country actively participating in administrative integration processes both at a global and regional (European) level, Estonia faces various challenges. It is the authors' aim to provide a brief and conclusive overview of certain aspects related to foreign administrative acts in Estonia. It should, however, be pointed out from the beginning that the theme of transnational administrative acts cannot be said to be a subject widely debated by Estonian scholars. Instead, the opposite is true: the doctrinal treatment of the subject of recognition of foreign administrative acts is still *terra incognita* for Estonian researchers and scholars.[1] There is no case law yet in Estonia in this regard either. Needless to say, these facts do not diminish the actuality and relevance of the subject in any way, but they do make it impossible to refer to a theoretical doctrine as such.

First of all, the concept of administrative act and its classification as 'foreign' is addressed. Next, some general considerations on the habitual administrative

[1] As a rare exception, harmonized, transnational and supranational licenses are briefly dealt with in I. Pilving's doctor's thesis on the binding effect of administrative acts. – Pilving, I. *Haldusakti siduvus. Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel*. Tartu: TÜ Kirjastus, 2006, pp. 48–51.

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procedure for adopting administrative acts are pointed out. Thirdly, the service of administrative acts, particularly in other countries, is dealt with. Finally the EU's role in the recognition and execution of foreign administrative acts as well as relevant international conventions on the recognition and execution of administrative acts are also addressed.

In the interest of comprehensibility it should be pointed out that both terms: foreign and transnational administrative acts are used interchangeably and synonymously.

Concept of Administrative Act and Its Classification as 'Foreign'

Pursuant to § 51 (1) of the Administrative Procedure Act[2] (APA), an administrative act is an order, resolution, precept, directive or other legal act which is issued by an administrative authority upon the performance of administrative functions in order to regulate individual cases in public law relationships and which is directed at the creation, alteration or extinguishment of the rights and obligations of persons.

It follows from this legal definition that in the definition of the APA only an activity which includes simultaneously each of the following characteristics can be said to be an administrative act:

The acting subject is an administrative authority;
The activity takes place in a legal relationship governed by public law;
The activity represents an expression of will to regulate the legal relationship;
The expression of will is unilateral;
An individual case is regulated;
The regulation is addressed to a person outside of the Administration

The Theory of Administrative Law distinguishes between *material* and *formal* concepts of administrative acts.[3] It can be inferred from the characteristics of § 51 (1) of the APA that only an activity corresponding to the *material concept* can be qualified as an administrative act as per the definition of this particular law.

Regarding the Code of Administrative Court Procedure,[4] it establishes (§ 6 (1)) that for the purposes of procedure in administrative courts, the following are deemed to constitute administrative acts: administrative acts as defined in section 51 of the

[2] RT I 2001, 58, 354…23/02/2011, 3. Accessible in English at https://www.riigiteataja.ee/en/eli/530102013037/consolide.

[3] Merusk, K. 2011. Haldusakt kehtivas õiguskorras: teooria ja praktika. (Administrative act in the legal order: theory and practise). In *Juridica*, 2011, No. 1, pp. 27–34; *Kehtiv õigus ja õigusakti teooria põhiküsimusi. 2. par. ja täiend. tr*. (*Positive Law and Main Problems of Theory of Legal Act. 2nd rev. ed*.), 1995. Tartu : Juristide Täienduskoolituskeskus, pp. 11–12.

[4] RT I 23/02/2011, 3…23/12/2013, 2. Accessible in English at https://www.riigiteataja.ee/en/eli/527012014001/consolide.

APA, public law contracts (§ 95 of the APA), as well as any internal regulation of an administrative authority which determines an individual case.

A foreign administrative act can, in principle, be distinguished from a national administrative act (*haldusakt*) at least in two respects: first of all, it is adopted by the administrative authority of a certain foreign country, not by the Estonian administrative authority; secondly, as per this kind of administrative act the foreign substantive law is applied. Consequently, there is an organizational aspect behind the differentiation of national and foreign administrative acts. The same conclusion can also be reached based on the provisions of the APA: this legislative act was adopted to regulate national administrative procedures.

Therefore, administrative acts adopted by the authorities of the EU should also be considered foreign. The Constitution[5] distinguishes between two types of international laws that are binding for Estonia – generally recognized principles of international law (§ 3) and international treaties (Chap. 9, particularly § 123).

General Considerations on the Habitual Administrative Procedure for Adopting Administrative Acts

The general administrative procedure for the adoption of administrative acts is governed by the APA (2002) – procedural legal act, which recognizes the procedural rights typical of the modern rule-of-law state. Pursuant to APA (§ 3), the protection of rights is an essential principle of administrative procedure. In this procedure, the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to law. This legislative provision emanates from the first sentence of § 3 (1) of the Constitution, which establishes: "Governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith." Paragraph 3 (2) of the APA – based upon § 11 of the Constitution – provides the requirement of proportionality of administrative acts and measures. The following essential procedural rights regulated by the APA should be mentioned here: right to be heard (§ 40), right to examination of documents (§ 37), right to the receiving of explanations (§ 36), right to secrecy of business data and personal data (§ 7 (3)), right to be represented (§ 13).[6]

Special administrative procedures are regulated by several relevant legislative acts: the Planning Act[7]; the Building Act[8]; the Taxation Act[9] (TA); the Local

[5] The Constitution of the Republic of Estonia. – RT 1992, 26, 349…27/04/2011, 1. Accessible in English at https://www.riigiteataja.ee/en/eli/530102013003/consolide.

[6] Merusk, K. 2001. Menetlusosaliste õigused haldusmenetluse seaduses. (Rights of parties to proceedings under the Administrative Procedure Act). In *Juridica*, 2001, No. 8, pp 519–528.

[7] RT I 2002, 59, 979…13/03/2014, 3. Accessible in English at https://www.riigiteataja.ee/en/eli/531032014003/consolide.

[8] RT I 2002, 47, 297…04/07/2013, 3. Accessible in English at https://www.riigiteataja.ee/en/eli/519112013002/consolide.

[9] RT I 2002, 26, 150…31/01/2014, 6. Accessible in English at https://www.riigiteataja.ee/en/eli/531032014006/consolide.

Government Organisation Act,[10] etc. Although the APA does not establish *expressis verbis* the principle of subsidiarity it is, nevertheless, a case. Therefore, special regulations are applied in the case of special procedures (*lex specialis derogat lege generali*).

Foreign natural persons and legal persons can act as participants in an administrative proceeding. They can therefore, according to § 11 of the APA, have one of the following legal positions:

A person applying for the issue of an administrative act or the adoption of a measure, or a person making a proposal for entry into a contract under public law (applicant);
A person at whom an administrative act or measure is directed or to whom an administrative authority makes a proposal for entry into a contract under public law (addressee);
A person whose rights or obligations the administrative act, contract under public law or measure may affect (third person).

An administrative authority may also involve other persons and bodies whose interests may be affected by an administrative act, contract under public law, or administrative measure as participants in a proceeding.

Service of Administrative Acts

According to Estonian law, administrative acts are generally notified by delivery. This is regulated by the APA as a general law. If a special law does not regulate the notification and there is no possibility in this regard to apply the APA, or it is expressly established that the APA will not be applied, this situation (legal blank) should be overcome through analogy with the relevant regulation of the APA.

In addition to the APA (§§ 25–32), delivery is also regulated by Chapter IV of the Taxation Act, Chapter 8 of the Code of Administrative Court Procedure (§§ 72–76); Part VI of the Code of Civil Procedure[11] (§§ 306–327), Code of Criminal Procedure[12] (CCP) (§§ 164–169[1]) etc.

The APA mentions four ways of delivery of the document:

By post;
By the administrative authority which issued the document;
Electronically (§ 25 (1));
By publication in a newspaper (§§ 25 (2); 31).

[10] RT I 1993, 37, 558…22/11/2013, 1. Accessible in English at https://www.riigiteataja.ee/en/eli/509012014003/consolide.

[11] RT I 2005, 26, 197…21/05/2014, 1. Accessible in English at https://www.riigiteataja.ee/en/eli/521052014005/consolide.

[12] RT I 2003, 27, 166…21/05/2014, 1. Accessible in English at https://www.riigiteataja.ee/en/eli/527052014003/consolide

From a systemic point of view, it is justified to mention only three ways of delivery of a document, as electronic delivery together with direct delivery should be classified as delivery by the administrative authority.

Delivery in foreign states is regulated by § 32 of the APA. Documents are delivered abroad pursuant to the procedure provided for in international agreements. For instance, the Convention between the Government of the Republic of Estonia and the Government of the Republic of Latvia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income[13] includes the provision (Article 27) on assistance in collection. If international agreements have not been entered into, documents are delivered through diplomatic channels. A competent agency forwards a document together with the corresponding application to the Ministry of Foreign Affairs, who forwards the document to a representation. Respectively, the Consular Act[14] (§ 44) stipulates that at the written request of a person, a consular officer or an honorary consul will forward a document to an Estonian agency or person, unless a different procedure is prescribed by an international agreement or pursuant to an Act. A list of information prescribed on an application for the forwarding of a document has been established by the Minister of Foreign Affairs.[15] A state fee must be paid for the forwarding of a document. An honorary consul may charge a service fee for the forwarding of a document within the limits of the state fee rates established by the State Fees Act.[16]

If the agreements mentioned above have not been entered into and if a law or regulation prescribes that a document be delivered by post, the document will be delivered pursuant to the following procedure (§ 26, APA)[17]:

> In the case of delivery of a document by post, the document will be sent by registered letter to a participant in proceedings to the address indicated in the application. In the cases provided by law or by a regulation, a document may be sent by unregistered letter or by registered letter with notification of delivery. Herein the European Convention on the Service Abroad of Documents Relating to Administrative Matters[18] (1977) is referred to. This convention was signed by the representative of Estonia in the year 2000, it was ratified on 25/04/2001[19] and it entered into force on 01/08/2001. Estonia has declared that it will apply

[13] RT II 2002, 33, 157.

[14] RT I 2009, 29, 175…09/10/2013, 1. Accessible in English at https://www.riigiteataja.ee/en/eli/530102013033/consolide.

[15] Rule of the Minister of Foreign Affairs No 14 (17/06/2009) on list of data provided for request for ordering and forwarding a public document. – RTL 2009, 49, 726.

[16] RT I 2010, 21, 107…12/06/2014, 4. Accessible in English at https://www.riigiteataja.ee/en/eli/504062014001/consolide.

[17] Reference to the procedure provided by § 26 of the APA was made by the Act on Amendments and Application of the Administrative Procedure Act (RT I 2002, 61, 375). It was substantiated by the need to create legal grounds for the delivery of documents by registered letter. – Act on Amendments and Application of the Administrative Procedure Act. 993 SE I. – Available at http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=020500019 (28/06/2014).

[18] Available at http://conventions.coe.int/Treaty/en/Treaties/Html/094.htm (28/06/2014).

[19] Law on Ratification of the European Convention on the Service Abroad of Documents Relating to Administrative Matters. – RT II 2001, 6, 31.

> this convention also to fiscal matters (Article 1 (2)) and has designated a Ministry of Justice as a central authority to receive and take action or requests for service of documents relating to administrative matters emanating from other contracting states (Article 2 (1)). The Ministry of Justice had already been acting as a centre of communication on international legal assistance heretofore.
>
> If a participant in proceedings has a representative, a document may also be sent to the representative only.
>
> A document is deemed to be delivered to a participant in proceedings if it is delivered at the address of residence or seat of the participant in proceedings, or handed over to the participant in proceedings against his or her signature in a post office.
>
> If a participant in proceedings does not inform the administrative authority of changes in his or her address, a document will be sent to the most recent address known to the administrative authority and the document will thereby be considered delivered.

As regards the right of foreign interested parties to receive documents in a language they can understand, the Constitution establishes that the official language of Estonia is Estonian (§ 6). The official language of government agencies and local authorities is Estonian (§ 52 (1)). Everyone has the right to address state agencies, local governments, and their officials in Estonian and to receive responses in Estonian. In localities where at least one-half of the permanent residents belong to a national minority, everyone has the right to also receive responses from state agencies, local governments, and their officials in the language of the national minority (§ 51). The APA establishes that the language of administrative proceedings is Estonian. Foreign languages are used in administrative proceedings pursuant to the procedure provided for in the Language Act.[20] The latter law enacts that if an application, request or other document submitted to a state agency or local government authority is in a foreign language, the agency has the right to require that the person who submits the document to submit the translation of the document into Estonian. The person who submits the request or other document will be notified of the requirement for translation immediately. In the cases provided by law, a state agency or local government has the right to require notarization of the translation. If the required translation is not submitted, the document may be returned or be translated with the consent and at the expense of the person who submitted it. As a rule, a state agency or local government responds in Estonian to the document in a foreign language. Should the person receiving the document express the desire to receive the response in a foreign language, the response may be translated at the expense of the person receiving the document. Per agreement between the person and the public authority, the response to the document in a foreign language may be given in a foreign language understood by both parties. The Language Act also provides (§ 13) that in international communication, public authorities and the officials and employees thereof have the right to use a language that is suitable for both parties.

The authors of this article are of the opinion that there exists no urgent need to modify Estonian legislation governing the service of documents relating to admin-

[20] RT I 18/03/2011, 1…23/12/2013, 1. Accessible in English at https://www.riigiteataja.ee/en/eli/515012014002/consolide.

istrative procedures in other countries. No plans in this regard have as yet been made public.

Role of EU Law and International Conventions with Respect to Foreign Administrative Acts

The need for a concept of recognition of transnational administrative acts is closely linked to the EU – the values, principles and purposes that this union aims to achieve – first and foremost the free movement of goods, persons, services and capital – should be mentioned here. This concept should be based on mutual trust and on the principle of reciprocity. The evolution of the EU, in general, and of its internal market, specifically, bring about developments related to transnational administrative acts and the need to have a certain degree of harmonization. It is commonly known that the milestone in the free movement of goods in the EU is the case *Cassis de Dijon*; a good example to illustrate the importance of mutual recognition and trust between member states. In this case it was established that in the absence of harmonization, measures, which are applied without distinction to domestic products imported from other member states, are capable of constituting a restriction on the free movement of goods. Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of the products […] must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of consumers (Para. 8).[21]

It must be noted that the EU's role in matters of harmonization and its efforts to achieve the workable recognition mechanism of foreign administrative acts are remarkable – not only the primary legislation, but also the secondary legislation serves this purpose. The EU has passed regulations in the following areas: product authorizations, customs decisions, driving licenses and residence permits, professional qualifications etc. Estonia, for example, has adopted the Recognition of Foreign Professional Qualification Act[22] (2008) to transpose Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications[23] and Council Directive 2006(100/EC adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria

[21] Judgement of the Court of 20 February 1979. – Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein. – Reference for a preliminary ruling: Hessisches Finanzgericht – Germany. – Measure having an effect equivalent to quantitative restrictions. – Case 120/78. Accessible at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61978CJ0120&from=EN.

[22] RT I 2008, 30, 191. Accessible in English at https://www.riigiteataja.ee/en/eli/509062014001/consolide.

[23] OJ L 255, 30/09/2005, pp. 22–142.

and Romania.[24] To give some more examples (there is a mutual recognition of expulsion decision): the Obligation to Leave and Prohibition on Entry Act[25] (§ 28^1 (1) 8): "Failure, without imposition of prohibition on entry, to allow aliens to enter Estonia is permitted if the decision on expulsion made on the basis of Article 3 of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L 149, 2.06. 2001, pp. 34–36) applies with regard to an alien that is not revoked or suspended by the state making the decision." To apply the Medicinal Products Act,[26] the Minister of Social Affairs has issued a regulation on the terms and procedure for granting the renewal of a market authorization and handling of an application for a medicinal product, and recognition of the evaluation of a competent institution of a member state of the European Economic Area.[27] These examples demonstrate the willingness of Estonia as a member state of the EU to facilitate the recognition of foreign administrative acts.

In addition to the transposition of several acts of secondary legislation regulating various fields into the national legislation, Estonia has also signed and ratified several international multi and bilateral international conventions: on academic recognition of educational qualifications[28]; on avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income[29]; on driving permits[30];

[24] OJ L 363. 20/12/2006, pp. 141–237.

[25] RT I 1998, 98, 1575…21/12/2013, 1. Accessible in English at https://www.riigiteataja.ee/en/eli/522122013001/consolide.

[26] RT I 2005, 2, 4…06/06/2014, 14. Accessible in English at https://www.riigiteataja.ee/en/eli/509062014008/consolide.

[27] RTL 2005, 23, 314…RT I 12/07/2012, 2. Accessible in English at https://www.riigiteataja.ee/akt_seosed.html?id=112072012005&vsty=TOLK. See also Directive 2001/82/EC of the European Parliament and Council regarding the Community regulations on veterinary medicinal products (OJ L 311, 28/11/2001, pp. 1–66), amended by Directives 2004/28/EC (OJ L 136, 30/04/2004, pp. 58–84), 2009/9/EC (OJ L 44, 14/02/2009, pp. 10–61) and 2009/53/EC (OJ L 168, 30/06/2009, pp. 33–34); Directive 2001/83/EC of the European Parliament and Council regarding the Community regulations on medicinal products for human use (OJ L 311, 28/11/2001, pp. 67–128), amended by Directives 2002/98/EC (OJ L 033, 08/02/ 2003, pp. 30–40), 2003/63/EC (OJ L 159, 27/06/ 2003, pp. 46–94), 2004/24/EC (OJ L 136, 27/06/ 2003, pp 85–90), 2004/27/EC (OJ L 136, 30/04/ 2004, pp. 34–57), 2008/29/EC (OJ L 81, 20/03/2008, pp. 51–52), 2009/53/EC (OJ L 168, 30/06/2009, pp. 33–34), 2009/120/EC (OJ L 242, 15/02/2009, pp. 3–12) and 2010/84/EU (OJ L 348, 31/12/2010, pp. 74–99).

[28] See i.e. Agreement of the Government of the Republic of Estonia, the Government of the Republic of Latvia and the Government of the Republic of Lithuania on the Academic Recognition of Educational Qualifications in the Baltic Educational Space (signed on 18/03/2000, entered into force on 01/04/ 2001). – RT II 2001, 21, 111.

[29] For example the Convention between the Government of the Republic of Estonia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains (1994). Accessible at http://www.emta.ee/?id=1782. See also reference 13.

[30] Convention on Road Traffic, Vienna 8 November 1968. Estonia is a party to this convention since 24/08/1992. Accessible at http://www.unece.org/trans/conventn/legalinst_08_RTRSS_RT1968.html.

on transfer of corps.[31] It should be pointed out that not only has Estonia signed and ratified conventions with its partner countries within the EU, but it also recognizes the administrative acts of non-European countries as well. Using driving licenses as an example, Estonia is a member of the Convention on Road Traffic and therefore recognizes the driving licenses issued in Australia and in the USA.[32]

Concerning the question of competent authorities to implement relevant regulations on the recognition of foreign administrative acts, it should be noted that as these regulations are mostly 'sector-specific', national authorities, dealing with problems of recognition processes on a daily basis, are generally designated to handle the responsibility. So, in matters concerning the recognition of academic qualifications, the Ministry of Education and Research coordinates the recognition of foreign professional qualifications and the uniform implementation of the Recognition of Foreign Professional Qualification Act in Estonia, and gathers information concerning the implementation of this legislative act.[33] The question of terms and procedure for granting the renewal of a the market authorization for a medicinal product and handling of an application, and the recognition of the evaluation of a competent institution of a member state of the European Economic Area, falls within the competence of the State Agency of Medicines.

As per the APA (§ 51 (1)) an administrative act is aimed at the creation, alteration or extinguishment of the rights and obligations of persons, thereby, both beneficial and onerous transnational administrative acts can be recognized by Estonia. Thus the onerous tax orders and decisions imposing fines for administrative offences can be recognized.

According to the CCP (§ 488 (1)), Estonia may request a foreign state to execute a punishment or any other sanction imposed on a person on the basis of the Estonian Penal Code[34] or another act, if:

The convicted offender is a citizen or permanent resident of the requested state or if he/she is staying in the requested state and is not extradited;

The convicted offender is a legal person whose registered office is in the requested state;

Execution of the punishment in the foreign state is in the interests of the convicted offender or the public.

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[31] Agreement on the Transfer of Corpses. – RT II 2003, 18, 95.

[32] List of countries, the driving licenses of which are recognized by Estonia is accessible at http://www.mnt.ee/index.php?id=10752.

[33] Reference to the following EU directives is made by the Recognition of the Foreign Professional Qualifications Act: Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications (OJ L 255, 30/09/2005, pp. 22–142), amended by Council Directive 2006/100/EC adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania (OJ L 363, 20/12/2006, pp. 141–237) and by Council Directive 2013/25/EU adapting certain directives in the field of right of establishment and freedom to provide services, by reason of the accession of the Republic of Croatia (OJ L 158, 10/06/2013, pp. 368–375).

[34] RT I 2001, 61, 364…26/02/2014, 1. Accessible in English at https://www.riigiteataja.ee/en/eli/511032014001/consolide.

This act transposes Council Framework Decision 2005/214/JHA[35] on the application of the principle of mutual recognition of financial penalties into national law. The format of the certificate is established by the regulation of the Minister of Justice.[36] As per this framework decision, an opportunity was provided for the compulsory execution of the pecuniary penalties imposed by the judicial or administrative authorities of other member states. It is a good instrument for fighting against an ever-growing feeling of impunity. Although there used to be a widespread opinion that a pecuniary penalty imposed by the foreign authority (for instance for a traffic offence) would not be enforced in Estonia and the person would remain unpunished when returning from abroad, now these decisions are also enforced. It should, however, be noted that whereas the framework decision has well been adopted by foreign countries with an ever-increasing number of pecuniary penalties to be sent year by year to Estonia for execution, the competent Estonian authorities unfortunately tend not to take advantage of this opportunity. A reason for this can be said to be the lack of training to introduce the framework decision to the officials concerned. It should also be noted that today the whole workload in this respect falls on one particular court.[37]

As regards the enforcement of tax orders, Directive 2010/24/EU concerning the mutual assistance for the recovery of claims relating to taxes, duties and other measures[38] provides rules on notifications (Art. 8) and on the enforcement of tax orders and similar decisions (Art. 10 ff). This directive is transposed into Estonian national law by the TA. The Tax and Customs Board is entitled to apply for international professional assistance from a competent authority of a foreign state (international professional assistance). The Board exchanges information with a competent authority of a foreign state concerning the taxes and duties and the related accessory liabilities, financial penalties and benefits (collectable duties) collected by a state, local government or other administrative authority. It also provides international professional assistance for the recovery of taxes collected by a foreign public authority that has lodged a request regarding the recovery, notification or inquiry for information or precautionary measures, from a taxable person who is living or residing in Estonia, or is the holder of property in Estonia.

Conclusion

Problems concerning transnational administrative acts have not yet induced the rise of subject-related legal-theoretical writings in Estonia. On a practical level, however, Estonia has taken several steps towards the recognition of foreign

[35] OJ L 76, 22/03/2005, pp. 16–30.

[36] RTL 2008, 78, 1091.

[37] Olesk, E. 2011. *Rahvusvaheline koostöö kriminaalasjades*. (*International cooperation in criminal matters*). [online] In *Kohtute aastaraamat 2011*. (*Annual of Courts 2011*). [cited 28/06/2014]. Accessible at https://www.google.ee/?gws_rd=ssl#q=kohtute+aastaraamat+2011.

[38] OJ L 84, 31/03/2010, pp. 1–12.

administrative acts. This has been done both on the basis of international law as well as within the framework of the EU laws. Mutual trust, the principle of reciprocity and respect for the rule-of-law make it possible to move towards further actions to be taken in order to develop closer cooperation in this important sphere.

Bibliography

Merusk, K. 2001. Menetlusosaliste õigused haldusmenetluse seaduses. (Rights of parties to proceedings under the Administrative Procedure Act). In *Juridica*, 2001, No. 8, 519–528.

Merusk, K. 2011. Haldusakt kehtivas õiguskorras: teooria ja praktika. (Administrative act in the legal order: theory and practise). In *Juridica*, No. 1, pp. 27–34; *Kehtiv õigus ja õigusakti teooria põhiküsimusi. 2. par. ja täiend. tr.* (*Positive Law and Main Problems of Theory of Legal Act. 2nd rev. ed.*), 1995. Tartu: Juristide Täienduskoolituskeskus.

Olesk, E. 2011. *Rahvusvaheline koostöö kriminaalasjades*. (*International cooperation in criminal matters*). [online] In *Kohtute aastaraamat 2011. (Annual of Courts 2011)*. [cited 28/06/2014]. Accessible at https://www.google.ee/?gws_rd=ssl#q=kohtute+aastaraamat+2011.

Pilving, I. 2006. *Haldusakti siduvus. Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel*. Tartu: TÜ Kirjastus.

Chapter 7
La reconnaissance des actes administratifs étrangers au droit français

M. Timothée Paris

Abstract According to French Law, administrative acts issued by foreign legal systems as well as the ones issued by international and global organisations can be qualified as administrative foreign acts. However, this is not the case of European secondary law acts wich must be considered like european administrative acts. Taking into account the scarce number of international services and the fact that the international conventions, specially the European ones, use to provide for specific proceedings for administrative assistance and service changes on domestic or European law in this area seems irrelevant.

Resumée
Au droit français, les actes administratifs émanant de systèmes juridiques nationaux étrangers et les actes de droit dérivé des organisations internationales et globales pourront être qualifiés, du point de vue du droit interne français, comme des actes administratifs étrangers, mais tel ne sera pas le cas des actes de droit dérivé issu de l'Union européenne regardés comme administratifs du point de vue de l'Union. Compte tenu du faible nombre de notifications internationales, du fait que, dans les hypothèses les plus fréquentes –en droit de l'Union notamment-, des textes prévoient les règles et procédure d'assistance administrative et de notification internationale et compte tenu, enfin, de la nécessité de laisser une certaine souplesse dans ce domaine, une évolution du droit interne ou du droit européen en la matière semble peu pertinente.

Avec l'inestimable collaboration de **M. François Lichère** professeur de droit public à l'Université d'Aix-Marseille et de **Mme Marie Gautier-Melleray**, professeure de droit public.

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Le concept d'« acte administratif » et sa qualification d'« étranger »

Dans l'ordre juridique français, l'acte administratif se définit comme un acte qui, du fait de son auteur – une personne ou un organisme relevant de l'administration/du pouvoir exécutif - et de son objet –la mise en œuvre de prérogatives de puissance publique et/ou l'exécution d'un service public à caractère administratif- est soumis à un droit particulier, spécifique à la puissance publique : le droit administratif. Le caractère administratif de cet acte dépend donc du régime juridique de fond qui lui est applicable qui, lui-même, détermine également la compétence du juge administratif, par rapport au juge judiciaire, pour connaître de la légalité de ces actes et, la plupart du temps, des questions liées à leur exécution.

L'acte administratif, au sens générique du terme, se distingue donc, notamment, de l'acte législatif, ce dernier émanant du Parlement. Il se distingue aussi de la décision à caractère juridictionnel, ou encore de l'acte dit « de gouvernement », qui correspond aux actes à caractère politique (actes relatifs aux relations entre les pouvoirs constitutionnels par exemple, ou actes relatifs aux relations diplomatiques). L'acte administratif se distingue, en outre, notamment, des actes qui, tout en émanant d'administrations publiques ou en étant certifiés, directement ou indirectement, par la puissance publique, restent des actes de droit privé car ils touchent, par exemple à l'état des personnes (actes d'état civil) ou aux relations entre personnes privées (actes authentiques et acte notariés).

La notion d'acte administratif, dans l'ordre juridique interne français recouvre deux catégories d'actes biens distincts qui sont, d'une part, les actes administratifs unilatéraux et d'autre part, les contrats administratifs. Compte tenu du champ de l'étude qui ressort du présent questionnaire, l'ensemble des réponses qui suivent concerneront l'acte administratif unilatéral.

Ce dernier se définit comme une décision, une expression unilatérale de la volonté d'un organe administratif, qui s'impose aux tiers du seul fait de la volonté de son auteur, et qui a pour effet, soit de modifier l'ordonnancement juridique, soit de le maintenir en l'état.

L'on distingue en règle générale, dans l'ordre juridique français, deux catégories d'actes administratifs unilatéraux. La première recouvre les actes généraux et impersonnels, qui ne visent aucune personne nommément identifiée, appelés « actes réglementaires ». Parmi ceux-ci figurent, par exemple, l'ensemble des actes généraux et impersonnels pris par les autorités exécutives, comme le Président de la République ou le Premier ministre, ou par les autorités administratives (préfets, maires…). Le règlement se distingue de la loi essentiellement par la nature administrative de son auteur, même si ses effets sont très similaires.

La seconde catégorie d'actes administratifs unilatéraux recouvre les décisions individuelles. Elles visent une ou plusieurs personnes nommément désignées. Celles-ci sont, en pratique, les plus nombreuses : décisions reconnaissant un droit, décisions accordant ou refusant un avantage, décisions de sanction, mesures individuelles de police administrative, mesures relatives à la carrière des agents publics, à l'aide sociale…

La notion d'acte administratif, ainsi qu'il a été dit, est intimement liée, dans l'ordre juridique français, à la soumission de cet acte au droit national et, plus précisément, au droit administratif interne. Il n'existe donc pas, à proprement parler, de définition de l'acte administratif « étranger » dans le droit public français : ni les lois, ni la jurisprudence n'utilisent cette notion comme une catégorie juridique en tant que telle. Et cette catégorie n'a pas, non plus, été théorisée par la doctrine, à la différence de celle des actes « publics » étrangers, qui recouvre certes les actes de droit public étrangers, autrement dit ceux relevant d'une initiative de la puissance publique (qui peuvent être des actes administratifs au sens du droit français ou non), mais aussi et surtout « les actes d'initiative privée mais de confection publique », qui recouvre l'ensemble des actes ayant un lien avec la puissance publique et revêtus d'un élément d'extranéité mais qui sont des actes de droit privé. Cette dernière catégorie, qui ne relève pas de la catégorie des actes administratifs (par exemple : actes relatifs à la naissance, au mariage, à l'adoption, à la propriété testaments… qui font l'objet d'une certification publique mais ne constituent pas des actes administratifs), a été étudiée de manière approfondie par la doctrine Voir notamment sur ce dernier point la thèse de C. Pamboukis, *L'acte public étranger en droit international privé,* LGDJ, collection La Bibliothèque de droit privé, Paris, 1993.

L'on peut néanmoins s'efforcer de définir la notion d'acte administratif étranger qui est l'objet de ce questionnaire, en définissant d'abord, du point de vue du système juridique français, la notion d'acte « étranger » puis celle d'acte « administratif » étranger.

Deux critères paraissent, dans l'absolu, possibles pour qualifier un acte d'acte étranger. Le premier pourrait être un critère matériel : serait un acte étranger un acte qui n'obéirait à aucune règle du droit interne français. Le second critère pourrait être un critère organique : serait un acte étranger un acte qui émanerait d'une entité –un Etat notamment- qui ne serait pas française ou, plus précisément, qui ne relèverait pas de l souveraineté nationale française.

Du point de vue du système juridique de droit administratif français, le critère matériel, qui conduirait à regarder comme étranger un acte qui ne serait pas soumis au droit interne français, pourrait être regardé, à première intuition, comme le critère déterminant. D'une part, en effet, le raisonnement emprunterait directement à celui – habituel en droit français- consistant à déterminer le caractère administratif d'un acte en même temps que la compétence du juge administratif français, à savoir au regard du droit matériel auquel est soumis cet acte. D'autre part, ce raisonnement peut aussi se réclamer d'une décision rendue par le Conseil d'Etat de France sur la compétence de la juridiction administrative française pour statuer sur les litiges ayant un lien avec l'exécution de contrats conclus à l'étranger par les autorités publiques françaises (Conseil d'Etat – France-, section, 19 novembre 1999, Tegos). Dans cette affaire, la question posée était celle de savoir si le contentieux de la décision refusant le renouvellement du contrat conclu entre l'Institut français d'Athènes et le requérant, recrutant celui-ci comme professeur relevait de la compétence de la juridiction administrative française. Le Conseil d'Etat a, à cette occasion, jugé que cette dernière n'était pas compétente pour connaître d'un litige né de l'exécution d'un contrat qui n'est en aucune façon régi par le droit français. Après avoir constaté

que la commune intention des parties avait été de soumettre le contrat de recrutement au droit grec et qu'aucune disposition de droit français ne s'y appliquait, le Conseil d'Etat a déclaré la juridiction administrative incompétente.

La décision du Conseil d'Etat révèle ainsi a contrario que le caractère administratif d'un acte, au sens du système juridique français, résulte bien de sa soumission au droit français. L'on pourrait donc logiquement en déduire que le caractère « étranger » d'un acte administratif résulterait de la soumission de cet acte à un droit autre que le droit français.

A plus mûre réflexion, il semblerait néanmoins qu'un tel raisonnement connaisse au moins trois limites :

La première tient au fait que la question qui était posée au Conseil d'Etat dans la décision Tegos était une question de compétence de la juridiction administrative française, et non directement la question de la qualification « d'étranger » d'un acte, fût-il administratif.

La seconde limite de ce raisonnement tient au fait que la décision Tegos du Conseil d'Etat a été rendue à propos d'un contrat qui, en outre, était de facto emprunt d'un très fort élément d'extranéité, à savoir le fait que, bien que conclu avec une institution française, il était exécuté à l'étranger. Or les effets d'un contrat, y compris en tenant compte des spécificités juridiques du contrat de recrutement d'un agent par des services publics, restent, en partie au moins, le fruit de la loi des parties. Ce qui est applicable au domaine contractuel ne le serait donc peut-être pas nécessairement à l'hypothèse d'un acte administratif unilatéral.

La troisième limite au critère matériel pour qualifier un acte d'étranger est un raisonnement, certes assez hypothétique, mais qui n'en reste pas moins convainquant : pourrait-on qualifier d'acte de droit français un acte qui aurait pour origine un Etat étranger, mais qui –tout en étant conscient du caractère théorique de la situation- soumettrait volontairement cet acte au droit français ?

La réponse serait assurément « non » et elle tient en réalité à une explication particulièrement simple, qui procède de ce que ne peut être qualifié d'acte public ou administratif français qu'un acte qui, directement ou indirectement, procède de la souveraineté nationale.

De ces trois limites découle naturellement le fait que c'est bien le second critère autrement dit le critère organique, celui de l'origine de l'acte qui, en réalité, conduira, seul, à qualifier un acte d'étranger. De fait, implicitement mais nécessairement, le critère de la souveraineté – au sens international du terme, celle qui conduit à ce que chaque Etat dispose de la compétence de sa compétence- est un élément central de détermination du champ du droit administratif. Ce droit est, de fait, un droit dont l'objet même est de contrôler l'exercice d'une fraction essentielle de la souveraineté nationale, à savoir celui du pouvoir exécutif. Par conséquent, ce critère et, donc, celui de l'origine de l'acte revêtira sans aucun doute une dimension essentielle pour qualifier un acte d'étranger.

Toute aussi délicate est l'appréciation du caractère « administratif » de l'acte étranger : cette qualification doit-elle résulter de celle que lui donne le système juridique dont l'acte est originaire ? Ou résulte-t-elle de ce que l'acte est susceptible d'entrer dans le champ du droit administratif français ?

Sans doute, dans de nombreuses hypothèses, les deux qualifications se recouvriront : une loi votée par un parlement étranger sera en principe regardée, du point de vue du droit français, comme une loi étrangère, alors qu'un acte émanant d'une administration publique d'un état étranger sera en principe regardé comme un acte administratif étranger. Pour autant, même si l'on peut douter que les conséquences pratiques de la distinction, s'agissant d'un acte étranger, soient nombreuses, l'articulation entre les différents systèmes juridiques peut conduire à des hésitations sur le périmètre du caractère administratif d'un acte. Un acte qui serait regardé, dans le système juridique d'un Etat, comme étant administratif, n'aurait en effet pas nécessairement ce caractère s'il était transposé dans l'ordre juridique français. A l'inverse, un acte regardé, par exemple, comme n'étant pas administratif dans un autre Etat (la nomination d'un juge par exemple), pourrait être regardé du point de vue du droit interne français comme étant un acte administratif.

Même si, à l'heure actuelle, encore une fois, cette catégorie «d'acte administratif étranger », à la différence de celle des actes publics étrangers, ne semble avoir fait l'objet d'aucune systématisation, il semble raisonnable de considérer que sera regardé comme « administratif », du point de vue du droit interne français, un acte étranger qui, à la fois, sera regardé comme administratif selon les formes usitées dans le système juridique dont il émane – le plus souvent un acte émanant d'un organe relevant des autorités exécutives du système étranger- et, en même temps, sera susceptible d'être regardé comme administratif du point de vue du système juridique français.

Il semble en effet cohérent de penser que le caractère administratif d'un acte ayant ainsi une vocation transnationale ne puisse résulter que du fait qu'il aura ce caractère dans le for des deux systèmes juridiques qui se superposent : celui dont il émane et celui dans lequel il doit produire ses effets.

Celui dont il émane, car c'est ce système juridique qui, ab initio, va déterminer la nature et la portée de l'acte : un acte administratif étranger revêtira ce caractère, d'abord, parce qu'il émane d'une autorité exécutive relevant d'un autre système souverain. Celui dans lequel cet acte va produire ses effets car, au final, l'intérêt, pour un système juridique national, de qualifier un acte étranger d'acte administratif, ou d'acte de droit privé est de déterminer le corpus juridique interne qui va s'appliquer –droit public ou droit privé par exemple- lorsque cet acte va avoir vocation produire des effets dans l'ordre juridique de réception. Logiquement, il semble donc bien que la qualification d' « administratif » d'un acte étranger, du point de vue du système juridique français, se fera aussi au regard des catégorisations internes des différents actes. Si cet acte étranger est regardé, du point de vue du système juridique français, comme étant un acte de droit privé, alors le droit qui s'appliquera est le droit international privé français –l'on sera alors en présence d'un acte public étranger-. S'il est qualifié d'acte administratif étranger, c'est alors le droit administratif français qui va guider les effets éventuels de cet acte sur le territoire – ou plutôt l'absence d'effet direct de cet acte.

En synthèse, un acte administratif étranger peut sans doute se définir, du point de vue du système français, comme un acte, d'une part, émanant d'une autorité publique qui ne relève pas de la souveraineté nationale française et, d'autre part, un acte regardé comme adminis-

tratif du point de vue du système juridique dont il émane et susceptible, dans le même temps, d'être qualifié d'acte administratif du point de vue du droit français.

Prolonger cette définition de l'acte administratif étranger implique sans doute de se demander si elle recouvre l'ensemble des actes administratifs non français, incluant ceux élaborés par les organisations internationales, ou seulement les actes administratifs émanant d'un autre système juridique national.

S'il est certain que des actes administratifs émanant d'un autre système juridique national seront qualifiés d'actes étrangers, la réponse doit sans doute être plus nuancée en ce qui concerne les actes administratifs émanant des organisations supranationales ou globales, autrement dit le droit dérivé de ces institutions.

Les actes émanant de l'Union européenne, du moins ceux qui ne relèvent pas de l'organisation interne de l'Union (comme les actes relevant de la gestion de la fonction publique de l'Union) mais visent les tiers (Etats, citoyens…) ne pourront sans doute pas être qualifiés d'actes administratifs étrangers du point de vue du système juridique français : l'ensemble du droit dérivé de l'Union s'incorpore en effet directement au droit national avec une autorité supérieure à celle des lois, compte tenu de la tradition moniste française et du caractère particulier de l'intégration européenne, que prend en compte aujourd'hui la Constitution française. Ainsi, les actes qui, du point de vue du système juridique de l'Union, seront regardés comme des actes administratifs (les décisions de la Commission par exemples), constitueront directement, sans transposition, une source du droit national, qui plus est avec une autorité supérieure à celle des lois française. Ils ne sont donc ni administratifs du point de vue de la hiérarchie des normes en droit interne, ni étrangers car incorporés directement à ce même droit interne.

En revanche, l'on pourra sans doute être amené à considérer que les actes dérivés édictés par des organisations internationales ou globales autres que l'Union européenne relèvent de la catégorie des actes administratifs étrangers, du point de vue du droit interne français : ces actes (l'on peut penser par exemple aux décisions des organisations internationales visant leurs propres agents), qui relèvent par principe d'un droit autre que le droit interne français, sont, le cas échéant, susceptibles de s'insérer dans le droit interne sans être dotés d'une autorité particulière et relèveraient donc, a priori, plutôt d'un régime de droit administratif.

En synthèse, les actes administratifs émanant de systèmes juridiques nationaux étrangers et les actes de droit dérivé des organisations internationales et globales pourront être qualifiés, du point de vue du droit interne français, comme des actes administratifs étrangers, mais tel ne sera pas le cas des actes de droit dérivé issu de l'Union européenne regardés comme administratifs du point de vue de l'Union.

La distinction entre les actes administratifs français et les actes administratifs étrangers aura nécessairement une conséquence radicale sur les effets juridiques de cet acte, du fait du caractère éminemment territorial –lié à la souveraineté- du droit administratif. L'acte administratif unilatéral français obéit au régime du droit administratif interne : il est donc immédiatement exécutoire, sans que l'administration n'ait besoin de recourir à un juge et emporte, dès son édiction, des conséquences juridiques. L'acte administratif étranger n'aura, par principe, aucun effet direct dans l'ordre juridique français, sauf si une règle de droit supérieure applicable en France

(d'origine interne, européenne ou internationale) prévoit que cet acte étranger produit directement des effets sur le territoire.

C'est ainsi par exemple, si l'on met de côté les évolutions induites par le droit de l'Union et le principe de reconnaissance mutuelle qui seront examinés après, que les permis de conduire délivrés par les Etats non membres de l'Union sont reconnus en France mais cette reconnaissance, -au demeurant limitée à une durée d'un an après l'acquisition de la résidence normale en France par son titulaire-, résulte explicitement d'un texte réglementaire français (article R. 222-3 du code de la route). De la même manière, si certains titres exécutoires émis par des Etats étrangers pour le recouvrement d'impôts peuvent produire des effets en France, et permettre à l'administration fiscale française de prendre des mesures coercitives pour le recouvrement de la créance concernée, ce n'est qu'à la condition qu'existent entre la France et l'Etat concerné un accord d'assistance en matière fiscale permettant le recouvrement, en France, d'impôts revenant à cet Etat (exemple ; voir CE sect 21 décembre 1977, n° 01344). La reconnaissance d'actes administratifs étrangers comme les diplômes ne pourra également procéder que d'une norme supérieure applicable en droit interne français (voir par exemple les stipulations de l'article 5 de la déclaration gouvernementale du 19 mars 1962 relative à la coopération culturelle entre la France et l'Algérie, qui prévoient la reconnaissance mutuelle des grades et diplômes d'enseignement délivrés dans les mêmes conditions de programme, de scolarité et d'examen; CE ass, 9 avril 1999, Mme Chevrol-Benkeddach. Voir également l'accord sur la reconnaissance des grades et diplômes dans l'enseignement supérieur entre la République française et le Saint-Siège signé à Paris le 18 décembre 2008 ; CE ass 30 juillet 2010, Fédération nationale de la libre pensée et autres, n° 327663 et suivants).

Il n'est pas exclu, par ailleurs, qu'un acte administratif étranger, même s'il n'est pas effectivement et directement applicable en France dans les conditions qui viennent d'être précisées, puisse néanmoins produire des effets indirects : tel sera le cas, par exemple, lorsque l'existence de cet acte ou les effets qu'il produit dans le système juridique dont il émane seront regardés comme des éléments de preuve par un juge interne français. L'on peut penser par exemple à l'hypothèse dans laquelle les diplômes obtenus à l'étranger par un étudiant seront pris en considération pour apprécier la réalité et le sérieux des études effectuées en France dans le cadre d'une demande de titre de séjour étudiant, ou encore aux hypothèses dans lesquelles des décisions d'octroi ou de refus d'avantages sociaux dans un autre pays seront prises en considération pour l'octroi ou le refus d'avantages sociaux en France.

Quant à l'exécution forcée, sous la stricte réserve que l'acte administratif étranger produise des effets directs en France du fait d'un texte qui lui confère de tels effets dans l'ordre juridique interne, elle obéira sans doute aux mêmes règles que celles qui guident l'exécution forcée des actes administratifs français : celle-ci ne sera possible que si une loi le prévoit et dans les conditions prévues par cette loi, ou alors en cas d'urgence, ou si aucune autre voie de droit n'existe et, dans cette dernière hypothèse, à la condition que l'administration se heurte à la résistance de l'administré et que les mesures d'exécution d'office soient nécessaires pour assurer l'exécution de la loi et proportionnées à l'objectif recherché.

La plupart du temps, néanmoins, les lois prévoient, soit des mesures de nature à permettre l'exécution forcée (en matière fiscale, par exemple, la loi ouvre à l'administration de nombreuses possibilités de pratiquer des saisies sans le recours à un juge), soit des mesures d'effet équivalent, telles que des sanctions pénales (pour la méconnaissance des règlements de police par exemple) ou des sanctions administratives (pécuniaires ou autres : retrait d'une licence…). Le non respect d'actes administratifs étrangers rendus exécutoires en France du fait d'une norme supérieure ne pourrait sans doute être assorti de mesures identiques que si, de la même manière, des normes supérieures en prévoient explicitement l'existence.

Observations générales sur la procédure administrative commune pour l'adoption d'actes administratifs

Si un code de procédure administrative non contentieuse est actuellement en cours de rédaction – la loi autorisant sa préparation a été votée par le Parlement français le 12 novembre 2013-, il n'existe encore, à l'heure actuelle, aucun texte général régissant la procédure pour l'adoption d'actes administratifs en France.

Si l'on excepte, néanmoins, les procédures particulières à l'adoption de certains actes administratifs (les autorités indépendantes de régulation, par exemple, disposent pour la plupart de règles spécifiques d'adoption des actes administratifs qu'elles édictent, les décisions administratives relatives à l'urbanisme et à l'environnement bénéficient aussi de règles de procédure spéciales – cf infra-), de manière générale, deux lois différentes regroupent les principes essentiels qui régissent l'adoption de la majorité des actes administratifs.

La première est la loi du 11 juillet 1979 relative à la motivation des actes administratifs, qui prévoit que toute décision administrative individuelle défavorable doit être motivée, c'est-à-dire comporter l'exposé des considérations de droit et de fait qui la fondent (ce principe ne s'applique pas pour les actes réglementaires). Il en va également ainsi pour toutes les décisions administratives individuelles qui dérogent aux règles générales fixées par la loi ou le règlement en vertu de l'article 2 de cette même loi. La seconde loi est celle du 12 avril 2000 portant droit des citoyens dans leurs relations avec l'administration, qui rassemble un ensemble de règles, soit de forme (mention du nom du signataire, signature de l'acte…), soit de procédure (l'obligation d'une procédure contradictoire préalable pour les décisions individuelles défavorables), soit précise le régime applicable à certaines décisions administratives (décisions implicites nées du silence gardé par l'administration, décisions créatrices de droit…).

Quelques principes qui régissent la procédure pour l'adoption d'actes administratifs résultent également de la jurisprudence du Conseil d'Etat : l'on peut penser, s'agissant des actes réglementaires, à l'obligation faite à l'administration de prendre les décrets d'application d'une loi dans un délai raisonnable, ou encore au principe d'impartialité qui s'impose à l'administration dans l'élaboration des actes administratifs. Ce dernier devrait prochainement être affirmé par une loi comme étant un principe fondamental de la fonction publique.

Parallèlement à ces lois qui fixent des obligations pour l'administration dans le cadre de la procédure d'élaboration des actes administratifs, plusieurs fondements juridiques prévoient également des droits pour les citoyens dans le cadre de l'élaboration des décisions administratives. L'on peut en citer principalement trois.

Le premier, déjà mentionné, est l'obligation faite à l'administration, avant de prendre une mesure individuelle défavorable à l'encontre d'une personne, de mettre à même cette personne de présenter des observations. Ce principe, prévu par l'article 24 de la loi du 12 avril 2000 portant droit des citoyens dans leurs relations avec l'administration, mais qui existait auparavant, depuis 1945, sous la forme d'un principe général du droit dans la jurisprudence du Conseil d'Etat, s'applique en particulier aux décisions prises en matière de sanction.

Le second fondement que l'on peut mentionner, qui prévoit l'intervention du public et de tiers dans l'élaboration d'un acte est le principe de participation du public à l'élaboration des décisions ayant une incidence sur l'environnement. L'article 7 de la Charte de l'environnement française de 2004, qui a une valeur constitutionnelle, prévoit en effet que « Toute personne a le droit, dans les conditions et les limites définies par la loi, d'accéder aux informations relatives à l'environnement détenues par les autorités publiques et de participer à l'élaboration des décisions publiques ayant une incidence sur l'environnement". Ce principe se traduit, d'une part, en ce qui concerne la plupart des actes administratifs ayant pour effet d'autoriser la création ou la construction d'ouvrages ou d'activités ayant une incidence sur l'environnement (ouvrages et travaux publics, activités polluantes ou dangeureuses, création de zones protégées, élaboration de documents et de schémas d'urbanisme…) par l'obligation de mettre en oeuvre, préalablement, une procédure formalisée appelée "enquête publique". Cette procédure, menée sous la direction d'un expert indépendant, a pour objet d'assurer l'information et la participation du public ainsi que la prise en compte des intérêts des tiers. Le principe de participation du public se traduit également, d'autre part, en ce qui concerne tous les actes administratifs relatifs à l'environnement qui ne sont pas soumis à une procédure spécifique, que ces actes soient réglemantaires ou individuels, par l'obligation pour toutes les collectivités publiques de mettre en oeuvre, préalablement, une procédure de consultation, qui se déroule en principe par voie électronique.

L'on peut mentionner, enfin, la loi du 17 juillet 1978 sur la communication des documents administratifs, qui pose le principe selon lequel tous les documents administratifs, c'est-à-dire les documents produits ou reçus par les organismes administratifs ou exerçant une mission à caractère administratif, sont communicables de plein droit à toute personne qui en fait la demande. Ce principe est, bien évidemment, assorti de plusieurs exceptions : le document doit être achevé et ne doit pas avoir un caractère préparatoire et le droit à communication ne s'applique pas, lorsque le document contient un certain nombre de secrets protégés par la loi (secret de la défense nationale, secret des délibérations du gouvernement). Le document n'est en outre communicable qu'à la personne concernée lorsqu'il contient des informations concernant celle-ci qui sont couvertes par le secret de la vie privée, le secret médical ou le secret des affaires. Dans ce dernier cas, le document doit être communiqué sans les mentions concernées.

Si aucune des règles juridiques prévoyant l'accès aux documents administratifs ou la participation du public à l'élaboration des décisions en matière d'environnement ne prévoit explicitement la possibilité de faire participer des administrations publiques ou des tiers étrangers, elles ne l'excluent absolument pas. Ces procédures de consultation et de participation relèvent en effet de ce que l'on pourrait appeler une sorte de citoyenneté administrative qui est totalement indépendante de la citoyenneté politique : toute personne, indépendamment de sa nationalité, peut demander la communication de documents administratifs dans les conditions prévues par la loi du 17 juillet 1978 et participer à une procédure d'enquête publique ou à une procédure de consultation du public et aura droit de présenter des observations si elle doit faire l'objet d'une sanction par une autorité administrative française.

L'hypothèse que la procédure d'élaboration d'un acte administratif français nécessite l'accomplissement de mesures d'instruction dans un autre Etat est assurément peu fréquente, dès lors que cet acte visera nécessairement une personne qui, même si elle est de nationalité étrangère, entre dans le champ territorial – le champ de la souveraineté- du droit administratif français. Une procédure de sanction administrative exercée en France contre un ressortissant étranger, par exemple, ou contre une société étrangère, sera sans doute, dans la plupart des hypothèses, fondée exclusivement sur les agissements de cette personne en France, dès lors que l'administration française, pour des questions de souveraineté, ne saurait en principe sanctionner que des manquements à une règle de droit interne français. L'on peut certes envisager, dans certains domaines, que l'administration française ait recours à des informations ou à des mesures d'instruction réalisées dans d'autres Etats – l'on peut penser par exemple au domaine de la fiscalité, en particulier lorsque la société visée en France relève d'un groupe multinational ou lorsque c'est une société de droit étranger qui exerce une activité en France, par l'intermédiaire d'un établissement stable ou non. Mais dans ces hypothèses, le droit de l'Union, en ce qui concerne l'Europe, et des conventions internationales bilatérales ou multilatérales en ce qui concerne les autres Etats, prévoient d'ores et déjà les modalités d'exercice de l'assistance administrative internationale et donc, les modalités d'exercice des mesures d'instruction. L'on peut penser, par exemple, au VIES mis en place dans l'Union à partir de 1993 (Système d'échange automatisé relatif à la TVA), à la directive 2011/16/UE du Conseil sur l'assistance administrative en matière fiscale, qui a remplacé la directive 77/799/CEE, ou encore à la convention élaborée par le Conseil de l'Europe et l'OCDE concernant l'assistance administrative mutuelle en matière fiscale. Compte tenu des textes déjà existants et du fait qu'elles couvrent les très rares domaines dans lesquels, du point de vue du droit français, des mesures d'instruction exercées au niveau international sont susceptibles d'être réalisées pour l'élaboration d'un acte administratif, la création d'un instrument unifié européen sur ce point paraît peu pertinente.

L'on peut d'ailleurs souligner à cet égard que les instruments à caractère non sectoriel du Conseil de l'Europe tendant à favoriser l'assistance administrative internationale sont très peu, voire pas usités, les textes internes ou internationaux prévoyant, lorsque c'est nécessaire, des procédures particulières adaptées à chaque catégorie d'actes. En matière d'authentification des permis de conduire étranger,

par exemple, le code de la route français prévoit lui-même une procédure particulière d'authentification, qui repose sur une demande des autorités préfectorales françaises aux autorités de l'Etat d'origine, effectuée par l'intermédiaire du réseau consulaire français.

La notification d'actes administratifs : attention toute particulière portée à la notification internationale

Il n'existe pas, en France, de règle générale concernant les procédures de notification des actes administratifs individuels. Certaines règles existent néanmoins, comme par exemple celle qui fait obligation à l'administration d'assortir la notification d'un acte administratif de la mention des voies et délais de recours contre celui-ci. Mais les conditions de notification d'un acte administratif restent sans incidence aucune sur la légalité et la validité de cet acte : le respect de ces conditions déterminera seulement, le cas échéant, le caractère opposable de l'acte et des délais de recours contre celui-ci à la personne qu'il vise. Autrement dit, si l'administration ne peut pas établir qu'un acte administratif a été régulièrement notifié à une personne avec la mention régulière des voies et délais de recours, le recours juridictionnel contre cet acte sera recevable alors même que le délai de recours –qui est en principe de deux mois à compter de la notification de l'acte- serait expiré. Mais, encore une fois, une irrégularité dans la notification de l'acte n'a d'incidence que sur le délai de recours et n'entraînera jamais l'illégalité de celui-ci.

Dans la mesure où il appartient à l'administration de prouver les conditions de notification des actes administratifs individuels, pour rendre le délai de recours opposable, et même si, encore une fois, sauf dans certaines hypothèses particulières, il n'existe pas de règle obligatoire en la matière, l'administration utilise le plus souvent, pour notifier les actes administratifs, des procédés de notification lui permettant ensuite de rapporter cette preuve. Le procédé le plus courant est l'envoi de l'acte par courrier postal recommandé avec demande d'avis de réception, mais l'administration peut aussi remettre l'acte en main propre si elle le souhaite. L'utilisation de la signification par voie d'huissier de justice est également possible mais elle est en pratique très rare (on la trouve essentiellement dans certaines procédures relatives au recouvrement des impôts). Dans tous les cas, l'administration peut toujours utiliser le courrier simple. Elle risque seulement de ne pas être en mesure d'établir la date de la notification.

Il n'existe, sous réserve d'un inventaire complet du droit existant, aucune hypothèse dans laquelle des règles de droit interne imposeraient des conditions particulières de notification des actes administratifs, lorsque cette notification doit être faite à l'étranger. D'une part, l'hypothèse est en pratique très rare et, d'autre part, la pratique courante est alors de notifier ces actes par la voie postale (recommandé international). Les stipulations de la convention européenne sur la notification à l'étranger des documents en matière administrative –qui renvoient d'ailleurs pour l'essentiel au droit et aux pratiques internes des Etats- ne semblent en pratique

jamais être utilisées par les administrations françaises. Une seule occurrence d'invocation de cette convention a pu être trouvée dans l'ensemble de la jurisprudence des juridictions administratives françaises des quinze dernières années, dans laquelle le juge (la Cour administrative d'appel de Lyon) a considéré que la circonstance que l'acte administratif n'ait pas été notifié selon les procédures prévues par cette convention était sans incidence sur l'écoulement du délai de recours contentieux, dès lors que la personne visée par la décision avait reconnu avoir eu connaissance de cette décision à une certaine date (CAA Lyon, 12 mai 2011, n°10LY1169).

S'il existe certains domaines de l'action administrative en France dans lesquels des dispositions spécifiques prévoient qu'une personne a le droit de recevoir une notification dans une langue qu'il connaît (en matière d'admission des étrangers sur le territoire, d'éloignement des étrangers selon certaines procédures d'urgence et en matière d'asile), ces domaines ne visent pas des notifications internationales. Aucun principe ni aucune règle de droit interne français ne semble prévoir, de manière générale, le droit pour une personne à recevoir des notifications internationales dans une langue compréhensible par l'intéressé.

Compte tenu du faible nombre de notifications internationales, du fait que, dans les hypothèses les plus fréquentes –en droit de l'Union notamment-, des textes prévoient les règles et procédure d'assistance administrative et de notification internationale et compte tenu, enfin, de la nécessité de laisser une certaine souplesse dans ce domaine, une évolution du droit interne ou du droit européen en la matière semble peu pertinente.

Sur la reconnaissance et l'exécution des actes administratifs internationaux

A la différence des actes de droit privé certifiés par une autorité publique, en particulier ceux relatifs à l'état des personnes, les actes administratifs étrangers, c'est-à-dire les actes procédant de la volonté d'une administration d'un autre Etat n'ont pas vocation à produire des effets sur le territoire français. Cela découle du principe de souveraineté nationale, dont le droit administratif, c'est-à-dire le droit qui régit l'exercice des fonctions exécutives de la puissance publique, est une composante. Logiquement, il n'existe donc aucune règle nationale à caractère général régissant la validité, l'effectivité ou le caractère exécutoire des actes administratifs étrangers. Ou, plutôt, il existe sans doute bien un principe, mais celui-ci prévoit que les actes administratifs étrangers, c'est-à-dire ceux qui ne sont pas régis par le droit français, ne sont pas applicables, ni exécutoires, du moins directement, sur le territoire français, sauf, ainsi qu'il a été dit, si une norme de droit interne prévoit ce caractère exécutoire –ce qui, hormis les hypothèses relevant du droit de l'Union qui seront examinées plus loin et celles déjà mentionnées qui procèdent d'autres traités internationaux, peu nombreuses et déjà mentionnées, semble une hypothèse quasi-inexistante.

Il n'existe pas de conditions formelles particulières pour qu'un acte administratif étranger produise des effets en droit interne français

Dans ces très rares hypothèses (encore une fois, si l'on excepte l'application du droit de l'Union), il n'existe pas de règle générale fixant des conditions de forme particulières pour que l'acte administratif déploie ses effets sur le territoire national, sous réserve, bien évidemment, de l'authenticité de l'acte.

Hormis, le domaine particulier de l'authentification des permis de conduire étrangers, qui fait l'objet d'une procédure spécifique de certification par les autorités nationales de l'Etat étranger, saisi par les autorités consulaires françaises, il n'existe pas de règle, ni de procédure à caractère général pour certifier l'authenticité d'une décision administrative étrangère. La procédure spécifique relative à la certification du permis de conduire étranger n'est d'ailleurs applicable que dans l'hypothèse où l'administration a un doute sur l'authenticité du permis présenté par le ressortissant étranger ce qui, a contrario, peut être interprété comme signifiant que les actes administratifs étrangers, lorsqu'ils sont destinés à produire des effets dans l'ordre juridique interne, disposent d'une présomption d'authenticité, et cela même en l'absence de toute procédure de certification du type apposition de l'apostille. En cas de doute sur l'authenticité, les autorités administratives françaises peuvent sans doute, soit demander l'apposition de l'apostille sur l'acte (ce qui est en pratique extrêmement rare en ce qui concerne les actes administratifs), soit demander aux autorités consulaires françaises qu'elles certifient l'authenticité de l'acte auprès des autorités de l'Etat étranger. Mutatis mutandis, l'on peut d'ailleurs relever que, en ce qui concerne les actes d'Etat civil étranger, le juge administratif français considère que l'absence d'apposition de l'apostille n'est pas nécessairement de nature à faire regarder l'acte étranger comme n'étant pas authentique (par ex CAA Nancy, 6 décembre 2012, préfet de la Moselle, n° 11NC01633, jugeant qu'en l'absence de dispositions législatives et réglementaires en ce sens et dès lors que n'existent pas de doutes sur l'authenticité des actes d'Etat civil, l'apostille ne peut être exigée. Voir également CAA Nancy, 23 avril 2012, préfet de la Moselle, n°11NC01749, jugeant que le préfet ne peut opposer devant le juge l'absence de l'apostille sur un acte d'état civil s'il n'a pas demande cette formalité avant l'édiction de sa décision).

La comparaison entre les actes d'Etat civil et les actes administratifs a ses limites car, pour les premiers, le code civil français (article 47) prévoit explicitement une présomption d'authenticité de l'acte étranger si celui-ci a été réalisé dans les formes usitées au sein de l'Etat étranger. Or il n'existe aucune disposition à caractère général identique relative aux actes administratifs. Toutefois, le principe de liberté de la preuve devant le juge administratif français et le fait que celui-ci apprécie souverainement de l'authenticité des documents qui lui sont produits, sans utiliser ni requérir de procédure spécifique d'authentification, incite néanmoins à considérer qu'un acte administratif étranger bénéficie bien d'une présomption d'authenticité lorsqu'il est présenté, y compris en l'absence de toute authentification formelle.

Aucune condition matérielle particulière ne semble être exigée pour qu'un acte administratif international déploie ses effets sur le territoire national. L'hypothèse qu'un acte administratif d'une organisation internationale (si l'on excepte l'Union européenne) soit susceptible de produire directement des effets dans l'ordre juridique interne reste très peu probable : si cet acte ne constitue pas un traité ou un accord international, il s'intégrera dans l'ordre juridique dans les conditions prévues par le traité qui prévoit son existence, mais à un niveau infra législatif. Il ne pourrait donc s'appliquer que s'il n'est pas contraire à une loi ou à un principe général du droit interne.

Les effets de « fond » des actes administratifs étrangers dans l'ordre juridique interne français sont opposables aux autorités administratives et au juge français

Dans l'hypothèse où un acte administratif étranger est amené à produire des effets directs dans l'ordre juridique français, ceux-ci découleront directement des textes qui prévoient le caractère exécutoire de cet acte en droit interne et seront limités par ces mêmes textes. C'est ainsi par exemple que, si les visas de court séjour d'une durée inférieure à trois mois délivrés par un autre Etat partie à la convention Schengen sont pleinement opposables aux autorités françaises et si les visas et titres d'une durée supérieure à trois mois délivrés par les mêmes Etats autorisent la personne qui en est titulaire à séjourner pour une durée de trois mois en France, ces effets d'actes administratifs étrangers dans le droit interne procèdent directement des stipulations même de la convention d'application de l'accord de Schengen (articles 18 et suivants de la convention de Schengen). Selon une logique analogue, les effets des créances fiscales établies par un autre Etat sur le territoire français résultent directement des stipulations mêmes des conventions d'assistance bilatérales. Voir par exemple CE sect. 21 décembre 1977, n° 01344, précité, jugeant que, si les créances fiscales belges ne sont pas revêtues du privilège applicable au recouvrement des impôts français, cela résulte directement des stipulations de ces conventions.

Parallèlement, les autorités administratives françaises et, a fortiori, le juge administratif français, doivent en principe se borner à tirer les effets et conséquences prévues par ces textes et conventions, en n'exerçant sur l'acte lui-même qu'un contrôle extrêmement limité. Ainsi que le soulignait le professeur Marie Gauthier (*Acte administratif transnational et droit communautaire*, in « Droit Administratif Européen »), l'acte administratif étranger revêt, pour l'administration et le juge administratif français, la nature d'un fait : ils peuvent en contrôler l'existence –en s'assurant de l'authenticité de l'acte et de l'exactitude des mentions qu'il contient-, mais ne peuvent exercer sur la procédure d'élaboration de l'acte et son contenu aucun contrôle direct, sauf lorsqu'un tel contrôle résulte d'une norme de droit supérieure. Cela a très clairement été jugé par le Conseil d'Etat à propos du recou-

vrement en France d'impositions établies à l'étranger, le juge administratif français s'étant déclaré « incompétent » pour examiner un moyen tiré de ce que la somme devant être recouvrée résultait d'une double imposition dans l'Etat d'origine (CE sect. 21 décembre 1977, n° 01344 précitée). De la même manière, dans le cadre du régime –essentiellement jurisprudentiel- de l'abrogation des actes administratifs créateurs de droits, le Conseil d'Etat a-t-il jugé qu'à partir du moment où a été mise en œuvre une procédure de droit interne de reconnaissance et d'équivalence spécifiquement prévue par les textes, un diplôme étranger est susceptible de conférer des droits à l'exercice d'une profession, autrement dit de produire des effets sur l'ordre juridique interne. Cela, sauf en cas de fraude – et l'on retrouve là, en partie du moins, la condition d'authenticité de l'acte (CE sect. 6 mars 2009, n° 306084).

La même dynamique de contrôle de l'existence de l'acte étranger et de son applicabilité en droit interne, mais d'absence de contrôle sur le fond de l'acte, se retrouve également dans le cadre de la mise en œuvre du principe de reconnaissance mutuelle au sein de l'Union –ou de la mise en œuvre des textes sectoriels spécifiques qui reprennent ce principe-. Ainsi, à l'occasion de la mise sur le marché en France d'un produit ayant déjà fait l'objet d'un agrément dans un autre Etat de l'Union, le juge se borne à apprécier le caractère identique des produits devant être commercialisés en France, avec ceux ayant bénéficié d'un agrément étranger ; mais il ne contrôle pas le bien-fondé de cet agrément(Voir par exemple, à propos de l'autorisation de mise sur le marché de produits phytosanitaires, CE 17 octobre 2007, Société Endymis, n° 292943). De la même manière, s'agissant de la reconnaissance mutuelle des établissements de crédit (directive 2006/48/CE du 14 juin 2006), le juge interne français exigera la présentation de l'agrément émis par les autorités étatiques du pays d'origine (contrôle de l'existence de la réalité du contenu de l'acte administratif étranger), mais ne contrôlera pas les conditions dans lesquelles cet agrément a été octroyé (CE 14 juin 2010, Money Cash Worldwide LTD, n° 305671). Il ne contrôle pas, non plus, du moins pas directement, la légalité de l'inscription d'un ressortissant étranger au système d'information Schengen faite par une autorité étrangère. Il ne peut ainsi s'assurer de la régularité du respect des procédures prévues dans l'Etat étranger lors d'un tel signalement (CE, 23 mai 2003, M. Catrina, n° 237934).

Les seules exceptions qu'il semble possible d'envisager à cette absence totale de contrôle du juge interne sur la procédure d'élaboration et sur le fond de l'acte administratif étranger résulteraient de situations dans lesquelles une norme de droit, au moins équivalente, dans la hiérarchie des normes, à celle qui prévoit les effets de l'acte étranger dans l'ordre juridique interne, impliquerait un tel contrôle sur les procédures ou sur le fond de l'acte étranger. C'est ainsi par exemple que le contenu de l'acte étranger peut être contrôlé directement par rapport aux exigences de forme et de fond prévues par le texte même qui confère à cet acte un caractère exécutoire en France. Tel est le cas par exemple en ce qui concerne le signalement aux fins de non admission d'un ressortissant étranger dans le système d'information Schengen : le juge s'assure que ce signalement a été réalisé conformément aux stipulations de la convention (en vérifiant par exemple que le motif du signalement étranger relève bien de ceux prévus par la convention) et, le cas échéant, si ce signalement n'a pas

été réalisé dans les conditions prévues par la convention (par exemple lorsque le signalement n'a pas été fait pour l'un des motifs prévus par la convention) il peut en tirer les conséquences sur la légalité de la décision des autorités administratives françaises – le refus de visa Schengen- prises sur le fondement de ce signalement (CE 9 juin 1999, Epoux Forabosco, n° 190384).

L'on peut également sans doute envisager l'hypothèse dans laquelle le contenu ou les effets d'un acte administratif étranger devant recevoir exécution dans l'ordre juridique interne français serait contraire à des droits fondamentaux garantis, notamment, par la Charte des droits fondamentaux de l'Union européenne ou par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, voire le cas échéant à des normes impératives de droit interne – constitutionnelles par exemple. Dans ce cas, y compris, si l'opposabilité de l'acte administratif étranger en France résultait du droit de l'Union, il paraît envisageable que le juge interne apprécie le contenu de l'acte, voire même la procédure ayant conduit élaboration, et prive cet acte des effets dont il aurait dû être revêtus.

L'on peut envisager, par exemple (mais, encore une fois, il ne s'agit que d'une hypothèse d'école), que, dans l'hypothèse d'une sanction administrative étrangère rendue exécutoire en France par un texte international (une directive par exemple), le juge interne français ne s'interdise pas, alors, de contrôler l'absence de violation, par cet acte étranger, de l'article 6 de la convention européen des droits de l'homme. S'il ne le faisait pas, cela conduirait la France à méconnaître ses obligations qui résultent de cette convention. Il s'agit en réalité, peu ou prou, du raisonnement tenu par la Cour européenne des droits de l'homme à propos des conséquences de l'application du règlement dit « Dublin II » qui fixe, au sein de l'Union, l'Etat compétent pour l'examen d'une demande d'asile (CEDH, gr. ch. 21 janvier 2011, Aff M.S.S. c/ Belgique, n° 30696/09), sous la réserve que la décision de refus d'asile reste encore une procédure essentiellement nationale dès lors que les effets d'un refus d'asile dans un Etat de l'Union ne lient pas les autres Etats.

Mutatis mutandis, par exemple, dans l'ordre juridique interne français, le signalement d'un étranger au système d'information Schengen ne fait pas obstacle, le cas échéant, en l'absence d'indication des motifs de ce signalement, à ce que le juge considère qu'une décision de refus de visa prise par une autorité administrative française sur le fondement de ce signalement méconnaisse l'article 8 de la convention européenne des droits de l'homme (CE, 30 juillet 2003, n° 223074). L'on peut également relever, s'agissant des sanctions pécuniaires, que la décision cadre 2005/234/JAI prévoit elle-même que le principe de reconnaissance mutuelle de telles sanctions ne fait pas obstacle au respect des droits fondamentaux prévus par l'article 6 du Traité (article 3 de la décision cadre). Mais il ne s'agit que d'un raisonnement par analogie dans la mesure où les infractions qui relèvent du champ d'application de cette décision cadre relèvent en France de qualifications pénales et sont hautement peu susceptibles de relever du champ d'application du droit administratif.

Au regard de ces différents éléments d'analyse, et, encore une fois, de manière tout à fait théorique, l'on peut donc s'efforcer d'imaginer que, si des règles à caractère général devaient être prévues pour rendre opposables les actes administratifs

étrangers, ou certains d'entre eux, en France, cette opposabilité devrait être subordonnée à au moins deux conditions.

La première condition serait l'authenticité de cet acte. A cet égard, si une législation ou une règle générale devait être prévue relative, soit à la forme, soit à l'authenticité des actes administratifs étrangers, que ce soit en droit interne ou dans le droit de l'Union, cette règle pourrait s'inspirer de celles utilisées à propos des actes publics étrangers. Autrement dit, cette règle pourrait être que les actes administratifs étrangers adoptés selon les formes usuelles dans le système juridique dont elles sont originaires bénéficient d'une présomption d'authenticité. Il appartiendrait alors à l'administration, en cas de doutes sur cette authenticité, de requérir la certification par les autorités publiques de l'Etat d'origine, sauf à ce que l'acte concerné soit revêtu de l'apostille. Cette certification pourrait être requise par les autorités consulaires françaises, sur demande de l'administration auprès de laquelle l'acte administratif étranger doit produire ses effets.

La seconde condition serait que cet acte administratif ne soit contraire, du fait de son contenu et de sa procédure d'adoption dans le système juridique dont il est originaire, à aucune règle impérative du droit public français. Parmi celles-ci figureraient sans doute, notamment, les normes constitutionnelles et les principes généraux du droit ainsi que les droits fondamentaux garantis par les traités internationaux auxquels la France est partie, mais aussi peut-être d'autres règles qui restent à définir en fonction des secteurs concernés. Cette notion de « règles impératives du droit public français » a en effet été dégagée, récemment, par un arrêt du Tribunal des conflits à propos du contrôle des sentences arbitrales rendues dans le cadre de litiges entrant dans le champ du commerce international et auxquels étaient parties une personne publique. Il a alors été jugé, pour la première fois, que certaines règles fondamentales du droit public français (en matière de marchés publics par exemple), pouvaient faire obstacle à la pleine acceptation, sur le territoire, des effets d'un acte juridique étranger. Il s'agissait alors d'une sentence arbitrale, mais il n'est pas exclu, à tout le moins en dehors de l'application du droit de l'Union, qu'une logique similaire puisse, le cas échéant, être transposable à l'exécution des actes administratifs étrangers en droit interne (TC, 17 mai 2010, *Inserm c/ Fondation Letten F. Saugstad*).

Le juge administratif français n'ayant pas le pouvoir d'annuler ces actes étrangers, il pourrait néanmoins être saisi d'un recours contre les mesures prises par l'administration française pour exécuter l'acte administratif étranger, ainsi que c'est d'ores et déjà le cas pour les procédures d'assistance au recouvrement des impositions établies par un Etat étranger. Il paraîtrait en effet plus logique, compte tenu du fonctionnement du système français, que l'exécution en France de l'acte administratif étranger soit confiée aux autorités administratives – selon leur champ de compétence normal en droit interne- plutôt que de résulter d'une procédure préalable d'homologation ou d'exequatur par le juge administratif.

Reste néanmoins que, dans la mesure où les hypothèses correspondant à l'application, en France, d'actes administratifs étrangers sont assez peu fréquentes, et dès lors que les effets de l'acte étranger et les conditions de son application sont susceptibles de varier, légitimement, en fonction de la nature de l'acte, il semble peu

utile de prévoir des dispositions à caractère général régissant le caractère exécutoire des actes administratifs étrangers en France. Une telle norme, au demeurant, si elle était d'origine interne, aurait peine à s'insérer dans la hiérarchie des normes : si elle était de nature législative, elle ne pourrait faire obstacle aux règles spécifiques relatives aux actes étrangers qui résultent du droit international et du droit de l'Union. Si elle était de nature constitutionnelle –ce qui paraît hautement improbable-, une opposition des règles qu'elle prévoit avec le droit de l'Union serait susceptible de créer un conflit entre les deux systèmes juridiques.

Le rôle de l'UE quant à l'avancée de la reconnaissance et l'exécution des actes administratifs étrangers ; le principe de reconnaissance mutuelle et le caractère transnational de certains actes administratifs.

Si, ainsi qu'il a été dit, il existe, en dehors de ce droit, quelques domaines en nombre très restreints dans lesquels des actes administratifs étrangers peuvent recevoir exécution en France, l'essentiel des questions liées à l'exécution de ces actes viennent de l'application en droit interne du principe de reconnaissance mutuelle et, plus encore, de l'application des directives sectorielles qui le mettent en œuvre. Autrement dit, le fait que la question de la reconnaissance et de l'exécution des actes administratifs étrangers commence aujourd'hui à se poser dans l'ordre juridique interne français résulte presque de manière exclusive de l'influence du droit de l'Union. Cela tient, encore une fois au fait que le droit administratif, qui est intimement lié à l'exercice de la souveraineté, est de ce fait un droit dont le champ d'application est lié au territoire, et que l'opposabilité, sur celui-ci, d'actes qui sont l'expression d'autres Etats souverains ne peut par conséquent résulter que de règles supérieures –les traités et accords internationaux en particulier-.

Les principaux textes législatifs sectoriels de l'Union qui ont conduit, en partie, à préciser les conditions de reconnaissance et d'exécution des actes administratifs étrangers en France sont :

la convention d'application de l'accord de Schengen, qui a une portée pratique particulièrement importante, tant en matière de reconnaissance des visas et des titres de séjour étrangers, qu'en ce qui concerne le système d'information Schengen, et qui a donné lieu à des décisions jurisprudentielles importantes.

la directive 1999/42/CE du Parlement et du Conseil du 7 juin 1999 instituant un mécanisme de reconnaissance des diplômes pour les activités professionnelles couvertes par les directives de libéralisation (CE, 20 mai 2011, n° 328594:)

la directive 2006/48/CE du Parlement européen et du Conseil du 14 juin 2006, reprenant la directive 2000/12/CE du Parlement européen et du Conseil du 20 mars 2000 concernant l'accès à l'activité des établissements de crédit et son exercice (CE 14 juin 2010, Money Cash Worldwide ltd, n° 305671).

Les directives relatives à la reconnaissance des diplômes et qualifications professionnelles: directive 92/51/CEE du Conseil, du 18 juin 1992, relative à un deuxième système général de reconnaissance des formations professionnelles, qui complète la directive 89/48/CEE et directive 1999/42/CE du Parlement européen et du Conseil du 7 juin 1999 instituant un mécanisme de reconnaissance des diplômes pour les activités professionnelles couvertes par les directives de libéralisation et portant mesures transitoires, et complétant le système général de reconnaissance des diplômes (CE 31 mars 2008, Fédération internationale des experts automobiles et autres, n° 302119 ; CAAP 11 mars 2012, n° 11PA00860). Directive 2005/36/CE du Parlement européen et du Conseil du 7 septembre 2005 relative à la reconnaissance des qualifications professionnelles (CE, 16 juin 2008, syndicat espace généraliste, n° 306214)

Les directives relatives à la mise sur le marché de certains produits: directive 2002/46/CE du Parlement européen et du Conseil du 10 juin 2002 relative au rapprochement des législations des Etats membres concernant les compléments alimentaires ; directive 1999/5/CE du Parlement européen et du Conseil du 9 mars 1999 concernant les équipements hertziens et les équipements terminaux de télécommunications et la reconnaissance mutuelle de leur conformité

la directive 2001/40/CE du Conseil relative à la reconnaissance mutuelle des décisions d'éloignement des ressortissants de pays tiers (CAAB 18 décembre 2007, 07BX01580).

la directive du 16 mars 2010 (2010/24/UE) concernant l'assistance mutuelle au recouvrement et le règlement d'exécution 1189/2011 du 18 novembre 2011 fixant les modalités d'application de la directive 2010/24/UE concernant l'assistance mutuelle au recouvrement a été publié au JOUE du 19 novembre 2011. Elle est applicable depuis le 1er janvier 2012. L'administration fiscale française peut requérir des Etats membres de l'Union européenne et elle est tenue de leur prêter assistance en matière de recouvrement, de notification d'actes ou de décisions, y compris judiciaires, de prises de mesures conservatoires et d'échange de renseignements relatifs à toutes les créances afférentes à l'ensemble des taxes, impôts et droits quels qu'ils soient, perçus par un Etat membre ou pour le compte de celui-ci ou par ses subdivisions territoriales ou administratives ou pour le compte de celles-ci, y compris les autorités locales, ou pour le compte de l'Union (LPF art. L 283 A-II-1°). L'assistance se fonde sur la présentation d'un acte exécutoire unifié dont la forme est prévue par le règlement d'application.

En revanche, si la décision-cadre 2005/214/JAI du Conseil du 24 février 2005, modifiée par la décision-cadre 2009/299/JAI du 26 février 2009 a fait l'objet d'une transposition en droit interne, la reconnaissance des sanctions pécuniaires qu'elle prévoit ne trouve aucune application qui concernerait des actes administratifs étrangers : toutes les catégories de sanctions qui entrent dans le champ d'application de cette décision-cadre relèvent, dans l'ordre juridique interne français, du droit pénal. Les décisions de sanction exécutoires en France en vertu de cette décision-cadre sont donc regardées comme des mesures pénales et non comme des actes administratifs. De la même manière, les mesures de transposition de cette décision-

cadre prises dans l'ordre juridique interne excluent la possibilité que des sanctions pécuniaires purement administratives édictées en France puissent faire l'objet de poursuites dans un autre Etat de l'Union. Cela est dû au fait que les sanctions pécuniaires qui entrent dans le champ de la décision-cadre s'entend de celles qui peuvent faire l'objet d'un recours devant une juridiction statuant, notamment, en matière pénale. Or les décisions administratives prononçant une condamnation pécuniaire, en France, ne peuvent faire l'objet de recours que devant des juridictions statuant en matière civile ou administrative (cf circulaire du 28 octobre 2011 relative à la présentation des dispositions des articles 707-1 et D.48-6 à D.48-36 du code de procédure pénale)

Les conventions internationales sur la reconnaissance et l'exécution d'actes administratifs et sur la certification d'actes publics

Si l'on excepte les conventions internationales sectorielles, par exemple en matière de reconnaissance des diplômes ou dans le domaine de la fiscalité, et si l'on excepte le droit de l'Union, il semblerait que la seule convention internationale à portée générale signée par la France qui prévoit la reconnaissance mutuelle d'actes administratifs est la convention de la Haye du 5 octobre 1961 supprimant l'exigence de la légalisation des actes publics étrangers (convention dite « apostille »).

Une enquête menée au cours de l'année 2004 en France a révélé qu'environ 200 000 actes publics étrangers, au sens de la convention (actes de droit privé et actes administratifs au sens du droit interne français), faisaient l'objet, annuellement, d'une certification par le moyen de l'Apostille. En pratique, il peut s'agir d'actes de droit privé (actes d'état civil, actes relatifs à des brevets), d'actes judiciaires (certificats de non-appel de décision, jugements, extraits de casier judiciaire), d'actes notariés (attestations, actes de notoriété, procurations, testaments, donations), d'actes judiciaires (extraits du registre du commerce et des sociétés par exemple), ou encore d'actes administratifs (avis d'imposition, attestation de droits sociaux, diplômes et relevés de notes scolaires et universitaires, certificats de scolarité …).

Les mesures visant à assurer la transposition de cette convention en droit interne ont confié à des autorités judiciaires (et non au juge administratif) la compétence pour légaliser les actes publics, en particulier le procureur de la République (plus précisément les procureurs généraux près les cours d'appel de l'ordre judiciaire). L'apostille, dont la délivrance par voie électronique est possible, vise à garantir l'authenticité de l'acte. Le document présenté en vue d'être apostillé fait l'objet d'une vérification concernant la signature apposée, la qualité en laquelle le signataire a agi et, le cas échéant, l'identité du sceau dont l'acte est revêtu. En revanche, l'apostille ne garantit pas le contenu de l'acte. Les actes apostillés sont inscrits dans un registre qui fait l'objet d'une diffusion électronique permettant aux tiers de s'assurer de la validité de l'apostille.

Traitement doctrinal de la question des actes administratifs étrangers

Les questions liées à l'acte administratif étranger ont fait l'objet de très peu d'études ou de très peu de travaux de recherche en France :

- certains aspects liés à la transnationalité de l'acte administratif ont été étudiés par le professeur Jean-Bernard Auby in *La globalisation, le droit et l'État : Montchrestien, 2003.*
- le professeur Marie Gauthier a consacré une étude à l'acte administratif transnational, dans le cadre du droit de l'Union européenne : *Acte administratif transnational et droit communautaire*, in « Droit Administratif Européen », sous la direction de Jean-Bernard Auby et Jacqueline Dutheil de la Rochère, Bruylant 2007
- certains aspects en relation avec les actes administratifs étrangers sont brièvement étudiés dans une chronique de droit administratif transnational, publiée annuellement par le professeur Mattias Audit dans la revue « Droit administratif ».
- une thèse est actuellement en cours sur le sujet (depuis octobre 2011), par M. Damien Elkind, sous la direction du professeur Olivier Dubos. Son titre est *Le champ d'application spatial des actes administratifs. Etude de droit administratif transnational.*
- Les questions liées à l'acte public étranger ont, pour leur part, fait l'objet de travaux de plus grande ampleur en droit privé, parmi lesquels l'ont peu citer.
- Pamboukis (Ch.), *L'acte public étranger en droit international privé*, Paris, LGDJ, Bibliothèque de droit privé. ;
- Biscottini (G.), *L'efficacité des actes administratifs étrangers*, RCADI, vol. 104, 1961, p.638–696.

Bibliographie

Biscottini, G. 1961. L'efficacité des actes administratifs étrangers. *RCADI* 104.

Gauthier, M. 2007. *Acte administratif transnational et droit communautaire*. In Droit Administratif Européen, sous la direction de Jean-Bernard Auby et Jacqueline Dutheil de la Rochère, Bruylant

Pamboukis, Ch. 1993. *L'acte public étranger en droit international privé*. Paris: LGDJ, Bibliothèque de droit privé.

Chapter 8
The Recognition of Foreign Administrative Acts: A German Perspective

Ulrich Stelkens and Michael Mirschberger

Abstract The chapter examines the legal basis for the recognition of foreign administrative acts in Germany. Starting with a description of the concept of administrative acts in Germany, it gives an insight into the term "Verwaltungsakt" (general German concept of administrative acts) and its different forms, the question of entry into force and binding effect of administrative acts in Germany, the notification and promulgation by service of administrative acts, the enforcement of administrative acts in Germany and the division between German and foreign administrative acts. In the second part, the chapter deals with question of "proof of authenticity", "translation" and the "execution" of foreign administrative acts in Germany. Doing so, the author distinguish clearly between beneficial and onerous administrative acts. The third part is build up on the context of transborder activities of German administration. Finally, the conclusion sums up the quite complex system of administrative acts in Germany in a transborder context.

Abbreviations

AöR	Archiv des öffentlichen Rechts (journal)
BGBl.	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (Federal Court of Justice)
BSG	Bundessozialgericht (Federal Social Court)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (collection of decisions of the BVerfG)
CMLRev	Common Market Law Review (journal)
DB	Der Betrieb (journal)

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DÖV	Die Öffentliche Verwaltung (journal)
DVBl.	Deutsches Verwaltungsblatt (journal)
EuR	Europarecht (journal)
FR	Finanzrundschau (journal)
JA	Juristische Ausbildung (journal)
Jura	Jura – Juristische Ausbildung (journal)
JuS	Juristische Schulung (journal)
KommJur	Kommunaljurist (journal)
LKV	Landes- und Kommunalverwaltung (journal)
NJW	Neue Juristische Wochenschrift (journal)
NVwZ	Neue Zeitschrift für Verwaltungsrecht (journal)
NWB	Neue Wirtschaftsbriefe für Steuer- und Wirtschaftsrecht (journal)
NZS	Neue Zeitschrift für Sozialrecht (journal)
NZV	Neue Zeitschrift für Verkehrsrecht (journal)
REALaw	Review of European Administrative Law (journal)
RGBl.	Reichsgesetzblatt (Law Gazette of the German Reich)
SGb	Die Sozialgerichtsbarkeit (journal)
StBW	Steuerberater Woche (journal)
VBlBW	Verwaltungsblätter für Baden-Württemberg (journal)
VerwArch	Verwaltungsarchiv (journal)
Verwaltung	Die Verwaltung (journal)
Verwaltung Beih.	Die Verwaltung – Beiheft (journal)
VwGO	Verwaltungsgerichtsordnung (Code of Administrative Court Procedure)
VwVfG	Verwaltungsverfahrengesetz (Administrative Procedures Act on the federal level in Germany)
VwVG	Verwaltungsvollstreckungsgesetz (Act of Administrative Enforcement)
VwZG	Verwaltungszustellungsgesetz (Law on Service in Administrative Procedures)
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (journal).

Introduction

The topic of the recognition of foreign administrative acts is one which is rarely treated in a comprehensive way by German scholars. In fact, it is seen less as a general theme embracing all sorts of interactions between German and non-German administrative bodies and more as a bundle of questions which may be all related to trans-border administrative action but that give rise to very different issues which should not be mixed up. Hence, three main issues have to be distinguished:

In which cases may a foreign administrative act be treated like German administrative decisions by the German authorities, thereby making them (directly or indirectly) binding

and maybe even enforceable in German territory? These questions are often treated by scholars under the catchphrase "*transnational administrative act*".[1]

How can German authorities ensure that their administrative decisions will be recognized by foreign administrative bodies as binding upon them and perhaps even enforceable in their territory? Furthermore, which procedures have to be respected when a German authority involves persons who are not domiciled in Germany? These questions are also dealt with by scholars partly under the catchphrases "*transborder administrative action*"[2] or "*international administrative law*"[3]

In which cases do decisions of international or supranational organizations have direct effect in Germany, meaning that they have to be respected by German authorities?

In fact, the third question would be considered very differently from the two others: In the end, the answer depends on whether Germany is a member of the international or supranational organization in question or not. If Germany is not a member of this organization, there is no reason why decisions of these organizations (e.g. MERCOSUR) should be treated differently from decisions of foreign states or other subjects of international law. If Germany is a member of an international or supranational organization, the possibility of its decisions having direct effects in Germany depends on the rules governing the international or supranational organization in question. For example, decisions of the EU Commission in individual cases are naturally effective in the whole territory of the Union, including Germany, due to European (Primary) Law.[4] If and under which conditions Germany and the EU are obliged to enforce single-case decisions of the UN Security Council (e.g. concerning terrorists blacklists[5]) is – at least in the first instance – a question of UN Law. These specific questions thus do not raise specific problems of recognition *involving German authorities or German administrative law* and will therefore not be considered in this chapter.

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[1] Joachim Becker, Der transnationale Verwaltungsakt, DVBl. 2001, pp. 855–866; Claus Dieter Classen, Rechtsschutz gegen fremde Hoheitsgewalt – zur Immunität und transnationalem Verwaltungshandeln, VerwArch 96 (2005), pp. 464–484; Markus Möstl, Preconditions and limits of mutual recognition, CMLRev 47 (2010), pp. 405–436; Volker Neßler, Der transnationale Verwaltungsakt – Zur Dogmatik eines neuen Rechtsinstituts, NVwZ 1995, pp. 863–866; Christoph Ohler, Die Kollisionsordnung des Allgemeinen Verwaltungsrechts, Mohr Siebeck, Tübingen, 2005, pp. 48 ff., especially pp. 55 ff.; Franz-Joseph Peine, Sonderformen des Verwaltungsakts, JA 2004, pp. 417–423; Matthias Ruffert, Der Transnationale Verwaltungsakt, Verwaltung 34 (2001), pp. 453–485; Michael Schwarz, Europa in der Horizontalen – Zur Abgrenzung des Prinzips gegenseitiger Anerkennung vom Rechtsinstitut des transnationalen Hoheitsakts, in: Alfred Debus et al. (eds.), Verwaltungsrechtsraum Europa, Nomos, Baden-Baden, 2011, pp. 55–78; Thorsten Siegel, Entscheidungsfindung im Verwaltungsverbund, Mohr Siebeck, Tübingen, 2009, pp. 324 ff.; Gernot Sydow, Verwaltungskooperation in der Europäischen Union, Mohr Siebeck, Tübingen, 2004, pp. 141 ff.

[2] Martin Kment, Grenzüberschreitendes Verwaltungshandeln, Mohr Siebeck, Tübingen, 2010, pp. 267 ff.

[3] Jörg Menzel, Internationales Öffentliches Recht, Mohr Siebeck, Tübingen, 2011, pp. 669 f.

[4] See – for a German reference – Thomas von Danwitz, Europäisches Verwaltungsrecht, Springer, Berlin, 2008, pp. 378 ff.

[5] Concerning these decisions of the UN Council see in the German literature (e.g.) Alexander Witte, Gewaltenteilung im Völkerrecht, AöR 137 (2012), pp. 233–241.

What will be taken into consideration is the following: After a short overview of the German conception of administrative acts and their enforcement, which provides the necessary background information (1), we will focus on the problems of "transnational administrative acts" and the German rules on assistance to foreign administrative authorities (2). Subsequently we will analyse the rules governing the transborder-activities of German administrative authorities (3).

The Concept of an Administrative Act in German Law

Writing a short overview on the concept of the administrative act in Germany is a complicated matter. You cannot simply refer to the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung – VwGO*)[6] or to the Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*),[7] because a whole bundle of Codes and legal acts are applicable in this context. All of them use the same concepts but their details provide for different solutions. This is due to the quite unique fact that in Germany there are five hierarchies of courts,[8] each with its own specific jurisdictions and codes of procedure.[9] Two of them are competent in matters of private law and three of them are specialized in matters of administrative law, these latter three being the finance courts (*Finanzgerichte*) with jurisdiction over (federal) tax matters, the social courts (*Sozialgerichte*) with jurisdiction over social law matters, and the administrative courts (*Verwaltungsgerichte*) with jurisdiction over all other administrative matters.[10] However, despite this complexity, for the sake of simplicity we will only refer to the VwGO and the VwVfG in the following: The

[6] VwGO in the version of the promulgation of 19 March 1991 (BGBl. I p. 686), most recently amended by Article 13 of the act of 8 July 2014 (BGBl. I p. 890) – a translation by Neil Musset can be found at http://www.gesetze-im-internet.de/englisch_vwgo/index.html. (last reviewed on 19 July 2015).

[7] VwVfG in the version of the promulgation of 23 January 2003 (BGBl. I p. 102), most recently amended by Article 3 of the act of 25 July 2013 (BGBl. I p. 2749). This law only applies to federal authorities. Nevertheless, the *Länder* have adopted (nearly) identical acts applicable to the *Länder* and municipal authorities; see Hartmut Maurer, Allgemeines Verwaltungsrecht, 18th edition, C. H. Beck, München, 2011, § 5 n 1.

[8] For an overview of the German court system see Nigel Foster/Satish Sule, German Legal System and Laws, 4th edition, Oxford University Press, Oxford, 2010, pp. 80 ff.; Gerhard Robbers, Introduction to German Law, 5th edition, Nomos, Baden-Baden, 2012, n 44 ff.

[9] On the reason for the existence of three codes of administrative procedure (VwVfG, AO and SGB X) see Maurer (note 7), § 5 n 5.

[10] See § 40 I VwGO: "Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute. Public-law disputes in the field of Land law may also be assigned to another court by a Land statute". The "art" of citing articles in a statute is quite elaborated in Germany: An "Art." or a "§" indicates a section of a statute, a Roman numeral indicates the subsection of a section and an Arabic numeral a phrase in a subsection. Therefore § 40 I VwGO means: Section 40 subsection 1 of the VwGO.

other codes provide for more or less identical rules on court procedure and administrative procedures, differing only in their details.

The Definition of "Verwaltungsakt"

The *Verwaltungsakt* (administrative act) in Germany is defined by § 35 phrase 1 of the VwVfG as follows:

> A *Verwaltungsakt* shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect.

Every characteristic of § 35 phrase 1 VwVfG has to be fulfilled in order to qualify an administrative decision as a *Verwaltungsakt*. Therefore not every administrative (single-case) decision is qualified as a *Verwaltungsakt*.[11] Above all, (nearly all) decisions concerning the conclusion and execution of public contracts are *not* considered as *Verwaltungsakte* in Germany.[12] Also *not* considered as *Verwaltungsakte* are (nearly all) decisions concerning compensation in state liability matters. This is because only the ordinary courts have jurisdiction over (nearly all) disputes on non-contractual state liability.

Apart from these particular cases, the qualification of administrative measures as *Verwaltungsakte* is the object of an abundant case law, reflected in the commentaries[13] on § 35 VwVfG.[14] As *Foster* and *Sule* correctly stress[15] the legal definitions provided by § 35 VwVfG cover all kinds of (but not all) administrative measures in everyday life: the granting of licenses, building permissions, permits of residence, tax orders, demolition orders, expulsion of foreigners, granting of state benefits, the withdrawal of licenses, and so on.

In addition, it is important to highlight that not only private persons but also public entities may be addressed by a *Verwaltungsakt*, even if the exercise of public authority is concerned.[16] Therefore, municipal supervisory authorities can address a

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[11] From a comparative perspective see Mahendra P. Singh, German Administrative Law in Common Law Perspective, Springer, Berlin, 2001, pp. 69 f.

[12] Martin Burgi, EU Procurement Rules – A report about the German Remedies System, in: Steen Treumer/François Lichère (eds.), Enforcement of EU Public Procurement Rules, Djoef Publishing, Copenhagen, 2011, pp. 105–135 (pp. 106 f.).

[13] For the function of commentaries in the German legal tradition see Reinhard Zimmermann, Characteristic Aspects of German Legal Culture, in: Mathias Reimann/Joachim Zekoll (ed.), Introduction to German Law, 2nd edition, Kluwer Law International, Den Haag 2005, pp. 1–51 (p. 46).

[14] See for example Ulrich Stelkens, in: Paul Stelkens/Heinz Joachim Bonk/Michael Sachs (eds.), Verwaltungsverfahrensgesetz, 8th edition, C. H. Beck, München, 2014, § 35 n 50 ff. For a brief overview see also Singh (note 11), pp. 63 ff.

[15] Foster/Sule (note 8), pp. 295 f.

[16] U. Stelkens (note 14), § 35 n 177 ff., 185 ff.

Verwaltungsakt vis-à-vis a local government, ordering it – to give an example – to change an illegal local regulation or to withdraw an illegal individual decision. Importantly, even when a *Verwaltungsakt* is addressed to administrative authorities the same rules are (in general) applicable as with *Verwaltungsakte* addressed to private persons.[17]

The Entry into Force of Verwaltungakte *and the Notion of* Bestandskraft *(Binding Effect) of* Verwaltungakte

The correct classification of whether an administrative decision is a *Verwaltungsakt* or not is of vital importance for the individual, as he or she must use the right procedural remedies against either a *Verwaltungsakt* imposing an obligation or the rejection of a beneficial *Verwaltungsakt*. There are special time-limited court actions foreseen by § 42 VwGO through which judicial quashing of a *Verwaltungsakt* (a rescissory action – *Anfechtungsklage*), as well as the judicial order to issue a rejected or omitted *Verwaltungsakt* (enforcement action – *Verpflichtungsklage*), can be requested by the plaintiff if he/she claims that his/her rights have been violated by the *Verwaltungsakt* or its refusal or omission.

Basically, the time-limit foreseen for the most important actions is one month after notification (§ 74 I 2 VwGO); importantly, in some cases there has to be a prior objection procedure, §§ 68 ff. VwGO, within the administration before one can go to court.[18] If a *Verwaltungsakt* fails to mention the remedy possibilities and the time limit, an objection or action can be filed within one year (see § 58 VwGO). After the expiry of that deadline the *Verwaltungsakt* or its rejection becomes (in general) definitive, which means, it can – despite its possible unlawfulness – no longer be challenged in the courts.

The fact that there are time limits for the initiation of the objection procedure and for the subsequent rescissory or enforcement actions has repercussions for the material conception of the *Verwaltungsakt*. This is the point of origin of the notion of *Bestandskraft* (binding effect, meaning non-appealability and definitiveness after the expiry of these time limits) of *Verwaltungsakte*.[19]

A *Verwaltungsakt* comes into effect as soon as it is notified to the person(s) concerned as laid down in § 43 VwVfG:

(1) A *Verwaltungsakt* shall become effective vis-à-vis the person for whom it is intended or who is affected thereby at the moment he is notified hereof. […].
(2) A *Verwaltungsakt* shall remain effective for as long as it is not withdrawn or annulled, otherwise cancelled or expires for reason of time or for any other reason.
(3) A *Verwaltungsakt* which is invalid shall be ineffective.

[17] For exceptions concerning these kinds of *Verwaltungsakte* see Vera Jungkind, Verwaltungsakte zwischen Hoheitsträgern, Duncker & Humblot, Berlin, 2008, pp. 209 ff.

[18] See Singh (note 11), pp. 229 f.

[19] For the following see Singh (note 11), pp. 80 ff.

Therefore only a void administrative act is ineffective (§ 43 III VwVfG), but the reasons for voidance are very restricted (§ 44 VwVfG).[20] In general, a *Verwaltungsakt* comes into effect as soon as it is brought to the attention of the person(s) concerned and continues to remain in effect until it is repealed, annulled, otherwise cancelled or expires for reason of time or for any other reason. As soon as a *Verwaltungsakt* comes into effect it becomes binding not only on the affected parties but also on the administrative authority. It can be repealed by the administrative authority only for reasons foreseen by law. After the expiration of the time limits the *Verwaltungsakt* therefore becomes final and conclusive: It is beyond challenge through the regular remedies of objection or through an action in court. However, the administrative authority can still repeal the *Verwaltungsakt* (i.e. "withdraw" an illegal act [*Rücknahme*, § 48 VwVfG] or revoke a legal act [*Widerruf*, § 49 VwVfG])[21] or reopen administrative proceedings under the conditions foreseen by law (§ 51 VwVfG). The person addressed by the *Verwaltungsakt*, however, can merely request the administrative authority to consider the possibility of withdrawing the *Verwaltungsakt* or reopening the proceedings. In rare cases the person may have an enforceable right to such a decision by the administrative authority (which may be pursued by an enforcement action).[22] In general, however, the decision to repeal an illegal *Verwaltungsakt* or to reopen the proceedings is a discretionary decision of the administrative authority. Furthermore, even if the administrative authority is aware of the illegality of the *Verwaltungsakt* or its rejection, it is generally not considered to be a misuse of their discretionary powers to reject such a demand to repeal/reopen. They can refer to the *Bestandskraft* of the *Verwaltungsakt* in question[23] – the *Bestandskraft* of a *Verwaltungsakt* is considered to be a very important element in assuring legal certainty and the effectiveness of administration. This fact has even been affirmed by the Federal Constitutional Court.[24]

Notification and Promulgation by Service of Verwaltungakte

The details concerning the notification of *Verwaltungsakte* are laid down in § 41 VwVfG:

(1) A *Verwaltungsakt* shall be made known to the person for whom it is intended or who is affected thereby. Where an authorized representative is appointed, the notification may be addressed to him.

[20] Singh (note 11), pp. 82 ff.

[21] For the differences between "repealing", "withdrawing" and "revoking" of *Verwaltungsakte* see Foster/Sule (note 8), p. 299 f.; Michael Nierhaus, Administrative Law, in: Reimann/Zekol (note 13), pp. 87–120 ff. (p. 99 f.); Singh (note 11), p. 87 ff.

[22] For more details see Singh (note 11), pp. 91 f.

[23] So, BSG, 8 February 2012 – B 5 R 38/11 R – NJW 2012, pp. 2139–2141 (point 17 of the judgment).

[24] BVerfG, 20 April 1982 – 2 BvL 26/81 – BVerfGE 60, pp. 253–305 (p. 270).

(2) A written *Verwaltungsakt* shall be deemed notified on the third day after posting if posted to an address within Germany. A *Verwaltungsakt* transmitted electronically within Germany or abroad shall be deemed notified on the third day after sending. This shall not apply if the *Verwaltungsakt* was not received or was received at a later date; in case of doubt the authority must prove the receipt of the administrative act and the date of receipt.
(3) A *Verwaltungsakt* act may be publicly promulgated where this is permitted by law. […].
(4) […].
(5) Provisions governing the promulgation of a *Verwaltungsakt* by service shall remain unaffected.

Hence, the VwVfG foresees various ways for the notification to be made; usually it is done by written letter and sent through the postal services. If it is sent using postal services the *Verwaltungsakt* is deemed to be notified three days after handing the letter/*Verwaltungsakt* in at the post office. The onus of proof, nevertheless, lies on the administrative body (compare § 41 II 2 and 3 VwVfG). The *Verwaltungsakt* could also be notified by public promulgation, if ordered by a specific act of substantive law.

Finally § 41 V VwVfG refers to the possibility of notification by service (*Zustellung*). In general, the service of *Verwaltungsakte* in Germany is laid down on the federal level of administration in the Law on Service in Administrative Procedures (Verwaltungszustellungsgesetz – VwZG).[25] The difference between the notification described according to § 41 VwVfG and this method is that service can be conducted only in strict forms and has to be chosen by the authority, if ordered by law.[26] "Service" is defined in § 2 I VwZG as notification through a written or electronic document in the legally required form. The service is conducted by postal services, De-Mail (a special secured electronic E-Mail format) or by the public authority itself (by its own delivery service), § 2 II VwZG. Which method of service the public authority uses is at its own liberty (§ 2 III VwZG). Beyond this, the law provides even more precise rules on the different ways of service – which will not be dealt with here as all these rules only apply for service within Germany.

Forms of Verwaltungsakte

In Germany many different forms of *Verwaltungsakte* can be identified[27] – a *numerus clausus* of forms does not exist[28]. Nevertheless, dealing with the concept of the administrative act in Germany – with a focus on the administrative procedure – means first of all distinguishing between *Verwaltungsakte* which grant a certain

[25] "Verwaltungszustellungsgesetz" of 12 August 2005 (BGBl. I p. 2354), most recently amended by Article 17 of the act of 10 October 2013 (BGBl. I p. 3786).

[26] See for notification and service: U. Stelkens (note 14), § 41 n 9 ff.

[27] The forms can be, for instance, grouped by temporary matters (preliminary/conclusive administrative acts), or by authorisation of the whole application or only parts of it, or by levels of procedure (multi-level administrative acts), or if there is a contribution by the applicant necessary to pass an administrative act or not.

[28] U. Stelkens (note 14), § 35 n 6.

benefit to an applicant or are in favour of the affected person (beneficial *Verwaltungsakte*) and an act of the administration that imposes certain burdens on a person (onerous *Verwaltungsakte*; compare § 48 I 2, § 49 I, II VwVfG). Beneficial *Verwaltungsakte* would be, for example, all kinds of licences or permissions or the granting of subsidies. Examples of onerous *Verwaltungsakte* would be tax orders, police orders, orders to demolish a building or orders to dissolve an assembly. Both categories have to fulfil the requirements of § 35 VwVfG and have to be notified to the addressee to be effective. Nevertheless, a decisive difference emerges when the administration wants to eliminate or alter the adopted *Verwaltungsakt*. A beneficial administrative act can be withdrawn – if the *Verwaltungsakte* has been shown as illegal – or revoked – if the *Verwaltungsakte* is still legal – only under certain strict rules, with many more hurdles for the administration than in the case of the withdrawal or revocation of an onerous *Verwaltungsakt*. Hence, the differentiation between beneficial and onerous *Verwaltungsakte* is crucial for the VwVfG[29] and, therefore, the question of foreign administrative acts from a German perspective will be also divided into these two perspectives when we turn to this issue later in this chapter.

Enforcement of Verwaltungsakte

Beneficial *Verwaltungsakte* that grant rights to the addressee can be enforced by court action. On the other hand, onerous *Verwaltungsakte* obliging the addressee to do something or to refrain from something may be enforced by the administration itself. The following outlines the way of enforcement as laid down in the law of the Federation; the federal states have their own acts on this topic which differ in their small details but usually stick to a common underlying standard. Basically two different objectives of the enforcement are recognized by the German Act of Administrative Enforcement (*Verwaltungsvollstreckungsgesetz – VwVG*)[30] – firstly, the enforcement of *Verwaltungsakte* imposing financial claims, and secondly, the enforcement of *Verwaltungsakte* imposing duties requiring actions or obligations to refrain from something. The enforcement of *Verwaltungsakte* imposing financial claims is initiated by the competent administration – which is the administration holding the claim against the obligor – by issuing an enforcement order (§ 3 VwVG). Such an order can only be issued, if the obligor has been summoned to fulfil his/her debt, if the claim is mature, and a period of one week has passed since the notification of the administrative act or one week after the maturity of the financial claim. Furthermore the obligor should be warned before issuing an enforcement order that enforcement will be ordered, if he/she does not fulfil his/her debt within one more

[29] Compare inter alia Matthias Ruffert, in: Hans-Uwe Erichsen/Dirk Ehlers, Allgemeines Verwaltungsrecht, 14th edition, de Gruyter, Berlin, 2010, § 21 n 53; Maurer (note 7), § 9 n 47 f.; Michael Sachs, in: Stelkens/Bonk/Sachs (note 14), § 48 n 115 ff., § 49 n 17 ff.

[30] "Verwaltungs-Vollstreckungsgesetz (VwVG)"of 27 April 1953 (BGBl. I p. 157), most recently amended by Article 4 I of the act of 29 July 2009 (BGBl. I p. 2258).

week (§ 3 VwVG). If the obligor does not fulfil his/her debt after that, the following enforcement itself is conducted by specially appointed administrative bodies or otherwise by the *Bundesfinanzveraltung* (Federal Fiscal Administration), § 4 VwVG. For the details of the enforcement procedure § 5 I VwVG refers to specific provisions of the Fiscal Code (*Abgabenordnung – AO*).[31]

With respect to the enforcement of *Verwaltungakte* imposing duties requiring actions or obligations to refrain from something, enforcement can be executed if the *Verwaltungsakt* is already incontestable, if an immediate execution is ordered, or if the filed remedy does not provide for a suspensive effect (§ 6 I VwVG). The competent authority for the enforcement always is the same administrative body which issued the *Verwaltungsakt* (§ 7 I VwVG). Only if the enforcement has to be conducted outside of its local competence is the help of other administrative bodies required (§ 8 VwVG). As means of enforcement the law foresees three options (§ 9 VwVG): (1) execution by substitution, (2) fines and (3) direct coercion. All three options have to be chosen with respect to the principle of proportionality, regarding the aims of the enforcement and the chosen mean. Execution by substitution means that another person fulfils the duty of the person who is addressed by the administrative act. Therefore he or she has to pay for the substitution (§ 10 VwVG). If the action is not fungible or it is clear that the obligor will not be able to pay for the substitution, the administrative authority can impose fines to urge the obligor to fulfil his/her duty (§ 11 VwVG). If neither execution by substitution nor fining will lead to a legal behaviour, the administrative authority can make use of direct coercion (§ 11 VwVG). All three means have to be threatened in written form, detailed and a priori, to the obligor, but cannot be threatened all together, and furthermore all means have to be notified to the obligor (§ 13 I, III, VII VwVG). If the obligor does not act in accordance with the administrative act within a reasonable time, the threatened enforcement mean can be executed (§ 14 VwVG). If fines are uncollectible, the administrative authority can request the competent administrative court to order detention for the obligor (§ 16 I VwVG). These means of enforcement do not apply if the *Verwaltungsakt* addresses another administrative authority or a legal entity under public law (§ 17 VwVG).

Distinction Between National and Foreign Administrative Acts

Basically a foreign administrative act is distinguished from a *Verwaltungsakt* by the fact that an administrative authority outside the German legislature adopted the administrative act. For this reason, it is primarily an organizational matter that determines foreign nature of the administrative act. Secondly, the applied substantive law

[31] AO in the version of the promulgation of 1 October 2002 (BGBl. I p. 3866), most recently amended by Art. 2 of the act of 22 December 2014 (BGBl. I p. 2417). A translation provided by the Language Service of the Federal Ministry of Finance can be found at http://www.gesetze-im-internet.de/englisch_ao/index.html (last reviewed on 19 July 2015).

for the adoption of the administrative act is usually foreign law as well. The fact that "foreign" is in this regard a term with purely formal effect is underlined by § 1 VwVfG, which says that this act is only applicable for administrative procedures of German authorities from the different levels of German administration.

Regarding administrative acts adopted in a multi-level procedure (*composite administrative acts*), one must emphasize the fact that such composite administrative acts are still either German or foreign administrative acts. If, for example, the European Commission is the level which in the end adopts a certain decision, it is – even if the German authorities were involved in earlier stages of the procedure – still considered to be a non-German administrative decision and, therefore, a foreign administrative act. Thus, even if the contribution of the German authority is compulsory for the decision of the EU institution, one cannot conclude from the integration of German authorities within the multi-level procedure that the end result is a German administrative act. On the other hand, if it is a German authority in whose name an administrative decision is enacted, it is considered as a German administrative act even if the content of this decision has been influenced or even determined by the action of administrative authorities of foreign states or the EU. Therefore, the special problems of judicial review and administrative procedures concerning composite administrative procedures involving administrative authorities of different countries, or even of international and supranational organizations, would not be regarded by German scholars as questions concerning the recognition of foreign administrative acts but as specific problems of trans-border or multilevel composite administrative procedures.

Therefore, from a German perspective, all administrative acts which are adopted by (and in the name of) a non-German administrative authority are considered to be foreign administrative acts. However, as already outlined in the introduction,[32] the possible direct effect within German territory of administrative decisions enacted by the European Union or an international organization would be considered as being due to primary EU law or the law concerning the international organization in question. Therefore, the German rules on the recognition of foreign administrative acts would, in general, not apply to them. Thus, to make it simple, we will call foreign administrative acts only those administrative decisions enacted by administrative authorities of other states, without differentiating between EU member states and third countries.

Proof of Authenticity, Translation, Recognition and Execution of Foreign Administrative Acts in Germany

It is important to distinguish between the rules concerning the proof of authenticity of foreign administrative acts (and other foreign documents) and the rules concerning their recognition and execution within the German territory. The rules

[32] See text to footnote 4.

concerning the proof of authenticity of foreign administrative acts addresses the question of whether a certain document which is put forward in a domestic administrative procedure is a real official document of a foreign state. If there are any doubts about this, the general rules concerning the assessment of facts (see e.g. § 24, § 26 VwVfG) would apply. Additionally, due to the rules on the use of German as the (only) official language (see e.g. § 23 VwVfG), in general a translation of these documents would be required. However, Germany has signed international treaties which are meant to facilitate the procedure in these regards (see *infra* section "General rules concerning proof of authenticity and translation of foreign documents").

These rules concerning the authenticity and the translation of foreign documents must be distinguished from the rules concerning the assistance of German administrative authorities extended to foreign administrative authorities (see *infra* section "International treaties and national rules facilitating trans-border administrative actions of foreign states within German territory") and from the rules enabling a foreign administrative decision (whose authenticity is established) to – in the end – have the same legal consequences as a German administrative decision within German territory. This means that a foreign administrative act could virtually replace a German administrative act: It is *recognized* by German law.[33] As already mentioned in the introduction these questions are treated by German scholars under the (ambiguous) catchphrase "*transnational administrative act*".[34] In this regards there are only sector specific statutes serving to transpose either sector specific EU law or international treaties concerning specific foreign administrative decisions. A general law on the validity, efficacy and enforceability of foreign administrative acts in Germany does not exist. Nevertheless, German doctrine tries to distil general principles concerning "transnational administrative acts" from these sector specific norms. These were primarily developed for beneficial transnational administrative acts such as product approvals, licences, university degrees and other decisions concerning professional qualifications (see *infra* section "Recognition of beneficial transnational administrative acts"). Yet soon the question arose as to whether the same principles may be applicable to onerous transnational administrative acts (see *infra* section "Recognition and enforcement of onerous transnational administrative acts").

[33] Kment ([note 3], pp. 447 ff.) distinguishes further – even more precisely – between "respect" of foreign administrative acts and "recognition" of administrative acts. For him respect in this regard entails some sort of duty to refrain for the state the addressee lives in according to the administrative decision of the host state. So in his view "respect" means building no obstacle for the effectiveness of the foreign administrative decision (e.g. decisions on nationality, marriage, …), whereas recognition would demand an active role to give legal effect to the foreign administrative decision; compare also Ohler (note 1), pp. 50 ff.

[34] See references in footnote 1.

General Rules Concerning Proof of Authenticity and Translation of Foreign Documents

As previously stated, the rules concerning the proof of authenticity of foreign administrative documents deal with the question of whether a certain document which is put forward in a domestic administrative procedure and which is claimed to be an official document of a foreign state is authentic. If there are any doubts about this, the general rules concerning the assessment of facts (see e.g. § 24, § 26 VwVfG) would apply, which means in the end that the German authority determines ex officio the facts of the case, determines the type and scope of investigation, and takes into account all circumstances of importance in an individual case, including those favourable to the participants. Concerning non-German documents § 23 VwVfG on the official language provides:

> (1) The official language shall be German.
> (2) If applications are made to an authority in a foreign language, or petitions, evidence, documents and the like are filed in a foreign language, the authority shall immediately require that a translation be provided. Where necessary the authority may require that the translation provided be made by a certified or publicly authorised and sworn translator or interpreter. If the required translation is not furnished without delay, the authority may, at the expense of the participant, itself arrange for a translation. […].
> (3) If a notice, application or statement of intent fixes a period within which the authority is to act in a certain manner and such notifications are received in a foreign language, the period shall commence only at the moment that a translation is available to the authority.
> (4) If a notice, application or statement of intent received in a foreign language fixes a period for a participant vis-à-vis the authority, enforces a claim under public law or requires the fulfilment of an action, the said notice, application or statement of intent shall be considered as being received by the authority on the actual date of receipt where at the authority's request a translation is provided within the period fixed by the authority. Otherwise the moment of receipt of the translation shall be deemed definitive, unless international agreements provide otherwise. This fact should be made known when a period is fixed."

Naturally, sector specific rules concerning specific foreign administrative documents may override these general rules on translations and proof of authenticity of foreign documents. Those sector specific rules may arise from EU law or (bilateral or multilateral) international treaties signed by Germany. Those sector specific rules generally prescribe that a specific document of another EU member state or another contracting state should be accepted without further proof or requirement if they are covered by a specific (multilingual) schedule.

Therefore, public documents issued in Germany according to the CIEC (La Commission Internationale de l'État Civil) conventions[35] are accepted without any

[35] For a list of signed or implemented conventions in Germany see http://ciec1.org/SignatRatifEtats.pdf (last reviewed on 19 July 2015).

further proof or requirements.[36] Furthermore, there are several bilateral agreements on documents relating to the civil status of a person or the legalisation of public documents. Such bilateral agreements exist at least with Belgium[37], Denmark[38], France[39], Greece[40], Italy[41], Luxembourg[42], Austria[43] and Switzerland[44] and do not demand legalisation for each individual case in certain fields of administration.[45]

[36] These documents refer to the civil status of a person or certificates of no impediment to marriage.

[37] "Gesetz zu dem Abkommen vom 13. Mai 1975 zwischen der Bundesrepublik Deutschland und dem Königreich Belgien über die Befreiung öffentlicher Urkunden von der Legalisation" of 25 June 1980 (BGBl II p. 813).

[38] "Bekanntmachung über das deutsch-dänische Beglaubigungsabkommen vom 23. Juni 1936" of 26 June 1936 (RGBl. II p. 213 ff.), without Article 6 reinforced after World War II by: "Bekanntmachung über die Wiederanwendung deutsch-dänischer Vorkriegsverträge" of 30 June 1953 (BGBl. II p. 186).

[39] "Gesetz zu dem Abkommen vom 13. September 1971 zwischen der Bundesrepublik Deutschland und der Französischen Republik über die Befreiung öffentlicher Urkunden von der Legalisation" of 30 July 1974 (BGBl. II p. 1074; corrigendum: BGBl. II p. 1100).

[40] "Bekanntmachung über das deutsch-griechische Abkommen über die gegenseitige Rechtshilfe in Angelegenheiten des bürgerlichen und Handelsrechts vom 11. Mai 1938" of 28.06.1939 (RGBl. II p. 848). "Gesetz zu dem Vertrag vom 4. November 1961 zwischen der Bundesrepublik Deutschland und dem Königreich Griechenland über die gegenseitige Anerkennung und Vollstreckung von gerichtlichen Entscheidungen, Vergleichen und öffentlichen Urkunden in Zivil- und Handelssachen" of 21 February 1963 (BGBl. II p. 109).

[41] "Gesetz zu dem Vertrag vom 7 Juni 1969 zwischen der Bundesrepublik Deutschland und der Italienischen Republik über den Verzicht auf die Legalisation von Urkunden" of 30 July 1974 (BGBl. II p. 1069).

[42] "Gesetz zu dem Abkommen vom 3. Juni 1982 zwischen der Bundesrepublik Deutschland und dem Großherzogtum Luxemburg über den Verzicht auf die Beglaubigung und über den Austausch von Personenstandsurkunden sowie über die Beschaffung von Ehefähigkeitszeugnissen" of 11 November 1983 (BGBl. II p. 698).

[43] "Beglaubigungsvertrag zwischen dem Deutschen Reiche und der Republik Österreich vom 21 Juni 1923" (RGBl. II 1924, p. 61); reinforced after World War II by: "Bekanntmachung über die Wiederanwendung von ehemals zwischen dem deutschen Reich und der Republik Österreich abgeschlossenen Verträgen über die Beglaubigung von Urkunden, über Fragen des gewerblichen Rechtsschutzes und des Schutzes des Urheberrechts, sowie über Pflegekinderschutz und den Geschäftsverkehr in Jugendsachen" of 13 March 1952, (BGBl. II p. 436).

[44] "Vertrag zwischen dem Deutschen Reiche und der Schweiz über die Beglaubigung öffentlicher Urkunden" of 14 February 1907 (RGBl. p. 411); "Bekanntmachung zum deutsch-schweizerischen Beglaubigungsvertrag (Verzeichnis der deutschen und schweizerischen Verwaltungsbehörden, deren Beurkundungen zum Gebrauch im Gebiete des anderen Staates keiner Beglaubigung bedürfen)" of 11 December 1997 (BGBl. II 1998, p. 71); "Gesetz zu dem Abkommen vom 4. November 1985 zwischen der Bundesrepublik Deutschland und der Schweizerischen Eidgenossenschaft über den Verzicht auf Beglaubigung und über den Austausch von Personenstandsurkunden/ Zivilstandsurkunden sowie über die Beschaffung von Ehefähigkeitszeugnissen" of 28 January 1988 (BGBl. II p. 126).

[45] Norbert Zimmermann, in: Günter Brambring/ Hans-Ulrich Jerschke (eds.), Beck'sches Notarhandbuch, 5th edition, C. H. Beck, München, 2009, H. Auslandsberührung, n 240.

A cornerstone of multilateral or international treaties is the Hague Convention[46], which was signed by Germany on October 5th 1961, ratified on December 15th 1965 and entered into force on February 13th 1966. The implementing law was passed on 21 June 1965.[47] As Germany is a federal state the law provides in Article 2 phrase 1 that the federal government and the governments of the federal states designate the authorities within their territories competent for the so-called apostille procedure. This authority can also be the president of a court. The federal authorities are the *Bundesverwaltungsamt* for all public documents of the federal authorities and courts, apart from public documents of the German Patent Office and the Federal Patent Court for which the president of the German Patent Office is competent. The federal states assign competency for the apostille procedure to various different offices. Because of the quite large amount of assigned offices the different authorities of the federal states cannot be listed here; for interested parties, they can be found on the website of The Hague Conference on Private International Law (HccH).[48] However, according to § 23 VwVfG a translation of the public documents is usually required by German authorities.[49] As far as can be found, an e-apostille has not been established in Germany.[50]

Concerning the proof of authenticity of administrative decisions of the EU member states, the relevant EU law could help in this regard by establishing databases for such a purpose. Such databases could, firstly, help national authorities to find the right and competent authority of another member state for a given decision. Furthermore, by allowing access only for public authorities, the authenticity of the requesting authority and its decisions could be safeguarded and documents could be exchanged in this way. Such databases already exist for some special secondary legislation, for example the IMI – Internal Market Information System. Such databases can strengthen the trust member states have in the legal systems of other member states. [51]

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[46] Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, available under: http://www.hcch.net/upload/conventions/txt12en.pdf (last reviewed on 19 July 2015).

[47] "Gesetz zu dem Haager Übereinkommen vom 5. Oktober 1961 zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation" of 21 June 1965 (BGBl. II p. 875), most recently amended by Article 4 of the act of 7 August 2013 (BGBl. I p. 3154).

[48] See http://www.hcch.net/upload/auth12de.pdf (last reviewed on 19 July 2015).

[49] Compare "VI. Übersetzungen" of the Information sheet of the German Foreign Ministry (*Auswärtiges Amt*) from October 2013, available at: http://www.konsularinfo.diplo.de/contentblob/1615026/Daten/ (last reviewed on 19 July 2015); a special rule for the translation can be found (e.g.) in Article 3 I, 11 I of the agreement of Germany and Poland on the Espoo-Convention (see infra note 125), (BGBl. II 2007, p. 595).

[50] See the implementation chart of the HccH: http://www.hcch.net/upload/impl_chrt_e.pdf (last reviewed on 19 July 2015).

[51] http://ec.europa.eu/internal_market/imi-net/about_de.html (last reviewed on 19 July 2015); on this topic also Veith Mehde, Europäische Amtshilfe, in: Stefan Fenzel/Winfried Kluth/Klaus Rennert (eds.), Neue Entwicklungen im Verwaltungsverfahrens- und -prozessrecht im Jahr 2010, Hallesche Schriften zum Öffentlichen Recht Bd. 18, Halle an der Saale, 2010, pp. 47 – 59 (pp. 52 ff.);

International Treaties and National Rules Facilitating Trans-border Administrative Actions of Foreign States Within German Territory

Germany has signed several bilateral and multilateral treaties which are meant to facilitate trans-border administrative procedures. These treaties enable foreign administrative authorities to request assistance from German authorities and are, of course, based on reciprocity so that they also facilitate trans-border administrative procedures of German authorities. These treaties are also applicable insofar as relations between the EU member states are concerned, even if they are implementing EU law, provided secondary EU legislation does not lay out specific and conclusive rules concerning trans-border administrative cooperation.[52]

To start with, Germany signed the European Convention on the Service Abroad of Documents relating to Administrative Matters (CETS No.: 094) on November 6th 1979. It was ratified on September 24th 1982 and entered into force on the 1st of January 1983. Simultaneously, Germany signed and ratified the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (CETS No.: 100), which has also been in force in Germany since 1st of January 1983. Germany passed a legal act for the implementation of the requirements of both conventions, the "Law on Conduct of the European Convention of 24 November 1977 on the Service Abroad of Documents relating to Administrative Matters, and the European Convention of 15 March 1978 on the Obtaining Abroad of Information and Evidence in Administrative Matters of 20 July 1981".[53]

§ 1 of this implementing law states that the central authorities that are mandated in Article 2 of the Convention CETS no. 094 should be set up by the federal states. Each federal state can only appoint one authority as a central authority in the sense of Convention CETS no. 094. Furthermore, § 2 of the implementing law establishes a restriction according to the provision of Article 6 I lit. b CETS no. 094: A formal service in cases of Art. 6 I lit. b CETS no. 094 – which means service in an specially requested form ordered by the foreign authority – is only allowed if the document to service is given in German or is translated into German; and naturally this is only possible when German administrative law foresees the requested service option. If service should be conducted according to Art. 6 I lit. a or II CETS no. 094 and the administrative matter is not in German or translated, then the central authority urges the competent authority to service the document by "simple" delivery/handing over. The competent authority has to indicate to the addressee that he/she can decline

Jens-Peter Schneider, Informationssysteme als Bausteine des Europäischen Verwaltungsverbunds, NVwZ 2012, pp. 65–70 (pp. 68 ff.)

[52] U. Stelkens (note 14), EuR n 243.

[53] "Gesetz zur Ausführung des Europäischen Übereinkommens vom 24. November 1977 über die Zustellung von Schriftstücken in Verwaltungssachen im Ausland und des Europäischen Übereinkommens vom 15. März 1978 über die Erlangung von Auskünften und Beweisen in Verwaltungssachen im Ausland" of 20 July 1981 (BGBl. I p. 665).

receipt due to non-comprehension of the document's language. If he/she declines receipt, the document has to be passed back to the central authority which must translate the document itself or urge the foreign authority to translate the document or to amend the document with a translation into German (§ 3 of the implementing law). In § 4 of the implementing law the central authority has been authorised to service the document – if it is given (directly or translated) in German – on postal way (with special formal requirements) and declares the VwVfG as applicable with reference to its § 3 and § 7 concerning (internal) mutual assistance. Finally, § 5 of the implementing law states that the central authority has to issue a certificate of service as required by in Art. 8 I of the CETS no. 094. § 6 of the implementing law states that service on diplomatic or consular representatives is only allowed if the addressee is a citizen of the addressing state and that service according to Art. 11 CETS no. 094 is not foreseen in Germany.

Altogether the implementation of the CETS no. 094 and no. 100 in Germany seems to be sufficient for the purpose of transnational cooperation. Of course it might be more efficient to simply grant for foreign states the right to service their documents themselves (like Article 11 CETS no. 094 gives the opportunity for this). Nevertheless, the current legal system seems to have more in common with German standards of service and probably provides more clarity.

Additionally there are two more bilateral treaties that should be mentioned here.[54] A treaty with Austria on administrative assistance and legal aid[55] provides a wider possibility than the international conventions for cooperating in matters of administrative law and administrative offences (Art. 1 I of the treaty). In Art. 2 I each public authority is basically empowered to seek direct assistance from any other public authority of the contracting partner. Altogether the treaty provides special rules on service – which can be conducted directly by Austrian public authorities through post in Germany – and enforcement of administrative acts and provides, for example, the legal basis for document exchanges or obtaining information on a person's "criminal history". A further area of focus covered is the field of driving licences and traffic offences.

The treaty with Switzerland[56] is basically an agreement in the field of transborder cooperation in police matters and extradition, but also contains provisions on legal aid. Nevertheless, some provisions – in regard to driving licenses and traffic offences – do deal with the exchange or service of documents and information.

[54] In the area of specific laws you can find, for example, agreements with France and the USA in the area of anti-trust law. See Kment (note 2), pp. 293 f.

[55] "Gesetz zu dem Vertrag vom 31. Mai 1988 zwischen der Bundesrepublik Deutschland und der Republik Österreich über Amts- und Rechtshilfe in Verwaltungssachen" of 26 April 1990 (BGBl. II p. 357).

[56] "Gesetz zu den Verträgen vom 27. April 1999 und 8. Juli 1999 zwischen der Bundesrepublik Deutschland und der Schweizerischen Eidgenossenschaft über grenzüberschreitende polizeiliche Zusammenarbeit, Auslieferung, Rechtshilfe sowie zu den Abkommen vom 08. Juli 1999 zwischen der Bundesrepublik Deutschland und der Schweizer Eidgenossenschaft über Durchgangsrecht" of 25 September 2001 (BGBl. II p. 946; corrigendum: BGBl. II 2003, p. 506).

In the sector of social public insurances there are further regulations on the recognition of administrative decisions of other countries. These are mainly based on EU law[57] or on bilateral treaties[58] and cannot be covered in detail here. This holds true also for the area of taxes[59] (see infra section "Recognition and enforcement of onerous transnational administrative acts") and the Schengen-Area inter alia.[60]

In addition, the VwVfG provides (national) rules on trans-border mutual assistance (§§ 8a – 8e VwVfG),[61] which were implemented to meet the requirements of the EU Services Directive.[62] § 8a VwVfG states that every public authority in Germany has to give mutual assistance to a foreign public authority of an EU member state in cases where the mutual assistance is imposed by European law and vice versa. Applications for mutual assistance of German authorities have to be made in German or – if required – have to be translated and have to reference the legal basis

[57] Especially, Regulation (EC) No 883/2004 on the coordination of social security systems; Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems; Regulation (EU) No 1231/2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

[58] See for a detailed list: http://www.bmas.de/SharedDocs/Downloads/DE/zweiseitige-abkommen.pdf?__blob=publicationFile (last reviewed on 19 July 2015).

[59] As regards mutual assistance in tax matters the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64 of 11/03/2011, pp. 1 ff., can be mentioned. It was implemented in Germany by "Gesetz zur Umsetzung der Amtshilferichtlinie sowie zur Änderung steuerlicher Vorschriften (Amtshilferichtlinie-Umsetzungsgesetz – AmtshilfeRLUmsG)" of 26 June 2013 (BGBl. I p. 1809); for the purpose of this chapter especially Article 1 of the AmtshilfeRLUmsG is of special interest, which contents the "Gesetz über die Durchführung der gegenseitigen Amtshilfe in Steuersachen zwischen den Mitgliedstaaten der Europäischen Union (EU-Amtshilfegesetz – EUAHiG)". § 10 EUAHiG allows – under certain conditions – the presence of foreign officials during German investigations in tax matters. § 14 EUAHiG provides the opportunity for service of administrative acts in the field of taxes by German authorities. But in general the directive and the implementing law are focused on giving information, not on enforcement. Therefore it will not be treated here any further.

[60] Compare Annex to 1999/435/EC: Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis, OJ L 176, 10.7.1999, pp. 1 ff.

[61] On the system of mutual assistance according to the §§ 8a-8eVwVfG see: Lorenz Prell, Verwaltungszusammenarbeit im Binnenmarkt, in Martin Burgi/Klaus Schönenbroicher (eds.), Die Zukunft des Verwaltungsverfahrens, Nomos, Baden-Baden, 2010, pp. 48–60; Burghardt Paulus Lenders/Rafael Paplocki, Aktuelles zum Verwaltungsverfahrensrecht – Teil II – Schwerpunkt: Europäische Verwaltungszusammenarbeit, NWVBl. 2010, pp. 87 – 95; Utz Schliesky/Sönke E. Schulz, §§ 8a ff. VwVfG n.F. – die Europäische Verwaltungszusammenarbeit im deutschen Verwaltungsverfahrensrecht, DVBl. 2010, 601 – 609.

[62] Directive 2006/123/EC on services in the internal market; for the implementation of the Services Directive in Germany see: Michael Mirschberger, The Implementation of the Services Directive in Germany, in: Ulrich Stelkens/Wolfgang Weiß/Michael Mirschberger (eds.), The Implementation of the EU Services Directive, Asser Press/Springer, The Hague, 2012, pp. 225–282.

for the application for assistance from EU law (§ 8b I VwVfG). If a foreign public authority of a member state of the EU asks for assistance, the content of the documents must be translated into German (§ 8b II VwVfG) and the legal basis from EU law has to be indicated (§ 8b II VwVfG). Assistance regarding information on persons or facts has to be given, if an EU legal act foresees so (§ 8d VwVfG).

Recognition of Beneficial Transnational Administrative Acts

As already mentioned, the legal concept described under the headline "transnational administrative act" (*transnationaler Verwaltungsakt*) has been developed by German scholars[63] to describe the fact that more and more provisions in secondary EU law – but also in international treaties – enable foreign administrative decisions (whose authenticity is established) to entail the same legal consequences as administrative decisions enacted by national authorities. In these cases the foreign administrative act can virtually replace a national administrative act.

However, the German designation of foreign administrative decisions of this kind of "*transnationale Verwaltungsakte*", which has become common in scholarly discussions,[64] is often misleading.[65] As already shown in brief above, the term "*Verwaltungsakt*" in Germany has a certain definite content and concept. The term "*transnationaler Verwaltungsakt*" therefore suggests that a foreign administrative body adopted a certain administrative decision in line with the prerequisites of a German *Verwaltungsakt* and thus with the same legal consequences. This is naturally wrong. There are a lot of different concepts of administrative acts, or at least administrative actions, in Europe that can result in a decision of a national administrative authority. But they do not at all have the same concept of administrative act or even administrative single case decisions.[66] In addition, the foreign administrative decision to be recognized does not even

[63] For an early example see Klaus König, Die Anerkennung ausländischer Verwaltungsakte, Heymanns, Köln, 1965, passim.

[64] Ulrich Fastenrath, Die veränderte Stellung der Verwaltung und ihr Verhältnis zum Bürger unter dem Einfluß des europäischen Gemeinschaftsrechts, Verwaltung 31 (1998), pp. 277–306 (p. 301); Neßler (note 1), p. 865; Ingolf Pernice/Stefan Kadelbach, Verfahren und Sanktionen im Wirtschaftsverwaltungsrecht, DVBl. 1996, pp. 1100–1114 (p. 1109); Eberhard Schmidt-Aßmann, Das Allgemeine Verwaltungsrecht als Ordnungsidee, 2nd edition, Springer, Berlin, 2004, n. 7/50; Rainer Wahl/Detlef Gross, Die Europäisierung des Genehmigungsrechts am Beispiel der Novel-Food-Verordnung, DVBl. 1998, pp. 2–13 (p. 2).

[65] As here Herwig C. H. Hofmann/Gerard C. Rowe/Alexander H. Türk, Administrative Law and Policy of the European Union, Oxford University Press, Oxford, 2011, p. 645 footnote 108.

[66] Ruffert (note 1), p. 456; Gernot Sydow, Europäisierte Verwaltungsverfahren, JuS 2005, pp. 202 – 208 (pp. 204 f.); Jens-Peter Schneider, Strukturen des Europäischen Verwaltungsverbunds – Einleitende Bemerkungen, Verwaltung Beih. 8 (2009), pp. 9–28 (p. 22).

need to be a unilateral single case decision but may also be an administrative regulation or even a public contract.[67]

Development and Types of (Beneficial) Transnational Administrative Acts

The development of the legal concept of the transnational administrative act is very closely linked to the development of the European Union internal market.[68] The starting point was the mutual recognition of the obligations of the EU member states deriving from the principle of the free movement of goods (Art. 34 ff. TFEU).[69] This obligation is independent of a specific authorization from the state of origin allowing a certain good to be placed on the market.[70] It generally obliges the receiving member state not to block its own market from goods which were legally produced and put on the market in another member state, provided there are no clear contrary rules in the receiving state which are compatible with the requirements EU law imposes on national restrictions on the free movement of goods.[71] If the national restriction does not comply with these EU law requirements then it is inapplicable. This illustrated that even simply the general principle of mutual recognition creates a need for member states to exchange information and thus creates forms of transnational cooperation between the member states.[72] This is concretized by Regulation (EC) No 764/2008, which lays down procedures relating to the application of certain national technical rules to products lawfully marketed in another member state.

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[67] See U. Stelkens (note 14), EuR n 179.

[68] Möstl (note 1), pp. 413 ff.

[69] Constitutive *EuGH*, Case 120/78, European Court Reports 1979, p. 649 – *Cassis de Dijon*; the effects of this principle are explained in the Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition (OJ C 265/2, 2003); furthermore Vassilis Hatzopoulos, Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation des services, Bruylant, Brussels, 1999, pp. 114 ff.; Andreas Th. Müller, Gegenseitige Anerkennung von Verwaltungsentscheidungen im europäischen Verwaltungsrechtsraum, in: Alfred Debus et al. (eds.), Verwaltungsrechtsraum Europa, Nomos, Baden-Baden, 2011, pp. 33–54 (pp. 41 ff.); Henrik Wenander, Recognition of Foreign Administrative Decisions, ZaöRV 71 (2011), pp. 755–785 (pp. 770 f.); Michael Winkelmüller, Verwaltungskooperation bei der Wirtschaftsaufsicht im EG-Binnenmarkt, C. H. Beck, München, 2002, pp. 14 ff.

[70] Distinct Sascha Michaels, Anerkennungspflichten im Wirtschaftsverwaltungsrecht der Europäischen Gemeinschaft und der Bundesrepublik Deutschland, Duncker & Humblot, Berlin, 2004, pp. 279 ff.

[71] Christoph Engel, Die Einwirkung des europäischen Gemeinschaftsrechts auf das deutsche Verwaltungsrecht, Verwaltung 25 (1992), pp. 437–476, (p. 452); Pernice/Kadelbach (note 64), p. 1109.

[72] See Julia Sommer, Verwaltungskooperation am Beispiel administrativer Informationsverfahren im europäischen Umweltrecht, Springer, Berlin, 2003, pp. 439 ff.; Winkelmüller (note 69), pp. 50 ff.; nevertheless the ECJ has ruled that the member states are obliged to take diplomas issued from other member states into consideration in order to ensure the right of free movements of Europeans, see: *EuGH* Case C-340/89, European Court Reports 1991, I-2357 para. 16 ff. – *Vlassopoulou*; furthermorer *EuGH*, Case C-238/98, European Court Reports 2000, I-6623 para. 36 ff – *Hocsman*; on this see also Hatzopoulos (note 69), pp. 134 ff.

However, it is not possible to extend the principle of mutual recognition deriving from primary law without attention to the other fundamental freedoms and rights of free movements deriving from the TFEU.[73] Therefore to facilitate procedures and thereby to establish and assure the internal market and the space of freedom, security and justice[74] secondary legislation of the EU has been passed in order to facilitate the recognition of foreign administrative acts concerning product authorisations, customs decisions, professional qualifications,[75] driving licences and residence permits, inter alia. All these administrative acts are effective in every member state of the EU.[76] However, there is not only one type of transnational administrative act; there exist different forms due to different techniques of secondary legislation,[77] as first described by *Gernot Sydow*:[78]

> The first model is the so called *Transnationalitätenmodell* (= system of transnationality). When applying this model, secondary legislation – typically an EU directive – obliges the member states to include a provision in their national administrative law which suspends national authorisation requirements if an authorisation has already been given by another member state of the EU.[79] Therefore, the authorisation of the state of origin has to be a constituent element of the provision of the receiving state to suspend from re-authorisation.[80] Some scholars see the directives' order as a sort of competence concentration in favour of one member state for a certain transnational fact.[81]

Another model applies when the decision of a foreign administrative body is substantively untouched and valid in a receiving state, but where, nonetheless, a procedure for recognition of the foreign decision is compulsory (so-called *Referenzentscheidungsmodell* = system of reference decisions). This is often the case in the recognitions of diploma, professional qualifications in general[82] or technical permissions for vehicle parts. Here the transnational effect of the foreign decision depends on the review requirements of the recognition procedure: If only the existence, the content and the comparability of the foreign administrative act with national administrative decisions is controlled for in the recognition procedure, then the foreign administrative decision may still be considered as having transnational

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[73] For the reasons see Michaels (note 70), pp. 233 ff.; Winkelmüller (note 69), pp. 55 ff.

[74] Compare on the basic differences of the recognition principle in these contexts Möstl (note 1), pp. 405 ff.

[75] See, therefore, especially Directive 2005/36/EC on the recognition of professional qualifications; on this directive Natalia-Anna Jaekel, Status quo bei der Umsetzung der EU-Berufsanerkennungsrichtlinie, VBlBW 2010, pp. 419–423.

[76] Compare the analysis of secondary EU legislation at Michaels (note 70), pp. 316 ff.

[77] Menzel (note 3), p. 826 f.

[78] See Sydow (note 1), pp. 122 f.

[79] On the term see Sydow (note 1), pp. 123.

[80] Compare Eberhard Schmidt-Aßmann, Deutsches und Europäisches Verwaltungsrecht, DVBl. 1993, pp. 924–936 (p. 935); Michaels (note 70), pp. 359 ff.; Möstl (note 1), p. 414.

[81] In detail Markus A. Glaser, Internationale Verwaltungsbeziehungen, Mohr Siebeck, Tübingen, 2010, pp. 183 ff.

[82] Möstl (note 1), p. 414; Pernice/Kadelbach (note 64), p. 1110.

effect. This would be different if also even the legality of the foreign act was reviewed in the recognition procedure.

In both ways mentioned (suspension of authorisation or recognition without substantive proof) the transnational element does not derive from the administrative act/decision itself, but from the implementing provisions of national law.[83] Therefore a *real transnational effect* may only arise from administrative decisions of the member states whose content and effects are directly determined by EU regulations.[84] This is, for instance, the case with Article 24 of the Visa Code.[85] For these kinds of transnational administrative acts it is characteristic that the competent authority of another member state could alter or withdraw/revoke the administrative act of the issuing foreign administrative body in the event that there are changes in competences that affect the whole territory of the EU.[86] For these cases there are often common EU provisions for the revision of administrative acts (e.g. Art. 34 of the Visa Codex).

Furthermore it has to be stressed, that the concept of "transnational administrative acts" is not necessarily linked to EU law. It also applies if the legal basis for the recognition of the foreign administrative act is not EU law but is instead based on international treaties.[87] Nevertheless, there are no further differences, so the aforementioned applies analogously also in these cases.[88]

It should also be mentioned that not only foreign administrative acts are covered by the term "*transnationaler Verwaltungsakt*" in the German perception, but also an administrative act of a German public authority which is determined to be effective beyond Germany.[89] *Matthias Ruffert* focuses especially on the perspective of the adopting authority[90]: Is the administrative decision adopted intended to have effect in another country?[91] This aspect is often not considered in the discussion on

[83] Becker (note 1), pp. 858 ff.; Fastenrath (note 64), p. 303; Jens Hofmann, Rechtsschutz und Haftung im Europäischen Verwaltungsverbund, Duncker & Humblot, Berlin, 2004, pp. 49 ff.; Stefan Kadelbach, Allgemeines Verwaltungsrecht unter europäischem Einfluss, Mohr Siebeck, Tübingen, 1999, pp. 36 and 328.

[84] U. Stelkens (note 14), EuR n 182; for a similar approach Michaels (note 70), pp. 208 ff. (on customs decisions); Schwarz (note 1), pp. 72 ff.; Sydow (note 1), pp. 144 ff.; Ohler (note 1), pp. 55 ff.

[85] Regulation (EC) No 810/2009 establishing a Community Code on Visas; on this topic: Matthias Laas, Instrumente der europäischen Migrationsverwaltung, Verwaltung Beih. 8 (2009), pp. 125–144 (pp. 129 ff.); Francisco Velasco Caballero, Organisation und Verfahren des Verwaltungsverbundes im Bereich "Grenzen, Asyl und Migration", Verwaltung Beih. 8 (2009), pp. 101–124 (pp. 114 ff.); Volker Westphal/Sabine Brakemeier, Der Visacodex, NVwZ 2010, pp. 621–624.

[86] Compare Christine E. Linke, Europäisches Internationales Verwaltungsrecht, Peter Lang, Frankfurt upon Main, 2001, pp. 250 ff.

[87] Glaser (note 81), pp. 195 ff.; Menzel (note 3), p. 827; Wenander (note 69), pp. 762 ff.

[88] U. Stelkens (note 14), EuR n 248.

[89] Compare Ruffert (note 1), p. 463; dissenting as regards finality as prerequisite for a transnational administrative act : Kment (note 3), p. 470.

[90] Menzel (note 3), p. 826.

[91] Menzel (note 3), pp. 826 ff.; Ruffert (note 1), p. 463.

foreign – or better – transnational administrative acts.[92] Usually the perspective of the country where the administrative act has effect is considered.[93]

Conditions of Recognition of (Beneficial) Transnational Administrative Acts

As regards to the effectiveness of transnational administrative acts, it is commonly accepted that such transnational foreign administrative acts have to be recognised by another member state even when the administrative acts contradict European law or the international treaty serving as the basis of its transnational effect.[94] Judicial review is only possible before the courts of the issuing administrative authority.[95] Only in cases of obvious illegality – which might derive from missing requirements in the legal provision for the authorisation or if such a missing requirement is obvious already from the authorisation itself – can a recognition be refused.[96] National defensive measures against a transnational administrative act of another member state due to infringements of EU law are therefore excluded.[97] Only an infringement procedure against the adopting member state as provided for in Articles 258 f.

[92] Menzel (note 3), p. 826.

[93] Ruffert (note 1), pp. 463, 469; discussing the problem and diversity of the term "transnational administrative act": Menzel (note 3), pp. 826 ff.

[94] Compare for authorisation of TV-programs: *ECJ*, Case C-11/95, European Court Reports I 1996, 4115 para. 34; on E-101-Certificate (now: Certificate A-1, compare Peter Schüren/Anna Wilde, Die neue Entsendebescheinigung A-1 und die Voraussetzungen ihrer Erteilung, NZS 2011, pp. 121–124): *ECJ*, Case C-202/97, European Court Reports I 2000, 883 para. 46 ff. (on this: Stephan Rixen, Neue Entwicklungen im koordinierenden Sozialrecht der EU: Zur Bindungswirkung der E-101-Bescheinigung bei Arbeitnehmer-Entsendungen, SGb 2002, pp. 93–96): *ECJ*, Case C-2/05, European Court Report I 2006, 1079 para 24 ff. – *Herborsch Kiere*; on **driving licences**: *ECJ*, Case C-476/01, European Court Report 2004, I-5205 para. 45 ff. – *Kapper*; *ECJ*, Case C-227/05, European Court Report 2006, I-49 para. 27 ff. – *Halbritter*; *ECJ*, Case C-340/05, European Court Report 2006, I-11479 para. 27 ff. – *Kremer*; *ECJ*, Case C-445/08, European Court Report 2009, I-119 para. 40 ff. – *Wierer*; *ECJ*, Case C-334/09, European Court Reports 2010, I-12379 para. 51 f. – *Scheffler*; *ECJ*, Case C-224/10, European Court Reports 2011, I-9601 para. 28 ff. – *Apelt*; *ECJ*, Case C-467/10, not yet reported, para. 57 – *Akyüz*; **in general**: Fastenrath (note 64), p. 203; Armin Hatje Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung, Nomos, Baden-Baden, 1998, p. 212; Linke (note 86), pp. 275 ff.; Michaels (note 70), pp. 366 f.; Neßler (note 1), p. 865; Peine (note 1), pp. 422 f.; Ruffert (note 1), pp. 474 ff.; Siegel (note 1), pp. 326 f.; Sydow (note 1), pp. 148 ff.; Sydow (note 66), pp. 204 f.

[95] Becker (note 1), p. 856; Classen (note 1), p. 465; Linke (note 86), pp. 256 ff.; Ruffert (note 1), p. 453 and p. 476; Schneider (note 66), p. 21.

[96] Compare (for driving licences): *ECJ*, Case C-329 and C-343/06, European Court Report 2008, I-4635 Rn. 67 ff. – *Wiedemann*; *ECJ*, Case C-184/10, European Court Reports 2011, I-4057 para. 22 ff. – *Grasser*; *ECJ*, Case C-224/10 European Court Reports 2011, I-9601 para. 35 – *Apelt*; *ECJ*, Case C-467/10, not yet reported, para. 62 ff. – *Akyüz*; see also Wenander (note 69), pp. 775 f.; Winkelmüller (note 69), pp. 216 f.

[97] Distinct *ECJ*, Case C-4/94, European Court Reports1996, I-2553 para. 19 f. – *Hedley Thomas*; see David (note 105), pp. 272 ff.; Winkelmüller (note 69), pp. 213 ff.

TFEU is possible, which can be initiated by the member state obliged to recognise the decisions of the host state of the administrative act.[98] Even a consequent maladministration could be a reason for such an infringement procedure.[99] Any further control mechanisms (for example giving supervisory powers to the European Commission) have to be implemented in secondary legislation.[100]

However, if the system of reference decisions is applicable, so that the foreign administrative act has to be recognised by a national administrative decision before having transnational effect (see *supra* section "Development and types of (beneficial) transnational administrative acts"), this recognising administrative act is an administrative act of the receiving state and therefore all legal provisions of the administrative law of this state concerning effectiveness, enforcement and so on apply and can be the subject of legal remedies of the receiving state.[101]

Regardless of the technique of legislation which provides transnational effects to (foreign) administrative acts, the whole system can only work if there is a minimum of mutual trust in the legal order of the states participating in the system of mutual recognition. This is a precondition of these systems to be effective.[102] To ensure this trust, secondary legislation or international treaties imposing recognition provisions have to harmonize the material prerequisites for adopting administrative acts with a transnational effect anyway to a common minimum standard.[103] Trust can also blossom if the affected member state is already incorporated into the adopting procedure of the host state.[104] But even if these conditions are fulfilled, the states have to trust

[98] ECJ, Case C-476/01, European Court Reports 2004, I-5205 para. 45 ff. – *Kapper*; ECJ, Case C-329 und C-343/06, European Court Reports 2008, I-4635 para. 57 – *Wiedemann*; also for E-101-Certificates: *BGH*, NJW 2008, p. 595 para. 32; critical Brenner (note 106), pp. 297 f.

[99] *ECJ*, Case C-494/01, European Court Reports 2005, I-3331 para. 37 ff.; *ECJ*, Case C-278/03, European Court Reports 2005, I-3747 para. 13; *ECJ*, Case C-489/06, European Court Reports 2009, I-1797 para. 45 ff.; *ECJ*, Case C-271/08, European Court Reports 2010, I-7091 para. 30 ff.; *ECJ*, Case C-297/08, European Court Reports 2010, I-1749 para. 60 ff.; *ECJ*, Case C-160/08, European Court Reports 2010, I-3713 para. 105 ff.; on this also Alicja Sikora, Administrative Practice as a failure of a Member State to fulfil its obligations under Community Law, REALaw 2 (2009), pp. 5–27; Maciej Taborowski, Infringement proceedings and non-compliant national courts, CMLRev 49 (2012), pp. 1881–1914 (pp. 1888 ff.); Pål Wennerås, Enforcement of EC Environmental Law, Oxford University Press, Oxford 2007, pp. 262 ff.

[100] Meike Eekhoff, Verbundaufsicht, Mohr Siebeck, Tübingen, 2006, pp. 184 ff.; Marian Klepper, Vollzugskompetenzen der EG aus abgeleitetem Recht, Nomos, Baden-Baden 2001, pp. 166 f.; Eckhard Pache, Verantwortung und Effizienz in der Mehrebenenverwaltung, in: VVDStRL 66 (2007), pp. 106–151 (pp. 128 f).

[101] Compare: Ruffert (note 1), pp. 461 f.; Ohler (note 1), pp. 54 f.

[102] Schmidt-Aßmann (note 80), p. 936; Ohler (note 1), p. 101.

[103] Hatzopoulos (note 69), pp. 366 ff.; Menzel (note 3), p. 828; Möstl (note 1), pp. 415 ff.

[104] Claus Dieter Classen, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim, Das Recht der Europäischen Union – Kommentar, 50th. supplement 2013, Article 197 AEUV para. 65; Hofmann/Rowe/Türk (note 65), pp. 646 f, Hans Christian Röhl, Verantwortung und Effizienz in der Mehrebenenverwaltung, DVBl 2006, pp. 1070–1079 (pp. 1078 f.); Sydow (note 66), p. 205.

that these harmonized standards are really applied, which in fact means that the state authorities should act according to common or at least comparable standards of good administration.[105] How fragile the field of trust can be has been remarkably shown – at least in Germany – by the recognition of driving licenses when German citizens who lost their German driving license got a new one from another member state of the European Union.[106]

Recognition and Enforcement of Onerous Transnational Administrative Acts

The development of the internal market of the EU and the European Space of Freedom, Security and Justice has raised the issue of whether and under which conditions even onerous administrative acts of one member state could be provided with transnational effects so that they have to be recognized and, moreover, enforced in the territory of all EU member states without a recognition procedure in the "receiving state" serving to control the legality of this foreign administrative act.

The question arose not only for tax orders or onerous custom decisions but also for decisions imposing fines for administrative offences or even in criminal law matters. In principle, two different issues are at stake in this regard:

– Are foreign authorities allowed to give notice of onerous administrative acts to persons domiciled in another member state without going through a formal service procedure and without involvement of the authorities of the "receiving state"? Is it possible that the legal effects of such a notification can be the same as if it was a purely domestic procedure? The easiest way for this kind of notification would be a notification by simple letter or electronic means.

[105] Eberhard Schmidt-Aßmann, Perspektiven der Europäisierung des Verwaltungsrechts, Verwaltung Beih. 10 (2010), pp. 263–283 (pp. 269 ff.); see also Antje David, Inspektionen im Europäischen Verwaltungsrecht, Duncker & Humblot, Berlin, 2003, pp. 274 ff.; Ann-Kathrin Kaufhold, Gegenseitiges Vertrauen. Wirksamkeitsbedingung und Rechtsprinzip der justiziellen Zusammenarbeit im Raum der Freiheit, der Sicherheit und des Rechts, EuR 2012, pp. 408–431; Müller (note 69), pp. 45 f.; Wenander (note 69), pp. 767 ff.

[106] Compare on this topic e.g. Michael Brenner, Führerscheintourismus in Europa: Noch kein Ende in Sicht, EuR 2010, pp. 292–298; Peter Dauer, Wenig Bewegung in Sachen Führerscheintourismus, NJW 2008, pp. 2381–2383; Joachim Dyllik/Ernö Lörincz/Reinhard Neubauer, Das Ende des Führerscheintourismus …, LKV 2010, pp. 481–489; Kay Hailbronner/ Uwe Thoms, Der Führerschein im EU-Recht, NJW 2007, pp. 1089–1094; Möstl (note 1), pp. 427 ff.; Johannes Saurer, Anerkennungsgrundsatz und Rechtsmissbrauch im europäischen Fahrerlaubnisrecht, Jura 2009, pp. 260–264; Tobias B. Scholz, Das Ende des sog. "Führerscheintourismus" in der Europäischen Union?, EuR 2009, pp. 275–281; Klaus Weber, Praxishinweis zu: Anerkennung ausländischer Führerscheine – Zerche, KommJur 2008, pp. 352–354.

– Is the "receiving state" obliged to enforce foreign onerous administrative decisions within its territory if the foreign administrative authority requests it to do so?[107] This question becomes crucial if the addressee of the act is a national subject of the "receiving state".

In some cases both these two questions may be of importance, for instance if a foreign authority first gives notice of an onerous administrative decision to a person domiciled in another member state and secondly requests the "receiving state" to enforce the decision. Both issues pose sensitive questions about sovereignty, likely making general rules on recognition of foreign onerous administrative acts out of the question. Only sector specific rules seem to be imaginable.[108]

In Germany, the most known rules in this regard are the rules on financial sanctions in §§ 87 – 87p of the Act on International Mutual Assistance in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen – IRG),[109] which transposes the Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition of financial penalties into national law.[110] These rules only address the question of enforcement of foreign (administrative) financial sanctions, not the question of their notice. This question is governed by Art. 5 I of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union,[111] which states that "*Each Member State shall send procedural documents intended for persons who are in the territory of another Member State to them directly by post*."[112]

Concerning the enforcement of tax orders, directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures foresees rules concerning notification (Art. 8 f.) and rules concerning enforcement of tax orders and similar decisions (Art. 10 ff.). This directive has been

[107] On different forms of administrative cooperation in general see Ohler (note 1), pp. 223 ff., for enforcement: pp. 235 ff.

[108] Compare also Ohler (note 1), pp. 235 f.

[109] "Gesetz über die internationale Rechtshilfe in Strafsachen (IRG)" in the version of the promulgation of 27 June 1994 (BGBl. I p. 1537), most recently amended by Article 1 of the act of 21 July 2012 (BGBl. I p. 1566); an English version can be found at http://www.gesetze-im-internet.de/englisch_irg/index.html (last reviewed on 29 January 2014).

[110] See on this provision Sebastian Trautmann, Das neue Europäische Geldsanktionsgesetz – Vollstreckung ausländischer Geldsanktionen zur Ahndung von Verkehrsverstößen, NZV 2011, pp. 57–62.

[111] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01) ratified by Germany by "Gesetz zu dem Übereinkommen vom 29. Mai 2000 über die Rechtshilfe in Strafsachen zwischen den Mitgliedstaaten der Europäischen Union" of 22 July 2005 (BGBl. II p. 650).

[112] Trautmann (note 110), pp. 59 f.

transposed to German law by the *EU-Beitreibungsrichtlinie-Umsetzungsgesetz*,[113] which has been given relatively little attention by German scholars.[114]

Comparing these provisions with the directives and treaties concerning beneficial transnational administrative acts it is at first glance surprising that the legislation gives transnational effect to the administrative acts in question without accompanying these provisions with a harmonization of substantive law (i.e. the prerequisites of such onerous administrative acts). Even the administrative procedures leading to these acts are not harmonized. This is due to the lack of competence of the EU for further harmonization and the absence of any real will amongst the member states to accept such a harmonization on the EU level in fields of law considered to be at the core of national sovereignty. However, *Markus Möstl* correctly stresses that the principle of mutual trust may be "overstretched" in its demand more or less for blind trust and that a more in-depth control could be better, or would at least help in the acceptance of the transnational effect of decisions of the administrations of other member states.[115]

Transborder-Activities of German Administrative Authorities[116]

As far as the transborder activities of German authorities are concerned, in general there are no special requirements to observe in the administrative procedure, except when foreseen by special agreements or treaties or EU law.

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[113] "Gesetz zur Umsetzung der Beitreibungsrichtlinie sowie zur Änderung steuerlicher Vorschriften (EU-Beitreibungrichtlinie-Umsetzungsgesetz – BeitrRLUmsG)" of 7 December 2011 (BGBl. I p. 2592); for the purpose of this chapter especially Article 1 of the BeitrRLUmsG is of special interest, which contents the "Gesetz über die Durchführung der Amtshilfe bei der Beitreibung von Forderungen in Bezug auf bestimmte Steuern, Abgaben und sonstige Maßnahmen zwischen den Mitgliedstaaten der Europäischen Union (EU-Beitreibungsgesetz – EUBeitrG)" which has been most recently amended by Article 21 of the act of 26 June 2013 (BGBl. I p. 1809); see also Ohler (note 1), pp. 236 ff. with further examples.

[114] Mainly in journals on taxes and legal practitioners, compare for instance: Ralf Hörster, Entwurf eines Gesetzes zur Umsetzung der EU-Beitreibungsrichtlinie sowie zur Änderung steuerlicher Vorschriften, NWB 2011, pp. 1690–1702; Isabel Gabert, Deutsche Beitreibungsamtshilfe nach dem EU-Beitreibungsgesetz (EU-BeitrG): Überblick und Bezüge zum Ertragssteuerrecht, FR 2012, pp. 707–715; Alois Th. Nacke, Änderungen durch das Beitreibungsrichtlinie-Umsetzungsgesetz, StBW 2012, pp. 25–31; Michael Kortz, Grenzüberschreitende Vollstreckung von Steuerforderungen im EU-Raum nach dem EU-Beitreibungsgesetz vom 07.12.2011, DB 2012, pp. 2422–2427.

[115] Compare for the area of criminal law: Möstl (note 1), pp. 418 ff.

[116] For a very systematic and convincing discussion on trans-border activities: Kment (note 3), pp. 269 ff.

Administrative Procedure with Involvement of Non-residents

Within the VwVfG the rights of affected or interested parties are safeguarded by different provisions.[117] These provisions are directly applicable with regard to persons who are not domiciled in Germany (non-residents). This is quite clearly shown by § 15 VwVfG:

> A participant with no permanent or habitual residence, registered office or agency in Germany shall on request give to the authority the name of an authorised recipient in Germany within a reasonable period. Should he fail to do so, any document sent to him shall be regarded as received on the seventh day after its posting, and a document transmitted electronically shall be regarded as received on the third day after its transmission. This shall not apply if it is established that the document did not reach the recipient or reached him at a later date. The participant shall be informed of the legal consequences of this failure.

§ 15 VwVfG therefore assumes that the fact that a person is not domiciled in Germany does not hinder German authorities from addressing requests to this non-resident by simple letter. This fact does neither hinder from taking into consideration the requests, acts of procedure etc. of non-residents. Cum *grano salis* one can therefore say that if a non-resident is affected by the German decision – as addressee or third-party – he/she/it has the same procedural rights as residents.[118]

Firstly, the right to be heard is laid down in § 28 VwVfG:

> (1) Before an administrative act affecting the rights of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision.
> (2) This hearing may be omitted when not required by the circumstances of an individual case and in particular when:
> 1. an immediate decision appears necessary in the public interest or because of the risk involved in delay;
> 2. the hearing would jeopardise the observance of a time limit vital to the decision;
> 3. the intent is not to diverge, to his disadvantage, from the actual statements made by a participant in an application or statement;
> 4. the authority wishes to issue a general order or similar administrative acts in considerable numbers or administrative acts using automatic equipment;
> 5. measures of administrative enforcement are to be taken.
> (3) A hearing shall not be granted when this is grossly against the public interest.

Moreover, interested parties must have the possibility to access records/files of the administrative procedure (§ 29 I VwVfG) and have a right to privacy (§ 30 VwVfG), which is in some cases specified in substantive acts.[119] Furthermore, the

[117] On the procedural rights of interested parties see *inter alia:* Jens-Peter Schneider, in Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Vosskuhle, Grundlagen des Verwaltungsrechts Bd. II, 2nd edition, 2012, C. H. Beck, München, § 28 n 42 ff.

[118] Compare Kment (note 3), pp. 288 ff. for the field of anti-trust law.

[119] *Inter alia*: Hermann Pünder, in: Erichsen/Ehlers (note 29), § 14 n 39.

VwVfG entails provisions for administrative help with the procedure (§ 25 VwVfG). Help may be needed, for example, to identify the necessary documents which have to be handed in for an application.

During the administrative procedure the administrative authority can make use of different forms of taking evidence. They are basically laid down by § 26 VwVfG. The administration is allowed to gather information of any kind for the purpose of the procedure, can hear interested parties, can arraign experts and witnesses, has access to documents and instruments, and can conduct legal inspections (§ 26 I VwVfG).

As already said, the VwVfG does not provide for a general provision which governs the interests that foreign public administrations or non-residents have in the administrative procedure. This can be different in some cases of sector specific law, especially in certain cases of environmental matters,[120] such as the Aarhus Convention,[121] the implementing EU directive 2003/35 (EC),[122] the EU directive 2011/92 (EU),[123] the EU directive 2001/42 (EC),[124] the so called Espoo Convention[125]

[120] Christian Walter, Anwendung des deutschen Rechts im Ausland und fremden Rechts in Deutschland, in: Josef Isensee/ Paul Kirchhof (eds.), Handbuch des Staatsrechts Bd. XI, 3rd edition, C. F. Müller, Heidelberg, 2013, § 237 n 43.

[121] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25 June 1998; signed by Germany on 21 December 1998, ratified on 15 January 2007.

[122] Directive 2003/35/EC providing for public participation in respect to the drawing up of certain plans and programmes relating to the environment. Implemented in Germany by "Gesetz über die Öffentlichkeitsbeteiligung in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Öffentlichkeistbeteiligungsgesetz)" of 9 December 2006 (BGBl. I p. 2819) and by "Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften" of 21 January 2013 (BGBl. I p. 95).

[123] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. Implemented in Germany by the "Gesetz über die Umweltverträglichkeitsprüfung" in the version of the promulgation of 24 February 2010 (BGBl. I p. 94), most recently amended by Article 10 of the act of 25 July 2013 (BGBl. I p. 2749) and by "Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz – UmwRG)" in the version of the promulgation of 08 April 2013 (BGBl. I p. 753) most recently amended by Article 2 of the act of 7 August 2013 (BGBl. I p. 3154).

[124] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. Implemented in Germany in the "Gesetz über die Umweltverträglichkeitsprüfung" in the version of the promulgation of 24 February 2010 (BGBl. I p. 94), most recently amended by Article 10 of the act of 25 July 2013 (BGBl. I p. 2749).

[125] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) – the 'Espoo (EIA) Convention', 25 February 1991; signed by Germany on 26 February 1991, ratified on 8 August 2002. Implemented in Germany by "Gesetz zu dem Übereinkommen vom 25. Februar 1991 über die Umweltverträglichkeitsprüfung im grenzüberschreitenden Rahmen sowie zu der auf der zweiten Konferenz der Parteien in Sofia am 27. Februar 2001 beschlossenen Änderungen des Übereinkommens (Espoo-Vertragsgesetz)" of 7 June 2002 (BGBl. II p. 1406) and in "Gesetz über die Umweltverträglichkeitsprüfung" in the version of the promulgation of 24 February 2010 (BGBl. I p. 94), most recently amended by Article 10 of the act of 25 July 2013 (BGBl. I p. 2749).

and the SEA-Protocol.[126] Also Article 22 of the Visa Codex provides for certain rights to information or consultation.[127]

Notification and Service of Verwaltunsgsakte *in Other Countries*

§ 41 I 2 VwVfG (see *supra* section "Notification and promulgation by service of Verwaltungakte"), like § 15 VwVfG (see *supra* section "Administrative procedure with involvement of non-residents"), imply as a general principle that a simple notification of *Verwaltungsakte* abroad by simple letter or e-mail is possible and conforms to international law even without the explicit consent of the state in which the addressee resides. Indeed, such consent is not necessary because the German authority itself is not acting abroad. It is rather simply the fact that a *Verwaltungsakt* is received abroad that serves as a legal condition thus entailing the legal consequences of § 41, § 43 VwVfG within Germany. The situation is not different from other cases in which national law entails legal consequences to facts happening abroad. The territoriality principle under international law is, therefore, respected.[128]

This is different in the case of a formal service (*Zustellung*) of a *Verwaltungsakt* in application of the VwZG (see *supra* section "Notification and promulgation by service of Verwaltungakte"). Here it seems to be undisputed that all actions related to the formal service procedure are considered as a German act of public authority which, therefore, cannot be executed in other countries without their formal consent.[129] Thus, to facilitate service abroad, Germany has signed the European Convention on the Service Abroad of Documents relating to Administrative Matters (CETS no. 094), as was already mentioned (see *supra* section "International Treaties and National Rules Facilitating Trans-border Administrative Actions of Foreign States Within German Territory").

Apart from that, the question of service abroad is the object of specific rules in § 9 VwZG. It is basically conducted by postal services with acknowledgement of receipt, provided international law allows the sending of the documents via post (§ 9 I no. 1 VwZG). Furthermore, the service abroad is conducted on request of the national competent public authority by foreign public authorities or through

[126] Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, 21 May 2003; signed by Germany on 21 May 2007, ratified on 22 February 2007. Implementing act: "Gesetz zum dem Protokoll vom 21. Mai 2003 über die strategische Umweltprüfung zum Übereinkommen über die Umweltverträglichkeitsprüfung im grenzüberschreitenden Rahmen (Vertragsgesetz zum SEA-Protokoll)" of 3 June 2006 (BGBl. II p. 497).

[127] Velasco Caballero (note 85), pp. 115 f.

[128] See (with further references) Kment (note 3), pp. 296 f.; l'instar (note 14), § 41 n 218; tending in this direction also: Menzel (note 3), pp. 673 ff.; for a different opinion: Christoph Ohler/Tobias Kruis, Die Bekanntgabe inländischer Verwaltungsakte im Ausland, DÖV 2009, pp. 93-101, (p. 94 f.).

[129] Kment (note 3), pp. 297 ff.; *Ohler/Kruis* (note 128), pp. 96 ff.; U. Stelkens (note 14), § 41 n 220; Ohler (note 1), pp. 78 ff.

competent diplomatic or consular representations of Germany (§ 9 I no. 2 VwZG). Third, the service abroad can also be conducted by the Ministry of Foreign Affairs if the addressee or his/her family members are protected by diplomatic immunity and are staff member of a diplomatic representation of Germany (§ 9 I no. 3 VwZG). Lastly, a service abroad is allowed by electronic communication if international law foresees the possibility (§ 9 I no. 4 VwZG). In case of service by a foreign authority or by the Ministry of Foreign Affairs the national public authority can demand a domestic person be authorised, in reasonable time, to accept service instead of the addressee (§ 9 III 1 VwZG). If no domestic person is authorised after a certain time span expires then service can be conducted via post to the addressee (§ 9 III 2 VwZG) and the act is deemed to have been notified seven days after handing it in at the post office unless it is proven that the documents were received by the addressee at a later date or not at all (§ 9 III 3 VwZG).

Finally § 10 VwZG provides the opportunity of service by public notification. This method shall apply inter alia (§ 10 I VwZG) if service abroad is not possible or does not promise any success. It is important to stress that the public notification is not considered to be an extraterritorial administrative action of German authorities, which is only possible with the formal consent of the state where the addressee resides. Such consent is not necessary because the German authority itself is not acting abroad when it publishes a notification within Germany – even if it can also be read abroad.[130]

The public notification has to include the issuing competent authority, the name and last known address of the addressee, the date and file number of the document, and the office where the document can be inspected (§ 10 II 2 VwZG). Furthermore, the document has to include the remark that the document is serviced publicly and by that a respite starts which could lead to a loss of rights of the addressee after expiring (§ 10 II 3 VwZG). The respite is two weeks after public notification and from then on the document is deemed to have been serviced (§ 10 II 6 VwZG).

Conclusion

The German system concerning transborder administrative action seems to be quite complex. On the one hand, if non-residents are affected by national administrative procedures, German law does in general grant the same procedural rights to non-residents as it does to residents. On the other hand, one cannot deny that there is no general political will to enable foreign administrative authorities to act with public authority within German territory and vis-à-vis German citizens. The "carapace of sovereignty" is only opened if this is foreseen by EU law or provided for on the basis of bilateral or multilateral international treaties governed by the principle of reciprocity. It is difficult to imagine how this could be otherwise. It has already been said that every system of mutual recognition of foreign administrative acts can only

[130] See (with further references) U. Stelkens (note 14), § 41 n 220.

function on the basis of mutual trust in the effectiveness of the administrations involved and their will to respect the rule of law, the principles of good governance, and the *ordre public* of the states concerned. This trust has to be earned "individually" and is expressed either by the assent to the accession of new member states to the European Union or the signature of international treaties.

References

Becker, J. 2001. Der transnationale Verwaltungsakt. *DVBl*, 855–866.

Brenner, M. 2010. Führerscheintourismus in Europa: Noch kein Ende in Sicht. *EuR*, 292–298.

Burgi, M. 2011. EU procurement rules – A report about the German remedies system. In *Enforcement of EU public procurement rules*, ed. Steen Treumer and François Lichere, 105–135. Copenhagen: Djoef Publishing.

Classen, C.D. 2005. Rechtsschutz gegen fremde Hoheitsgewalt – zur Immunität und transnationalem Verwaltungshandeln. *VerwArch* 96: 464–484.

Classen, C.D. 2013. In *Das Recht der Europäischen Union – Kommentar,* eds. Grabitz, Eberhard, Hilf, Meinhard, Nettesheim, Martin, 50th. supplement, Article 197 AEUV para. 65.

Dauer, P. 2008. Wenig Bewegung in Sachen Führerscheintourismus. *NJW*, 2381–2383.

David, A. 2003. *Inspektionen im Europäischen Verwaltungsrecht*. Berlin: Duncker & Humblot.

Dyllik, J., Lörincz, E, Neubauer, R. 2010. Das Ende des Führerscheintourismus. *LKV*, 481–489.

Eekhoff, M. 2006. *Verbundaufsicht*, 437–476. Mohr Siebeck: Tübingen.

Engel, Ch. 1992. Die Einwirkungen des europäischen Gemeinschaftsrechts auf das deutsche Verwaltungsrecht. *Verwaltung* 25: 277–306.

Fastenrath, U. 1998. Die veränderte Stellung der Verwaltung und ihr Verhältnis zum Bürger unter dem Einfluß des europäischen Gemeinschaftsrechts. *Verwaltung* 31: 277–306.

Foster, N., and S. Sule. 2010. *German legal system and laws*, 4th ed. Oxford: Oxford University Press.

Gabert, I. 2012. Deutsche Beitreibungsamtshilfe nach dem EU-Beitreibungsgesetz (EU-BeitrG): Überblick und Bezüge zum Ertragssteuerrecht. *FR*, pp. 707–715.

Glaser, M.A. 2010. *Internationale Verwaltungsbeziehungen*. Tübingen: Mohr Siebeck.

Hailbronner, K., Thoms, U. 2007. Der Führerschein im EU-Recht. *NJW*, pp. 1089–1094.

Hatje, A. 1998. *Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung*. Baden-Baden: Nomos.

Hatzopoulos, V. 1999. *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation des services*. Brussels: Bruylant.

Hofmann, J. 2004. *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund*. Berlin: Duncker & Humblot.

Hofmann, C.H., G.C. Rowe, and A.C. Türk. 2011. *Administrative law and policy of the European Union*. Oxford: Oxford University Press.

Hörster, R. 2011. Entwurf eines Gesetzes zur Umsetzung der EU-Beitreibungsrichtlinie sowie zur Änderung steuerlicher Vorschriften. *NWB*, 1690–1702.

Jaekel, N.A. 2010. Status quo bei der Umsetzung der EU-Berufsanerkennungsrichtlinie. *VBlBW*, pp. 419–423.

Jungkind, V. 2008. *Verwaltungsakte zwischen Hoheitsträgern*. Berlin: Duncker & Humblot.

Kadelbach, S. 1999. *Allgemeines Verwaltungsrecht unter europäischem Einfluss*. Tübingen: Mohr Siebeck.

Kaufhold, A.K. 2012. Gegenseitiges Vertrauen. Wirksamkeitsbedingung und Rechtsprinzip der justiziellen Zusammenarbeit im Raum der Freiheit, der Sicherheit und des Rechts. *EuR*, 408–431.

Klepper, M. 2001. *Vollzugskompetenzen der EG aus abgeleitetem Recht*. Baden-Baden: Nomos.

Kment, M. 2010. *Grenzüberschreitendes Verwaltungshandeln*. Tübingen: Mohr Siebeck.

König, K. 1965. *Die Anerkennung ausländischer Verwaltungsakte*. Köln: Heymanns.
Kortz, M. 2012. Grenzüberschreitende Vollstreckung von Steuerforderungen im EU-Raum nach dem EU-Beitreibungsgesetz vom 07.12.2011. *DB*, 2422–2427.
Laas, M. 2009. Instrumente der europäischen Migrationsverwaltung. *Verwaltung Beih* 8: 125–144.
Lenders, B.P., Paplocki, R. 2010. Aktuelles zum Verwaltungsverfahrensrecht – Teil II – Schwerpunkt: Europäische Verwaltungszusammenarbeit, *NWVBl*, 87–95.
Linke, C.E. 2001. *Europäisches Internationales Verwaltungsrecht*. Frankfurt upon Main: Peter Lang.
Mehde, V. 2010. Europäische Amtshilfe. In *Neue Entwicklungen im Verwaltungsverfahrens- und -prozessrecht im Jahr 2010,* eds. Stefan Fenzel, Winfried Kluth, Klaus Rennert. Hallesche Schriften zum Öffentlichen Recht Bd. 18, Halle an der Saale.
Menzel, J. 2011. *Internationales Öffentliches Recht*. Tübingen: Mohr Siebeck.
Michaels, S. 2004. *Anerkennungspflichten im Wirtschaftsverwaltungsrecht der Europäischen Gemeinschaft und der Bundesrepublik Deutschland*. Berlin: Duncker & Humblot.
Mirschberger, M. 2012. The implementation of the services directive in Germany. In *The implementation of the EU services directive*, ed. Ulrich Stelkens, Wolfgang Weiß, and Michael Mirschberger, 225–282. The Hague: Asser Press/Springer.
Möstl, M. 2010. Preconditions and limits of mutual recognition. *CMLRev* 47: 405–436.
Nacke, A.T. 2012. Anderungen durch das Beitreibungsrichtlinie-Umsetzungsgesetz. *StBW*, 25–31.
Neßler, V. 1995. Der transnationale Verwaltungsakt – Zur Dogmatik eines neuen Rechtsinstituts. *NVwZ*, pp. 863–866.
Ohler, Ch. 2005. *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts*. Tübingen: Mohr Siebeck.
Ohler, Ch., and T. Kruis. 2009. Die Bekanntgabe inländischer Verwaltungsakte im Ausland. *DÖV* 62(93): 93–101.
Pache, E. 2007. Verantwortung und Effizienz in der Mehrebenenverwaltung. *VVDStRL* 66: 106–151.
Peine, F.-J. 2004. Sonderformen des Verwaltungsakts. *JA*, pp. 417–423.
Pernice, I., Kadelbach, S. 1996. Verfahren und Sanktionen im Wirtschaftsverwaltungsrecht. *DVBl*, pp. 1100–1114.
Prell, L. 2010. Verwaltungszusammenarbeit im Binnenmarkt. In *Die Zukunft des Verwaltungsverfahrens*, ed. Martin Burgi and Klaus Schönenbroicher, 48–60. Nomos: Baden-Baden.
Rixen, S. 2002. Neue Entwicklungen im koordinierenden Sozialrecht der EU: Zur Bindungswirkung der E-101-Bescheinigung bei Arbeitnehmer-Entsendungen. *SGb*, 93–96.
Robbers, G. 2012. *Introduction to German law*, 5th ed. Baden-Baden: Nomos.
Röhl, H.Ch. 2006. Verantwortung und Effizienz in der Mehrebenenverwaltung. *DVBl*, pp. 1070–1079.
Ruffert, M. 2001. Der Transnationale Verwaltungsakt. *Verwaltung* 34: 453–485.
Ruffert, M. 2010. In *Allgemeines Verwaltungsrecht*, 14th ed, ed. Hans-Uwe Erichsen and Dirk Ehlers. Berlin: de Gruyter.
Saurer, J. 2009. Anerkennungsgrundsatz und Rechtsmissbrauch im europäischen Fahrerlaubnisrecht. *Jura*, 260–264.
Schliesky, U., Schulz, S.E. 2010, Die Europäische Verwaltungszusammenarbeit im deutschen Verwaltungsverfahrensrecht. *DVBl*, pp. 601–609.
Schmidt-Aßmann, E. 1993. Deutsches und Europäisches Verwaltungsrecht. *DVBl*, pp. 924–936.
Schmidt-Aßmann, E. 2004. *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd ed. Berlin: Springer.
Schmidt-Aßmann, E. 2010. Perspektiven der Europäisierung des Verwaltungsrechts. *Verwaltung Beih* 10: 263–283.
Schneider, J.-P. 2009. Strukturen des Europäischen Verwaltungsverbunds – Einleitende Bemerkungen. *Verwaltung Beih* 8: 9–28.
Schneider, J.-P. 2012a. In *Grundlagen des Verwaltungsrechts Bd. II*, 2nd ed, ed. Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann, and Andreas Voßkuhle. München: C. H. Beck.

Schneider, J.-P. 2012b. Informationssysteme als Bausteine des Europäischen Verwaltungsverbunds. *NVwZ*, 65–70.
Scholz, T.B. 2009. Das Ende des sog. "Führerscheintourismus" in der Europäischen Union? *EuR*, 65–70.
Schüren, P., Wilde, A. 2011. Die neue Entsendebescheinigung A-1 und die Voraussetzungen ihrer Erteilung. *NZS*, 121–124.
Schwarz, M. 2011. Europa in der Horizontalen – Zur Abgrenzung des Prinzips gegenseitiger Anerkennung vom Rechtsinstitut des transnationalen Hoheitsakts. In *Alfred Debus et al*, ed. Verwaltungsrechtsraum Europa, 55–78. Nomos: Baden-Baden.
Siegel, Th. 2009. *Entscheidungsfindung im Verwaltungsverbund*, 5–27. Mohr Siebeck: Tübingen.
Sikora, A. 2009. Administrative practice as a failure of a member state to fulfil its obligations under community law. *REALaw* 2.
Singh, M.P. 2001. *German administrative law in common law perspective*. Berlin: Springer.
Sommer, S. 2003. *Verwaltungskooperation am Beispiel administrativer Informationsverfahren im europäischen Umweltrecht*. Berlin: Springer.
Sydow, G. 2004. *Verwaltungskooperation in der Europäischen Union*. Tübingen: Mohr Siebeck.
Sydow, G. 2005. Europäisierte Verwaltungsverfahren. *JuS*, 202–208.
Taborowski, M. 2012. Infringement proceedings and non-compliant national courts. *CMLRev* 49: 1881–1914.
Trautmann, S. 2011. Das neue Europäische Geldsanktionsgesetz – Vollstreckung ausländischer Geldsanktionen zur Ahndung von Verkehrsverstößen. *NZV*, 57–62.
Velasco Caballero, F. 2009. Organisation und Verfahren des Verwaltungsverbundes im Bereich "Grenzen, Asyl und Migration". *Verwaltung Beih* 8: 101–124.
Von Danwitz, Th. 2008. *Europäisches Verwaltungsrecht*. Berlin: Springer.
Wahl, R., Groß, D. 1998. Die Europäisierung des Genehmigungsrechts am Beispiel der Novel-Food-Verordnung. *DVBl*, 2–13.
Walter, Ch. 2013. Anwendung des deutschen Rechts im Ausland und fremden Rechts in Deutschland. In *Handbuch des Staatsrechts,* eds. Josef Isensee, Paul Kirchhof. Bd. XI, 3rd ed. Heidelberg: C. F. Müller.
Weber, K. 2008. Praxishinweis zu: Anerkennung ausländischer Führerscheine – Zerche. *KommJur*, pp. 352–354.
Wenander, H. 2011. Recognition of foreign administrative decisions. *ZaöRV* 71: 755–785.
Wennerås, P. 2007. *Enforcement of EC environmental law*. Oxford: Oxford University Press.
Westphal, V., Brakemeier, S. 2010. Der Visacodex. *NVwZ*, 621–624.
Winkelmüller, M. 2002. *Verwaltungskooperation bei der Wirtschaftsaufsicht im EG-Binnenmarkt*. München: C. H Beck.
Witte, A. 2012. Gewaltenteilung im Völkerrecht. *AöR* 137: 233–241.
Zimmermann, R. 2005. Characteristic aspects of German legal culture. In *Introduction to German Law*, 2nd ed, ed. Mathias Reimann and Joachim Zekoll. Den Haag: Kluwer Law International.
Zimmermann, N. 2009. In *Günter Brambring, Hans-Ulrich Jerschke*, 5th ed, ed. Beck'sches Notarhandbuch. München: C. H. Beck.

Chapter 9
On the Recognition of Foreign Administrative Acts in Greece

Alexandra E. Douga

Abstract A framework for the recognition and enforcement of foreign administrative acts does not yet exist in Greece. National legislation should be adopted, taking into consideration criteria and methods which emerged from the academic and practical development of the concept of the transnational administrative act in the European Union. In order to achieve the aims of the European Union, common recognition and enforcement criteria and procedures should be adopted at European level, in order to have unified solutions which would facilitate the process in question.

The Concept of Administrative Act and Its Classification as "Foreign"

The Concept of Greek Administrative Acts

Under Greek law, administrative procedure encompasses all actions of the administrative organs or individuals, which are necessary for an administrative act to be issued. Article 26 of the Greek Constitution[1] incorporates the doctrine of separation of powers. State authority is divided into the three traditional powers: (*a*) the legislative power, which is exercised by the Parliament, (*b*) the executive power, which is exercised by the President of the Republic and mainly the Government, and (*c*) the judicial power, which is exercised by the courts. Administrative organs are state organs which exercise public power and do not belong to the legislative or judicial power. According to the Greek Constitution, administrative organs are the President of the Republic, the Government, the Prime Minister, the ministers and the deputy

[1] The current Constitution came into force on 11 June 1975 and established Greece as a presidential parliamentary republic. It was revised in 1986 and 2001.

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ministers; all other organs in hierarchical relation with or under the administrative supervision of the above-mentioned organs, directly referred in the Constitution, are also administrative organs.

The Administrative Procedure Code,[2] which regulates most of the issues relating to the issuance process and the validity of administrative acts, does not contain a definition of the term. Nevertheless, the administrative act is the most prominent and frequently used form of action to regulate single, individual cases, deriving from the very important competence of the State to take unilateral decisions, imposing obligations upon its addressees without any consent from them to be required. However, the term does not only include decisions by an administrative authority addressed to a particular individual, but also statutory instruments or by-laws addressed to an uncertain number of individuals, containing legal rules.[3] More precisely, according to *Professor Spiliotopoulos*, a legal act is the act of any organ which produces a regulation that alters the legal status either of the persons to whom the act is addressed or of the organ itself.[4] In the specific field of administrative law, administrative acts are considered those issued by the central or local government, or other self-governing authority[5] which establish unilaterally legal norms. A wide definition of the term could cover every unilateral and precise decision of an administrative authority and delimit the administrative act from consensual, i.e. contractual activities. Thus, basic elements of the concept of administrative act are the unilateral establishment of a legal norm and its issuing by an administrative authority. One of the main divisions of administrative acts is between regulatory, by which impersonal legal norms are established, and individual, by which individual norms are introduced. In both cases, the norms established may have a general or special character. A distinction should also be made between administrative acts and acts of state, i.e. acts of the Government which define and direct the country's general policy and are of guiding character, lacking direct enforceability. The decisions taken in this respect, although coming from a State authority, do not seem to have the nature of an administrative act.

[2] Administrative Procedure Code (*Κώδικας Διοικητικής Διαδικασίας – Kodikas Dioikitikis Diadikasias*), Law 2690/1999 (Government Gazette No. A 45/1999), as amended.

[3] Dagtoglou, P., 2008. Constitutional and Administrative Law. In Kerameus K. & Kozyris, Ph. (eds). 2008. *Introduction to Greek Law. 3rd ed*. Alphen aan den Rijn: Kluwer Law International/ Sakkoulas, 2008, pp. 23–64, 50. ISBN 9789041125408 (Kluwer Law International), 978-960-15-1837-4 (Sakkoulas).

[4] Spiliotopoulos, E. 2004. *Greek administrative law*. Athens/Brussels: Sakkoulas/Bruylant, 2004, p. 5. ISBN 960-15-0954-2 (Sakkoulas), 2-8027-1804-5 (Bruylant).

[5] Council of State applies organic rather than functional criteria in the assessment of administrative acts.

Enforceability of Greek Administrative Acts

The main characteristics of administrative acts are presumption of legality and enforceability. Presumption of legality permits every individual administrative act to produce all its legal effects regardless of possible legal defects, until its annulment, revocation or abolishment. The presumption of legality stems from the public character of the administrative organs and their unilateral competence to establish legal norms, i.e. to exercise public authority.[6] The principle of presumption of legality does not fully apply to regulatory acts. As long as such an act is in force, its legality and validity can always be incidentally reviewed by courts, even when remedies against it are no longer available.

Regulations introduced by administrative acts are mandatory with no need for further formalities; therefore administrative acts are immediately and directly enforceable with no requirement of former procedure or prior judicial decision: they automatically produce effects in the legal order.[7] Enforceability is the consequence of the unilateral establishment of legal norms. In order to secure enforceability, sanctions are threatened in case of non-compliance. Such sanctions are established by general or special provisions and can have a penal, disciplinary, administrative or civil character. Furthermore, individual administrative acts imposing pecuniary obligations on their addressees are enforceable instruments per se without the issuing of a writ of execution. Thus, enforcement measures against the property of the debtor in accordance with general or special procedural rules can be immediately taken.

The direct enforceability of administrative acts has a further consequence: the exercise of administrative coercion. Administrative organs have the competence to resort to unilateral material actions in order to make individuals comply with the content of an administrative act. Administrative coercion, as a last resort measure, must be exercised only in case of refusal or failure of the addressee to conform and only if this is allowed by specific legal provisions and there is an urgent need for the execution of the act. The illegal exercise of administrative coercion creates a right to damages for the prejudiced addressee and may even lead to the criminal liability of the civil servant who performed the action of coercion.

The suspension of enforcement of an administrative act, when an application for annulment or other recourses against it have been filed, is not mandatory but it lies within the discretionary power of the court.

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[6] Tachos, A. 2008. *Ελληνικό Διοικητικό Δίκαιο (Greek administrative law – Elliniko Diikitiko Dikaio) 9th ed*. Athens/Thessaloniki: Sakkoulas, 2008, p. 642 [in Greek]. ISBN 978-960-445-250-7.

[7] Cf Art. 30 ACP according to which "[w]hen the term 'administrative act' is mentioned in the Code, it means the enforceable administrative act".

Effectiveness of Greek Administrative Acts

The requirements that an administrative act must fulfil in order to be effective are mainly provided by the Administrative Procedure Code (hereinafter APC). According to Article 16 APC, administrative acts shall be issued in written form and only in exceptional cases can they be verbal. The document of an administrative act shall indicate the issuing authority and the issuance date and contain the signature of the competent administrative organ. There shall also be mention as to whether the administrative act can be challenged by a special or quasi-judicial administrative appeal and, if so, the scrutinising authority, the deadline and the consequences if the interested party fails to file such an appeal. The reasoning of administrative acts[8] shall be clear, specific and adequate and in principle able to be concluded by the data contained in the file of the particular case, unless other provisions explicitly require that it be included in the document of the administrative act.[9] Promulgation of regulatory administrative acts shall be effected by their publication in the Government Gazette, unless otherwise provided. By contrast, the promulgation of individual administrative acts is effected in principle by their signing and dating. It is provided, however, that they shall be notified to the interested party. Article 20 governs issues concerning the prior submission of opinions and proposals by administrative organs other than the issuing one, when this is required for the promulgation of administrative acts.[10]

Formal force of administrative acts begins as of their issuance, regardless of whether they are regulatory or individual. The acts which require notification commence as of their service to the addressee.

Differentiation of National from Foreign Administrative Acts

As already mentioned above, from the standpoint of Greek doctrine and jurisprudence an administrative act is the declaration of will of an administrative authority by which a legal norm is unilaterally established. The administrative act can only be an act of a public organ, since only public organs have the power to unilaterally introduce legal norms. Public power is exercised through administrative acts by the administrative organs which form the executive power.[11] Furthermore, according to the principle of territoriality applying to the exercise of sovereign power of the

[8] Regulatory administrative acts do not need reasoning, unless this is explicitly required by the delegating statutory provision. See Spiliotopoulos, E. 2001. *Εγχειρίδιο Διοικητικού Δικαίου* (*Handbook of Administrative Law – Encheiridio Diikitikou Dikaiou*) Vol. 1. *14th ed*. Athens: Nomiki Bibliothiki, 2011, p. 175 [in Greek], with reference to case-law. ISBN 978-960-272-882-6.

[9] Art. 17 APC.

[10] Koumpli, V. 2012. On the Codification of Administrative Procedure in Greece. In *Revue hellénique de droit international*, 2012, Vol. 65, pp. 511–530.

[11] Spiliotopoulos, *supra*, No. 4, p. 75.

State, Greek laws can create competences and delegate them only to Greek administrative authorities, and not to foreign authorities or organs.[12] Thus national administrative acts are those issued by Greek administrative organs, this definition also complying with the organic criterion adopted by the Council of State.[13] The organic criterion is also directly provided by the Administrative Procedural Code which states that its provisions apply to the state and the local government as well as to legal entities governed by public law, excluding from its scope legal entities that belong to the public sector but are governed by private law. In contrast, a foreign administrative act is the one issued by an administrative authority of a foreign state. Of course, the concept of administrative authority will be assessed according to the law of the issuing State. If in the issuing State functional criteria are used in order to define administrative organs, then the same criteria must be followed by the national legal system. The relationships of administrative organs, when they belong to two or more states, are examined in the framework of international administrative law.

The main consequence of defining an administrative act as foreign relates to its enforceability. As already mentioned above, one of the main characteristics of Greek administrative acts is that they are immediately enforceable, with no need of any kind of prior authorisation. By contrast, foreign administrative acts are not directly enforceable in Greece but must first be recognised through regulatory or administrative acts. By contrast, the administrative act of a member-state of the European Union is in principle binding for the administrative and judicial authorities of the other member-states without prior recognition. This recognition is deemed to have already been effected either directly, through European Union rules, either indirectly, by the harmonisation of Greek legislation to the European Union law. These latter acts are characterised as transnational administrative acts.[14]

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[12] Tachos, *supra*, n. 6, p. 185 with relevant jurisprudence.

[13] Cf. Lazaratos, P. 2004a. *Η διακρατική διοικητική πράξη στο ευρωπαϊκό διοικητικό δίκαιο* (*The transnational administrative act in European administrative law – I diakratiki diikitiki praxis to europaiko kinotiko dikaio*). Athens-Komotini: Sakkoulas, 2004, p. 102 [in Greek]. ISBN 9789601512464.

[14] Tachos, A. 2006. *Ερμηνεία Κώδικα Διοικητικής Διαδικασίας – No. 2690/1999, όπως τροποποιήθηκε* (*Commentary of the Administrative Procedure Code – Law 2690/1999, as amended - Erminia Kodika Diikitikis Diadikasias*) *3rd ed*. Athens-Thessaloniki: Sakkoulas, 2006. Art. 30 No. 9 [in Greek]. ISBN 960-445-067-0. The theory of transnational administrative act has been mainly developed in Germany by the following authors: Nessler, V. 1995. Der transnationale Verwaltugsakt – Zur Dogmatik eines neuen Rechtsinstituts. In *NVwZ* 1995, pp. 863–866; Becker, J. 2001. Der transnationale Verwaltungsakt. In *DVBI* 2001, pp. 855–866; Ruffert, M. 2001. Der transnational Verwaltungsakt. In *DV* 2001, pp. 453–485. In Greece see on the same topic Lazaratos, *supra*, No. 13, *passim*, pp. 197; *idem*, 2004b. *Ζητήματα δικαστικής προστασίας σε διακρατική έννομη σχέση στο ευρωπαϊκό διοικητικό δίκαιο* (*Matters of judicial protection in transnational legal relationship in European administrative law – Zitimata dikastikis prostasias se diakratiki ennomi shesi sto europaiko diikitiko dikaio*) Athens: Sakkoulas, 2004, *passim*, pp. 166 [in Greek]. ISBN 9789601512488; Gerontas, A. 2004. Η διασυνοριακή διοικητική πράξη (The transterritorial administrative act). In *Dioikitiki Diki* (*Administrative Process*) 2004, pp. 281–305 [in Greek]; *idem*, 2009. *Ο «εξευρωπαϊσμός» του εθνικού διοικητικού και δικονομικού δικαίου* (*The* '*Europeanisation*' *of National Administrative Law and Court Procedure – O exeuropaismos tou*

International administrative acts, by contrast to national and foreign acts which are issued by the administrative authorities of a single state, are issued by international organisations in the form of international conventions. Thus administrative international law encompasses the study of international community and the relative rules, which do not pertain to a certain national order but to the international one.[15] Supranational and global administrative acts are respectively provided by supranational or global authorities, if there exist any, in the framework of their competence.

Procedure for the Adoption of Administrative Acts

Prior Hearing of the Interested Party

In Greece general administrative procedure for adopting administrative acts is governed by the Administrative Procedural Code (hereinafter APC). Art. 6 APC, in conformity with Art. 20 § 2 of the Greek Constitution, provides that before any action or measure against the rights or interests of a specific person are taken, the administrative authorities are obliged to invite the interested party to express his opinion, in writing or orally, on the relevant issues. The summons to the hearing must be in writing, stating the place, day and time of the hearing and determining the subject of the measure or the action. The invitation is notified to the interested party at least 5 days before the hearing date. The interested party is entitled to be informed of the relevant evidence and proceed to counter-evidence. The observance of the said procedure, as well as the consideration of the views of the interested party, should be ascertained by the reasoning of the administrative act. The adopted measure should be taken within a reasonable period of time from the date of the hearing of the interested party. If it is necessary to immediately adopt an unfavourable measure in order to prevent a risk or due to imperative public interest, it is exceptionally possible to take measures without a previous hearing of the interested party. If, however, it is possible for the situation which has already been regulated to change, the administrative authority, within 15 days, summons the interested party to express his views in accordance with the previous paragraphs. The administration may redress the situation which was created to the detriment of the individual, and may take new measures. If the said time limit elapses and no action is taken, the measure ceases to be in force *ipso jure* without any further action.

ACP does not envisage the intervention of foreign public administrations or third parties in the process of issuing an administrative act. Art. 2 ACP establishes the principle of the *ipso iure* action of the Public Administration, meaning that public authorities have both the right and the obligation to act, regardless of the filing or

ethnikou diikitikou kai dikonomikou dikaiou) Athens/Thessaloniki: Sakkoulas, 2009, pp. 113–120 [in Greek]. ISBN 978-960-445-450-1.

[15] Biscottini, G. 1961. L'efficacité des actes administratifs étrangers. In *Recueil des Cours de l'Académie de Droit International*, 1961 III, Vol. 104, pp. 634–723, 634–695, 640.

not of petitions by interested parties. Nevertheless, a petition of the interested party for the issuance of an administrative act is required when so stipulated by specific provisions.[16] Indeed, in some cases, according to the norms which determine the competence of the administrative authority and the process of its actions, the submission by the individual of a petition is a prerequisite for the issuing of an administrative act. The declaration of the will of the individual is not considered as an element of the administrative act but rather a condition for its issuing. The non-filing of a petition of the individual, when its submission is required, is a defect of the administrative act and a ground for revocation or annulment.

Taking of Evidence

ACP contains no provisions regulating the evidence procedure, apart from Art. 17, which provides that when the administrative act is issued *ex officio*, evidence is collected at the initiative of the competent organ for the issuance thereof. When the interested party requests the issuance of an administrative act, he is obliged to submit the supporting documents specified by the relevant provisions, unless such documents are already available to the administrative authority which is competent for the issuance of the act. This lack of a general regulatory frame has led to the adoption of special provisions governing specific cases and to the implementation of general principles deriving from civil and criminal procedural law, unless directly forbidden by law. Evidence refers only to facts which substantially affect the reasoning of the administrative act. In other words, the reasoning of the administrative acts, including those which impose penalties, presupposes the process of taking evidence.

The following principles govern the administrative evidence procedure: (a) the principle of *ex officio* collecting of evidence; (b) the principle of the direct taking of evidence by the competent organ for the issuance of the administrative act; (c) the principle of freely choosing and evaluating the means of evidence, unless otherwise stipulated by law; (d) the principle of equality of the means of evidence; (e) the principle of information of the addressee for all administrative facts of the case; (f) the principle of community of the means of evidence, when there exist many addressees involved in the case.

International taking of evidence is not contemplated by any provisions regulating evidence procedure in the administrative field, broadly speaking. As far as adopting an EU procedure for the taking of evidence in other countries, I think that it would be a helpful step towards facilitating and accelerating administrative procedures and, of course, safeguarding the rights of individuals. It could also serve as a model, for jurisdictions like Greece, which do not posses a coherent set of provisions on the taking of evidence in the administrative sector, to adopt such national rules.

[16] Art. 3 APC.

The Service of Administrative Acts

Service in Greece

As already mentioned above, individual administrative acts shall be notified to the interested party. Service is not considered a constitutive element of the administrative act: an administrative act is valid, even if service has never been duly performed. Nevertheless, time-limits for lodging appeals against individual administrative acts do not commence until valid service is effected. ACP does not contain provisions regulating service but only provides that service is made by any suitable means.[17] It is accepted that the service provisions of the Code of Civil Procedure[18] (Arts 122 et seq.) and of the Code of Administrative Courts Procedure[19] (Arts 47 et seq) also apply to the service of administrative acts, in the absence of special regulations.[20] In general, service must take place in such a way that the act reaches the interested party and that it is proved by a document drawn up by a public or other competent organ. Service can be performed whenever and wherever the addressee of the act is located by the competent for service person. According to the Code of Civil Procedure[21] service is primarily effected by bailiffs, but it can alternatively be effected by organs of the police. The Code of Administrative Courts Procedure in Art. 48 provides that State and public law entities perform service through bailiffs or civil servants; alternatively police organs can be used. When service is effected for the court, court clerks, bailiffs or civil servants perform the necessary actions. Nevertheless, service by post, through registered letter, e-mail or facsimile is also valid, unless the contrary is stipulated by specific provisions.

Service Abroad

Under Greek law, there are no special provisions regulating service of administrative acts abroad. Service of an administrative act in a foreign country would be necessary, when the addressee of the act has his habitual residence abroad. In general, individual administrative acts that are subject to service abroad are those in which the addressees permanently reside in a foreign country. The requirements which apply for legal service in Greece should *mutatis mutandis* apply to the service abroad. Service needs

[17] Art. 19 ACP.

[18] Code of Civil Procedure (*Κώδικας Πολιτικής Δικονομίας – Kodikas Politikis Dikonomias*), necessity Law 44/1967, in force 16 September 1968, as repeatedly amended.

[19] Code of Administrative Courts Procedure (*Κώδικας Διοικητικής Δικονομίας – Kodikas Dioikitikis Dikonomias*), Law 2717/1999 (Government Gazette No. A 97/1999), as amended.

[20] TACHOS, *supra*, note 14, Art. 19 No. 1.

[21] Art. 122.

to be complete: it must include all the features of the act as to its substantive part as well as the reasoning and its enactment. In order for the service to be valid, documents should be translated into the language of the addressee, unless service is accepted in the original language. Service could be performed by any suitable means, including post, e-mail or fax. Nevertheless, in order to ensure performance of service and the rights of the individuals, central authorities responsible for the effectuation of service could be designated, like the ones existing in the framework of international conventions. Alternatively, provisions on service abroad of judicial documents could also relatively apply.

Service abroad of judicial documents in administrative matters is regulated by Art. 54 of the Code of Administrative Courts Procedure (hereinafter CACP). According to this Article, which could possibly apply to administrative acts as well, if the residence and work address of the person whom the service concerns, of his legal representative and of his judicial representative, is, according to their declaration, located abroad, service is effected through delivery to the Minister of Foreign Affairs or to an authorised civil servant, who is obliged to deliver the documents without delay to the addressee, with submission of written proof to the Court Secretary. If the addressee has appointed an authorised service receiver (*αντίκλητος–antiklitos*),[22] the documents will be legally served to him. Translation of the documents to the language of the addressee is not necessary.[23]

One could also resort to an analogous application of the provisions of the Code of Civil Procedure governing service abroad,[24] of the Hague Convention on the service abroad of judicial and extrajudicial documents in civil and commercial matters of 15 November 1965[25] and of course of EU Service Regulations.[26] Greece is a signatory member of the European Convention on the Service Abroad of Documents relating to Administrative Matters of 24 November 1977 but has not ratified it. Taking into consideration that in Greece service of administrative acts in general is almost unregulated, the means of service provided by the 1977 European Convention are a decisive step in the right direction. Nevertheless, since the translation of the documents in a language that the interested party can understand is not guaranteed

[22] The appointment and the powers of the authorized service receiver are regulated by Arts 58-59 CACP.

[23] Marinakis, P. (ed.) 2005. *Διοικητικό Δικονομικό Δίκαιο* (*Administrative Procedural Law – Dioikitiko Dikonomiko Dikaio*) *5th ed*. Athens: Nomiki Bibliothiki, 2005, Commentary of Art. 54 [in Greek]. ISBN 960-272-138-3.

[24] According to Art. 134 CCP if the service addressee resides abroad, service is effected to the Public Prosecutor who should without delay deliver the documents to the Minister of Foreign Affairs; the Minister is responsible to forward them to the service addressee. Service according to this provision is not common, since Greece has ratified The Hague Service Convention and of course since EU Service Regulation came in force (see *supra* notes 25 and 26).

[25] Greece ratified this Convention by Law 1334/1983 (Government Gazette A, No. 31).

[26] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.

by the Convention, a modification rendering such a translation mandatory could be envisaged. If, however, a common regulatory framework was deemed necessary at a European level, which is quite doubtful for the time being, it would be easier for the European Union to either ratify the existing Convention, or broaden the scope of application of EU Service Regulation, rather than to introduce a completely new legislation.

Recognition and Execution of Administrative Acts

In Greece, validity, efficacy and enforceability of foreign administrative acts are not governed by any general law and no competent authorities for recognition and execution of administrative acts in other countries, or for handling requests from other countries exist. Such lack of legislative regulation may be due to the fact that administrative acts are a pure manifestation of sovereign authority, solely serving the scopes of each establishing state, thus not generally susceptible to extraterritorial execution.[27] It should be stressed that these characteristics refer to foreign administrative acts in a strict sense and not to transnational administrative acts in the framework of a union of states, like the European Union, as we will *infra* see. An international instrument towards this direction could be envisaged, like the ones already existing for recognition and enforcement of judicial decisions in civil matters, taking into account the particularities of administrative acts, starting from their dual character: every administrative act is at the same time a manifestation of the administrative public authority and a source of obligations for that same authority.

Provisions for recognition and enforcement of judicial decisions in civil matters at national and European level could serve as a model for an international convention or for regulation at national level. Under Greek law, recognition and enforcement of foreign judgments are governed by the Code of Civil Procedure. Foreign judgments may be either only recognized, that is, given *res judicata* effect in domestic proceedings, or also rendered directly enforceable by being invested with a local *exequatur*. No reciprocity is required and recognition and enforcement take place without re-examination of the merits. Article 323 CCP enunciates five requirements for the recognition of the judgments of a foreign civil court rendered in contentious proceedings. First, the court must have had international jurisdiction according to Greek law, which is tested under the rules regulating the jurisdiction of the Greek courts themselves. Second, the judgment must have the claimed *res judicata* effect under the law of the country of origin. Third, the losing party must have been given an opportunity to defend itself, not less favourable than that available to nationals of the country of origin. Fourth, the judgment must not be inconsistent with a Greek judgment on the same matter binding the same parties. Fifth, the judgment should not be contrary to morality and generally to Greek public policy. While recognition is often sufficient for declaratory or constitutive foreign judgments, when they order

[27] Biscottini, *supra*, No. 15, p. 642.

the payment of money or the execution of an act, their enforceability must also be obtained. For an *exequatur* to be obtained, it must be shown that the foreign document is judicially enforceable under the law of the country of origin and not contrary to morality or generally to Greek public policy. In addition, the recognition requirements of Art. 323 CCP must be met.[28] Greece is of course subject to Regulation 44/2001[29] which prevails *pro tanto* over any inconsistent domestic law as concerns judgments from Member States. The provisions of the Regulation are generally similar to those under Greek law except that it is not necessary that the court of rendition have international jurisdiction under the Greek rules.

The authority of judgments or orders rendered *ex parte* (voluntary or non-contentious jurisdiction) is recognized more easily: it is sufficient that the foreign court have jurisdiction under the applicable substantive law and that the decision is not contrary to morality and generally to Greek public policy. However, the court also must have chosen the applicable law consistently with the Greek conflict rules (Art. 780 CCP). Under this specific procedure, foreign administrative decisions pronouncing divorce by consensus or decisions regarding change of name are recognised in Greece.[30] The abovementioned criteria could be generally used in the recognition and enforcement of foreign administrative acts, with the exception of applicable law. Indeed, it would be very difficult, if not impossible, for an administrative authority not to apply its national law. Furthermore, I am of the opinion that the lack of international competence should be a ground for refusal of recognition only when, according to domestic legislation of the receiving state, its organs have exclusive jurisdiction to regulate the matter in question.

The general requirements for an administrative act to be effective in Greece have already been analysed *supra*. As far as form is concerned, first of all the administrative act must be in writing. By way of exception, an administrative act may be oral if it is proved that a declaration of the will of the administrative organ has really been made and that this declaration is necessary for the achievement of the objective pursued. Furthermore, tacit administrative acts are provided for by express provisions: (a) tacit expression of the will of the administrative organ deriving from the elapse of a peremptory time-limit without action being taken; (b) tacit refusal which is presumed from the omission of due legal action. The document of the administrative act must be dated and bear the signature of the issuing organ. In the case of collective authorities' acts, the signature of the chairman and the secretary suffice. Acts which are issued by virtue of joint competence which is exercised simultaneously must bear the signatures of all the competent organs who act jointly. If the

[28] Kozyris, Ph. 2008. Conflict of Laws, International Jurisdiction, and Recognition and Enforcement of Judgments and Awards. In Kerameus K. & Kozyris, Ph. (eds). 2008. *Introduction to Greek Law. 3rd ed*. Alphen aan den Rijn: Kluwer Law International/Sakkoulas, 2008, pp. 379–408, 399–401. ISBN 9789041125408 (Kluwer Law International), 978-960-15-1837-4 (Sakkoulas).

[29] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[30] See for example One Member First Instance Court of Thessalonica 11953/2011, recognizing a decision of the Russian Civil Status Registry pronouncing divorce.

provisions stipulate counter-signing by another organ, this is necessary for the act to exist. The text which does not have the necessary signatures does not constitute an administrative act, but only a draft of it. Furthermore, every regulatory administrative act and individual acts of general content must be published in the Government Gazette. Publication of individual administrative acts is necessary only when it is stipulated by relevant provisions. The publication of an administrative act is a necessary element in the existence of the statement of the will of the administrative organ and a constituent element of the act. In this case, without and until publication there is no administrative act, but a non-existent act.[31] An administrative decision is deemed to be authentic until its formal validity is challenged before a court. Such a challenge, if successful, will negate the act's probative force and deprive it of its executory force.

The material requirements needed for a foreign administrative act to be effective in Greece are not stipulated by law. The abovementioned criteria regarding recognition of judicial decisions could serve as a model in order to set out rules for recognition of foreign administrative acts. It would be also useful to consider the reasons for adopting recognition principles favourable to this scope. Indeed, recognition is a means of avoiding situations where authorities in several states address the same legal issue. The founding idea of recognition is not to assess foreign decisions once more in the host state. Furthermore, the authorities of the issuing state have thorough knowledge of the national legal order under which the decision was issued. Finally, in many cases, possible errors by the issuing authority could be addressed through an appeal or other procedures in the issuing state. Thus, the main rule when assessing foreign decisions in order to recognise them would be not to refuse recognition.[32]

While examining the recognition criteria under the above set framework, first of all international competence should be considered. Indeed recognition should be refused if the issuing state lacks jurisdiction to issue such administrative act. However, there seem to be few limits to the jurisdiction of states to issue administrative acts, so maybe the only factor which makes sense in this field is refusing recognition if the host state has exclusive jurisdiction to regulate the matter in question. Such an example could be decisions on citizenship. International competence could also be of relevance regarding the international status of the entity issuing the administrative act. If that state is not recognised by the government of the host state, it could be questioned whether the decision should be recognised.[33]

Public order should also be a factor to be considered in the process of recognition of foreign administrative acts. As already stated above), under Greek law, prior hearing of the interested party is provided before any action or measure against his rights or interests are taken by the administrative authorities. Thus, recognition of a foreign administrative act issued by a state, which does not in its legislation

[31] Spiliotopoulos, *supra*, No. 4, pp. 107–110.

[32] Wenander, H. 2001. Recognition of Foreign Administrative Decisions. Balancing International Cooperation, National Self-Determination, and Individual Rights. In *ZaöRV* 2011, Vol. 71, pp. 755–785, 755–758, 773–774.

[33] Wenander, ibid., p. 778.

provide such rights of defence of the addresses, may be denied. Of course, it should be stressed that the range of implementation of the general rule on prior hearing of the interested party, as it is delineated by the case law of the Council of State, should *mutatis mutandis* apply. In addition, recognition can be refused where a foreign burdensome decision violates the fundamental rights of an individual in some respect. This could be the case if the foreign administrative procedure does not meet the procedural requirements of the European convention on Human Rights.[34]

Other factors connected to the applicable law should not constitute grounds for refusal of recognition of a foreign administrative act. Thus, an allegedly erroneous application of the domestic law of the issuing state should not lead to the denial of recognition. It is not the task of the host state to control that the legal rules of the issuing state are applied correctly. The issuing authority must be deemed to have greater knowledge of the legal system of the issuing state than the host state. Of course, when reasons of abuse of right of the administrative act are invoked, or when disproportionality between penalty and infringement arises, then recognition should be refused due to public order reasons.

It should be noted that according to Art. 25, para. 1 of the Greek Constitution, the rights of the human being as an individual and as a member of society and the principle of the welfare rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply to relations between private persons to which they are appropriate. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights should be provided either directly by the Constitution or by law when it is provided by the Constitution, and should respect the principle of proportionality. In the field of administrative law the principle of proportionality is included in the principles of reasonable administration, that is, the sound judgment which must in general govern the administrative authorities in the exercise of their competences aiming at the service of public interest and the smooth operation of the Administration. At the same time, the principle of proportionality is a factor delineating the limits of discretion of the administrative authorities, the infringement of which constitutes grounds for the annulment of the administrative act.[35] The principle of proportionality is also applied by the courts in cases of expropriation. Art. 17, para. 2 of the Greek Constitution provides that no one shall be deprived of his property except for public benefit which must be duly proven. Courts are examining the principle of proportionality while checking in each case the constitutionality of the restriction of the individual right of property with concrete reference to the reasoning of the administrative act.[36] The principles deriving from this case-law could be by analogy implemented regarding foreign administrative acts imposing penalties.

The abovementioned criteria regarding recognition could also apply to the enforcement of foreign administrative acts, a procedure not regulated under Greek

[34] Wenander, ibid., p. 776.

[35] Spiliotopoulos, *supra*, No. 4, pp. 351–353.

[36] Choromidis, K. 2007. *Η αναγκαστική απαλλοτρίωση* (*Expropriation – I anagkastiki apallotriosi*) *4th ed*. Thessalonica: 2007, pp. 303–307 [in Greek].

law. In that case, the initiative to enforce a foreign administrative decision should probably pertain to the foreign public authority: public authorities are concerned to impose decisions that are burdensome for individuals, such as decisions on expulsion or of claims concerning administrative levies. From the moment a foreign administrative act is recognised from the host state, enforcement procedure should be governed by the *lex fori,* and enforcement measures of the host state should be used. Of course, some implications could arise, if, for example, the executing state does not admit the principle of the liability of legal persons in matters of administrative penalties, which is not the case for Greece. Under these circumstances, enforcement of the foreign administrative act, in my opinion, could not be sought.

Since enforcement of foreign administrative acts is not regulated under Greek law, competent authorities for the execution of such acts do not exist. If the recognition and enforcement of foreign administrative judicial decisions on matters regarding personal status can serve as a model, then a court authority would be the most eligible one, in order to guarantee the interests of every party concerned. Of course, in the abovementioned case, civil courts have jurisdiction for recognition and enforcement under civil procedure rules, but it would be preferable in the case of foreign administrative acts for the jurisdiction to be switched to administrative authorities.

To sum up, it seems that no decisive steps have been made by the Greek legislator to adapt a coherent framework for recognition and enforcement of foreign administrative acts. Since it seems that this is a common European trend, it might be better for some common recognition and enforcement criteria and procedures to be adopted at European level, in order to have unified solutions which would facilitate the process under question.

The EU's Role Towards the Recognition and Execution of Foreign Administrative Acts

European Transnational Administrative Acts

The European Union is a composite legal order founded upon a complex system of cooperation between governmental, judicial and administrative bodies aimed at reaching the objectives set out in the Treaties. European integration has among its many consequences the horizontal opening up of national legal systems. Thus, 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 acts, i.e. acts of one state which, according to a European secondary legal norm, produce juridical effects in one or more than one of the other Member States, 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 play an important role.

As already stressed, traditionally, only few administrative acts are issued by a state with a view to being enforced by another state. These acts, mainly related to personal status, need to be recognised by the competent authorities of the state on which they are to be enforced, through an *exequatur* mechanism. Indeed, in the context of international administrative law, the principles of sovereignty and non-intervention, expressing the interest of national self-discrimination, mean that one's state's decisions lack legal effects in another state. So, for foreign administrative decisions to have legal effects in a certain state, that state has to attribute such effects to them through its own legal rules. Nevertheless, the *exequatur* mechanism only permits addressing the issue at a very limited pace. Of course, some international conventions have been developed in order to smooth the recognition step in some fields, like the European Convention on the Service abroad of Documents relating to Administrative Matters, or to cancel the recognition step, like the European Convention on Mutual Administrative Assistance in Tax Matters of 25 January 1988.[37]

Inside the European Union, the situation is radically different, since European integration requires administrative transnationality, founded on administrative cooperation and on recognition duties. The principle of sincere cooperation expressed in Art. 4(3) of the Treaty on the European Union provides a base for solidarity between the Member States, requesting cooperation of different kinds. The principle of sincere cooperation has important implications concerning administrative cooperation. First, Member States shall rely on mutual trust in harmonised areas of law. Second, the solidarity of the Member States requires them to maintain quality in decisions with relevance to other Member States. Third, the principle of sincere cooperation entails obligations to establish direct and efficient contacts and to exchange information when needed. Moreover, certain duties to recognise foreign administrative acts derive from the founding treaties, the general principles flowing from those treaties and of course from secondary law. The most important principles in this context are the principle of equal treatment and the principle of mutual recognition.[38] This last principle, especially, based only on minimum approximation, has been considered as the key pillar for the construction of the internal market through secondary legislation. The application of the principle of mutual recognition,[39] first adopted in the internal market, has been extended to the area of freedom, security and justice and in particular to judicial cooperation in criminal matters. Examples of the mutual recognition principle are Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States 202/584/JHA,[40] Directive 2005/36/EC of

[37] Greece ratified the Convention by Law 4153/2013 (Government Gazette A No. 116) on 29/5/2013, in force since 1/9/2013.

[38] Wenander, supra, No. 32, pp. 767–773.

[39] On the principle of mutual recognition see quite recently Möstl, M. 2010. Preconditions and Limits of Mutual Recognition. In *CMLR* 2010, Vol. 47, pp. 405–436 with extended bibliography on the subject.

[40] O.J. 2002, L 190/1.

7 September 2005 on the recognition of professional qualifications[41] and Directive 2006/126/EC on driving licences.[42] This principle, as already stated, presupposes a high level of legal harmonisation between national legal orders and leads to authorisations with automatic transnational effects, allowing the beneficiaries to exercise fundamental freedom outside their home country without the host administrations having to give their consent. The transnational effect is particularly incisive in the host country, which is bound to respect the measure. This country must allow the private party to carry out the activities authorised by the act. It cannot review the legitimacy or appropriateness of the act itself, nor can it demand that the private party concerned obtain a new authorisation. Of course, in many areas, authorisations subject to recognition still exist, nevertheless taking into consideration the rulings of the Court of Justice of the European Union on mutual recognition. Thus, an authorisation issued in one Member State produces its effects in another Member State only if the second one allows it. This process of recognition emphasises the importance of the role of the host administrations, which in the majority of cases must ensure that the first act is adapted to their own legal system.

Based on what has been put forward so far, two models of transnational acts can be identified. In the first, the administrative act permits the exercise of a private activity across the whole internal market, without the host States being entitled to demand new authorisations; in the second, the host administration is allowed to exercise powers of authorisation in relation to a subject, but these are limited by the obligation to respect the principles of proportionality, as they are not allowed to repeat the same checks or verifications carried out in the first Member State when the results of these are available to them.[43]

To sum up, inside the European Union significant steps have been made, through transnational acts, towards an automatic recognition and enforcement of administrative acts.[44] Nevertheless, the EU's paradigm can hardly serve as a general model of recognition and enforcement of foreign administrative acts, since a high level of integration between administrations is necessary and, of course, the very important role of the Court of Justice of the European Union in this direction cannot be disregarded.

Mutual Recognition of Financial Penalties

Council Framework Decision 2005/214/JHA of 24 February 2005, amended by Council Framework Decision 2009/299/JHA of 26 February 2009, was the result of an initiative by the United Kingdom, the French Republic and the Kingdom of

[41] O.J. 2005. L 255/22.

[42] O.J. 2006, L 403/18.

[43] De Lucia, L. 2005. Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts. In *Review of European Administrative Law*, 2012, Vol. 5, pp. 17–45, 21.

[44] De Lucia, *idem*, uses the term "inter-administrative ties".

Sweden, extending the principle of mutual recognition to financial penalties imposed by the judicial and administrative authorities of another Member State. According to the principle of mutual recognition of decisions, the competent authorities must recognise decisions relating to financial penalties transmitted by another Member State without any further formality.

These penalties are imposed in the case of infringements that cover actions such as participation in a criminal organisation, terrorism, trafficking in human beings, trafficking in arms, swindling, trafficking in stolen vehicles, rape, etc. The framework decision also covers financial penalties for road traffic offences. Decisions imposing a financial penalty can relate to both natural and legal persons.

The penalties must be imposed by the judicial or administrative authorities of the Member States. The decision imposing a financial penalty must be final, i.e. there is no longer any possibility to appeal the decision.

The decision imposing a financial penalty is transmitted from the issuing state, i.e. the Member State that delivered the decision, to the executing state, i.e. the Member State that executes the decision in its territory. To this effect, the framework decision provides a certificate in its annex that must accompany the decision, translated into the official language of the executing state. The decision is transmitted to the competent authorities of the Member State where the natural or legal person has property or income, is normally resident or, in the case of a legal person, has its registered seat.

The state to which the decision was transmitted can refuse to execute the decision if the certificate provided for by this framework decision is not produced, is incomplete or manifestly does not correspond to the decision. Execution can also be refused for a number of other reasons, for example if it is established that the decision has been delivered in respect of the same acts in the executing state or in any state other than the issuing or executing state and, in the latter case, has been executed, or the decision relates to an act that is neither listed as an infringement in the framework decision nor constitutes an offence under the national law of the executing state, or the execution of the decision is statute-barred according to the law of the executing state and relates to acts that fall within the jurisdiction of that state under its own law, or there is immunity under the law of the executing state, which makes it impossible to execute the decision, or the decision has been imposed on a person who could not have been held criminally liable under the law of the executing state due to his age.

The framework decision provides that the execution of the decision is governed by the law of the executing state. The latter can also decide to reduce the amount of the financial penalty in accordance with the amount provided for by national law, on condition that the acts had not been committed in the territory of the issuing state. A financial penalty imposed on a company will be enforced even if the executing state does not recognise the principle of criminal liability of legal persons. It can impose imprisonment or other penalties provided for by national law in the event of non-recovery of the financial penalty. Amnesty, pardon and review of sentence can be granted by both the issuing state and the executing state. Monies obtained from

the enforcement of decisions will accrue to the executing state, unless otherwise agreed by the respective Member States.

Greece has not yet transposed Council Framework Decision 2005/214/JHA of 24 February 2005 to its internal legal order, although the deadline for its transposition in the Member States was 22/3/2007.

International Conventions

International Conventions on the Recognition and Execution of Administrative Acts

Greece has ratified the following international conventions: (a) European Convention on Extradition of 13 December 1957, and (b) European Convention on Mutual Administrative Assistance in Tax Matters of 25 January 1988.[45] Greece has signed but not ratified the European Convention on the Academic Recognition of University Qualifications of 14 December 1959 and the European Convention on the Service abroad of Documents relating to Administrative Matters. Greece has neither signed nor ratified the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters of 15 March 1978 or the Council of Europe Convention on Access to Official Documents of 18/6/2009. Greece has also signed but not ratified the following Conventions of the International Commission on Civil Status: (a) Convention on the Exemption from Legalisation of Certain Records and Documents, of 15 September 1977, and (b) Convention on the International Exchange of Information relating to Civil Status of 12 September 1997.

Legalisation of Foreign Public Documents

For a foreign public document to be accepted by Greek public services, its prior certification is required, according to the legalisation requirements in the given case. Certification also precedes official translation by the Ministry of Foreign Affairs' Translation Service, whose task is of course to validly translate public and private documents. More specifically:

1. If the foreign public document has been issued by an authority from a country that is party to the Hague Apostille Convention, it must bear the Apostille. Indeed, Greece has ratified[46] the Hague Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents, concluded on 5 October 1961

[45] See *supra*, note 37.

[46] Greece ratified the Convention by Law 1497/1984 (Government Gazette A No. 188) on 27/11/1984.

(The Apostille Convention). The Apostille Convention facilitates the circulation of public documents executed in one State and to be produced in another State by replacing the formalities of a full legalisation process with the issuance of an Apostille. The Convention applies only to public documents. These are documents emanating from an authority or official connected with a court or tribunal of the State (including documents issued by an administrative, constitutional or ecclesiastical court or tribunal), administrative documents, notarial acts and official certificates. The main examples of public documents for which Apostilles are issued in practice include birth, marriage and death certificates, extracts from commercial registers and other registers, patents, court rulings, notarial acts etc. Apostilles may also be issued for a certified copy of a public document. On the other hand, the Convention neither applies to documents executed by diplomatic or consular agents nor to administrative documents dealing directly with commercial or customs operations. Apostilles may only be issued by a Competent Authority designated by the State from which the public document emanates. The designated competent authorities for Greece are the Prefect for all documents issued by the services of the Prefectural Administration, and the Secretary General of the Region for (a) all documents issued by the public services of the County or the Prefecture, which do not fall under the competence of the Prefectural Administration; (b) all documents issued by the legal entities of public law; (c) all documents issued by first degree local government organisations, and (d) all documents issued by the Registry Offices; responsible authority for judicial documents is the First Instance Court of the region where the issuing authority is seated. Greece does not have an electronic-Apostille procedure. The only effect of an Apostille is to certify the authenticity of the signature, the capacity in which the person signing the document has acted, and where appropriate, the identity of the seal or stamp which the document bears. The Apostille does not relate to the content of the underlying document itself.

2. If the foreign public document comes from an authority of a country that has ratified the Convention, but against which Greece has raised objections (Albania, Georgia, Kyrgyzstan, Mongolia, Peru and Uzbekistan), the document is certified only by the Greek consular authority in the document's country of origin.
3. If the foreign public document comes from an authority of a country that is not a party to the Apostille Convention or it is expressly exempted from the field of application of the Convention (i.e. documents issued by Diplomatic or Consular agents, administrative documents directly concerning a commercial or customs act), it requires consular certification if it is to be accepted by Greek public services. Consular certification can be carried out by the closest Greek Consular Authority in the country of the document's origin, provided it has first been certified by the Ministry of Foreign Affairs of the country of origin. Alternatively, the foreign public document can be certified by the Greek competent certification authority, which is the Certification Department of the Service Centre for Citizens and Greeks Living Abroad (KEPPA), established within the Ministry of Foreign Affairs, or alternatively the Certification Office established within the Thessalonica International Relations Service, provided that, following its

certification by the Ministry of Foreign Affairs of the country of origin, it is certified by the Consular authority of that country in Greece. Documents issued by a Diplomatic or Consular Mission accredited in Greece, within the framework of their consular duties, must be certified by the above mentioned relevant Greek competent certification authorities, except in cases where the document is exempt from the certification requirement due to bilateral or multilateral contractual obligations of Greece, like the ones arising from the European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers of 7 June 1968.[47]

Doctrinal Treatment of the Subject of Foreign Administrative Acts

In Greece the subject of recognition and enforcement of foreign administrative acts has barely been dealt with. As already mentioned above, under note 14, the influence of the law of the European Union and the emergence of the transnational administrative act have been the subject of a few monographs. Their authors, i.e., P. Lazaratos and A. Gerontas are professors of administrative law. Of course, concepts such as the principles of mutual recognition and equal treatment in the framework of the European Union have explicitly been treated by professors and scholars of European Union Law. Finally, a relatively recent work also in connection with the subject is Bakirtzi, E., Tsifopoulou, I., 2009. *Ληξιαρχικές πράξεις με στοιχείο αλλοδαπότητας κατά τη διοικητική και δικαστική πρακτική* (*Register's Acts with a Foreign Element in Administrative and Judicial Practice – Lixiarhikes praxeis me stihio allodapotitas kata ti diikitiki kai dikastiki praktiki*) Athens/Thessaloniki: Sakkoulas, 2009, pp. 284. ISBN 978-960-445-456-3.

Conclusion

As has been shown in the report, a framework for the recognition and enforcement of foreign administrative acts does not yet exist in Greece. National legislation should be adopted, taking into consideration criteria and methods which emerged from the academic and practical development of the concept of the transnational administrative act in the European Union. In order to achieve the aims of the European Union, common recognition and enforcement criteria and procedures should be adopted at European level, in order to have unified solutions which would facilitate the process in question.

[47] Greece ratified the Convention by Law 844/1978 (Government Gazette A No. 227) on 21/12/1978.

References

Becker, J. 2001. Der transnationale Verwaltungsakt. In *DVBI* 2001, 855–866.

Biscottini, G. 1961. L'efficacité des actes administratifs étrangers. In *Recueil des Cours de l'Académie de Droit International*, 1961 III, Vol. 104, 634–723.

Choromidis, K. 2007. *Η αναγκαστική απαλλοτρίωση* (*Expropriation – I anagkastiki apallotriosi*) 4th ed. Thessalonica: 2007 [in Greek].

Dagtoglou, P. 2008. Constitutional and administrative law. In *Introduction to Greek law*, 3rd ed, ed. K. Kerameus and P.H. Kozyris, 23–64. Alphen aan den Rijn: Kluwer Law International/ Sakkoulas (Kluwer Law International) 978-960-15-1837-4 (Sakkoulas). ISBN 9789041125408.

De Lucia, L. 2005. Administrative pluralism, horizontal cooperation and transnational administrative acts. *Review of European Administrative Law* 5: 17–45. 2012.

Gerontas, A. 2004. Η διασυνοριακή διοικητική πράξη (The transterritorial administrative act). In *Dioikitiki Diki* (*Administrative process*) 2004, 281–305 [in Greek].

Gerontas, A. 2009. *Ο 'εξευρωπαϊσμός' του εθνικού διοικητικού και δικονομικού δικαίου (The 'Europeanisation' of National Administrative Law and Court Procedure – O exeuropaismos tou ethnikou diikitikou kai dikonomikou dikaiou)*. Athens: Sakkoulas. 2009 [in Greek]. ISBN 978-960-445-450-1.

Koumpli, V. 2012. On the codification of administrative procedure in Greece. *Revue hellénique de droit international* 65: 511–530.

Kozyris, P.H. 2008. Conflict of laws, international jurisdiction, and recognition and enforcement of judgments and awards. In *Introduction to Greek law*, 3rd ed, ed. K. Kerameus and P.H. Kozyris, 379–408. Alphen aan den Rijn: Kluwer Law International/Sakkoulas (Kluwer Law International) 978-960-15-1837-4 (Sakkoulas). ISBN 9789041125408.

Lazaratos, P. 2004a. *Η διακρατική διοικητική πράξη στο ευρωπαϊκό διοικητικό δίκαιο (The transnational administrative act in European administrative law – I diakratiki diikitiki praxis to europaiko kinotiko dikaio)*, 2004. Athens: Sakkoulas [in Greek]. ISBN 9789601512464.

Lazaratos, P. 2004b. *Ζητήματα δικαστικής προστασίας σε διακρατική έννομη σχέση στο ευρωπαϊκό διοικητικό δίκαιο* (Matters of judicial protection in transnational legal relationship in European administrative law – Zitimata dikastikis prostasias se diakratiki ennomi shesi sto europaiko diikitiko dikaio) Athens: Sakkoulas, 2004 [in Greek]. ISBN 9789601512488.

Marinakis, P. (ed.). 2005. *Διοικητικό Δικονομικό Δίκαιο (Administrative Procedural Law – Dioikitiko Dikonomiko Dikaio)*, 5th ed. Athens: Nomiki Bibliothiki. 2005, [in Greek]. ISBN 960-272-138-3.

Möstl, M. 2010. Preconditions and limits of mutual recognition. *CMLR* 47: 405–436.

Nessler, V. 1995. Der transnationale Verwaltugsakt – Zur Dogmatik eines neuen Rechtsinstituts. In NVwZ 1995, 863–866.

Ruffert, M. 2001. Der transnational Verwaltungsakt. In *DV* 2001, 453–485.

Spiliotopoulos, E. 2004. *Greek administrative law*. Athens: Sakkoulas/Bruylant (Sakkoulas) 2-8027-1804-5 (Bruylant). ISBN 960-15-0954-2.

Spiliotopoulos, E. 2011. *Εγχειρίδιο Διοικητικού Δικαίου (Handbook of Administrative Law – Encheiridio Diikitikou Dikaiou)*, vol. 1, 14th ed. Athens: Nomiki Bibliothiki [in Greek]. ISBN 978-960-272-882-6.

Tachos, A. 2006. *Ερμηνεία Κώδικα Διοικητικής Διαδικασίας – Ν. 2690/1999, όπως τροποποιήθηκε (Commentary of the Administrative Procedure Code – Law 2690/1999, as amended – Erminia Kodika Diikitikis Diadikasias)*, 3rd ed. Athens: Sakkoulas. 2006 [in Greek]. ISBN 960-445-067-0.

Tachos, A. 2008. *Ελληνικό Διοικητικό Δίκαιο (Greek administrative law – Elliniko Diikitiko Dikaio)*, 9th ed, 2008. Athens: Sakkoulas [in Greek]. ISBN 978-960-445-250-7.

Wenander, H. 2001. Recognition of foreign administrative decisions. Balancing international cooperation, national self-determination, and individual rights. *ZaöRV* 71: 755–785. 2011.

Chapter 10
La reconnaissance des actes administratifs étrangers en Hongrie

István Balázs, Marianna Nagy, and Krisztina Rozsnyai

Abstract In Hungary there do already exist several mechanisms for the acceptance and execution of foreign acts. These mechanisms function well in the areas regulated especially by international or supranational law. As Hungary has not signed the European Convention on International Service, it would be certainly useful the EU to regulate this foreign notification. The procedure of assistance is very slow and difficult, it is not always possible to remove language barriers. If the authorities could notify the decisions directly abroad, this improved efficiency. The issue of language use should also be carefully managed. These problems are not likely to be solved at Member State level.

Resumée
En Hongrie, il déjá existent des mécanismes á l'égard de l'acceptance et l'exécution des actes étrangéres. Ces mécanismes fonctionnent au meilleur dans les champs réglés par le droit supranational ou bien international. Il serait certainement très utile que l'UE réglemente la notification à l'étranger d'autant plus que la Hongrie n'a pas signé la Convention européenne sur la notification internationale. La procédure de l'entraide est très lente et difficile, il n'est pas toujours possible de démonter les barrières linguistiques. Si les autorités pouvaient notifier les décisions directement à l'étranger, cela améliorait l'efficacité. La question de l'utilisation de la langue devrait être également réglée avec soin. Ces problèmes ne sont pas susceptibles d'être réglés au niveau des États membres.

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Le concept d'« acte administratif » et les aspects qui le caractérisent

La définition légale de l'acte administratif

Le Code de procédure administrative hongrois (CPA) définit la notion d'*affaire administrative*. Toute procédure concernant une affaire administrative aboutit à *un acte administratif d'autorité*,[1] qui correspond à peu près à la notion d'« acte administratif ». Selon le Code, une affaire est considérée comme administrative, lorsqu'une autorité administrative :

définit les droits et les obligations de l'intéressé (client),
certifie une donnée, un fait ou un droit,
tient un registre administratif,
exécute un contrôle administratif.

Ce concept comporte plusieurs aspects significatifs. Dans ces actes administratifs d'autorité, l'organe administratif intervient en qualité d'autorité ; en d'autres termes, il exerce le pouvoir public à l'égard d'un sujet de droit extérieur à l'organe agissant. Généralement, une autorité administrative est un organe administratif relevant du système administratif. Le système administratif se divise en deux grands sous-systèmes. Le premier est le sous-système administratif qui, sous la direction du Gouvernement, comprend les organes d'ordre hiérarchique (ministères, hautes autorités, organes déconcentrés). Y sont également inclus les organes administratifs autonomes et les organes régulateurs indépendants qui ne sont pas soumis au Gouvernement. Le deuxième sous-système est composé des collectivités territoriales : les communes et les départements. Elles ont leurs propres compétences pour régler les affaires administratives : dans ces actes peuvent agir soit le conseil des élus de la collectivité territoriale, soit ses organes (commission, maire, secrétaire) en vertu des décisions du conseil des élus territoriaux. La loi peut aussi déléguer des pouvoirs administratifs au maire et au secrétaire. Dans les actes spéciaux, des organisations extérieures au système ainsi que des personnes physiques peuvent se voir accorder la délégation d'un pouvoir administratif. Les ordres professionnels, en premier lieu, accomplissent des missions de pouvoir public à l'égard de leurs membres et, parfois, ils ont aussi une compétence administrative à l'égard de tiers.

Par conséquent, les actes qui ne produisent pas de relation administrative ne relèvent pas du concept d'« acte administratif d'autorité ». Ainsi ne constituent pas un acte administratif d'autorité les décisions d'autorité publique qui ne seraient pas prises par un organe administratif ou un tout autre organe ayant reçu la délégation

[1] C'est un acte individuel, unilatéral d'une autorité administrative. Cette notion est essentiellement la même que la notion de Jean Rivero : « […] la distinction *des actes d'autorité*, réservés à la compétence administrative et des actes de gestion, analogues à ceux des particuliers […] » (Rivero, 1990, 206. p.158/2)

d'accomplir des actes administratifs, telles que les décisions gouvernementales et les décisions prises lors de l'administration des juridictions.

La notion d'« acte administratif » : quelques questions doctrinales

Selon la réglementation hongroise, les mesures administratives prises par une autorité afin d'éliminer un danger et qui sont immédiatement exécutées (par exemple, la mise en fourrière d'un véhicule en stationnement interdit ou l'imposition de la quarantaine animale) ne sont pas régies par le CPA et le recours contre ces mesures n'est possible qu'en vertu de dispositions légales spéciales. La doctrine classe les mesures parmi les actes de la puissance publique.

Les actes des services publics constituent un ensemble particulier. Ces actes ne sont pas pris dans l'exercice de la puissance publique, mais dans le cadre de la compétence d'une service publique public et ils ne sont donc soumis au CPA. Dans certains domaines, ces actes sont soumis à une procédure spéciale et il existe un recours contre eux, à l'instar du recours contre les décisions importantes d'une école ou d'une université, dans le domaine de l'éducation.

Les actes émis lors du fonctionnement de l'Administration constituent également un sous-ensemble des actes administratifs, au sens large du terme. Ceux-ci sont émis en vertu d'un pouvoir organisationnel ; leurs destinataires sont des organes administratifs en relation hiérarchique ou de contrôle de légalité avec l'émetteur ; ou bien il s'agit de rapports entre les personnes au sein du même organe (par exemple, les décisions relatives aux fonctionnaires, telles que les nominations, les sanctions disciplinaires, etc.).

Comme aucune relation administrative n'est créée dans les affaires de droit civil, la participation dans ces affaires ne relève pas de la notion d'« acte administratif ». L'appréciation du caractère administratif ou civil de la relation juridique dans les affaires où une subvention de l'État a été utilisée se fait sur le fondement des règles sur lesquelles ces affaires reposent, la jurisprudence n'ayant pas une pratique uniforme pour l'application de la notion d'« acte administratif d'autorité » (Barabás et Nagy 2011).

On peut distinguer par leur objet des actes réglementaires et des actes subjectifs. Par contre, la doctrine hongroise exclut des actes-règles des actes administratifs. Il existe aussi la distinction entre actes unilatéraux et plurilatéraux. Les actes administratifs unilatéraux constituent le principal moyen d'action de l'Administration et prennent la forme de décisions exécutoires. Les actes unilatéraux sont un régime particulier des contrats administratifs. Ces derniers sont pourtant souvent qualifiés par la jurisprudence comme contrats privés. Car en Hongrie, les contrats administratifs n'ont pas de régime particulier, mais ils existent dans la pratique et aussi dans la théorie (Barabás et Nagy 2011).

Les conditions requises pour l'efficacité des actes administratifs

La doctrine désigne comme conditions pour la validité des actes l'habilitation de l'émetteur à délivrer l'acte, c'est-à-dire la compétence internationale, la compétence d'attribution et la compétence territoriale, l'absence de motifs d'exclusion et, si l'émetteur est un organe colléctive, le respect des règles relatives à la convocation, au quorum, à la proportion des voix. Une autre condition de validité est la légalité formelle et matérielle de l'acte. L'acte devient valable avec la notification. Selon la jurisprudence l'acte qui n'a pas été notifié n'existe pas, il ne peut pas produire de conséquences juridiques. Ces derniers temps, la jurisprudence a élargi les matières dans lesquelles elle déclare l'invalidité des actes en faisant référence à la doctrine.

Le CPA ne prévoit pas de conditions pour la validité des actes ; l'on peut faire des déductions en la matière en abordant l'institution de la nullité, qui est réglementée dans le détail depuis 2004 (Rozsnyai, 2008, 208.). Selon le CPA, la décision est considérée nulle lorsque :

la compétence juridictionnelle de l'autorité hongroise est exclue sur le fondement d'un acte obligatoire de l'Union européenne ayant une portée générale et directement applicable, sur le fondement d'une disposition d'une convention internationale, d'une disposition légale,
l'affaire ne relève pas de la compétence d'attribution ou territoriale de l'autorité qui procède (sauf si l'autorité a pris une mesure provisoire),
la décision a été prise sans recours à l'autorité spécialisée ou sans tenir compte de la position de l'autorité spécialisée,
le contenu de la décision administrative a été influencé par une infraction, à condition que l'infraction ait été constatée par un jugement définitif ou, à défaut, si ce n'est que par manque de preuves qu'une telle décision judiciaire n'a pas été rendue,
l'organe qui prend la décision n'a pas respecté les règles relatives à la convocation, au quorum, à la proportion des voix,
le contenu de la décision est contraire à la décision de la justice.

Selon la disposition qui a été élaborée d'après la jurisprudence, le contrôle juridictionnel peut conclure à l'annulation de la décision pour non-respect des autres règles matérielles et procédurales, à l'exception des règles procédurales qui n'ont pas d'effet sur le fond de l'affaire. Les autorités de deuxième instance gèrent de manière semblable le non-respect des règles procédurales.

La question de validité des décisions étrangères se pose au cours de l'instruction. L'alinéa 2 de l'article 52 du CPA prévoit que « *tout acte authentique fait à l'étranger ou tout document privé certifié par un tribunal étranger, organe administratif, notaire ou toute autre personne dépositaire de l'authenticité, étrangers, – sauf si des réglementations, des dispositions des accords internationaux et des pratiques de réciprocité relatives à l'affaire en question en disposent autrement – n'a de force probante en vertu de la loi hongroise que si le document est légalisé par l'agent de la mission diplomatique de la Hongrie dans le pays où le document a été délivré* ».

La deuxième phrase du présent paragraphe prévoit que les documents délivrés dans une langue autre que le hongrois ne peuvent être acceptés qu'avec une traduction officielle. L'alinéa 3 de l'article 52 du CPA prévoit la même obligation pour les autres documents ; cependant, le client peut bénéficier d'un allègement de la preuve pour les documents établis en langues étrangères qui sont excessivement difficiles à obtenir : le client peut faire une déclaration concernant ces documents.

L'exécution forcée de l'acte administratif. Les voies d'exécution forcée

En vertu de la loi sur l'exécution par voie judiciaire, il faut appliquer les règles de l'exécution par voie judiciaire au cours de l'exécution forcée d'un acte administratif. Le CPA lui-même prévoit que, sauf disposition contraire, il faut appliquer la loi précitée. Sur ce fondement, l'autorité qui ordonne l'exécution forcée est considérée comme une juridiction ; le concours de la justice n'est pas nécessaire pour ordonner l'exécution forcée d'un acte administratif. Le CPA définit les conditions préalables de l'exécution forcée :

la décision (accord, contrat administratif) faisant l'objet de l'exécution forcée fixe des obligations,
la décision est soit définitive, soit exécutoire par provision,
le délai d'exécution s'est écoulé sans succès,
le droit à l'exécution forcée n'est pas prescrit.
La loi prévoit *deux formes* de l'exécution forcée :
l'exécution forcée d'une obligation pécuniaire ;
les modalités de l'exécution forcée en cas d'une obligation de faire.

Au cours de l'exécution forcée administrative ayant pour but l'exécution d'une obligation pécuniaire par la contrainte, il faut soumettre à la procédure de l'exécution forcée la somme saisie lors de la saisie conservatoire auprès du prestataire de services financiers et, si cette somme ne couvre pas ou couvre seulement partiellement l'obligation, sera soumise à la procédure la somme appartenant au débiteur, demeurée librement disponible auprès du prestataire de services financiers ou bien, si cela n'est pas possible pour une personne physique, le salaire du débiteur sera saisi. Dans les affaires dans lesquelles ces mesures d'exécution forcée *ne pourraient pas* être fructueuses ou dans lesquelles le résultat ne pourrait être atteint qu'au bout d'un terme excessivement long, *un bien quelconque* du débiteur pourra être soumis à la procédure de l'exécution forcée, en premier lieu, les biens concernés par la saisie conservatoire. *L'exécution forcée sur un immeuble* peut être ordonnée si la créance porte sur une somme égale ou supérieure à cinq cent mille forints. Exceptionnellement, la créance peut être inférieure à cette somme si la dette est proportionnelle à la valeur de l'immeuble sur lequel porte l'exécution forcée. L'immeuble servant à l'habitation du débiteur et de sa famille – ne dépassant pas la mesure maximale

prévue par la loi pour le besoin d'habitation – peut-être l'objet de l'exécution forcée si d'autres modalités de l'exécution forcée sont restées infructueuses. Une autre possibilité est d'hypothéquer l'immeuble au cas où l'exécution forcée sur un immeuble serait impossible et les autres formes de l'exécution forcée seraient restées sans résultat.

Dans les affaires où la décision exécutoire oblige le client à respecter un comportement, à accomplir un acte, à s'abstenir d'accomplir un acte, à cesser une action ou une activité, à supporter, et où le client ne s'exécute pas de lui-même, le CPA prévoit *plusieurs formes* de contrainte. Parmi ces mesures, *l'autorité chargée de l'exécution* est obligée de prendre la mesure – en connaissance de toutes les circonstances de l'affaire –, qui assure le plus fructueusement et efficacement l'exécution de l'obligation. Ainsi l'autorité :

peut faire exécuter l'obligation aux frais et risques du débiteur,
peut autoriser le créancier à exécuter ou à faire exécuter l'obligation aux frais et risques du débiteur,
peut contraindre le débiteur à verser l'équivalent pécuniaire de la prestation à la demande du créancier,
peut imposer une amende administrative au débiteur – sans examen de sa situation patrimoniale et financière – au cas où l'inexécution serait imputable au débiteur,
peut recourir à la force publique pour contraindre le débiteur à s'exécuter.

Facteurs déterminant la nature étrangère des actes administratifs

L'élément étranger n'entraîne pas automatiquement le caractère étranger de l'acte administratif d'autorité, il faut prendre en compte les règles de compétence juridictionnelle. Le CPA repose sur le principe de la territorialité. Ainsi, pour l'affaire administrative d'un client ressortissant hongrois, d'une personne morale ou d'une organisation sans personnalité morale immatriculées en Hongrie est compétente l'autorité hongroise sur le territoire de la Hongrie. Il en est de même pour le cas d'un ressortissant étranger et d'une personne morale ou d'une organisation sans personnalité morale immatriculées à l'étranger, si dans la procédure un acte obligatoire de l'Union européenne ayant une portée générale et directement applicable est appliqué. Il y a donc une différence considérable entre les affaires d'un ressortissant hongrois et celui d'un étranger. La raison de cette différence réside dans le fait que l'autorité hongroise ne peut pas appliquer le droit étranger à l'égard d'un ressortissant étranger ; cela relève de la compétence de l'autorité étrangère. Si dans une telle affaire, il faut agir sur le territoire de la Hongrie, l'autorité étrangère doit adresser une demande d'entraide juridictionnelle à l'autorité hongroise.

En ce qui concerne la procédure hors du territoire de la Hongrie, le CPA prévoit seulement que dans un tel acte le ministre des Affaires étrangères ou le fonctionnaire de consulat procédera en vertu d'une loi ou d'un décret.

Ces règles générales ne sont applicables dans une affaire donnée qu'en l'absence de règles particulières existantes comme pour les affaires portant sur une obligation alimentaire à caractère transfrontalier. Ces dernières années, à l'occasion des litiges, on soulève de plus en plus fréquemment la question d'interprétation suivante : une autorité nationale exerçant le contrôle d'un marché relève de la compétence juridictionnelle de l'Administration de quel État ? La question se pose en particulier à l'occasion des matières qui ne sont pas couvertes par la directive Services, par exemple, les jeux de fortune. Selon la pratique jurisprudentielle, c'est à l'autorité hongroise que revient la compétence juridictionnelle pour vérifier la régularité des services transfrontaliers au sein de l'Union européenne à l'égard d'un prestataire de service établi dans un autre État membre qui fournit ses services dans l'État membre du lieu de son établissement expressément dans le but d'offrir ses services accessibles hors des frontières, dans un autre État membre, tel que la Hongrie.

Si l'on se propose d'examiner cette question à travers le prisme du principe de la séparation des pouvoirs et de la nécessité de la légitimation démocratique, on peut conclure qu'est habilité à prendre une décision relevant du pouvoir public celui qui a le droit d'exercer l'« *imperium* ». C'est, en premier lieu, sur la base du principe de la territorialité que l'on pourra décider à qui revient ce droit. Cela détermine de façon générale le droit applicable dans une affaire donnée. La délégation d'une partie de la souveraineté – donc, du droit d'exercer le pouvoir public – à l'Union européenne et le développement progressif de l'ordre juridique européen ont conduit aujourd'hui à la possibilité d'appliquer deux ordres juridiques en vertu du principe de la territorialité. Par conséquent, ce qui est essentiel, c'est de définir à quel système juridique appartient le droit applicable.

Ce qui fait la différence principale entre un acte administratif étranger, international, supranational et global, c'est le droit de l'émetteur d'exercer l'*imperium*, c'est-à-dire le droit de recourir à la contrainte physique pour rendre efficace sa décision. Ce qui semble plutôt douteux dans de nombreuses affaires des décisions internationales et globales, et parfois c'est lourd dans l'affaire de l'exécution directe des décisions européennes.

Quelques règles importantes de la procédure administrative hongroise

Le CPA comprend des règles procédurales générales, mais un certain nombre de règles de procédure spéciales sont aussi en vigueur. Les exigences des règles matérielles sont définies par des règles sectorielles ; elles sont très différenciées.

Les droits de l'intéressé dans la procédure

Le CPA assure la participation active des parties dans la procédure de première instance tout comme dans la procédure d'appel. Dans la procédure de première instance, les droits de l'intéressé sont garantis par :

le droit de prendre l'initiative d'une procédure,
le droit d'utiliser sa langue maternelle,
le droit de connaître ses droits et obligations (le droit d'être informé),
le droit de faire une déclaration,
le droit de prendre l'initiative de l'instruction,
le droit de se faire communiquer les preuves,
le droit d'accès aux documents,
le droit à la décision, à la motivation des décisions,
le droit d'exercer le recours.

Le droit de prendre l'initiative d'une procédure

Les procédures peuvent être intentées d'office, mais elles peuvent également être engagées à la requête de l'intéressé. Ce dernier est le sujet dont le droit ou l'intérêt légitime est concerné dans le cas donné. L'ouverture de certaines procédures est réservée à la demande de l'intéressé, auquel cas celui-ci sera le maître exclusif de l'affaire.

Le droit d'utiliser sa langue maternelle

En Hongrie, la langue officielle de la procédure de l'autorité administrative est le hongrois. Les personnes n'ayant pas le hongrois pour langue maternelle peuvent utiliser leur langue maternelle. Dans la procédure devant les autorités hongroises, la méconnaissance de la langue hongroise ne pourrait en aucun cas être préjudiciable. Les règles portant sur l'utilisation de la langue maternelle distinguent les conditions d'utilisation de la langue maternelle pour un ressortissant hongrois appartenant à une minorité et pour d'autres intéressés qui ne parlent pas le hongrois. L'article XXIX de la Loi fondamentale garantit à titre de droit fondamental le droit des minorités à l'utilisation de la langue maternelle. Les organes représentant les minorités et les personnes physiques soumises à la loi sur les droits des minorités ont le droit d'utiliser leur langue maternelle dans la procédure écrite et orale devant une autorité administrative. Sur la requête d'un intéressé appartenant à une minorité, déposée en sa langue maternelle, il sera statué par décision en langue hongroise, qui à la demande de l'intéressé sera traduite dans la langue de la requête. Cette réglementation s'applique aussi aux décisions procédurales. Dans ce cas, la traduction est assurée par l'autorité. L'autorité administrative doit assurer l'utilisation de la

langue maternelle d'une personne qui n'a pas la nationalité hongroise et qui ne parle pas la langue hongroise si pendant son séjour en Hongrie l'autorité administrative engage une procédure d'office nécessitant une mesure d'urgence ou si la personne physique s'adresse aux autorités administratives avec une demande de protection juridique d'urgence. Dans ce cas, les frais de traduction et d'interprétation sont à la charge de l'autorité. L'intéressé ne connaissant pas la langue hongroise pourra demander aussi à l'autorité de statuer dans d'autres affaires sur sa requête rédigée dans sa langue maternelle ou dans une langue intermédiaire. Mais dans ce cas, les frais de traduction et d'interprétation sont à la charge de l'intéressé. En cas de divergence entre le sens de la décision en version hongroise et celui de la version en langue étrangère, c'est le texte hongrois qui sera considéré comme authentique. Pour les affaires dans lesquelles l'agent de l'administration ne parle pas la langue parlée par l'intéressé ou par d'autres participants à la procédure, il faudra recourir à un interprète.

Le droit de connaître ses droits et obligations (le droit d'être informé)

L'autorité administrative doit s'assurer que l'intéressé ne subit pas de préjudice à cause de la méconnaissance des règles de droit. L'autorité administrative chargée de la procédure doit fournir à l'intéressé les informations nécessaires concernant ses droits et ses obligations, afin qu'il puisse se prévaloir de ses droits. Ce droit à l'information est particulièrement important pour les intéressés, personnes physiques, qui, dans la plupart des affaires, ne sont pas représentés au cours de la procédure administrative. L'autorité informe l'intéressé agissant sans représentation sur ses droits et obligations ainsi que sur les conséquences juridiques du manquement à ses obligations et des conditions du recours à l'aide juridique pour l'intéressé personne physique. L'intéressé doit être informé sur les possibilités d'exercer le droit de faire une déclaration et le droit d'accès aux documents. Avant d'auditionner l'intéressé, l'agent de l'Administration doit fournir à l'intéressé les renseignements nécessaires, l'informer sur ses droits et obligations. Parmi les règles relatives à la communication, la loi prévoit le droit de l'intéressé de se renseigner auprès de l'Administration sur les données figurant dans les documents se rapportant à son affaire dans toutes les formes de la communication. L'autorité ne peut refuser l'accès aux informations qu'en cas d'abus de droit commis par l'intéressé.

Le droit de faire une déclaration

La loi reconnaît à l'intéressé le droit subjectif de faire une déclaration orale ou écrite au cours de la procédure. L'autorité administrative ne peut pas l'empêcher d'exercer ce droit. Si l'éclaircissement des faits rend nécessaire l'audition de l'intéressé, l'autorité administrative peut appeler l'intéressé pour faire une déclaration au cours

de la procédure intentée à la demande de l'intéressé. Comme il s'agit d'un droit subjectif de l'intéressé, il peut refuser de faire une déclaration. Si l'intéressé ne donne pas suite à l'appel, l'autorité va prendre la décision en connaissance des données qui lui sont disponibles et si les données ne sont pas suffisantes pour rendre une décision, la procédure se terminera. Dans la procédure intentée d'office, la loi ou le décret peut imposer à l'intéressé l'obligation de fournir des renseignements. Le refus de la fourniture de données en violation de la loi et – dans une procédure intentée soit à la demande de l'intéressé soit d'office – la fourniture d'une fausse donnée entraînent une amende procédurale.

Le droit de prendre l'initiative de l'instruction

L'intéressé au cours de la procédure peut prendre l'initiative des mesures d'instruction comme l'enquête, la vue des pièces, le transport sur les lieux, la commission d'expert. En ce qui concerne l'expert, l'intéressé peut prendre l'initiative de demander la commission d'un expert supplémentaire.

Le droit de se faire communiquer les preuves

L'intéressé peut être présent à toutes les mesures d'instruction – soit au cours de l'audience soit en dehors de l'audience –, il peut *poser des questions* aux personnes auditionnées et il peut *faire des déclarations* sur les allégations prononcées. C'est pourquoi l'autorité qui procède doit l'*aviser* de l'audition des témoins, des experts, de la vue des pièces et de l'audience. L'intéressé peut assister aux mesures d'instruction, mais l'avis ne rend pas sa présence obligatoire. Le CPA réglemente la *communication des preuves.* Elle assure pour l'intéressé la possibilité d'accéder aux preuves et d'exercer ses droits dans les procédures qui se déroulent sans la présence de l'intéressé. Dans ces affaires, l'autorité l'avise de la possibilité d'accéder aux preuves, de faire des observations et des déclarations par rapport à ces preuves et de prendre l'initiative des mesures d'instruction.

Le droit d'accéder aux documents

La procédure administrative est avant tout une procédure écrite (la tenue d'une audience est possible, mais rare). Par conséquent, l'intéressé ne peut se prévaloir de son droit que s'il peut accéder aux documents de la procédure. L'intéressé (ou son représentant) peut accéder aux documents de la procédure et en faire un extrait ou une copie. Il peut demander la délivrance d'une copie. L'autorité qui procède ne peut refuser l'accès aux documents que si la loi prévoit expressément une restriction à ce droit. L'intéressé n'a pas d'accès :

au projet de décision,
aux documents susceptibles de révéler l'identité d'une personne dont les données sont traitées confidentiellement par l'autorité,
au document contenant une donnée qualifiée (secrète) en cas d'absence d'autorisation d'utilisation ou de communication,
aux documents contenant d'autres données protégées par la loi, si la loi assurant la protection de cette donnée exclut l'accès au document.

L'intéressé peut également demander la restriction au droit d'accès aux documents au motif de la protection de ses intérêts économiques ou d'autres intérêts privés appréciables. L'autorité – après avoir étudié minutieusement toutes les circonstances – donne suite à la demande si l'impossibilité de prendre connaissance des données n'empêche pas les titulaires du droit d'accès aux documents d'exercer leur droit. L'autorité peut également rendre possible l'accès aux documents aux tierces personnes si elles justifient que la connaissance des documents est indispensable pour l'exercice de leur droit, pour l'exécution d'une obligation prescrite par une règle de droit ou une décision administrative.

La décision qui refuse ou limite l'accès aux documents ou qui autorise une tierce personne à prendre connaissance des documents est susceptible d'appel.

Le droit à la décision, à la motivation des décisions

L'intéressé a le droit de connaître les faits et les circonstances sur lesquels repose la décision de l'autorité ainsi que les points de vue de l'appréciation concernant les décisions rendues dans le cadre du pouvoir discrétionnaire de l'autorité qui procède. L'autorité doit motiver sa décision ; elle peut en être dispensée dans les cas prévus par la loi. L'obligation de motivation ne concerne pas la décision si l'autorité fait entièrement droit à la demande et s'il n'y a pas de partie adverse ou bien si la décision ne porte pas atteinte au droit, à l'intérêt légitime de la partie adverse. La décision contenant un accord ou l'acceptation d'un accord peut être également dispensée de motivation. En cas de silence de l'Administration, l'intéressé peut s'adresser à un organe de contrôle qui examinera l'affaire et pourra ordonner à l'autorité une procédure en priorité. Si l'autorité n'agit pas, un autre organe de même nature sera désigné, dans la plupart des affaires. En cas d'absence ou d'inaction de l'organe de contrôle, il faut saisir le juge pour contraindre l'autorité à agir.

Le droit d'exercer le recours

L'intéressé a le droit d'exercer le recours contre les décisions qui sont entachées d'erreur ou considérées par lui comme entachées d'erreur. L'intéressé peut se prévaloir de son droit d'exercer le recours par la voie de l'appel qui oblige l'autorité

de deuxième instance à examiner la décision et à prendre une décision dans l'affaire concernée. Le droit d'exercer le recours implique le droit pour l'intéressé de saisir le juge du contrôle de la décision administrative.

Possibilités de l'intervention d'administrations publiques, des intéressés ou de tiers étrangers

En vertu de l'alinéa 1 de l'article 15 du CPA, l'intéressé est une personne physique ou morale ou bien un organe ne disposant pas de personnalité morale dont le droit ou l'intérêt légitime est affecté par l'affaire soumise au contrôle d'une autorité administrative, dont une donnée figure sur un registre administratif. Un tiers étranger peut intervenir dans la procédure sous réserve qu'il justifie un intérêt légitime. Il a, donc, le statut de l'intéressé. Parfois, un tiers a la possibilité d'intervenir et d'accéder aux documents, s'il peut justifier d'un intérêt spécial ou s'il s'agit de décision d'intérêt commun. Les ONG ont le droit de faire une déclaration dans toutes les affaires administratives.

En outre, le statut d'intéressé est attribué à une autorité dont le champ de compétences est concerné dans l'affaire et elle ne participe pas dans la procédure comme autorité (autorité compétente). Les ONG peuvent se voir attribuer le statut d'intéressé en vertu des dispositions d'une loi spéciale, comme dans les affaires relatives à la protection de l'environnement, de la nature, des animaux et des consommateurs.

L'accomplissement international des mesures d'instruction

L'article 27 du CPA réglemente l'assistance juridique internationale. Il existe 3 fondements juridiques : l'accord d'assistance administrative mutuelle, la réciprocité, l'accord international multilatéral. En outre, le droit européen prévoit également certaines dispositions relatives à l'assistance administrative. La Hongrie a signé plusieurs accords bilatéraux et multilatéraux en matière d'assistance administrative. Dans ces affaires, l'autorité procède en application des règles prescrites par ces accords, comme dans les affaires de l'accord entre la République de Bulgarie, la République de Croatie, la République d'Autriche et la République de Hongrie sur l'amélioration de l'exécution transfrontalière des sanctions appliquées aux infractions en matière de sécurité routière. Parmi les actes qui sanctionnent, il faut mentionner plus particulièrement la loi XXXVI de 2007 sur les contraventions (voir le point 5).[2] La réciprocité est une pratique de coopération mutuelle, une coutume sur

[2] Ainsi, la mise en conformité avec l'acte du Conseil du 29 mai 2000 établissant la Convention relative à l'entraide judiciaire en matière pénale entre les États membres de l'Union européenne, la mise en conformité avec la Décision du Comité exécutif du 28 avril 1999 concernant l'Accord sur la coopération dans le cadre des procédures relatives aux infractions routières, avec la Décision-

l'existence de laquelle – en cas de doute – une prise de position sera formulée par le ministre des Affaires étrangères et le ministre compétent. Dans ce cas, l'autorité à laquelle la requête a été adressée procédera selon les règles procédurales en la matière.

La notification des actes administratifs

Les moyens pour notifier les actes administratifs

C'est le CPA qui réglemente la communication des décisions administratives. Il désigne certaines formes de communication propices à la communication de la décision à l'intéressé ou bien à la personne concernée par la décision. La décision peut être communiquée par voie postale, en personne – sous forme écrite ou orale –, par document électronique, par un moyen de télécommunication, sous la forme d'un avis, à l'aide d'un mandataire pour la notification ou d'un mandataire pour la représentation, par le service de notification de l'autorité. La voie postale est la forme la plus usuellement utilisée pour communiquer des documents officiels. Si l'intéressé n'a pas de domicile (siège) en Hongrie et la communication électronique n'est pas prévue, le CPA oblige l'intéressé étranger (qui peut être un citoyen hongrois établi à l'étranger) à désigner un mandataire pour la notification lors de la prise du premier contact avec l'autorité. Le CPA prévoit cette mesure en vue d'éliminer les problèmes lors des contacts avec un client étranger. Bien sûr, souvent l'autorité ne parvient pas à établir le premier contact sans l'assistance juridique. Si l'intéressé ne désigne pas de mandataire pour la notification ou s'il est impossible de notifier la décision à ce dernier, il convient alors de recourir à la notification par avis public. L'avis public doit être affiché sur le panneau d'affichage et le site internet de l'autorité. La décision est considérée comme notifiée à compter du quinzième jour de l'affichage. À cette date, la décision aura force exécutoire (ou à la date de la notification, s'il n'y pas d'appel, ou à la date de l'écoulement du délai prévu pour l'appel).

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cadre 2005/214/JAI du Conseil du 24 février 2005 concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires, l'article 12 de la Décision du Conseil 2008/615/JAI du 23 juin 2008 relative à l'approfondissement de la coopération transfrontalière, notamment en vue de la lutte contre le terrorisme et la criminalité transfrontalière et l'article 15 de la Décision 2008/616/JAI du Conseil du 23 juin 2008 concernant la mise en œuvre de la décision 2008/615/JAI, tout comme la mise en conformité avec la décision du Conseil du 21 septembre 2009 concernant la signature au nom de l'E.U. de l'accord entre l'UE, l'Islande et la Norvège pour l'application de certaines des dispositions de la Décision du Conseil 2008/615/JAI relative à l'approfondissement de la coopération transfrontalière en vue de lutter contre le terrorisme et la criminalité transfrontalière et de la Décision du Conseil 2008/616/JAI portant sur la mise en œuvre de la décision 2008/615/JAI et l'application provisoire de certaines dispositions de cet accord et la mise en conformité avec les articles 4 et 7 de la Directive 2011/82/UE du Parlement européen et du Conseil du 25 octobre 2011 facilitant l'échange transfrontalier d'informations concernant les infractions en matière de sécurité routière.

La CPA n'interdit pas la notification à l'étranger. Aussi, en vertu des principes de rapidité et rentabilité de la procédure, peut-on conclure qu'elle est permise. Dans certains domaines, le législateur prévoit explicitement ce mode de notification ; la loi sur l'interdiction des pratiques commerciales déloyales prévoit expressément que la notification effectuée au lieu de la notification dans le respect des règles est considérée comme régulière. Si l'autorité connaît l'adresse de l'intéressé étranger, elle pourrait tenter de notifier la lettre à cette adresse. Toutefois, c'est le service postal qui décide de la notification à l'étranger de la lettre expédiée en Hongrie.

Si aucun service postal ne se charge de la notification de l'acte officiel ou si l'adresse de l'intéressé n'est pas connue, il sera plus efficace de demander l'assistance juridique de l'autorité partenaire étrangère. Dans ce cas, l'autorité hongroise s'adresse à l'autorité partenaire étrangère qui procédera selon les règles applicables dans son pays. Les autorités qui effectuent souvent des procédures à l'étranger sont habilitées à conclure des accords d'assistance avec des autorités partenaires étrangères. Ces accords peuvent également prévoir l'aide mutuelle en matière de notification.

La notification internationale

Du fait que la Hongrie n'a pas ratifié la Convention européenne du 24 novembre 1977 sur la notification à l'étranger des documents en matière administrative, le CPA ne contient pas de dispositions relatives à la notification internationale. Mais, les autorités peuvent aussi diligenter l'assistance juridique, uniquement en matière de notification. En vertu des nouvelles règles assouplies, elles peuvent s'adresser directement aux autorités partenaires étrangères. Si l'autorité hongroise ne sait pas à quelle autorité étrangère compétente s'adresser, la demande de l'assistance juridique devra être transmise au ministre des Affaires étrangères par l'intermédiaire de l'organe supérieur hiérarchique. Si les conditions de la demande de l'assistance juridique sont remplies, le ministre des Affaires étrangères la transmet à l'autorité étrangère compétente par l'intermédiaire du ministère des Affaires étrangères du pays concerné.

Le droit à recevoir des notifications internationales dans une langue étrangère

Le CPA précise qu'en Hongrie la langue officielle au cours des procédures administratives est le hongrois, mais il garantit également l'utilisation de la langue maternelle pour les intéressés. L'obligation de l'utilisation de la langue hongroise prévue pour l'agent de l'autorité ne l'empêche pas de contacter l'intéressé dans une langue étrangère. Les actes de procédure en vue de respecter les formes prévues par la loi

doivent aussi être accomplis en langue hongroise. Dans ce cas, il faut assurer pour l'intéressé une traduction officielle ou un interprète. Si l'agent ne parle pas la langue étrangère donnée, pour éviter les dépenses élevées, le premier document sera délivré probablement en langue hongroise et il ne sera traduit qu'à la demande de l'intéressé avec une avance de frais. Les actes de procédure effectués dans le cadre de l'entraide administrative internationale peuvent se faire dans une autre langue, l'utilisation de la langue officielle n'étant pas obligatoire.

La reconnaissance et l'exécution des actes administratifs internationaux

Les actes administratifs étrangers dans le droit administratif hongrois

Le CPA ne prévoit aucune condition de forme spéciale pour la validité des actes étrangers.

Les autorités respectives doivent examiner l'existence des autres conditions nécessaires pour l'exécution des actes administratifs internationaux. Ainsi, l'autorité désignée doit vérifier que la demande est conforme au cadre général d'un instrument juridique directement applicable de l'Union européenne ou aux conditions d'un traité international, ou encore aux pratiques de réciprocité. En l'absence des conditions énumérées, l'autorité désignée doit vérifier que la demande est conforme à la législation générale hongroise et que l'exécution n'est pas contraire à l'intérêt public hongrois.

La question des décisions étrangères peut également poser des problèmes au cours des procédures administratives hongroises. En effet, l'alinéa 2 de l'article 52 du CPA prévoit, comme cela a été déjà dit, la légalisation par l'agent de la mission diplomatique de la Hongrie dans le pays où le document a été délivré ».

Ces règles étaient suffisantes jusqu'à nos jours dans la pratique. Avec la création du marché commun, la répartition de compétence internationale est une question de plus en plus importance. Le CPA règle la compétence internationale depuis 2004 en déclarant le principe territorial. (2) Si l'intéressé n'est pas un citoyen hongrois ou est une personne morale ou une entité sans personnalité juridique immatriculée à l'étranger, dans les cas administratifs – sauf si la loi en dispose autrement – sur le territoire de la Hongrie, il revient aux autorités hongroises d'agir à condition que le droit de l'Union européenne ou la réglementation hongroise s'applique. De cette règle l'on peut déduire que la reconnaissance des actes étrangers poserait des problèmes si l'autorité hongroise se considère comme compétente dans l'affaire. On trouve aussi des règles de compétence spéciales dans la législation sectorielle, dans les actes directement applicables de l'Union européenne ainsi que dans d'autres normes juridiques internationales.

Le décret-loi 13 de 1979 relatif au droit international privé étend l'effet des dispositions sur les règles de compétence aux autorités administratives. Malheureusement, l'exécution des décisions étrangères en Hongrie en est encore au stade du balbutiement et les questions de compétence restent encore à éclaircir.

Dans la pratique de l'Autorité de concurrence et l'Autorité de protection des consommateurs ainsi que dans le droit de la protection des données, la question de la compétence internationale se pose de plus en plus, surtout si l'infraction est commise à distance. D'autre part, ces problèmes existent également dans le cas de la reconnaissance des actes. Le principe territorial est une bonne base pour éclaircir ces questions. De même, le lieu principal de fonctionnement et le marché principal visé par l'activité commerciale sont des aspects utilisables. Des règles internationales sur les actes administratifs internationaux ou transnationaux seront probablement utiles. L'adaptation des mécanismes développés par le droit international privé pourrait être envisageable. D'ailleurs, dans une certaine mesure, un tel mécanisme existe dans le travail des équipes communes d'enquête européennes lorsque les résultats de leurs opérations d'investigation sont acceptés comme preuves dans la procédure pénale de tous les États participants. Hormis les questions réglées par le droit de l'UE, il y a une limite à la transposition des mécanismes développés par le droit international privé dans le milieu du droit public. Dans le cas du droit public, qui a pour fonction de faire respecter l'intérêt général, il revient aux États concernés de définir le contenu de la notion d'intérêt général, ce qui peut créer de notables différences.

Les autorités compétentes pour demander la reconnaissance et l'exécution d'actes administratifs à d'autres États ou pour le traitement des demandes d'autres États

En vertu de l'article 137 du CPA, il appartient au gouvernement de désigner par décret l'autorité compétente pour demander la reconnaissance et l'exécution d'actes administratifs à d'autres États ou pour le traitement des demandes d'autres États. Cependant, à ce jour, cette désignation n'a pas encore été faite par le gouvernement. C'est donc le ministre qui désigne, après la réception de la demande d'entraide, l'autorité qui procédera à l'exécution. Si la demande relève de la compétence d'un tribunal, l'on défère la demande au tribunal compétent sans délai.

En l'absence d'autorité désignée, les demandes peuvent aussi être adressées directement à l'autorité compétente pour l'émission de la décision exécutoire ou la mise en œuvre de la décision exécutoire.

Les conditions exigées par le droit national pour l'exécution de l'acte administratif étranger

Selon l'article 137 du CPA, une décision étrangère peut être exécutée sur la base d'une disposition législative ou réglementaire nationale, sur la base d'un acte obligatoire de l'Union européenne ayant une portée générale et directement applicable ou sur la base de la réciprocité. Dans ces cas, l'on procédera en application de ces règles. Les dispositions du CAP ne sont applicables qu'en l'absence de telles règles.

Les articles 137-139 du CAP portent sur les dispositions *générales* relatives à la *coopération en matière d'exécution.* Dans ces cas, pour la mise en œuvre de l'exécution, il faut s'adresser à l'autorité qui a délivré la décision étrangère ou bien à l'autorité désignée par le droit étranger comme compétente pour l'exécution. Cette demande doit être transmise à l'autorité désignée (centrale) qui examinera la conformité de la demande aux exigences énoncées dans un acte obligatoire de l'Union européenne ayant une portée générale et directement applicable ou dans une convention internationale, avec le principe de la réciprocité ou – à défaut, donc en cas d'exécution d'une décision étrangère en application des règles hongroises – aux dispositions du droit international. Si la demande est incomplète ou la loi susdite ne permet pas de la satisfaire, l'autorité désignée retourne la demande à l'autorité étrangère en indiquant les motifs. Lorsque la demande porte sur l'exécution d'une obligation qui relève de la compétence d'un tribunal, elle est transmise au tribunal compétent. Si l'autorité désignée ne voit pas d'obstacle à l'exécution, la demande est transmise à l'autorité compétente pour la mise en œuvre de l'exécution. Si la loi hongroise ne prévoit pas d'autorité compétente en la matière et la compétence du tribunal ne peut pas non plus être déterminée, l'autorité désignée demande l'avis du ministre responsable de l'organisation de l'Administration publique. Le ministre transmet dans un délai de quinze jours à l'autorité désignée l'avis formulé en concertation avec le ministre concerné ou le chef de l'organe administratif central compétent. Par la suite, l'autorité désignée transmet la demande à l'autorité précisée dans ledit avis.

L'exécution de la décision d'une autorité hongroise à l'étranger est soumise aux mêmes conditions. Dans ce cas, l'autorité de première instance adresse la demande à l'autorité étrangère compétente et, lorsqu'elle ne peut pas la déterminer sur la base de sa pratique ni à l'aide de l'organe supérieur hiérarchique, la demande sera envoyée au ministre des Affaires étrangères qui la transmettra à son homologue étranger.

Les articles 137–139 du CPA régissent donc l'entraide administrative en matière de l'exécution d'actes administratifs étrangers. Les accords d'entraide administrative et les conventions internationales susmentionnées prévoient généralement des règles de procédure. Cela peut donc ouvrir la voie à la procédure de rapprochement.

Quant aux sanctions administratives, le droit hongrois ne fait pas de distinction du point de vue de l'exécution entre les actes administratifs imposant une sanction et ceux n'en imposant pas. Pour ce qui est des actes de sanction, tous les États européens ont adopté la recommandation n° R(91) du Comité des ministres du Conseil de l'Europe relative aux sanctions administratives répressives. Dans ces cas, les actes respectent les exigences fondamentales d'ordre public. L'exigence du respect par l'autorité étrangère de l'équité de la procédure est évidente, mais l'on peut douter de la possibilité d'examiner le respect de cette exigence par l'autorité chargée de l'exécution. La Hongrie reconnaît le principe de la responsabilité des personnes morales en matière administrative de sanction. Par conséquent, aucun problème ne se pose à cet égard.

L'autorité doit vérifier que la demande est conforme au cadre général d'un instrument juridique directement applicable de l'Union européenne, aux conditions d'un traité international ou aux pratiques de réciprocité. En l'absence des conditions énumérées, l'autorité désignée doit vérifier que la demande est conforme à la législation générale hongroise.

Une condition complémentaire très importante impose que l'exécution ne soit pas contraire à l'intérêt public hongrois. Les règles administratives hongroises ne prévoient aucune clause générale d'ordre public. Toutefois, l'effet de l'acte administratif est limité si la décision exécutoire est manifestement contraire aux exigences de l'ordre public prévues par les règles hongroises. L'exécution peut être empêchée si les actes exécutoires sont interdits ou illicites selon la loi hongroise, s'ils constituent une infraction pénale ou portent atteinte à la vie ou à la santé d'une personne ou en cas de prescription. Si l'autorité qui a ordonné l'exécution ou l'autorité qui est chargée de sa mise en œuvre prend connaissance des circonstances empêchant l'exécution, elle est obligée de refuser l'exécution.

Le rôle de l'UE quant à l'avancée de la reconnaissance et l'exécution des actes administratifs étrangers

Effets généraux

L'effet le plus important sur le droit de procédure administrative générale est l'addition au CAP des sous-titres « Exécution des décisions étrangères » et « Exécution des décisions des autorités hongroises administratives à l'étranger ». Le législateur a justifié l'insertion en février 2012 par l'évolution du droit européen.

En matière de reconnaissance mutuelle des décisions, ce sont la directive 2005/36/CE du Parlement européen et du Conseil du 7 septembre 2005 relative à la reconnaissance des qualifications professionnelles et la directive 2006/123/CE du Parlement européen et du Conseil relative aux services qui ont eu le plus d'impact. Cette dernière (directive Services) a directement transformé certaines procédures d'autorisation administratives nationales. En Hongrie, la directive a généré une très

grande activité législative : outre l'adoption de la loi-cadre (loi LXXVI de 2009) sur les services, les dispositions du CAP ont été modifiées sur plusieurs points et certaines institutions ont été entièrement réformées. Désormais, la règle de l'accord tacite est appliquée comme une règle générale au cours de la procédure d'autorisation et les dispositions modifiées de l'entraide internationale prévoient la demande directe susmentionnée. L'introduction de la notion d'autorité participante au CAP découle aussi de l'obligation de l'intégration des procédures. En premier lieu, l'intégration des procédures liées a été effectuée dans les secteurs de la construction et de la protection de l'environnement. Nombre de lois et de décrets sectoriels liés ont également été modifiés. Des dizaines d'arrêtés ministériels précisant les règles de procédure sectorielles ont également fait l'objet de révision.

Concernant les services qui ne sont pas visés par la directive Services, les autorisations délivrées par des autorités étrangères remplacent les autorisations des autorités hongroises ; c'est le cas pour les licences accordées aux sociétés des chemins de fer.

La reconnaissance mutuelle des qualifications professionnelles a également abouti à la modification de nombreuses règles. D'autre part, en vue d'assurer la reconnaissance de certaines compétences professionnelles, les conditions d'entrée et de sortie de la formation ont même été modifiées.

Effets sectoriels

Les systèmes d'information transeuropéens ont un rôle majeur dans la mise en œuvre des actes administratifs délivrés dans d'autres États membres. Grâce au flux rapide des informations, une action coordonnée à l'échelle européenne peut être engagée dans le cas d'un acte administratif délivré dans un État membre donné. Le Système d'information sur le marché intérieur est un système d'échange d'information, dans le cadre de la mise en œuvre de la directive sur la reconnaissance des compétences professionnelles et de la directive Services. Il vise à faciliter les échanges d'informations électroniques entre les autorités administratives compétentes des États membres. Dans les affaires en matière d'entraide internationale et en cas de limitation occasionnelle de la prestation de service transfrontalière, l'autorité ou les organismes publics procédant en qualité d'autorité ou d'autres organisations, dans le respect des dispositions du décret du gouvernement, sont en communication électronique avec les autorités des autres États de l'UE via le Système d'Information sur le Marché intérieur. Les systèmes d'alerte dans le domaine de la protection des consommateurs, de la sécurité alimentaire et de la surveillance du médicament ont une importance identique.

En vertu de la loi ayant transposé la directive 2001/40 relative à la reconnaissance mutuelle des décisions d'éloignement des ressortissants de pays tiers après le 24 décembre 2010, l'autorité chargée de l'administration des étrangers ne procède pas à l'expulsion du ressortissant d'un pays tiers qui fait l'objet d'une décision d'éloignement prise par une autorité d'un autre État membre, fondée sur une men-

ace grave et actuelle pour l'ordre public ou la sécurité publique et la sûreté nationale, sur la condamnation du ressortissant du pays tiers par l'État membre auteur pour une infraction intentionnelle passible d'une peine privative de liberté d'au moins un an, sur l'existence d'indices laissant présumer que le ressortissant d'un pays tiers a commis des faits punissables graves ou sur la commission d'une infraction aux réglementations nationales relatives à l'entrée et au séjour des étrangers. Dans ces cas, l'éloignement ordonné par une autorité étrangère est mis en œuvre par l'autorité nationale chargée de l'administration des étrangers aux termes de la décision étrangère, sans que cette autorité nationale ait à délivrer une décision d'éloignement.

Inversement, si l'autorité nationale chargée de l'administration des étrangers ordonne l'éloignement et l'interdiction d'entrée et de séjour ou l'interdiction distincte d'entrée et de séjour à l'encontre du ressortissant d'un pays tiers muni d'un titre de séjour délivré par un État appliquant le SIS II et elle procède au signalement aux fins de non-admission dans le fichier du SIS, l'autorité ordonnatrice sollicite, par l'intermédiaire du Bureau SIRENE, la consultation de l'État qui a délivré ledit titre.

Dans le domaine de l'administration des étrangers, un rôle important est attribué au système d'information commun. Lorsque le refus de l'entrée ou du séjour d'un ressortissant d'un pays tiers est signalé au SIS par un État membre de l'Espace Schengen, l'entrée ou le séjour d'une telle personne ne serait autorisé qu'à titre exceptionnel, en vue du respect des obligations internationales, pour des motifs humanitaires imminents ou dans l'intérêt national. Le titre de séjour d'une telle personne ne pourrait être accordé que pour des raisons identiques et le titre de séjour qui lui a été délivré ne pourrait pas être retiré dans les cas précités. Dans ces cas, l'autorité chargée de l'administration des étrangers avant l'adoption de la décision a l'obligation de consulter par l'intermédiaire du Bureau SIRENE l'autorité désignée de l'État Schengen ayant introduit le signalement. L'autorité chargée de l'administration des étrangers informe de sa décision l'autorité compétente de l'État Schengen concerné par l'intermédiaire du Bureau SIRENE.

Un autre volet de la reconnaissance des actes étrangers en matière d'administration des étrangers est qu'un ressortissant d'un pays tiers titulaire d'un titre de séjour ou d'une carte bleue E.U. délivrés par un État membre de l'UE ne pourrait être expulsé que s'il ne quitte pas le territoire de la Hongrie sans délai, malgré l'avertissement écrit de l'autorité chargée de l'administration des étrangers ou si son séjour porte atteinte à la sûreté nationale, à la sécurité publique, à l'ordre public. Dans ce cas, il sera expulsé vers l'État sur le territoire duquel il a un titre de séjour valable ou vers l'État qui a délivré la carte bleue européenne. Dans ce cas, il n'a y pas lieu d'enregistrer l'expulsion et la durée de l'interdiction d'entrée et de séjour sur le passeport.

Les procédures d'asile étrangères peuvent également avoir un rôle important dans la procédure de l'autorité chargée de l'administration des étrangers. Ainsi, en cas de bénéfice du statut de réfugié et de la protection subsidiaire, le ressortissant d'un pays tiers ayant le statut de résident de longue durée européen en vertu d'un

titre délivré par un État membre de l'UE ne pourrait être expulsé du territoire de la Hongrie que vers le pays où le statut et la protection précités sont reconnus.

La décision-cadre 2005/214/JAI du Conseil du 24 février 2005 concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires

Le législateur hongrois n'a pas intégré les dispositions nécessaires dans la loi sur les contraventions, toutefois – comme dans le cas des affaires correctionnelles – il a créé une loi spéciale sur l'entraide judiciaire en matière contraventionnelle (Loi XXXVI de 2007) pour la mise en œuvre des dispositions européennes et des engagements internationaux. Elle s'applique aux affaires dans le cadre de l'entraide judiciaire contraventionnelle sur la base d'un accord international ou d'un acte européen, mais elle a une portée secondaire par rapport aux engagements internationaux en la matière.

La loi est composée de 6 sections : la section I réunit les dispositions générales ; la section II, les règles générales de procédure et les règles relatives à la prise en charge des frais de procédure ; la section III, les règles de la procédure d'assistance ; la section IV, les règles relatives à l'acceptation et à la transmission de l'exécution des décisions administratives définitives ordonnant des sanctions pécuniaires ; la section V, les règles relatives à l'enregistrement des décisions étrangères dont l'exécution est acceptée ; enfin, la section VI contient les dispositions finales.

L'acceptation de l'exécution des décisions administratives définitives ordonnant des sanctions pécuniaires

L'autorité centrale se charge de l'exécution de la décision étrangère à la demande d'une autorité ou une juridiction étrangère, si l'auteur de la contravention possède en Hongrie un domicile ou une résidence fixe, des biens ou des revenus. En cas d'acceptation de l'exécution d'une décision étrangère, la demande en vue de la dispense du paiement de la sanction pécuniaire n'est pas envisageable. L'exécution d'une décision issue d'un État membre de l'Union européenne peut être acceptée si la demande est envoyée avec un formulaire de certificat déterminé par arrêté du ministre de l'Intérieur.

En vertu des accords internationaux, l'exécution d'une décision étrangère peut être acceptée, si la demande est envoyée en application d'un formulaire de certificat prévu par une règle de droit, contenant les éléments essentiels de la décision. L'autorité centrale étudie d'office les conditions de l'acceptation de l'exécution de la décision étrangère.

L'exécution du jugement ou de la décision étrangère doit être immédiatement suspendue ou la procédure d'exécution interrompue, si l'autorité étrangère ayant adressé la demande informe l'autorité centrale de la survenance d'une décision, d'une mesure ou d'un événement faisant obstacle à l'exécution.

L'acceptation de l'exécution de la décision étrangère doit être refusée, si :

selon la loi hongroise la peine est prescrite,
le fait faisant l'objet d'une décision étrangère a déjà été définitivement jugé par l'autorité hongroise compétente pour les contraventions ou par le tribunal hongrois,
le fait faisant l'objet d'une décision étrangère a déjà été définitivement jugé par l'autorité étrangère et l'exécution de cette décision a été acceptée par la Hongrie,
le certificat annexé et envoyé par l'autorité étrangère ne s'applique manifestement pas à la décision qui l'accompagne,
en l'absence de disposition contraire d'un accord international, la somme fixée dans la décision étrangère, après conversion au taux de change officiel de la Banque Nationale de Hongrie en vigueur le jour où la décision a été prise, est inférieure à 70 euros.

Il n'y a pas lieu d'exécuter la décision étrangère, si un an s'est écoulé après qu'elle soit devenue définitive. La reprise de l'exécution intentée dans le délai de la prescription est possible, même si la prescription a fait son œuvre.

Le recouvrement de la somme indiquée dans la décision étrangère est effectué par l'autorité du gouvernement ayant une compétence générale : le bureau gouvernemental du lieu du domicile ou de la résidence du contrevenant.

La demande de l'exécution doit être faite conformément aux règles relatives à l'exécution des sanctions pécuniaires sauf que le tribunal, lors du contrôle de la légalité de la procédure de l'exécution, ne peut pas examiner la légalité de la procédure principale. Si la demande a exclu la conversion de la sanction pécuniaire en une peine privative de liberté contraventionnelle, il faut appliquer les règles relatives à la perception des impôts.

En l'absence de disposition contraire d'un accord international, si le montant de l'amende infligée à l'étranger pour les infractions routières de même nature excède le montant maximal prescrit en la matière par les lois hongroises, l'exécution portera sur la sanction maximale qui peut être infligée en Hongrie. Si le contrevenant justifie d'avoir payé intégralement ou partiellement le montant de l'amende indiqué dans la décision étrangère, l'autorité centrale, sur notification de l'autorité ayant une compétence générale en matière de contravention, suspend la procédure et en même temps elle s'adresse à l'autorité étrangère auteur de la décision pour demander une déclaration sur le fait du paiement dans le délai de 30 jours. Si l'autorité étrangère ne répond pas à la demande dans le délai imparti, la procédure sera déclarée close. L'exécution de l'amende et des frais de procédure infligés en devise étrangère doit se faire dans la monnaie ayant cours légal en Hongrie. La conversion s'effectue au taux de change moyen de la Banque Nationale de Hongrie, en vigueur le jour où la décision a été prise. Le paiement de l'amende et des frais de procédure rentre directement dans le budget central.

La transmission de l'exécution de la décision contraventionnelle définitive ordonnant une sanction pécuniaire.

L'exécution de la décision contraventionnelle définitive ordonnant une sanction pécuniaire peut être transmise ainsi que l'exécution des frais de procédure y compris si l'exécution par l'autorité étrangère est plus opportune. La transmission de

l'exécution s'avère opportune plus particulièrement si le contrevenant est étranger, s'il s'agit d'un ressortissant hongrois ayant fixé son domicile ou sa résidence à l'étranger ou s'il possède des biens ou des revenus à l'étranger.

Les autres conditions de la transmission de l'exécution :

le contrevenant ne s'est pas acquitté de la sanction pécuniaire,
en l'absence de disposition contraire d'un accord international, le montant de la sanction pécuniaire, après conversion au taux de change officiel de la Banque Nationale de Hongrie, en vigueur le jour où la décision a été prise, est inférieur à 70 euros.

La demande de la transmission de l'exécution en application d'un accord international est envoyée à l'autorité centrale avec un formulaire de certificat déterminé par une règle de droit spéciale et contenant les éléments essentiels de la décision. Dans ce cas, la décision ne sera envoyée que si l'autorité étrangère acceptant la transmission de l'exécution le demande expressément. Si l'exécution a été transmise à l'autorité étrangère, en Hongrie on ne pourra mettre en œuvre un acte d'exécution que si le contrevenant s'est soustrait à la procédure d'exécution dans l'État où l'exécution a été transmise ou si la décision n'était pas susceptible d'exécution pour d'autres raisons et l'autorité chargée de l'exécution transmise en a informé l'autorité centrale. Si, après la transmission de l'exécution, au cours de la procédure de révision, le tribunal a annulé la décision en tout ou en partie, il a rendu une nouvelle décision et il en a informé l'autorité centrale avec l'envoi de la nouvelle décision.

L'enregistrement des décisions étrangères dont l'exécution est acceptée.

L'autorité centrale chargée de l'acceptation ou de la transmission de la décision contraventionnelle définitive ordonnant une sanction pécuniaire tient un registre centralisé des décisions étrangères qu'elle a acceptées en vue d'exécution. Ce registre centralisé a pour but d'empêcher que l'autorité centrale accepte à plusieurs reprises une décision étrangère en vue d'exécution.

Les conventions internationales sur la reconnaissance et l'exécution d'actes administratifs et sur la certification d'actes publics signés par la Hongrie

Le droit hongrois comprend plus de quatre-vingts conventions bilatérales pour la reconnaissance et l'exécution en matière fiscale et nous en avons signé plusieurs autres sur la sécurité routière, sur la directive Services, sur l'entraide judiciaire en matière pénale et correctionnelle.

C'est en matière d'*exécution des décisions en matière fiscale* que la procédure de l'exécution d'actes administratifs à l'étranger est le plus souvent appliquée. Il existe des conventions avec plusieurs pays excluant la double imposition. Chacune d'entre elles fixe des règles spéciales relatives à l'exécution à l'étranger et, en outre, les

règles hongroises concernant la procédure fiscale prévoient l'assistance administrative en matière d'assiette et de recouvrement des impôts.

La base de la réglementation de l'assistance administrative pour le recouvrement des impôts est la directive 2011/16/UE du 15 février 2011, qui prévoit des règles relatives aux demandes concernant l'échange d'informations, la notification d'actes, le recouvrement et les mesures conservatoires. Actuellement, le projet de loi sur les règles de coopération administrative internationale en matière d'impôts et de charges publiques est en cours de discussion au Parlement ; il a pour vocation de créer un texte consolidé sur la coopération internationale en matière fiscale.

La Hongrie a ratifié la Convention Apostille en vertu de laquelle l'Agence nationale de Traduction et Légalisation est habilitée à délivrer les traductions authentiques. L'Apostille peut être émise par le ministère de l'Administration publique et de la Justice si l'acte et sa traduction certifiée conforme ont été délivrés par les institutions d'expertise judiciaire ou les tribunaux étant sous l'autorité du Ministre, par la Chambre nationale des notaires de Hongrie pour les actes notariés et traductions certifiées conformes et par le ministère des Affaires étrangères pour les autres actes. Les traductions authentiques sont susceptibles d'être apostillées si le certificateur peut s'assurer de l'authenticité de l'acte annexé à la traduction et de l'authenticité du sceau et de la signature dont cet acte est revêtu ; l'acte annexé doit donc être muni d'un certificat officiel requis (par exemple, l'extrait de l'acte de naissance doit être muni du certificat du ministère de l'Administration publique et de la Justice, un diplôme scolaire, du certificat de l'Office de l'Éducation). La délivrance de l'Apostille électronique n'est pas possible.

Perspectives

Jusqu'à présent, les actes administratifs étrangers étaient très peu traités dans la doctrine : le nombre d'articles abordant cette question est faible (Fábián 2006 ; Vincze 2012). Avec l'introduction des questions de droit communautaire dans le CAP, les commentaires portant sur le CAP traitent aussi ces questions (Barabás et coll. 2013). Les œuvres portant sur l'européisation du droit hongrois le font aussi (Kovács et Varjú 2014 ; Rozsnyai 2008). D'autre part, l'on trouve également des sections sur ces thèmes dans les ouvrages sur le droit administratif sectoriel. Naturellement, dans les secteurs le plus touchés par le droit communautaire, comme les marchés réglementés (énergie, infocommunication, transport) et d'autres domaines de droit administratif économique (droits des médicaments, protection des consommateurs, droit de concurrence), ce sont des questions importantes, traitées parfois en profondeur (Lapsánszky 2013). Les problèmes abordés ci-dessus donneront certainement lieu à l'élaboration de plus en plus de travaux scientifiques.

De toute façon, il n'y a pas beaucoup de travaux publiés en matière d'actes administratifs internationaux et étrangers dans d'autres pays non plus. Cela veut dire que les bases doctrinales doivent être renforcées par les travaux des groupes de recherche spécialisés, afin que la législation nationale ou internationale soit solidement préparée et établie.

Il serait certainement très utile que l'UE réglemente la notification à l'étranger d'autant plus que la Hongrie n'a pas signé la Convention européenne sur la notification internationale. La procédure de l'entraide est très lente et difficile ; il n'est pas toujours possible de démonter les barrières linguistiques. Si les autorités pouvaient notifier les décisions directement à l'étranger, cela améliorait l'efficacité. La question de l'utilisation de la langue devrait être également réglée avec soin. Ces problèmes ne sont pas susceptibles d'être résolus à l'échelle des États membres.

Pour l'exécution des actes étrangers fondés sur le droit communautaire, un instrument juridique directement applicable de l'Union européenne serait certainement utile. Sans compétences régu latrices, l'UE ne pourrait que proposer une procédure unifiée pour les pays membres, mais une recommandation ne saurait substituer des accords de réciprocité. En plus, vu la grande différence entre les systèmes de procédure administrative des pays respectifs, il ne serait pas simple de trouver une solution optimale. Les expériences de l'introduction de la directive Services montrent que l'harmonisation du droit administratif est loin d'être une entreprise aisée.

Bibliographie

Barabás, G., et M. Nagy. 2011. Le contentieux des contrats publics en Europe – Hongrie. *Revue française d'Administration publique* 1 : 47–53.

Barabás, G., B. Baranyi, et A. Kovacs (eds.). 2013. *Nagykommentár a közigazgatási eljárási törvényhez* [Great commentary on the Administrative Procedure Act], 1104. Budapest: Wolters Kluwer. ISBN 978 963 295 299 4

Fábián, A. 2006. Az EU-jog és a tagállami közigazgatási eljárás kapcsolódási pontjai. [Points of connection between the Law of the EU and the administrative procedure]. *Magyar Közigazgatás* 10: 615–619.

Gyekiczky, T (ed.). 2013. *Nagykommentár a bírósági végrehajtásról szóló törvényhez* (Great Commentary on the Act on Judicial Execution), 1150. Budapest: Wolters Kluwer, ISBN 978 963 224 987 2

Kovács, A., and M. Varjú. 2014. Hungary. *The Europeanization of Judicial Review, European Public Law* 20(2) : 195–226.

Lapsánszky, A. (ed.). 2013. *Közigazgatási jog. Fejezetek szakigazgatásaink köréből. II. kötet. Gazdasági közigazgatás, infrastruktúra igazgatás.* [Administrative law. Chapters on Sectoral Administrative Law, Tome II: Administration of the economy and of infrastructure], 619. Budapest: Wolters Kluwer. ISBN 978 963 295 317 5.

Rivero, J. 1990. *Droit administratif. Treizième édition*, 654. Paris : Dalloz. ISBN 2-247-01103-9.

Rozsnyai, K. 2008. Europäisierung des ungarischen Verwaltungsverfahrensrechts. [Europeanization of administrative procedure]. In: *Europäisierung des Rechts*, ed. W. Heun, et V. Lipp, 199–211. Göttingen: Universitätsverlag. ISBN 978-3-940344-45-8.

Vincze, A. 2012. A transznacionálisközigazgatási aktusok színe és fonákja – Az európai vezetői engedély [Good and bad side of transnational administrative acts – The European Drivers' Licence] *Jogtudományi Közlöny* 67(11) : 437–448.

Chapter 11
From the Recognition of Foreign Acts to Trans-national Administrative Procedures

Giacinto della Cananea

Abstract This paper suggests that a public law analysis of the recognition of foreign administrative acts or decision can contribute to the discussion between specialists of different fields of law. We are now in a position to appreciate why this might be the case. The aim is to show that under the traditional label "recognition", there are two distinct models, each based on distinct underlying assumptions and producing different institutional and operational consequences.

A Subject or Two Subjects?

The "recognition of foreign administrative acts" is an excellent subject for a discussion about comparative legal analysis (*Rechtsvergleichung*). It is, in a certain sense, a classical subject.[1] At the same time, in an increasingly globalized world, where not only markets are closely connected, but there are also growing interactions between public authorities, several and important questions arise, including whether the state and other public bodies are governed by the ordinary processes of law in much the same manner as all other legal persons or entities are governed by the law.

Such interactions are also under-theorized, in many respects. For example, we may wonder whether the notion of "administrative act", beyond a first and superficial approach, really corresponds to the reality of public law in a variety of legal cultures. The question that arises is not so much whether an "act" issued by a public authority hold some special status in the legal ordering of social relations, at least if it is an act adopted "*jure imperii*", but, rather, whether there is such thing as a unitary concept of "administrative act". The question can receive different answers even within the same legal tradition. For example, within the Western legal tradition, there is no doubt that German legal tradition is based on the notion of "*Verwaltungsakt*", as it

[1] See Felice Morgenstern, *Recognition and enforcement of foreign legislative, administrative and judicial acts which are contrary to international law*, 4 Int'l L. Quart. 326 (1951).

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was elaborated by Otto Mayer and later codified by the *Verwaltungsverfahrengesetz* (law governing administrative procedures) of 1977.

Quite the contrary, not only the traditional view about public law in England is that there is not a distinctive system of public law, but there is no unitary concept of administrative act.[2] This difference can apparently be explained by referring to the well-known divide between continental rationalism and English empiricism. However, I suspect that things are much more complex. For example, while the central notion of French administrative law, that of "service public", is conceived as a synthetic notion, the corresponding notion in Italy is a analytic notion, "*servizi pubblici*". To observe this does not mean that, as some would argue, there is no such thing as a common Western or European legal tradition and that a correct comparative legal analysis can only reveal incommensurable differences. It means, rather, a strong caveat is needed against the risk of giving for granted that the same words designate the same phenomena.

The conjecture which lies at the basis of this paper is that such risk characterizes the "recognition of foreign administrative acts". What is at issue is not whether this expression may catch very different views about public law, in particular the Anglo-American doctrine of the "Act of State" and the different, sometimes very different, doctrines elaborated elsewhere. Today, I suspect, few experts of private and public international law would hesitate to acknowledge that the doctrine of the "Act of State" is no longer conceptualized so rigidly as the US Supreme Court did in *Sabbatino*.[3]

Nor, *a fortiori*, they would hesitate to observe that the doctrines followed by the courts in other Western countries are founded on very different ideas about how the position of the state is determined by general principles of law.

My conjecture is, rather, that it cannot be taken for granted that "recognition of foreign administrative acts" may be still considered to be the same subject in a wide range of states. Quite the contrary, much of modern international law obliges the courts and academic scholarship to make a distinction between the phenomena that can still be conceptualized in terms of "recognition of foreign administrative acts" and new phenomena, such as the mutual recognition of diplomas. Furthermore, much of European Community (now European Union) law, which has exerted a deep influence on the member states' system of government and legal culture, is not simply based on the concept and principle of mutual recognition. It is based on "common" activities of national and supra-national public authorities and, more specifically, on new, trans-national patterns of public action.

What is being suggested here is not that the traditional approach, which focuses on the "recognition of foreign administrative acts", is intrinsically and irremediably flawed. It is probably true that this approach to the subject-matter and the demands

[2] Otto Mayer, *Deutsches Verwaltungsrecht*, Volume 1, Duncker und Humblot, 1895.

[3] *Banco Nacional de Cuba v. Sabbatino* – 376 U.S. 398 (1964).

which it imposes are not fully adequate, because they are influenced by private law theories.[4]

But this is not the method I propose to adopt here. The method is, rather, to see whether the traditional approach is unsuitable to describe and explain much of the law of our epoch. This is, in my view, a more interesting premise, which does deny the fact some basic ideas about legality and fairness are based on the same values in public and private law, but which argues that the issues and disputes generically covered by the traditional approach belong to different classes and require, therefore, different descriptive and normative theories about the law.

Before embarking on an enquiry into the nature of this law, it can be useful to explain in a more detailed manner some ideas about the law that underlie my conjecture, as well as to point out the limits that characterize the traditional model (part II). A phenomenological analysis will follow (part. III), the implications of which will be considered in the final part (IV).

The "Model" of Recognition and Its Limits

An Issue of Method: Legal Realities and Legal Theories

It is important to clarify at the outset that, by pointing out the importance of facts, I am not assuming that legal scholarship can, let alone should, be pressed into a natural scientific framework, based on the rigorous collection of data, the formulation of hypotheses (or abductions) and the dispassionate verification of their validity. Whatever the intellectual validity of this theoretical framework, its applicability to the legal field is, to say the least, highly controversial. Sir Isaiah Berlin's argument that political beliefs, as well as their underlying values, deeply influence the conduct of human beings retains a great importance also in the legal field.[5] As Martin Loughlin has convincingly argued, many of most basic fundamental laws of public law cannot be understood without an adequate awareness that public law owes much to its distinctiveness to the fundamentally political nature of the relationships which public law regulates.[6]

The importance of facts, in our case of the facts that are relevant for the law or legal realities, can be appreciated in a twofold sense. First, in the field of humanities, a theory is only meaningful when it applies and tries to give meaning to a given set of facts and relationships between social actors. It is, therefore, "bound" by those

[4] Against this divide, see Dawn Oliver, *Common Values and the Public-Private Divide* (Clarendon 1999);

Duncan Kennedy, 'The Stages of Decline of the Public/Private Distinction', 130 *U Pa L Rev* 1423 (1982). But see also Martin Loughlin, *Public Law and Political Theory* (1992).

[5] I. Berlin *Does Political Theory Still Exists?*, in P. Laslett and W.G. Runciman (eds.), *Philosophy and Society*, 1962, 1;.

[6] M. Loughlin, *Public Law and Political Theory*, cit., 3, 31).

phenomena, in the sense that, if it neglects them, it is merely an abstraction. In other words, when a theory is considered for its descriptive or explanatory capacity, it must provide an account of all the phenomena which fall within its scope of application. If it fails to do so, either such theory must be revised, by restricting the class of phenomena it applies to or the claims it makes, or a new theory is needed for the phenomena which it is unable to explain. The need of either solution becomes evident when using the metaphor of the map: the task of a theory is to make us aware of all what constitutes the terrain of an enquiry, in the same way in which a map is a graphic representation of a territory, and its adequacy in this respect is a key element for choosing between competing theories.[7]

Second, if the existing theory cannot be regarded as a valid theory in a normative sense, that it say to provide solutions to real-world problems, it is clearly inadequate from a normative point of view. This aspect is particularly relevant in the legal field. Legal scholarship, arguably, does not simply collect evidence or seeks for empirical confirmation of a given theory. It often interacts directly with its object. This happens, for example, when the courts, either explicitly or implicitly, dismiss a certain argument of the parties on the basis of an established authority or, *a fortiori*, when the sources of law of which the courts must ensure the respect include the "writings of learned commentators", to borrow the expression used by Article 38, § 2, of the Statute of the International Court of Justice. An interesting example is provided by the theory according to which the European Community, being a union of states based on the rule of law (*Rechtsstaat*) must itself be regarded as a *Rechtsgemeinschaft*, that is to say a Community based on the Rule of law, though the two concepts do not coincide.

The two dimension, descriptive and normative, of a theory are particularly important for my conjecture. As observed earlier, my conjecture is not that the expression "recognition of foreign administrative acts" is no longer capable of explaining any legal reality at all, but, rather, that it is unable to make sense of some new legal realities, because it is incomplete or not enough accurate.

In other, and more precise words, it can be said that, if the conjecture satisfies careful examination with respect to correct observation of those legal realities and does not make any faulty inference from them, then at least two different models can be sketched. While the first regards the more traditional phenomena, which are typical or relationships between "foreign" laws, the second regards the new legal realities that have emerged in the context of global regulatory regimes and, in particular, in the European legal space.

For our purposes, this notion is to be preferred to the more traditional notion of European "integration". It is less ambiguous, because especially in political science "integration" is often contrasted with "cooperation", while from a legal point of view the duties of cooperation are an important part of the interactions between public authorities which take place within the new regulatory regimes. Furthermore, it is more precise, because it includes all the countries which, regardless of their EU membership, have accepted the partial harmonization of their laws which is

[7] For this metaphor, see M. Loughlin, *Public Law and Political Theory*, cit., 37.

the necessary requisite of any kind of mutual recognition.[8] Whether the traditional comparative method as such suits no longer to the European legal space, as some scholars have argued, is another question, which cannot be properly analyzed in this context, because it requires to consider a much greater variety of phenomena and to confront the partial outcomes of all, in order to see whether the overall outcome supports that view.[9]

The Recognition "Model" and Its Underlying Assumptions

I have said earlier that my intention is not to contest the traditional model, based on the "recognition of foreign acts". It ought to be clarified, however, that such model is influenced by the principles of private law as well as by its philosophy and methodology. But, that said, there is nothing in this argument that challenges the idea of the unity of the law, which lies at the basis of important achievements in Italian legal scholarship and elsewhere.[10]

My contention is, rather, that the traditional model no longer describes or explains in a satisfactory way all legal realities, old and new. In short, not only is the emphasis on "recognition" much less useful in the field of administrative law than it is, or used to be, in the field of private law, but the focus on "acts" neglects a fundamental part of legal realities, those of administrative procedures, as distinct from "acts". Last but not least, the traditional characterization of the activities and measures of other national authorities as "foreign" no longer applies to an increasingly important part of administrative activities and measures.

It is now time to consider more closely the main features of the recognition model. Two main factors have played an important influence in determining this focus on "recognition of foreign acts": the concept of sovereignty and the doctrines concerning the judicial power.

The keystone of this way of thinking about the law is the concept of sovereignty. Among the many versions of sovereignty in the history of ideas, of particular importance is the Hobbesian conception. According to Hobbes, as well as to

[8] In this sense, a "model" provides an adequate explanation only of some observed phenomena, as well as of their relationships, Mark van Hoecke – Mark Warrington, *Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law*, 47 Int'l & Comp. L. Q. 495 (1998). A "theorem" is, instead, either the first step in elaborating or testing a theory or a concrete application of it.

[9] See again Mark van Hoecke – Mark Warrington, *Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law*, cit., 527, 533. See also Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, vol 7.3 El. J. Comp. L (2003), arguing that there is a "need for a dual choice of law system, geared on the one hand to dealing with cross-border activities within the internal market, on the other to defining the scope of Community regulation *vis-à-vis* the law of third states".

[10] Sabino Cassese (ed.), *L'unità del diritto. Massimo Severo Giannini e la teoria giuridica* (Il Mulino, 1994); Dawn Oliver, *Common Values and the Public-Private Divide* (Clarendon 1999).

Bentham and Austin, the authority of the law did not rest on the fact that it reflected truth. Rather, it rested only on its legal basis, that is to say the fact that the law was emanated by the authorized ruler ("*auctorits, non veritas facit legem*"). Once sovereignty was conceived in these terms, it was to identify, in the guise of a corollary, its logical consequence: a State, every State, does not only affirm the sovereignty of the ruler, but also of the other supreme functions. Precisely because the judicial branch of government exercises one of such supreme functions of the State, the effects which derive from the acts by which such function is exercised are inevitably limited to the territory of the State.[11]

Although this strong version of sovereignty and legal positivism has been functional to the consolidation of the nation-State, it was not blind to the possibility that a municipal court was called to recognize the effects of or to enforce official acts emanating from another legal system. "Recognition" has, in this respect, a twofold meaning. In view of the strong version of sovereignty, an ultimate rule of recognition is needed in order to attribute whatsoever legal effect to the acts of foreign public authorities. It is solely this from this rule – in sharp contrast with the theories and practices of law that had flourished in the period of *jus commune* – that all others derive they authority and, in particular, that municipal courts derive the power to "recognize" the effects of foreign legislative, administrative of judicial measures.

However, the rule of recognition is not an unconditional norm. The power to recognize the effects of foreign legislative, administrative or judicial measures, for example those concerning the titles to property which have come within the jurisdiction of the host State or the status of persons who reside in its territory, can be exercised only if three essential conditions are satisfied.[12]

First, the fundamental principles of the legal order of the host State must be respected. Second, the foreign act must not violate international law. Although these conditions can be kept distinct conceptually, sometimes they are blurred in judicial decisions, referring to vague ideas of legal conscience, universal values, and the like. Third, coherently with the axiom on which the authority of the law rests, that is to say its being promulgated by the authorized ruler, it is necessary that foreign law is enacted by a recognized (in still another sense) government. Provided that such conditions are satisfied, the scope of legal analysis is formalistically, defined: the legal acts which emanate from states are viewed as a datum, to be considered with a view to ascertaining whether such acts can be recognized. Otherwise, the

[11] Thomas Hobbes, *The Leviathan* (1651), II, 26. John Austin, *The Province of Jurisprudence Determined* (1832) (arguing that the last is constituted by commands, emanated by the sovereign and backed by the threats of sanctions).

[12] This kind of situation must be distinguished from that in which an action is brought in a municipal court, in a form that contests the action of the foreign State, as it happened in the case of the seizure of arms, destined for Persia, on a request by the British government: see Morgestern, *Recognition of foreign acts*, cit., 327.

municipal court would carry out a review of a foreign governmental act, in contrast with the postulate of national sovereignty.[13]

Whatever the influence played by the strong version of both sovereignty and legal positivism, the model of recognition is an important attempt to reconcile the exclusive authority of municipal law with the needs of the variable relationships between social actors and States. It provides lawyers and judges with sophisticated doctrines, such as comity and expediency. It also provides an operational infrastructure, through the norms governing conflict of laws.

Beyond the Traditional Conception of Sovereignty

This helpful and sophisticated model is, nevertheless, not without its difficulties. To begin with, the idea, or ideology of sovereignty, which is the legitimizing principle of such model, is a critical aspect. It is essential not only to the establishment of the uncontested and unconditional authority of domestic rulers, but it also lies at the heart of the concept of recognition. Whatever the intellectual soundness of this set of ideas or ideology, it rested on the traditional Westphalian system of coexisting nation States, each one conceived as *legibus solutus*, outside its own will, after the decline of *jus gentium*. The adequacy of the recognition model, more than one century later, in a world which is characterized by much more complex and fluid relationships between a variety of legal orders, is, to say the least, questionable.[14]

Critics have convincingly argued that it is difficult to envisage any conception of state sovereignty that does not take into account a basic feature of current international relations, that is to say that the primary responsibility of all states is to protect and promote their essential interests, but this can be done only by instituting international regulatory agreements and complying with their rules.[15] This does not apply only to economic cooperation. Consider also human rights treaties. Whether municipal courts conceive their action as limited to ascertaining that a foreign act exists or they argue that such act must be interpreted as not to conflict with the fundamental principles of their own legal order as well as with international law, the legal provisions recognizing and safeguarding human rights can and do make a difference. Some have gone further to suggest that, the more the postulate of a unitary sovereignty ceases to be the fundamental principle guiding international

[13] In this perspective, see the US Supreme Court's ruling in *Underhill v. Hernandez*, ……. (declining jurisdiction to review the legality of the foreign act in the light of international law).

[14] Mathias Reimann, *Comparative law and neighboring disciplines*, in Mauro Bussani and Ugo Mattei, *The Cambridge Companion to Comparative Law* (2012), 20 (pointing out the connection between the new transnational law and comparative legal analysis); On the decline of *jus gentium*, replaced by international law, seen as an inter-state law, see Carl Schmitt, *Der Nomos der Erde* (1950), English translation *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*.

[15] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (1995).

relations, the more such relations do not take place between the States-as-a-whole, but between their components, or institutions.[16]

Within "supranational" legal orders such as the European Union this shift is particularly manifest. It supports the view that our epoch has inverted the path followed by Jean Bodin, in the sense that the traditional synthetic conception of sovereignty has been replaced by an analytic conception, which permits the differentiated "*encadrement*" of state functions and powers.[17] If the argument is correct, then the critical distinction between the traditional concept of sovereignty and the "new sovereignty" would appear to be a qualitative distinction, not merely one that emphasizes a difference of degree.

A twofold consequence follows from this. First, within all global and regional regulatory agreements, though with variable degree, non-discrimination duties are imposed on public authorities. As a result, the principle of equality ceases to be a distinctive and salient trait of the relationships between citizens. This is particularly evident within the European Union, where member states' citizens enjoy not only civil and economic liberties, but also political rights. It is not anymore correct, therefore, to characterize them as "foreigners". Second, and more relevant for our purposes, national public authorities are not simply placed under duties of non-discrimination, fairness, and transparency. They are also requested to recognize "automatically", that is to say without exercising a significative discretion or without any discretion at all, the effects of the rules and decisions issued by the public authorities of the other member states. In some cases, national authorities are also involved in complex decision-making processes, the "composite" or "mixed" administrative procedures. For some, this should be considered an achievement of great importance, not simply functionally, but also morally, because it is a manifestation of Jean Monnet's concrete steps towards solidarity and integration. For others, this kind of procedures are simply preferable to an unacceptable centralization of administrative powers in favor of the institutions and agencies of the EU and in any event the issues that they raise are neither few nor or scarce importance. These criticisms of recent legal changes should not be ignored. But it is important to recognize them for what they are, changes, and of undoubted importance. Whether and the extent to that the traditional model based on recognition still applies, therefore, remains ambiguous.

[16] Anne-Marie Slaughter, The New World Order (2005).

[17] Giacinto Della Cananea, *Sovranità e globalizzazione*, *Parolechiave*, 2006, p. 97. On the concept of "encadrement", see D. Triantafyllou, *L'encadrement communautaire du financement du service public*, RTDE, 35 (1), janvier-mars 1999 p. 21.

"Recognition": An Ambiguous Expression

Ambiguity is also a feature of "recognition" itself. Legal literature points out that "recognition takes place when a foreign decision is treated as valid in an individual case" (). Essentially, the host State recognizes a foreign decision, taken by the home State, permitting it to produce effects within the *lex fori*.[18]

However, as soon as we consider things more closely, it becomes evident that recognition, thus intended, designates two distinct types of circumstances or relationships. Within the first type, called recognition in the strict sense or explicit, the foreign decision, taken by the home State, produces its legal effects within the legal order of the host State, by virtue of a specific decision taken by the latter. The whole mechanism leads, thus, to a decision in an individual case, coherently with Otto Mayer's authoritative characterization of the *Verwaltungsakt* as "deciding what the law is" in an individual case. It is not clear, however, whether such decision taken by the host State simply "declares" that the decision taken by the home State produces its effects within the *lex fori* or it "constitutes" them. Nor is it clear what kind of role the public authority of the host State has: is it simply a power or a power characterized by duties concerning its exercise?

In the second type of recognition mechanism, the legal effects of the foreign decision within the *lex fori* do not rest on an individual decision. Rather, they derive from either a general principle, written or unwritten, or a more or less defined rule. Obviously, the role of the public authority may and does differ. Moreover, it remains to be seen what kind of rule this rule of recognition, that is to say whether it simply imposes a duty on public authorities or it also requires them to carry out some sort of activity (e.g. assisting the private parties who seek to have the foreign measure recognized and enforced) is and which is scope of application: is it a rule practiced only by public administrations or also by representative institutions?

Finally, one major gap in the recognition model, that should not be ignored, is that it says nothing about the fundamental issue whether the only criterion that matters for the law is the bindingness of an act, or more precisely of the effects that it can produce if it is valid for the *lex fori*. The question that arises is whether the legal order of the host State may regard the measure taken by the home State as legally relevant, though not binding. Santi Romano, the most influential Italian public lawyer of the first half of the Twentieth century, introduced the concept of relevance, in the context of his theory the plurality of legal orders. "Legal relevance", in his view, must not be confounded with the factual importance of the measure taken, within a legal order, by the competent authority. Instead of focusing only on the recognition of a given act as such by another legal order, Romano argued, lawyers should take ascertain whether a legal order takes the existence or the content of such act or its effects into account. The concept of relevance thus

[18] Matthias Ruffert, *Recognition of Foreign Legislative and Administrative Acts*, in Rudiger Wolfrum (ed.), Max Planck Encyclopoedia of Public International Law (2008); Henrik Wenander, *Recognition of Foreign Administrative Decisions. Balancing International Cooperation, National Self-determination, and Individual Right*s, in 71 Zaov 755, 758 (2011).

permits to eschew the limits intrinsic to the rigid alternative between recognition and lack of recognition, in favor of a more nuanced approach. Interestingly, Romano added that the recognition or attribution of relevance may take place in a variety of ways, unilaterally (as in the case of the so-called international private law) or reciprocally and also by virtue of a third legal order, which is in a higher position.[19]

The Excessive Emphasis on "Acts"

There is still a further category of difficulty with the recognition model, when it is applied to administrative activities. This concerns a salient distinctive trait that distinguishes such activities from the activities of private parties. For true, both are traditionally placed under the principles of legality and natural justice. More recently, duties of propriety and transparency have been imposed not only on public authorities, but also on some kinds of private bodies, especially in view of 'sensible' interests such as privacy. This does not imply that the same canons of conduct have been established for public and private bodies. There are still important distinctive elements. In particular, while for public authorities the giving reasons requirement has an increasing scope of application, for private bodies it is limited to some specific cases. However, as observed earlier, the premiss on which this study is based does not consist in denying the fact some basic ideas about legality and fairness are based on the same values in public and private law. It consists, rather, in arguing that the traditional approach does not adequately catch the complexity of modern legal relationships.

This inadequacy becomes evident when considering one of the most fundamental achievements of contemporary theories of public law, the importance of public decision-making processes, as opposed to acts. In the context of public decision making it is important to ascertain whether the first step can be made by individuals or by a public authority, which acts ex officio. It is important likewise to ascertain which public authority can make a proposal or issue an opinion or a technical statement. The principles of openness and participation, moreover, structure the ways in which rules and decisions can be taken, making processes much more controlled than in other areas of the law.

In this perspective, one elements looks particularly relevant for our purposes. It derives from the distinction between the elements of fact and law on which rules and decisions must be based. It is becoming increasingly widely recognized that public authorities must respect a duty of diligence in the gathering of all facts. Although such facts influence the exercise of power and make it accountable (a typical ground of illegitimacy is the impropriety of facts adduced or their misunderstanding), they can have an autonomous legal relevance. Or, more precisely, the analysis of those facts carried out by a national authority may be referred to by the

[19] Santi Romano, *L'ordinamento giuridico* (1946, 2nd ed.), 130, 145, 148, French translation *L'ordre juridique*.

authority of another State, for example in the context of cooperation between antitrust authorities. In sum, not only is the notion of "recognition" is ambiguous, but the focus on "acts" neglects a fundamental part of legal realities, those of administrative procedures, as distinct from "acts". Last but not least, the traditional characterization of the activities and measures of other national authorities as "foreign" no longer applies to an increasingly important part of administrative activities and measures.

A Phenomenology: The Italian Case in a European Perspective

Variety of Models

The doubts just cast on the adequacy of the recognition model confirm the conjecture put forward initially. They suggest that, instead of focusing only on the administrative acts that fall within such model, a different methodology ought to be used. Methodologically, it is important to shed some light on the various relationship that exist between the legal orders of the States. Although a fully-fledged systematic analysis has not yet been carried out, there are various studies, some of which are recent and accurate, which encourage us to develop the initial conjecture, by elaborating a sketch of the different types of relationship that are relevant for our purposes.

Of course, an accurate study of such relationships would require a very detailed analysis of many fields, which would largely encompass the limits of this paper. What follows, therefore, is simply a sketch. If we were to try to reconstruct in a simple, non historical way the main types of legal relationships, we would find that, instead of a unitary pattern, they can be included in three main groups that only with a certain degree of approximation can be labelled as models. There are, first, the cases in which a public authority of the host State refers to an administrative measure taken by the home State, in order to recognize it. Another group of relationships between national legal orders is based on mutual recognition. Thirdly, there are processes in which several States are involved in view of the adoption of an administrative act that can be regarded as being transnational.

These models, in the weak sense just specified, will now be addressed mainly from the perspective of a specific national legal order, that of Italy, but seen in a broader European perspective. Of course, the difficulties which beset the working of recognition processes may not be the same as those which operate in other contexts. Notwithstanding these differences, which are not only of detail, it is reasonable to assume that at least the main elements of the picture largely corresponds to those which can be found in other member States of the EU.

The Traditional Model of Individual or Direct Recognition

A very large part of the early cases concerning the recognition of foreign administrative concerned one the main legal institution guarding the "troubled boundary" between individuals and the State, that is to say property.[20] Several disputes arose when private property was expropriated or confiscated in times of war. If we focus on expropriation, it is easy to understand why those cases were regarded as being very significant from the point of view of the recognition of foreign decisions. First, the State power to expropriate the rights regarding private properties is particularly intense with regard to lands and manufactures built thereupon. Such power is a manifestation of *imperium*, although some emphasize the connection with the *dominium eminens*, that is to say the State's power to determine the conditions for ownership of parts of its territory. Second, although such power is often exercised through administrative measures, sometimes it is the legislature that takes the decision to expropriate, generally in the context of reforms. Third, the conditions for the legitimate exercise of the power to expropriate are not established only by national (formal or material) constitutional provisions, but also by international law. According to a widespread opinion, the conditions that had to be satisfied were essentially the following three: expropriation had to respect the rules set by legislation, it had to be justified by a specific public purpose, and had to be compensated. Only more recently, has a further requisite, the respect of due process of law, been generalized by treaties and practice.

More than 60 years ago, the importance of those requisites emerged in an oft-cited dispute, *Anglo-Iranian Oil v. S.U.P.O.R.* The dispute took place before the Rome Tribunal. It arose out of the economically and politically controversial nationalization of Iranian oil. Iranian rulers had used their powers to nationalize and cease the concessions issued to foreign undertakings. The plaintiff sued to recover oil extracted from the area of its concession and imported into Italy by defendant. The English corporation argued, among other things, that the Iranian nationalization was confiscatory in nature, because no compensation had been provided by national authorities. Accordingly, so the argument went, expropriation was unlawful under international law, it was in contrast with Italian public order and could not, therefore, be recognized as legally valid. The Court rejected the claim on the assumption that the *lex fori* was in favor of the holder of the title to the oil extracted, the Iranian State. It added that the foreign decision did not rule out completely compensation, which would have been in contrast with international law, the observance of which – under Article 10 of the Italian Constitution – is ensured by the national legal order. Nor, the Tribunal specified, was the nationalization in contrast with Italian public order on another ground, notably discrimination.[21]

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[20] Charles A. Reich, *The New Property*, 73 Yale L.J. 739 (1963–1964).

[21] Civil Tribunal of Rome, judgment of July 14, 1954, *Anglo-Iranian Oil Co. Ltd. v. Società S.U.P.O.R.*, … Am. J. Int'l. L. 259 (1955). See also, for further details, Giorgio de Nova, *Efficacia di una<<espropriazione protettiva>>di beni siti in uno Stato alleato*, in *Giurisprudenza comparata di diritto internazionale privato*, vol. XI, 1954, p. 105.

This dispute sheds some light on a twofold feature of the national legal order. First, broad as is the power to expropriate, since the public authority has wide measure of discretion to interpret its own powers and to exercise them, it is magnified in trans-national relations. The openness of the Italian legal order toward international law (including the UN General Assembly's resolution of 1950 recommending non-interference with the States' exercise of sovereignty over national resources), the deference towards the exercise of discretion by foreign political authorities, and the possession of the legal titles (concessions, licenses) reinforced the home State power, rather than weakening it. However, as it often happens when a court takes a decision that protects the authority of the State against individuals contesting the abuse of power, the Tribunal made an important statement concerning the limits which surround the recognition of a foreign decision and this is the second feature worth mentioning. It affirmed that Italian courts must deny effect to foreign law providing for expropriation not for motives of public interest, but discriminatory or even persecutory, and without compensation. The real willingness of national judges to object to expropriation on the first ground remained to be seen, given their reluctance to check whether expropriation was carried out in the public interest. The discretion of the agency was, therefore, even greater and less reviewable when the decision was taken abroad. However, the fact that the need to ensure the respect of *ordre public* was clearly affirmed should not be neglected. It confirmed the courts' willingness to intervene if the fundamental boundaries to the recognition of foreign measures were infringed, although the concept of international *ordre public* was narrower than that of internal *ordre public*.[22]

Forty years later, both these features were substantially confirmed by the long overdue legislative reform of the so-called "international private law". The provisions of the new statute, n. 218/1995, determine the relevance of foreign measures concerning status and capacity of individuals, family relations, and specific rights ("*diritti della personalità*"). Such foreign measures can be recognized only if three essential requisites are met (Articles 65–66). First, those measures must emanate from the authorities of the State whose law is referred to by the Act n. 218/1995 or, which produce their effects within the law of that State. Second, foreign measures must not be in contrast with *ordre public*. The third requisite concerns the respect of the fundamental rights of the defense.

While the second requisite confirms the established case-law of Italian civil courts, the third can be regarded as a manifestation of the growing importance of the principles of procedural justice, which have later been enshrined into Article 111 of the Constitution. However, it would be wrong to infer from all this that the discretionary power enjoyed by the public authorities of the host State have been substantially redefined and limited. In fact, outside either the provisions of the Act n. 218/1995 or others, the discretion enjoyed by public agencies and bodies is very broad. Discretion as to recognition or enforcement of foreign measures is perhaps one of the greatest powers of national administrations. Not only do they have the

[22] For further analysis, see Francesca Angelini, O*rdine pubblico e integration costituzionale europea. I principi fondamentali nelle relazioni interordinamentali* (2010).

power to recognize foreign measures or to refuse to do so, but they have a wide marge of appreciation of the facts and evidence before them, in order to decide whether there is any danger to the public health and security, if not to the public peace, especially when the recognition – for example, of a diploma or professional qualification – is contested by the holders of vested interests, such as the powerful professional "guilds" (*ordini* or *collegi professionali*). The external observer may be tempted to think that, below the rhetoric of the defense of the interests of the public, there is the intent to protect insiders' self-interest. These tensions increase the element of uncertainty and unpredictability, even if there is a general agreement on the rules governing the recognition of foreign measures.

Mutual Recognition (I): International Regulatory Regimes

The last decades have been characterized by mutual recognition regimes, which achieve a sort of "governance without global government". More precisely, we speak of mutual recognition in reference to a number of similar legal devices, which have a salient common feature: agreements between States establish a common rule of recognition. Much has been written on the way in which the concept of mutual recognition since its inception.[23]

Since this literature contains many useful insights, I will briefly consider the two central aspects of the topic. These aspects are of particular interest not only for their inherent important, but also because of the more general light which the cast upon the more general question that was put forward at the beginning of this paper, that is to say whether there is a single model of recognition or a plurality of models.

The first of the issues which will be considered regard the rationale for the introduction of mutual recognition regimes. As we saw earlier, public authorities can cause costly, indefinite delay either by commencing ad hoc investigation into the facts and evidence before them or by requesting individuals to present new and expansive documents, in addition to having wide discretionary powers as far as the recognition of foreign measures is concerned. It is to cope with these problems that a new trend has emerged in contemporary international treaties. Several treaties provide for mutual recognition of national measures issuing diplomas or professional qualifications, authorizations or licenses to firms. This innovative technique is not simply a response to the problems just mentioned. It is, moreover, an original response to the more general problem pointed out by earlier legal scholarship: the central problem of conflict of laws would not exist, it was argued, either if all the

[23] See Martin Shapiro, *The Globalization of Law*, 1 Ind. J. Global Legal Studies, 37 (1993–1994) (ponting out that there is no "single coercive regulator"); Kalypso Nicolaidis and Gregory Shaffer, *Managed Mutual Recognition Regimes: Governance Without Government*, 68 Law and Contemp. Probl, 263 (2005). See also Robert Howse and Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Subsidiarity?*, 16 Governance 73 (2003) (referring to subsidiarity, a key element in the official discourses about the European Union, as a core element of global governance).

interests at stake were handled by a powerful central government, a sort of omnipotent world authority (a unified administration) or if all independent sovereigns had identical rules of law (harmonization).[24]

Whatever the practicability of either scenario, which many observers would regard as undesirable, within mutual recognition regimes recognition is thus subtracted to the discretionary decisions which are otherwise taken by the public authority of the host State. The decision is taken, rather, once and for all cases, by the rulers and it is a conditional decision, in the sense that, if all the conditions agreed are met, the measure taken by the home State can produce its effects within the legal order of the host State. Why they agree on this can be explained not only in terms of mutual interest (the former benefits from an extraterritorial extension of its rules and decisions, the latter avoids innumerable decisions having the same or a similar content), but also of mutual trust. Lacking a political agreement about "common" rules, the contracting parties agree that the differences that exist between their own laws and regulations, of administrative precepts and technical standards concerning goods and services are acceptable. Accordingly, those precepts can be regarded as being legally valid outside their normal sphere of validity.

The second of the issues which will be briefly considered considered the consequences of mutual recognition regimes on the balance between authority and freedom or, to use a slightly different terminology, between public institutions and private parties. According to a widespread opinion, mutual recognition regimes presuppose and strengthen the autonomy of private parties, or market forces. Firms and professionals, in particular, can benefit from the rules and standards that they regard as being more suitable to their needs. From this point of view, mutual recognition regimes do not imply simply an extension of the sphere of territoriality validity, or exclusivity, of such rules and standards. They also imply a challenge to the claim of the States – considered as a whole – to impose a certain legal framework and certain formalities. The space for regulatory arbitrages, therefore, is considerably increased, not without raising delicate problems, such as those concerning the abuse of rights.[25]

The two main issues just mentioned can be seen more in detail through some examples. Consider, first, the Vienna Convention on road traffic (1968). The contracting parties have agreed to take appropriate measures to ensure that the rules governing road traffic in their territories conform "in substance" to the provisions of the Convention (Article 3.1). All vehicles must be registered by one of the contracting parties and the driver must carry a certificate of such registration (Article 35 (1) (a)). If the certificate bears the minimum elements established by the Convention

[24] Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 2, Duke L. J., 171, 173 (1959).

[25] For the remark that the "general principle of mutual recognition of driving permits" issued by the Member States, "was established in order to facilitate the movement of persons settling in a Member State other than that in which they have passed a driving test", see ECJ, Case C-476/01 *Kapper* [2004], § 71). See also Case C-230797 Awoyemi (1998), where the Court excluded that States can impose "formalities".).

and the vehicle respects the essential rules agreed by the contracting parties, it is allowed to be used in their roads. If the driver holds a driving permit (issued after verification that the holder "possesses the required knowledge and skill": Article 41 (1) (b)), the contracting parties undertake the commitment of recognizing "any domestic permit drawn up in their national languages" conforming to the specifications established by the Convention.[26]

An international permit is also provided. But what matters more, for our purposes, is that any domestic permit which satisfies the conditions just indicated is regarded by any State signatory to the Convention as "valid for driving" in their territories (Article 41 (2) (c). Also the conditions under which a State may refuse to recognize the validity of a driving permit are specified by the Convention, such as the age or the particular nature of the motor vehicle. Other provisions clarify that a State may withdraw from a driver the right to use a domestic or international driving permit in their territories in case of a breach of their own rules of the road (Article 42). Interestingly, this measure is qualified as "suspension of the validity" of the driving permit and must be notified to the public authority that issued such permit. This confirms that, provided that the requisites for recognition are satisfied, the host State's public authority has renounced to exercise its traditional power to accept or refuse the "title" possessed by any individual.

The State also undertakes the commitment to "convert" a foreign driving permit into a domestic one, under conditions of reciprocity. This does not apply to the driving permits issues by the other member States of the EU, as well as by Iceland and Norway, by virtue of Directive N. 91/439 and of national implementing measures.[27] Another distinctive element is that, for those who are not citizens of the EU, the validity of the domestic driving permit is limited to 1 year, after which the permit must be "converted" and pecuniary sanctions are provided in case of disregard of this rule. In addition to the condition of reciprocity, which is a traditional feature of international law, a valid permit of stay is required. Once again, the status of EU citizens implies an important difference, in view of their right to circulate and stay in the territory of the Union. Whether such distinctive features imply that the difference between international and EU mutual recognition regimes is a difference of quality, not simply of degree, is a question that will now be addressed.

Mutual Recognition (II): The European Legal Space

An helpful way to begin can be to remind that, in the context of the EC, mutual recognition has been regarded as a "new approach", in contrast with the traditional approach based on harmonization directives. That it was the European Court of

[26] In Italy, national rules (Article 135 of the legislative decree n. 285 of April 30, 1992) are full coherent with the Convention.

[27] In Italy, there is a "circular" (n. 31 of May 28, 1999), that is to say an administrative act laying down guidance to all public authorities and bodies. These rules specify that not all foreign driving permits can be converted.

Justice in its Cassis de Dijon ruling to argue that, provided that a minimum harmonization exists, goods can be marketed on the basis of the rules of the home State is too well known to require here more than a quick mention.[28]

It is worth adding that the Commission fully understood the potentialities of such new approach and showed its advantages in its communication: the complex decision-making processes for adopting directives were no longer necessary and differences were not regarded as an obstacle to closer integration. Herein lies the attraction of the new approach. But there is also a change in the way to conceive, structure and limit the discretionary powers of public administrations. This change has been acknowledged and emphasized by the ECJ in a series of judicial decisions. National courts have followed a similar path.

A dispute adjudicated by Italian administrative courts provides a good example of this. Before Latvia joined the EC, some of its member States (including Germany, Italy, Spain and Sweden) agreed with it about the development of cooperation between their universities and the Latvian Academy of sciences. The students who participated to this program completed their studies and were allowed to carry out professional activities, in particular in the field of medicine. But two of the Italian universities involved in the program raised objections and did not recognize the diploma issued abroad. An action was then brought before the lower administrative court. The plaintiffs complained about the fact the decision whether or not the documentation was sufficient was at the discretion of the two universities. They sought to obtain the annulment of the acts by which the two universities had denied the recognition of their diplomas. The lower administrative court observed that each university had to issue only a partial recognition, concerning the studies and exams carried out abroad. It added that not only reasons, but adequate reasons, had to be given to justify the denial of recognition. It found that the universities' request to provide an additional declaration about the adequacy of the studies and exams carried out elsewhere was not only unjustified, but lacked a proper legal basis, because the recognition process did not provide any further condition, left to the appreciation of the Italian universities. Not surprisingly, the two universities appealed against this judicial decision. They argued that the decision concerning the recognition comes at the end of a "highly discretionary process", in the context of which a university is entrusted with the power to gather all the elements that are deemed as necessary in order to ascertain whether the equivalence of those studies and exams can be recognized. The higher administrative court (Consiglio di Stato) did not exclude that such power existed and could be validly exercised by the universities. It held, rather, that the exercise of such power was valid only if it

[28] (ECJ, Case 16/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979) where the Court held that a regulation to both domestic and imported (from other EC countries) goods that produces an effect equivalent to a quantitative import restriction is an unlawful restriction on the free Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 2, Duke L. J., 171, 173 (1959) movement of goods. For further details, see Paul Craig and Grainne de Burca, *EU Law. Text, Cases, and Materials* (2007, 4th ed.), 676 ff.; Joseph H.H. WEILER, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*', in Paul Craig and Gráinne de Burca, *The Evolution of EU Law* (2001).

concerned the contents of the studies carried out abroad and their implications for the final diploma. It was not valid, instead, if it concerned "extrinsic" elements such as the declaration issued by the offices of national embassies or consulates, for the simple reason that such document was not provided by the rules of law, but was merely an administrative practice.[29]

Interestingly, the administrative judge accepted the premiss on which the universities based their argument, that is to say that the Italian Constitution recognizes the autonomy of universities. The analysis of the effects deriving from a mutual recognition agreement, therefore, was not simply an analysis of legislative precepts, it implied a revision of constitutional fundamentals. The rulings issued by the administrative judges rested on the assumption that universities' autonomy could only be exercised within the limits set by State legislation, which defined the students' rights. The statutory characterization of the claimants' interests is evidence of those limits and does not leave public authorities unbound discretionary powers. Quite the contrary, those powers are bound. It remains to be seen whether public authorities can develop a persuasive case for excluding recognition or limiting its effects, and this is an important issue, which can be considered by referring to both the examples of driving licenses and diplomas.

Consider, first, driving licenses. As observed earlier, an international mutual recognition regimes exists and it allows drivers to keep their driving permits for no more than a year, while the EU regime governing driving licenses, which is now based on Directive N. 2006/126 (applicable to the whole European economic area) eliminated this limit. Interestingly, the more recent rules seek to achieve the more ambitious goal of improving transparency for citizens and police forces, despite the "over 110 different models of driving licenses valid in the Member States".[30] It thus requires the Member States to introduce a national driving license based on the "Community model" set out by the Directive (Article 1 (1), which confirms the States' fundamental obligation to establish equivalence between driving permits previously issued. It would be wrong, however, to infer from this that the traditional balance between authority and freedom has been completely reversed in favor of the latter, as it is demonstrated by the ruling of the ECJ in the joined cases concerning two German citizens, Wiedemann and Funk.[31] Both drivers had been using their home State driving permits, which had been withdrawn on the ground that they were unfit to drive a motor vehicle on account of drug and alcohol use, respectively. Both drivers sought to obtain a driving permit in the Czech Republic and they succeeded. But, when they caused accidents in Germany, their home country, such driving permits were taken away by policemen. These police measures were contested by drivers before German administrative courts and the preliminary reference procedure was followed. The ECJ was thus requested to rule as to whether

[29] The two rulings are: Tribunale amministrativo regionale per il Lazio, panel III-bis, decision n. 1704 of March 3, 2002; Consiglio di Stato, 6th panel, decision n. 4613 of September 4, 2007.

[30] EU Directive N. 2006/126, 3rd indent.

[31] ECJ, Joined Cases C-329/06 and C-343/06, *Wiedemann v. Land Baden-Wurtemberg* and *Funk v. Stadt Chemnitz* (2008).

a Member State may refuse to recognize the validity of a driving permit issued by another and whether it may temporarily suspend the rights do drive stemming from such permit. Building on its precedents, the Court found it easy to answer negatively to the first question, by affirming that a State's request that the holder of a driving permit issues in one Member State should apply for recognition of that permit in another Member State is contrary to the principle of mutual recognition. No refusal to recognize the validity of that permit or postponement of its effects is compatible with the "general principle of mutual recognition".[32]

However, the Court added by quoting the observations made by the Commission, EU law provides for an important requisite, that is to say residence in the State that issues the driving license. This serves to achieve important public goals, in particular public security (through ensuring the observance of the condition of fitness to drive) and the "fight against 'driving-license' tourism". if "incontestable information" demonstrates that the holder of the driving permit had been subject to a measure withdrawing an earlier permit in his own State and has not respected the condition of residence in the other member State, the former State may refuse to recognize in its territory the effects of the driving permit issued by the latter.[33]

A similar conclusion applies to the recognition of diplomas. The main principles, in this field, are that the freedom of movement for persons and the freedom to provide services cannot be neutralized by State barriers, which must be dismantled, and that within the European legal space all diplomas that can be recognized as equivalent to domestic ones are automatically recognized (Directive n. 89/448). Only overriding reasons related to the public interest justify restrictions to such rights. Such "overriding reasons of general interest" include public policy, public security and public health.[34]

In the light of these norms, all EU citizens in possession of a Degree or a qualification obtained abroad who intend to get the recognition of their curriculum in Italy can apply for its recognition. However, this does not imply that an EU citizen may validly request a sort of recognition of second degree, that is to say the recognition by the State of an administrative act issued by another Member State recognizing a diploma issued by a public authority of the former State. A situation of this type occurred when an Italian chemist obtained the recognition of his diploma as a "chartered engineer" in the United Kingdom and subsequently sought to obtain the recognition of this measure in order to be included in the registry of engineer in an Italian province. The administrative judge excluded that this "title" could fall within the scope of application of Directive n. 89/48 (as implemented by the legislative decree n. 115 of January 27, 1992).[35]

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[32] ECJ, Joined Cases C-329/06 and C-343/06, *Wiedemann v. Land Baden-Wurtemberg* and *Funk v. Stadt Chemnitz*, § 51.

[33] ECJ, Joined Cases C-329/06 and C-343/06, *Wiedemann v. Land Baden-Wurtemberg* and *Funk v. Stadt Chemnitz*, § 69 and 73.

[34] ECJ, Case C-260/89, *ERT* and Case C-159/86, *Kohll* (doctors and dentists).

[35] Consiglio di Stato, IV panel, decision n. 1478 of March 16, 2012, confirming TAR Umbria n. 225 of May 10, 2004.

While it is undisputed that EU institutions intended individuals to be able to circulate freely, without any legal or administrative obstacle preventing them from using the diplomas and professional qualifications obtained in any part of the Union and this inevitably entails some kinds of choice of law, nothing in the way EU law is constructed prevents national authorities from preventing the abuse of such rights, where overriding public interests so require.

These examples show that the differences between the traditional model of recognition and international regimes of mutual recognition does not concern only the rationales and the operational features of the latter. There is also another fundamental difference, the creation of a transnational party structure in which individuals are aware of the transportability of domestic rules in other domestic fora for use, if necessary through judicial enforcement.[36]

Beyond Recognition: Transnational Administrative Procedures and Acts

As the single European market began to involve not only the conduct of market forces, that is to say private parties, but also the conduct of public authorities, their duties were increasingly based on new premises. Legal scholars who studied the new legal realities attempted to change the shape and direction of the analysis used in defining the conduct of public authorities within mutual recognition regimes. Commentators demanded and promoted an approach less focused on legal techniques coherent with the logic of international regimes and more adequate to the new, transnational decision-making processes that characterized a variety of fields, such as the marketization of pharmaceuticals and the regulation of genetically modified organisms. They proposed to label approaches that reflected the perception as "transnational theories" and elaborated a new concept, that of the "transnational administrative act", while others focused on organizational aspects, describing the new regulatory regimes as "administrative unions". In this section of the paper I will follow the former approach. First, I want to suggest that this approach is not only attractive, but that it is necessary, because it is grounded in a new kind of phenomena, or legal realities. But, second, I shall elaborate reasons for showing that any such theory must be developed, in order to provide adequate answers to the procedural and substantial issues that arise.

At an intuitive level, a transnational theory of administrative decisions is obviously appealing. There is no need to look backwards to the Diceyan repudiation of administrative law as such (it is significant that Dicey did not even use this expression, but the French one, *droit administratif*), to perceive the important influence played by the theories that conceived administrative law as a product of the State, of each State, a sort of national *enclave*, in sharp contrast with private law,

[36] See Harold Kongiu Koh, *Transnational Public Law Litigation*, 100 Yale L. J. 2347 (1992).

that was regarded as a product of human reason and experience. The intuition that both views about the law were simply oversimplifications of much more complex realities has been confirmed by recent empirical studies which demonstrate that in a variety of fields public authorities do not only "recognize" the rules and decisions taken elsewhere, but concur in adopting them.

Consider, for example, EU Directive 98/8 concerning the placing of biocidal products on the market. Its (declared) goal is to eliminate differences in the regulatory situation in the Member States, which may constitute barriers to trade in biocidal products.[37] The basic rules are the following ones: authorizations are released by national public authorities without undue delay (Article 3); before issuing authorizations, within 1 month the Member States shall inform each other and the Commission of any biocidal product which has been authorized or registered within their territory or which an authorization or registration has been refused (Article 18 (1); where a Member State has legitimate reason to believe that the dossier received is incomplete, it "shall immediately communicate its concerns to the competent authority" (Article 18 (2)). Similarly, EU Directive 2009/54 on the exploitation and marketing of mineral natural waters (another directive applicable within the whole European economic area) establishes the principle of mutual recognition of any national measure concerning a natural mineral water (Article 1). The underlying assumption is, again, mutual trust, to be considered in a twofold respect. First, the Member State which has received the application shall provide all relevant information to the others. Second, it must ensure a constant control on the quality of such natural mineral water.[38] However, the other Member States keep the power to issue safeguard measures where they have good reasons ("detailed ground", according to Article 11) to believe that a mineral natural water does not fully complies with the provisions laid down by the Directive "or endangers public health".

There are, in my opinion, four principal distinctive features of the regulatory regimes of this type. First, there is a clear difference with respect to the traditional model of regulation, to the extent to that the power to recognize is subject to common rules. Second, unlike in both direct recognition and mutual recognition regimes, there is a network of public officers, from both the Union and its Member States, who are involved in the administrative procedures at the end of which an authorization, license or registration may be issued. A third difference is closely related to the second. It is not the rule of the home country, but its administrative act or decision that is allowed to produce its effects outside the territory of the home country. Such administrative acts or decisions can thus be characterized as transnational adminis-

[37] (Under Article 2 (1) (a), a biocidal product is an "active substance and preparations containing one or more active substances, put in the form in which they are supplied to the user, intended to destroy, deter and otherwise exert a controlling effect on any harmful organism by chemical or biological means"..

[38] In Italy, these provisions are implemented by Articles 1 and 14 of the legislative decree n. 176 of October 8, 2011. For further details, see Luca De Lucia, *Autorizzazioni transnazionali e ordinamento europeo*, in Rivista di diritto pubblico comunitario, 2010, 759.

trative acts.[39] Last but not least, in order for such a regulatory regime to be effective, a constant co-operation between the public authorities of the Union and its Member States is required. Mutual trust, in other words, does concern only the moment in which a common rule of recognition is established, but extends to the entire administrative processes of adjudication. Whether this set of features are exclusive of the regional integration within the "ever closer" Union and the European legal area or it may be regarded as a "model" for other areas of the world, it remains to be seen.

Implications for Legal Analysis

The Limits of Recognition Within the Three Models

It was argued above that the subject of recognition of foreign administrative acts can offer interesting insights for comparative legal analysis, whilst at the same time going beyond comparison, since transnational processes are emerging. The present section will examine these related, but distinct, aspects.

The discussion thus far has concentrated on the way in which recognition can, and does, take place, alleviating the problems deriving from the dichotomy between the States' claim of exclusivity and the relationships that arise across national borders. The discussion would however be incomplete if it were to rest here. Not only does recognition produce effects on the interests of the parties, but it also has an impact on the legal order of the *lex fori*. Granting rights to individuals, especially in the context of mutual recognition regimes, permits them to enforce legal norms, in the guise of private attorneys. But it is also a form of social ordering which is not immune from problems, as it is acknowledged by judges and scholars. In the Anglo-Iranian dispute mentioned earlier, the concept of *ordre public* was at the heart of the reasoning of the Italian judge. The arguments of the plaintiff were rejected by the Tribunal, but they were nonetheless of interests since they were indicative of how the courts perceive the limits stemming from constitutional values and general principles of law. Everywhere, the courts use similar concepts to put limits to the recognition of foreign measures.

Interestingly, an important difference emerge between Anglo-American and other Western judges and scholars. The Act of State doctrine has no equivalent, in particular, in Italy and other European legal orders acts.[40] Two other concepts, public policy and ordre public, are used by judges and scholars. Though they are sometimes

[39] Eberhard Schmidt-Aßmann, *The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship*, 9 German L. J. 2061 (2008); Matthias Ruffert, *Recognition of Foreign Legislative and Administrative Acts*, cit., § 16; Luca de Lucia, *Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts*, in Review of European Administrative Law, 2012, 17.

[40] Matthias Ruffert, *Recognition of Foreign Legislative and Administrative Acts*, cit., § 16.

used in an undiscriminated manner, they must be kept distinct, also because public policy has a wider scope of application than public order.

From Comparative Law to Transnational Law

This paper opened with the suggestion that a public law analysis of the recognition of foreign administrative acts or decision can contribute to the discussion between specialists of different fields of law. We are now in a position to appreciate why this might be the case. I have tried to show, first, that under the traditional label "recognition", there are two distinct models, each based on distinct underlying assumptions and producing different institutional and operational consequences.

I have also suggested that a third model has emerged, which does not simply accentuate some features of the second, but that performs a different role institutionally and must, thus, be appreciated under a distinct, rival model of public law. Since this model regard transnational processes and transnational acts, it is logical to label it as the transnational model. I am aware that no neutral language in public law and this is no exception. The main point is that what is at stake is not only the traditional postulate of separateness between domestic legal order, but also the traditional dichotomy between domestic and international, public and private. Transnational law thus implies a mutation not only of rules and techniques, but also of legal theories and conceptual categories.

Bibliography

Angelini, F. 2010. *Ordine pubblico e integration costituzionale europea. I principi fondamentali nelle relazioni interordinamentali*.

Austin, J. 1832. *The province of jurisprudence determined*. London: J. Murray.

Berlin, I. 1962. Does political theory still exists? In *Philosophy and society*, ed. P. Laslett and W.G. Runciman. Oxford: Blackwell.

Cassese, S. ed. 1994. *L'unità del diritto. Massimo Severo Giannini e la teoria giuridica* (Il Mulino).

Chayes, A., and A.H. Chayes. 1995. *The new sovereignty. Compliance with international regulatory agreements*. Cambridge, MA: Harvard University Press.

Craig, P., and G. de Burca. 2007. *EU law, text, cases, and materials*, 4th ed. Oxford: Oxford University Press.

Currie, B. 1959. Notes on methods and objectives in the conflict of laws. *Duke Law Journal* 2: 171. 173.

de Lucia, L. 2010. Autorizzazioni transnazionali e ordinamento europeo. In *Rivista di diritto pubblico comunitario*, 759.

de Lucia, L. 2012. Administrative pluralism, horizontal cooperation and transnational administrative acts. *In Review of European Administrative Law* 5: 17.

de Nova, G. 1954. *Efficacia di una «espropriazione protettiva» di beni siti in uno Stato alleato*, in *Giurisprudenza comparata di diritto internazionale privato*, vol. XI.

della Cananea, G. 2006. *Sovranità e globalizzazione*, Parolechiave.

Hobbes, T.H. 1651. *The Leviathan*.

Howse, R., and K. Nicolaidis. 2003. Enhancing WTO legitimacy: Constitutionalization or subsidiarity? *Governance* 16: 73.
Kennedy, D. 1982. The stages of decline of the public/private distinction. *University of Pennsylvania Law Review* 130: 1423.
Kongiu Koh, H. 1992. Transnational public law litigation. *Yale Law Journal* 100: 2347.
Loughlin, M. 1992. *Public law and political theory*. Oxford: Clarendon Press.
Mayer, O. 1895. *Deutsches Verwaltungsrecht*, vol. 1. Leipzig: Duncker und Humblot.
Morgenstern, F. 1951. Recognition and enforcement of foreign legislative, administrative and judicial acts which are contrary to international law. *International Law Quarterly* 4: 326.
Nicolaidis, K., and G. Shaffer. 2005. Managed mutual recognition regimes: Governance without government. *Law and Contemporary Problems* 68: 263.
Oliver, D. 1999. *Common values and the public-private divide*. London: Clarendon.
Reich, C.A. 1963–1964. The new property. *Yale Law Journal* 73: 739.
Reimann, M. 2012. Comparative law and neighboring disciplines. In *The Cambridge companion to comparative law, eds.* Mauro Bussani, and Ugo Mattei.
Romano, S. 1946. *L'ordinamento giuridico.* 2nd ed., 130, 145, 148, French translation *L'ordre juridique.*
Ruffert, M. 2008. Recognition of foreign legislative and administrative acts. In *Max planck encyclopedia of public international law*, ed. Rudiger Wolfrum.
Schmidt-Aßmann, E. 2008. The internationalization of administrative relations as a challenge for administrative law scholarship. *German Law Journal* 9: 2061.
Schmitt, C. 1950. *Der Nomos der Erde*, English translation *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*.
Shapiro, M. 1993–1994. The globalization of law. *Indiana Journal of Global Legal Studies* 1: 37.
Slaughter, A.M. 2005. *The new world order*. Princeton: Princeton University Press.
Triantafyllou, D. 1999. *L'encadrement communautaire du financement du service public*, RTDE, 35(1), janvier-mars.
Van Hoecke, M., and M. Warrington. 1998. Legal cultures, legal paradigms and legal doctrine: Towards a new model for comparative law. *International and Comparative Law Quarterly* 47: 495.
Watt, H.M. 2003. Choice of law in integrated and interconnected markets: A matter of political economy. *Electronic Journal Of Comparative Law* 7.3.
Weiler, J.H.H. 2001. The constitution of the common market place: Text and context in the evolution of the free movement of good'. In *The evolution of EU law,* eds. Paul Craig, and Gráinne de Burca.
Wenander, H. 2011. Recognition of foreign administrative decisions. Balancing international cooperation, national self-determination, and individual rights. *Zaov* 71: 755–758.

Chapter 12
Notion and Recognition of Foreign Administrative Acts in Poland

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Abstract The subject of enforcement of foreign administrative acts has not been undertaken in Poland. Only some elements have been identified when discussing the problems of global administrative law, international administrative acts or EU administrative law. As it has been repeatedly raised above Polish law has also many gaps in that materia. The increasing importance of application of the international and foreign administrative acts should lead to new solutions in public international law. The European Union has the greatest opportunities and resources for creation of that kind of provisions under condition of the respect of the different forms of administrative activities (e.g. regulatory acts, single-case decisions) and numerous branches of administrative law (e.g. environmental law, construction law or tax law).

The Concept of Administrative Act and Its Classification as 'Foreign'

An administrative act (decision) in the meaning of the Polish Code of Administrative Procedure (hereinafter: C.A.P.)[1] is identified with an individual act. The substantial definition of the decision was created by doctrine and case-law. According to it a decision is a unilateral, official administrative act issued by a public body, dealing

[1] Law of 14 June 1960, consolidated text published in Official Journal of the Republic of Poland 2013, item 267.

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with a concrete case of individual entity which does not result from organizational or contractual subordination to the public body which issued it and is independent from the name given by law to this act.[2]

Such an approach does not include: acts of a general character (regulatory acts), physical acts (especially acts or actions, other than individual decisions or orders, made within the area of public administration concerning the rights or obligations ensuing from provisions of law) and silence of administration (settlement of the case by silence). The definition of administrative act from the perspective of the Polish legal system is therefore not adequate with regard to the definition adopted in Recommendation Rec(2004)20 of the Committee of Ministers of the Council of Europe to the Member States on judicial review of administrative acts (created, however, only for the purposes of that recommendation).

The issue of features distinguishing a national administrative act from a foreign one has hardly been addressed in the Polish legal literature. It seems that the nationality of the entity constituting the act should be considered as such a feature. National administrative acts are therefore constituted by the national bodies performing the tasks of the public administration, while foreign administrative acts are constituted by foreign bodies. This would mean both the governmental bodies (federal), self-governmental bodies (regional, local, municipal), administrative authorities of an autonomous community recognized in a given country as well as other entities, if they perform tasks in the field of public administration.

Moreover, it can be said that in order for a foreign administrative act to become the subject of interest of another jurisdiction it should, as J. Makowski stated, contain an element of "foreignness". According to the aforementioned author the "foreignness" can be of a personal (an act aimed at an individual without citizenship of the given country) or territorial character (an act causing an effect in another jurisdiction).[3]

In the moment of service, administrative decisions become public and are legally binding for the administrative body which has issued them. According to Article 130 of C.A.P. final administrative decisions, decisions on which an administrative authority establishes immediately enforceable clauses, decisions which are immediately enforceable ex lege, decisions which are in accordance with the request of all parties are enforceable. An administrative decision becomes final if it has been issued by the first instance body and the deadline for a measure of appeal has elapsed (generally 14 days), or if it has been issued by the second instance body.

It should be noted that the enforcement of the decision may be suspended, for example, by an administrative authority after the initiation of reopening proceedings, proceedings for annulment of the decision, or after initiation of the judicial review (then the enforcement can be also suspended by the administrative court).

[2] Kmieciak (2014), p. 337. See also (Skoczylas 2011), pp. 388–389 and Ziemski (2005), pp. 157–159.

[3] Makowski (1947), p. 4.

There is no general regulation on the recognition of foreign administrative acts in the Polish system of law. One could, however, identify a number of areas in which such recognition does occur, such as in the case of recognition of professional qualifications, documents certifying certain skills or education (including the nostrification of diplomas), or in the case of various types of permits. The analysis of such solutions leads to the conclusion that for the effectiveness of a foreign administrative act there is a requirement of an international law norm providing for the recognition. Such norm must be binding in Poland and, according to Modrzejewski (2010), should also provide for the course of action undertaken by national administrative bodies in situation, when they exercise foreign administrative act.[4]

Examples of that type of norms are provided in the Law of 5 January 2011 on Vehicle Drivers.[5] Article 4, section 1, point 2 of this law provides for the recognition in Poland of international driving licenses issued in other countries in accordance with the Geneva Convention on Road Traffic, of 19 September 1949[6]: international or national driving licenses compatible with the Vienna Convention on Road Traffic of 8 November 1968,[7] driving licenses issued in the EU and EFTA—parties of the Agreement on the European Economic Area or in Switzerland (the so-called European driving license), or other foreign driving licenses specified in an agreement, to which Poland is a party. It is worth mentioning that the recognition of European driving licenses is a result of the implementation of Article 2 section 1 of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licenses,[8] which states: "Driving licenses issued by Member States shall be mutually recognised." European Union law rapidly enters new sectors of administrative law,[9] introducing in many of them superior rules of mutual recognition of administrative acts by the Member States. This activity speeds up the creation of the European administrative space.

Bilateral agreements can be the basis for recognition of administrative acts from another state. The Polish-German agreement of cooperation between police and border guards in the border areas, signed on 18 February 2002,[10] provides in Article 12, section 3, that officers of one of the parties designated to work in the territory of the other party are subject to the orders, instructions and disciplinary authority of their national supervisors. In the necessity of conducting disciplinary proceedings against a police officer stationed in Germany, the relevant part of the Polish Law of

[4] See Modrzejewski (2010), p. 126.

[5] Official Journal of the Republic of Poland 2011, No. 30, item 151 with amendments.

[6] Official Journal of the Republic of Poland 1959, No. 54, item 321 and 322.

[7] Official Journal of the Republic of Poland 1988, No. 5, item 40 and 44.

[8] Official Journal of the European Union L 403/18.

[9] See Chiti and Greco (2007). The authors indicate more than 40 areas of administrative law from which European provisions arise, for example: public health, maritime transport, tourism, sport, social protection, energy.

[10] Official Journal of the Republic of Poland 2005, No. 223, item 1915.

6 April 1990 on Police could be regarded as part of the Polish international administrative law in its external dimension.[11]

It also appears that an international custom based on the principle of reciprocity could be the basis for the mutual recognition of certain administrative acts. One could consider in this context the functioning of diplomatic services between two countries, which have not ratified an international agreement in this regard.

In the case of the recipient's failure to comply with an administrative act which imposes an obligation, the administrative authority may initiate an administrative enforcement proceeding without the need to resort to a court proceeding. Generally, an action on the part of the creditor is required: serving the obligor with an admonition, the preparation of the enforcement order and sending it together with a request to initiate the execution to the enforcement authority. The Law of 16 June 1966 on Enforcement Procedure in Administration[12] divides enforcement measures into two categories. The first of them concerns enforcement measures on monetary claims which includes: enforcement of money, wages, retirement benefits and social security as well as social pension, bank accounts, other monetary claims, the rights from financial instruments as defined by the regulations on trading in financial instruments, which were recorded in a securities account or other account, assets in a money account used to operate such accounts, securities, bills of exchange, copyrights and related rights and rights of industrial property, shares in a limited liability company, other property rights, movables, real estate. The second category concerns the enforcement measures for non-monetary obligations: a fine in order to compel to perform, replacement of performance, collection of a movable object or of real estate, emptying premises or other facilities, direct coercion. According to Article 7 § 2 of the Law of Enforcement Procedure in Administration "[e]nforcement body applies enforcement measures which lead directly to the performance of an obligation, and among several such measures—measures least burdensome to the obligor". In case of enforcement of non-monetary obligations an enforcement measure which is quite often applied is a fine in order to compel to perform.

As stated at the beginning—it seems that the nationality of the public body constituting the act should be the one of the most relevant factors which determine an administrative act as being foreign. Today the transboundary effects of the law are more often emphasized. However, the concept of national jurisdiction should still be of crucial importance for the determination of foreign administrative acts. From that perspective, a significant problem is the fact that administrative law is not uniform in certain countries.[13] Provisions, which are considered as administrative law in one country, should be considered as civil or constitutional law in another one.

As rightly observed by B. Kingsbury, N. Krisch and R.B. Stewart: "[d]omestic law presumes a shared sense of what constitutes administrative action, even though it may be defined primarily in the negative—as state acts that are not legislative or judicial—and even though the boundaries between these categories are blurred at

[11] Zieliński (2008), p. 25.

[12] Consolidated text in Official Journal of the Republic of Poland 2012, item 1015 with amendments.

[13] See for example Maciejewski (2013), p. 765.

the margins."[14] However, in European hard law there is no definition of administrative act; furthermore, some European states still have problems defining it in national legal systems. It seems to be very difficult to create a common definition for a foreign administrative act, because "the influence of the EU and global law is not strong enough to disrupt the theory of administrative acts—at least, not stronger than the domestic factors which could undermine its basis."[15] In the future, a general definition for foreign administrative acts and principles concerning their recognition may be indicated in international law, first in soft law (for example by recommendation of the Council of Europe) and, after creating the commonly accepted rules, in hard law.

Taking into account only the 'affiliation' of the entity (public authority or other entity with private or mixed character) constituting the act we can point out many types of administrative acts. Foreign administrative acts are constituted by foreign administrative authorities. International administrative acts are constituted on the basis of bilateral or multilateral international agreement between states, international organizations, or other actors of international relations. Supranational administrative acts are constituted by international organizations. EU administrative acts are a specific type of those acts, because they provide fair trial guarantees (for example: parties' right to participation, to access files, the authority's duty to give reasons for final decisions, the judicial review of administrative acts).[16] The concept of global administrative law is still developing. Consequently, it is very problematic to clearly define what is a global administrative act and to distinguish it from the international and supranational ones.

From the perspective of the Constitution of the Republic of Poland,[17] the existence of a ratified international agreement binding Poland is relevant for the enforcement of the foreign, international or supranational administrative act. According to Article 90, section 1 of the Constitution: "The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution, the competence of organs of State authority in relation to certain matters." International agreements may directly indicate enforceable administrative acts or establish an international organization, which will have the power to create enforceable administrative acts (like the European Union).

We can provide examples of administrative acts, which due to supranational provisions will produce effects in other countries. One of them is related to citizenship of the European Union. Article 9 of the Treaty on the European Union[18] in its second sentence states that: "Every national of a Member State shall be a citizen of the

[14] Kingsbury et al. (2005), p. 17 and the literature quoted there.

[15] Mattarella (2011), p. 80.

[16] General considerations on procedural guarantees in EU law see Nehl (1999) and Pepe (2012), certain rules, rights, principles and their evolution (Kańska 2004; Bignami 2004; Barbier de la Serre 2006; Schwarze 2005).

[17] Official Journal of the Republic of Poland 1997, No. 78, item 483 with amendments.

[18] Consolidated version, Official Journal of the European Union 2012, C 326/13.

Union." In this context, if one of the Member States naturalises someone by means of an administrative act, this act will produce effects in all EU Member States.

General Considerations on the Habitual Administrative Procedure for Adopting Administrative Acts in Poland

The general administrative procedure for the adoption of administrative acts is governed by the provisions of the aforementioned C.A.P., while tax procedure is regulated in book IV of the Law of 29 August 1997—Tax Ordinance[19] (Articles 120–271). Both laws recognise the rights of parties and other entities which take part in a procedure, for example: entities on the rights of parties, witnesses, experts. In C.A.P. there are no provisions concerning the intervention of foreign public administrations. Polish legislation does not provide intervention of foreign public administrations in general administrative procedures, but does provides it in special procedures. Article 219 of the Law of 27 April 2007 on Environmental Protection[20] is an example of that solution. It provides the procedure for informing the other Member States of the European Union of the possibility of a significant transboundary environmental impact on its territory and a procedure of participation in proceedings to obtain appropriate permits.

According to Article 10 § 1 of C.A.P., which establishes the general principles for the hearing of the parties, administrative bodies are obliged to guarantee the parties' active participation during each stage of the proceedings, and, before the adoption of the final decision, they shall enable them to express their opinion concerning gathered evidence, materials and lodged demands. The rights of third parties are also protected. More precise is Article 200 § 1 on Tax Ordinance, which provides that before issuing a decision, a tax authority is obliged to give a party a 7 day time limit to express his/her opinion on the collected evidences.

The Polish Code of Criminal Procedure[21] provides in part XIII, the procedure for criminal cases in international relations. It may be carried out, by way of judicial assistance, for example: taking depositions of persons as accused persons, witnesses, or experts, inspection and searches of dwellings and persons, confiscation of material objects and their service abroad, summoning of persons staying abroad to make a personal voluntary appearance before the court or state prosecutor, in order to be examined as a witness or to be submitted to confrontation, and bringing in of persons under detention, for the same purposes, and giving access to records and documents, and information on the criminal record of the accused. From the Polish

[19] Consolidated text in the Official Journal of the Republic of Poland 2012, item 749 with amendments.

[20] Official Journal of the Republic of Poland 2008, No. 25, item 150 with amendments.

[21] Law of 6 June 1997, Official Journal of the Republic of Poland 1997, No. 89, item 555 with amendments.

point of view, current legal regulation and cooperation between EU Member States in this area is satisfactory.

The Service of Administrative Acts

The service of administrative acts in general administrative procedure is governed by the provisions of C.A.P. (Chapter 8, Articles 39–49) and in tax procedure by Tax Ordinance (Chapter 5 of Book IV, Articles 144–154c).

The recipient of a letter confirms the service through his personal signature and notes down the day of the service. If an addressee refuses to accept a letter sent to him in the correct form by an administrative authority, the letter is returned to the sender, accompanied by a notice confirming the refusal and specifying the date of the refusal. The letter and the notice are kept in case files. In such a situation, it is considered that a letter was served on the day when it was refused by the addressee. If an addressee is not at home, a letter may be left, against acknowledgment of receipt, with an adult household member, neighbour or janitor, if they agree to hand the letter over to the addressee. A note that a letter was left with a neighbour or janitor shall be placed in the mail box or on the door to the addressee's home or in a visible place by the entrance to the addressee's property.

If a letter cannot be served in the abovementioned way:

1. a postal operator within the scope of the Postal Law Act[22] keeps the letter for 14 days at the post office—if a letter is served by a postal operator, or
2. a letter is left for 14 days at a municipal office—if a letter is served by an employee of that office or another authorised person.

Subsequently, the addressee is notified twice where the letter was left. If the addressee does not receive the letter, a legal fiction that he received a letter on the last day of the aforementioned 14 days period, will be adopted.

In the course of proceedings, a party or his representative or attorney are obliged to notify an authority of any change of address, otherwise a letter is considered to be delivered to the previous address, and the authority leaves the letter in the case files. If a letter is served electronically, the service is effective if an authority receives an electronic confirmation of the service within 7 days as of the day when the letter was sent. If no confirmation is received, an authority serves a letter in the ordinary mode.

Letters addressed to natural persons whose place of residence is unknown are served to a representative. Letters addressed to legal persons and organisational units without legal personality are served to their registered office or business office—to a person authorised to receive mail.

A party whose domicile or seat is outside the Polish borders is obliged to appoint a representative for service in Poland. Furthermore, according to Article 147 § 1 of

[22] Law of 23 November 2012, Official Journal of the Republic of Poland 2012, item 1529.

Tax Ordinance a party who is going abroad for at least 2 months is obliged to appoint a representative for service.

Polish legislation does not provide a general regulation, but in tax procedures an authority may apply to the authorities of a Member State of the European Union in charge of tax matters to serve a letter issued by a tax authority. Such an application should include any data that may be necessary to identify the entity to which a letter is to be delivered, in particular his name or business name and address. Letters issued by a foreign authority are served by a tax authority designated by the minister in charge of public finance.

It should be noted that the Republic of Poland has not ratified the European Convention on the Service Abroad of Documents relating to Administrative Matters of 24 November 1977. The Polish law has gaps because the means of service in other countries are not sufficient in the light of that convention.

In cases in which Poland is bound by international or EU law, the right of foreign interested parties to receive documents in a language they can understand is guaranteed. The same rules exist in cases in which parties are persons belonging to national minorities.

It seems that Polish legislation is not ready to introduce modifications to govern the service of documents relating to administrative procedures in other countries. Legislation at the EU level is a more possible solution.

Recognition and Execution of Administrative Acts in Other Countries

A general law governing matters related to the validity, efficacy and enforceability of foreign administrative acts does not exist in Poland. That kind of provision could be developed in EU law or in public international law. It should take into account both: different types of administrative acts and numerous branches of administrative law.

The Law of 11 October 2013 on mutual assistance for the pursuing of tax claims, duties and other monetary claims[23] provides the granting of assistance to a foreign state and the use of the assistance of a foreign state to investigate monetary claims. In such cases the competent authority is the Minister of Finance.

The formal requirements for an administrative decision has been provided by both C.A.P. and Tax Ordinance. A decision shall settle a case in its essential aspect either totally or partially or close the case at first (or second) instance by cancelling the proceedings and should contain:

[23] Official Journal of the Republic of Poland 2013, item 1289. This Law implements Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (Official Journal of the European Union 2010, L 84/1).

1. indication of the name of the public administration body;
2. the date of issuance;
3. indication of the name(s) of the party or parties;
4. reference to the legal basis;
5. ruling;
6. factual and legal justification;
7. an advisory notice as to whether and how an appeal may be brought (generally it is 14 days) and
8. the signature with indication of name, surname and official position of the person authorised to issue the decision.

Any decision that may be subject to an action brought before the ordinary (civil) court or a complaint filed with the administrative court shall advise a party of the possibility to bring an action or file a complaint. Provisions of *lex specialis* may contain other elements which should be included in the decision (e.g. term).

The factual justification of the decision should contain the facts that the body regards as proven, the evidence relied upon, and the reasons for which other evidence has been treated as not authentic and without probative force. The legal justification should contain the legal authority for the decision with reference to the relevant law. If the decision fully reflects the demands of the party then there is no need to provide a justification for the decision, but this does not apply to decisions in contentious cases and decisions given on appeal. A public authority can also dispense with a justification of a decision in such cases if under current statutory regulations there is a possibility of dispensing with or limiting the justification because of the interests of State security or public order.

The problem of formal gaps in decisions was the subject of many judgments of Polish administrative courts. As it is determined in the case law, there are four essential elements of a decision: indication of the name of the public authority, indication of the party or parties of proceedings, ruling and the signature with indication of name, surname and official position of the person authorised to issue the decision. Without any of them the decision does not exist. The lack of other elements does not have a crucial influence on the legal efficacy. In other words, despite the fact that the decision has defects, it may produce legal effects.

Less important elements can be supplemented. Within 14 days of service or publication of a decision a party can: require it to be completed in relation to the adjudicative element or the right of appeal, file an action brought to the civil court or a complaint filed with the administrative court, or clarify the advisory notices set out in the decision on these issues. In those cases, the deadline for a party to bring an appeal or complaint runs from the date on which the reply is served to the party. An erroneous advisory notice in a decision regarding the right of appeal, an action brought to the civil court or a complaint filed with the administrative court shall not be prejudicial to the party that has complied with it. Furthermore, the public authority can make a ruling ex officio or at the instigation of a party in order to

correct typographical or mathematical errors or other evident mistakes in decisions issued by that authority.

A decision shall be served on the parties in writing. From the moment of service the public administration body issuing the decision is bound by it, unless C.A.P. provides otherwise.

Standards of formal requirements for all administrative decisions in EU and its Member States should be indicated in the codification of administrative procedure for institutions, bodies, offices and agencies of the EU. That regulation shall be established on the basis of Article 298 of the Treaty on the Functioning of the European Union.[24] Legislative initiative in that matter has been already taken by the European Parliament in the resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union. Other independent organizations (for example Research Network on EU Administrative Law) are also working on the project of law in that sphere. Nowadays we can find certain standards of due administrative procedure or procedural aspects of good administration in recommendations of the Committee of Ministers of the Council of Europe, which unfortunately only have the character of non-binding soft law.

The material requirement for an international administrative act in order to be effective in Poland is the adoption of that act within the limits of jurisdiction of a certain administrative body and with respect for the principle of legality.

We accept that the states have the international competence of dictating the administrative act as a requirement. Otherwise, states would not have the power to control or react to an excess of power by international organizations. States' competence should provide the control of compliance with the law.

The existence of international provisions obliging a state to recognise the foreign administrative act is very relevant for its recognition. Requirements for foreign administrative acts shall be indicated in those international provisions. We have no knowledge of sentences of administrative courts focusing on the conditions which should be fulfilled by a foreign administrative act in order to be effective.

The respect of the principles of procedural fairness (guarantees of impartiality of public authority, party's right to participation in the proceedings, which includes no less than the hearing of the parties and the right to present evidence, explanation of motivation of the decision, the right to appeal to another authority or to the judicial review of the administrative act) should be requirements in the case of foreign administrative acts relating to penalties.

The law of the executing state should be applicable in order to perform a foreign administrative act. The provisions of international law or the law of the country in which the administrative act should be executed (if principle of mutual recognition is applicable) are important for the execution of foreign administrative acts. There are no generally defined criteria for refusing to execute a foreign administrative act. The law on mutual assistance for the pursuing of tax claims, duties and other monetary claims and the Law on Enforcement Procedure in Administration are applicable to monetary claims.

[24] Consolidated version, Official Journal of the European Union 2012, C 326/47.

The general procedure for the execution of foreign administrative acts should be developed in international law, especially in EU law, as it is in private international law—regulations Rome I and Rome II.

According to Article 5, section 1 of the Law on mutual assistance for the pursuing tax claims, duties and other monetary claims the authorities competent to all tasks in the field of enforcement of foreign administrative acts are the Minister of Finance, central liaison office, creditor, director of tax office and enforcement body. It should be highlighted that similar provisions could be also applicable in other kinds of administrative activities.

The mechanisms for recognising court decisions developed in private international law can be useful for the doctrinal development of the recognition and execution of foreign administrative acts to the extent in which they could be modified in regard to specific features of administrative acts (authoritative, unilateral) and specific branches of administrative law (building law, tax law, water law).

The EU's Role in the Progress Towards the Recognition and Execution of Foreign Administrative Acts: The Principle of Mutual Recognition and the Transnational Nature of Certain Administrative Acts

The European Union, in order to achieve the fundamental freedoms of the Treaty; free movement of goods, persons (workers, services, freedom of establishment), capital and also union citizenship, to a certain extent in practice forced the need for the mutual recognition of administrative acts of Member States and the cross-border nature of some of them.

The legal basis of that trend in the Treaty, besides the abovementioned Treaty Freedoms, constitutes the principle of sincere cooperation, mutual respect and support, expressed in Article 4 (3) of the Treaty on the European Union (TEU).

Also, Article 18 of the Treaty on the Functioning of the European Union TFEU, establishing the principle of equal treatment/the principle of non-discrimination against nationals of another EU country and other provisions TFUE concerning the Inner Market: free movement of workers (Art. 45 TFEU), right of establishment (Art. 49 TFEU) or services (Art. 56 TFEU) may imply the duty of mutual recognition of administrative acts.

The progress made in this area also strengthens the case law of the Court of Justice, that points out, that the principle of sincere cooperation means Member States should rely on mutual trust at least in areas harmonised by EU law.[25]

[25] See ECJ Cases: 46/76 Bauhuis, ECR 1977, p. 5, para 22; 25/88 Bouchara, ECR 1989, p. 1105, para 18; C-5/94 Hedley Lomas, ECR 1996, p. I-2553, para 19; C-110/01 Tennah-Durez, ECR 2003, p. I-6239, para 34; C-476/01 Kapper, ECR 2004, p. I-5205, para 37.

For example, in Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, EU legislation refers to this principle in a partly nonharmonised area.[26]

It appears that the trend toward the mutual recognition of administrative acts is also partly the outcome of the federalizing character of the European Union as a supranational organization.

The administrative cooperation in certain sectors provided by EU law, brings about the horizontal internationalization of administrative relationships between administrative authorities of Member States.

The Republic of Poland has implemented Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition of financial penalties by the enactment of the act of 24 October 2008 on the amendment of the Law—Code of Penal Procedure and other laws,[27] which inserted:

1. to the Code of Penal Procedure after Chapter 66 Chapter 66a entitled "Procedure for requesting the EU Member State to carry out a decision on a fine, penal measures in the form of exemplary damages, or a pecuniary payment, or a decision obliging a perpetrator to assume costs of the proceedings", and Chapter 66b entitled "Procedure for requesting by the EU Member State to carry out a decision on financial penalties" (Articles 611fa–611fm),
2. to the Law of 6 June 1997—Criminal Executive Code[28] new Article 52a,
3. to the Law of 24 August 2001—Code of Petty Offences Procedure[29] new Division XIIa (entitled "Procedure of cases from international relations"), consisting of two chapters: Chapter 20a entitled "Procedure for requesting the EU Member State to carry out a resolution on retention of evidence or retention of property and execution of the judicial decision or decision of other authority of EU Member State on retention of evidence or retention of property") and Chapter 20b entitled "Procedure for requesting the EU Member State to carry out a fine, criminal measures in form of a fine [for the benefit of a special recipient] or the obligation to compensate the damage or decision imposing the costs of proceedings and execution of the judicial decision or decision of other authority of EU Member State on financial penalties".

The implementing provisions came into force on 18 December 2008—14 days since their promulgation (publication) in the Official Journal of the Republic of Poland (the legal base was Article 6 of the Act of 24 October 2008).

[26] See recital 22 of the preamble to Regulation (EC) No. 1346/2000 (OJ L 160, 30.6.2000, p. 1–18).

[27] Official Journal of the Republic of Poland 2008, No. 214, item 1344.

[28] Official Journal of the Republic of Poland 1997, No. 90, item 557 with amendments.

[29] Official Journal of the Republic of Poland 2008, No. 133, item 848.

International Conventions on the Recognition and Execution of Administrative Acts and on the Legalisation of Public Documents

It must be emphasized that for the enumeration of international conventions related to the recognition and execution of administrative acts and to the legalisation of public documents we should adopt a broad definition of an administrative act and avoid a detailed discussion about the scope of its meaning as an act of a public administration authority. Another problem is the question whether the convention should concern both the recognition and execution of administrative acts.

The international conventions that meet at least one of these criteria can be considered, e.g. the following acts:

The Convention on International Civil Aviation, signed on 7 December 1944 in Chicago—the Chicago Convention[30];
The Convention on Road Traffic[31];
The Agreement Establishing the World Trade Organization (WTO), signed in Marrakesh on 15 April 1994[32];
The announcement by the Minister of Foreign Affairs of 4 December 1995 on the publication of the annexes to the Agreement Establishing the World Trade Organization (WTO)[33] [Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards];
Convention on the Recognition of Qualifications concerning Higher Education in the European Region, signed in Lisbon on 11 April 1997 (ratified by Poland on 17 March 2004).

It follows that the areas in which Poland became a party to international agreements include civil aviation, traffic and transportation, trade, higher education.

The Republic of Poland is a party of the following multilateral conventions:

European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers, done in London on 7 June 1968[34];
ICCS Convention No. 3 on the international exchange of information relating to civil status, signed at Istanbul on 4 September 1958[35];

[30] Official Journal of the Republic of Poland 1959, No. 35, item 212 with amendments.

[31] See judgement of the Voivodship Administrative Court in Cracow of 14 April 2010, File No. III SA/Kr 1094/09.

[32] Official Journal of the Republic of Poland 1995, No. 98, item 484.

[33] Official Journal of the Republic of Poland 1996, No. 9, item 54.

[34] Official Journal of the Republic of Poland 1995, No. 76, item 381.

[35] Official Journal of the Republic of Poland 2003, No. 172, item 1667.

Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations, signed in The Hague[36];
European Convention of 20 May 1980 on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children, signed in Luxembourg [37];
ICCS Convention No. 16 on the issue of multilingual extracts from civil status records, signed in Vienna on 8 September 1976[38];
European Convention of 27 January 1977 on transferring applications for legal assistance, signed in Strasbourg [39];
ICCS Convention No. 17 exempting certain certificates and documents from legalisation, signed in Athens on 15 September 1977[40];
Convention of 25 October 1980 on international access to justice, signed in The Hague[41];
Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, signed in The Hague[42];
Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed in The Hague.[43]

Poland is also a party of the following bilateral conventions:

Agreement of 9 November 1976 between Algeria and Poland on judicial assistance in civil and criminal matters, signed in Algiers[44];
Agreement of 11 December 1963 between Austria and Poland on mutual relations in civil matters and on documents, signed in Vienna[45];
Agreement of 26 October 1994 between Belarus and Poland on judicial assistance and legal relations in civil matters, family matters, employees' matters and criminal matters, signed in Minsk[46];
Agreement of 4 December 1961 on judicial assistance and legal relations in civil matters, family matters and criminal matters, signed in Warsaw[47] including Protocol[48];

[36] Official Journal of the Republic of Poland 2000, No. 2, item 13.
[37] Official Journal of the Republic of Poland 1996, No. 31, item 134 with amendments.
[38] Official Journal of the Republic of Poland 2004, No. 166, item 1736.
[39] Official Journal of the Republic of Poland 1998, No. 102, item 1183 and 1184.
[40] Official Journal of the Republic of Poland 2003, No. 148, item 1446.
[41] Official Journal of the Republic of Poland 1995, No. 18, item 86 and 87.
[42] Official Journal of the Republic of Poland 1995, No. 108 item 528.
[43] Official Journal of the Republic of Poland 2010, No. 172, item 1158.
[44] Official Journal of the Republic of Poland 1982, No. 10, item 73 and 74.
[45] Official Journal of the Republic of Poland 1974, No. 6, item 33 with amendments and item 35.
[46] Official Journal of the Republic of Poland 1995, No. 128, item 619 and 620.
[47] Official Journal of the Republic of Poland 1963, No. 17, item 88 and 89.
[48] Official Journal of the Republic of Poland 1981, No. 10, item 43 and 44.

Agreement of 5 June 1987 between China and Poland on judicial assistance in civil and criminal matters, signed in Warsaw[49];
Agreement of 14 November 1996 between Cyprus and Poland on judicial cooperation in civil and criminal matters, signed in Nicosia[50];
Agreement of 21 December 1987 between Czechoslovakia and Poland on judicial assistance and legal relations in civil matters, signed in Warsaw[51];
Agreement of 17 May 1992 between Egypt and Poland on judicial assistance in civil and commercial matters, signed in Cairo[52];
Agreement of 27 November 1998 between Estonia and Poland on judicial assistance and legal relations in civil matters, employees' matters and criminal matters, signed in Tallinn[53];
Agreement of 24 October 1979 between Greece and Poland on judicial assistance in civil and criminal matters, signed in Athens[54];
Agreement of 29 October 1988 between Iraq and Poland on judicial assistance in civil and criminal matters, signed in Baghdad[55];
Agreement between the Socialist Federal Republic of Yugoslavia and the People's Republic of Poland on Legal Exchange in Civil and Criminal Matters signed in Warsaw on 6 February 1960[56]—it applies to the following countries: Bosnia and Herzegovina, Croatia, Montenegro (F.Y.R.O.M.), Macedonia, Serbia, Slovenia;
Agreement of 28 September 1986 between North Korea and Poland on judicial assistance in civil matters, family matters and criminal matters, signed in Pyongyang[57];
Agreement of 18 November 1982 between Cuba and Poland on judicial assistance in civil matters, family matters and criminal matters, signed in Havana[58];
Agreement of 2 December 1985 between Libya and Poland on judicial assistance in civil matters, commercial matters, family matters and criminal matters, signed in Tripoli[59];
Agreement of 26 January 1993 between Lithuania and Poland on judicial assistance and legal relations in civil matters, family matters, employees' matters and criminal matters, signed in Warsaw[60];

[49] Official Journal of the Republic of Poland 1988, No. 9, item 65 and 66.
[50] Official Journal of the Republic of Poland 1999, No. 39, item 383 and 384.
[51] Official Journal of the Republic of Poland 1989, No. 39, item 210 and 211.
[52] Official Journal of the Republic of Poland 1994, No. 34, item 126 and 127.
[53] Official Journal of the Republic of Poland 2000, No. 5, item 49 and 50.
[54] Official Journal of the Republic of Poland 1982, No. 4, item 24 and 25.
[55] Official Journal of the Republic of Poland 1989, No. 70, item 418 and 419.
[56] Official Journal of the Republic of Poland 1963, No. 27, item 162 and 163.
[57] Official Journal of the Republic of Poland 1987, No. 24, item 135 and 136.
[58] Official Journal of the Republic of Poland 1984, No. 47, item 247 and 248.
[59] Official Journal of the Republic of Poland 1987, No. 13, item 80 and 81.
[60] Official Journal of the Republic of Poland 1994, No. 35, item 130 and 131.

Agreement of 23 February 1994 between Latvia and Poland on judicial assistance and legal relations in civil matters, family matters, employees' matters and criminal matters, signed in Riga[61];
Agreement of 21 May 1979 between Morocco and Poland on judicial assistance in civil and criminal matters, signed in Warsaw[62];
Agreement of 14 September 1971 between Mongolia and Poland on judicial assistance and legal relations in civil matters, family matters and criminal matters, signed in Warsaw[63];
Agreement of 16 September 1996 between Russia and Poland on judicial assistance and legal relations in civil and criminal matters, signed in Warsaw[64];
Agreement of 15 May 1999 between Romania and Poland on judicial assistance and legal relations in civil matters, signed in Bucharest[65];
Agreement of 16 February 1985 between Syria and Poland on judicial assistance in civil and criminal matters, signed in Damascus[66];
Agreement of 22 March 1985 between Tunisia and Poland on judicial assistance in civil and criminal matters, signed in Warsaw[67];
Agreement of 12 April 1988 between Turkey and Poland on judicial assistance in civil and commercial matters, signed in Warsaw[68];
Agreement of 24 May 1993 between Ukraine and Poland on judicial assistance and legal relations in civil and criminal matters, signed in Kiev[69];
Agreement of 6 March 1959 between Hungary and Poland on judicial assistance and legal relations in civil matters, family matters and criminal matters, signed in Budapest,[70] including Protocol[71];
Agreement of 22 March 1993 between Vietnam and Poland on judicial assistance and legal relations in civil matters, family matters and criminal matters, signed in Warsaw[72];
Agreement of 28 April 1989 between Italy and Poland on judicial assistance and on recognition and enforcement of judgments in civil matters, signed in Warsaw.[73]

The Republic of Poland is a party to The Hague Convention abolishing the requirement of legalisation for foreign public documents, concluded on 5 October

[61] Official Journal of the Republic of Poland 1995, No. 110, item 534 and 535.
[62] Official Journal of the Republic of Poland 1983, No. 14, item 69 and 70.
[63] Official Journal of the Republic of Poland 1972, No. 36, item 244 and 245.
[64] Official Journal of the Republic of Poland 2002, No. 83, item 750 and 751.
[65] Official Journal of the Republic of Poland 2002, No. 83, item 752 and 753.
[66] Official Journal of the Republic of Poland 1986, No. 37, item 181 and 182.
[67] Official Journal of the Republic of Poland 1987, No. 11, item 71 and 72.
[68] Official Journal of the Republic of Poland 1992, No. 3, item 13 and 14.
[69] Official Journal of the Republic of Poland 1994, No. 96, item 465 and 466.
[70] Official Journal of the Republic of Poland 1960, No. 8, item 54 and 55.
[71] Official Journal of the Republic of Poland 1982, No. 5, item 32 and 33.
[72] Official Journal of the Republic of Poland 1995, No. 55, item 289 and 290.
[73] Official Journal of the Republic of Poland 1992, No. 23, item 97 and 98.

1961 (The Apostille Convention). The text of the Convention was published in the Official Journal of the Republic of Poland.[74] The provisions of the Convention entered into force to Poland on 14 August 2005. It was ratified by the President of the Republic on 15 October 2004. The legal base was the act of the Polish Parliament—Sejm—The Law of 22 July 2004 on the ratification of the Convention.

The question of the application of the Convention was the subject of the case law of administrative courts—judgment of Voivodship Administrative Court of Warsaw of 23 December 2008.[75]

The validation of the existence or authenticity of foreign official documents is justified in a situation when such documents have to be used as evidence in proceedings before a court or before administrative bodies.

The only provision of statute law in Polish legal order concerning foreign official (public) documents (issued by the authorities of another foreign state) is Article 1138 of the Law of 17 November 1964—Code of Civil Procedure (C.C.P.).[76]

Pursuant to Article 1138 of the C.C.P., foreign public documents that are of the same force of evidence (probatory force) as Polish public documents, with two exceptions, being: a public document concerning the conveyance of the property right to the immovables located in Poland, or a public document whose authenticity is doubtful. These two groups of documents need legalisation.

Both doctrine[77] and the courts[78] allow the application of Article 1138 C.C.P. *per analogiam* outside the civil proceedings, because the question of the authorization of foreign official (public) documents and their force of evidence has not been regulated in other legal acts, including other procedural provisions (e.g. in the Law of 30 August 2002—Law on Proceedings before Administrative Courts or in C.A.P.).

It is not clear if Article 76 § 1 C.A.P., providing "Official documents drawn up in the prescribed form by competent state authorities within the scope of their activity shall constitute proof of what has been officially confirmed therein" and using the term "public authorities" covers also foreign public authorities.

Apostille proceedings are the written procedure. Until now Poland does not have an electronic Apostille procedure. The Apostille cannot be obtained by fax or e-mail. The competent authority to issue the apostille is the Ministry of Foreign Affairs—Legalization Section.

Applications for the issue of the Apostille or for the legalisation of documents may be filed with the Ministry of Foreign Affairs personally or by a third person (no additional authorisation is required) and the application is analysed "on the spot". In case the application was filed by post or e-mail, the document certification takes ca. 2–3 weeks. For every certified document is the stamp duty (fee) charged.

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[74] Official Journal of the Republic of Poland 2005, No. 112, item 938.

[75] File No. I SA/Wa 394/08.

[76] Official Journal of the Republic of Poland 1964, No. 43, item 296 with amendments.

[77] See Ciszewski (2012).

[78] See e.g. Judgment of the Voivodship Administrative Court in Rzeszów, 21 July 2010, File No. II SA/Rz 157/10 and decision of the Supreme Court, 16 March 2007, File No. III CSK 380/06.

The procedure of issuing an "Apostille" is a one-instance procedure and does not provide any remedies.

Certain documents have to be authenticated before issuing the Apostille.

In the case of notarial acts (e.g. notarial deeds, powers of attorney, certified true copies, notarial authentications of signatures) and court documents (except for copies from the National Court Register), the competent authority responsible for the certification is the president of the competent circuit court or authorised judge or judge associate. If the court documents were issued by one of the courts of appeal, the competent authority for the certification of such documents is the president of the competent court of appeal or authorised judge.

Diplomas from higher education institutions are certified by the Ministry of Science and Higher Education. However, diplomas issued by Higher Art Schools (Academies of Music, Academies of Fine Arts, Theatre and Film Schools) are legalised by the Minister of Culture and National Heritage.

The Minister of National Defence legalizes diplomas of Higher Military Schools.

Medical school diplomas are legalised by the Minister of Health. Diplomas issued by the Gdynia Maritime University and the Maritime University of Szczecin are legalised by the Minister of Transport, Building and Maritime Economy.

The Matura exam certificate is certified by the Ministry of National Education.

School certificates are certified by the competent local board of education.

Master craftsman's certificates and craftsman's certificates are certified by the Association of Polish Crafts in Warsaw.

The legal base of the "Apostille procedure" are the following legal acts:

The Hague Convention abolishing the requirement of the legalisation of foreign public documents;
The Stamp Duty Law of 16 November 2006[79];
The Regulation of the Minister of Science and Higher Education of 2 November 2006 on the documentation of the course of study[80]
The Regulation of the Minister of National Education on 28 May 2010 on certificates, diplomas and other school forms[81];
The Crafts Law Act of 22 March 1989.[82]

[79] Official Journal of the Republic of Poland 2006, No. 225, item 1635.

[80] Official Journal of the Republic of Poland 2006, No. 224, item 1634.

[81] Official Journal of the Republic of Poland 2010, No. 97, item 624.

[82] Consolidated text in Official Journal of the Republic of Poland 2002, No. 112, item 979 with amendments.

Doctrinal Treatment of the Subject of Foreign Administrative Acts

The subject of enforcement of foreign administrative acts has not been undertaken in Poland. Only some elements have been identified when discussing the problems of global administrative law, international administrative acts or EU administrative law. As has been repeatedly stated above, Polish law also has many gaps in that matter. The increasing importance of the application of international and foreign administrative acts should lead to new solutions in public international law. The European Union has the greatest opportunities and resources for the creation of those kinds of provisions under the condition of respect for the different forms of administrative activities (e.g. regulatory acts, single-case decisions) and numerous branches of administrative law (e.g. environmental law, construction law or tax law).

Bibliography

Barbier De La Serre, E. 2006. Procedural justice in the European community case-law concerning the right of defense: Essentialist and instrumental trends. *European Public Law* 12(2): 225–250. ISSN 1354-3725.

Bignami, F. 2004. Three generations of participation rights before the European Commission. *Law and Contemporary Problems* 68(1): 61–83. ISSN 0023-9186.

Chiti, M.P., and G. Greco (eds.). 2007. *Trattato di diritto amministrativo europeo. Parte speciale* [Treaty on European administrative law. Special part], vol. I–IV, 2396 p. Milan: Giuffrè. ISBN:9788814127403.

Ciszewski, J. 2012. Kodeks postępowania cywilnego. Komentarz do art. 1138 k.p.c. [Code of civil procedure. Commentary to the article 1138]. In *Lex Polonica* [online], 2012. Cited 31 May 2014. Accessible from http://www.lexpolonica.lexisnexis.pl

Kańska, K. 2004. Towards administrative human rights in the EU. Impact of the charter of fundamental rights. *European Law Journal* 10(3): 296–326. ISSN 1468-0386.

Kingsbury, B., N. Krisch, and R.B. Stewart. 2005. The emergence of global administrative law. *Law and Contemporary Problems* 68(3–4): 15–61. ISSN 0023-9186.

Kmieciak, Z. 2014. Poland. In *Codification of administrative procedure*, ed. J.-B. Auby, 329–343. Bruxelles: Bruylant. ISBN 978-2-8027-4347-7.

Maciejewski, M. 2013. Administracyjne prawo międzynarodowe. Zagadnienia definicyjne. [International administrative law. Definitional issues]. In *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną.* [The influence of civilizational changes on administrative law and public administration], ed. J. Zimmermann and P.J. Suwaj, 750–768. Warsaw: Wolter Kluwer. ISBN 978-83-264-4037-3.

Makowski, J. 1947. Prawo międzynarodowe administracyjne. [International administrative law]. In *Śląsko-Dąbrowski Przegląd Administracyjny* [Silesian-Dąbrowa basin administrative review]. 1947, No. 7–8.

Mattarella, B.G. 2011. The influence of European and global administrative law on national administrative acts. In *Global administrative law and European administrative law. Relationship, legal issues and comparision*, ed. E. Chiti and B.G. Mattarella, 61–85. Heidelberg: Springer. ISBN 978-3-642-20263-6.

Modrzejewski, A. 2010. Międzynarodowy akt administracyjny w międzynarodowym prawie administracyjnym. [International administrative act in international administrative law]. In *Współzależność dyscyplin badawczych w sferze administracji publicznej* [Correlation of research disciplines on the sphere of public administration], ed. S. Wrzosek, M. Domagała, J. Izdebski, and T. Stanisławski, 113–128. Warsaw: C.H. Beck. ISBN 978-83-255-2013-7.

Nehl, H.P. 1999. *Principles of administrative procedure in EC law*, 214 p. Oxford: Hart Publishing. ISBN 1-84113-008-7.

Pepe, G. 2012. *Principi generali dell'ordinamento comunitario e attività amministrativa.* [General principles of community order and administrative activity], 412 p. Rome: Eurilink. ISBN 978-88-97931-072.

Schwarze, J. 2005. Judicial review of European administrative procedure. *Law and Contemporary Problems* 68(1): 85–105. ISSN 0023-9186.

Skoczylas, A. 2011. Administrative proceedings and judicial review of administration. In *Handbook of polish law*, ed. W. Dajczak, A.J. Szwarc, and P. Wiliński, 381–402. Warsaw: Wydawnictwo Szkolne PWN. ISBN 978-83-262-0987-1.

Zieliński, M. 2008. O pojęciu międzynarodowego prawa administracyjnego. [On the concept of international administrative law]. In *Państwo i Prawo* [State and law], 16–30, 2008(9). ISSN 0031–0980.

Ziemski, K. 2005. *Indywidualny akt administracyjny jako forma prawna działania administracji.* [Individual administrative act as a legal form of Administrations' activity], 536 p. Poznań: Wydawnictwo Naukowe UAM. ISBN 83-232-1458-1.

Chapter 13
Recognition of Foreign Administrative Acts in Portugal

Dulce Lopes

Abstract The subject of recognition and enforcement of foreign administrative acts is not new, but is undergoing renewal and has recently attracted great interest from part of the Portuguese doctrine, mostly under the dogmatic of transnational acts. However not always greater attention means better regulation. And this is a field were, unlike what should be expected (or desired), plurality and fragmentation are still the rule and the need for clarification of recognition procedures is crucial. Indeed, beyond the recognition demands resulting from international and European Union law and from specific legislative provisions, there is no general framework on recognition and enforcement of foreign administrative acts, nor in what regards their possible effects, neither in what concerns the requirements and procedures from which they can or should be drawn.

Introduction

The recognition of foreign administrative acts has gained again – after a century – a striking importance in doctrinal and legislative terms. In a world were distances are rapidly overcome and new forms of private and public interaction develop, the exercise of sovereignty is reconceptualized and new territorial logics appear.

The possibility of drawing effects from an administrative act, mostly if in a forcible way, was traditionally considered one of the prerogatives of statehood that could not be shared or allowed beyond the borders of the State, unless in exceptional circumstances.

Now, with more importance and frequency, foreign administrative acts – originally or subsequently, typically or incidentally – aim at being recognised and executed in/by other States (the receiving or host States, distinct from the issuing or home authorities), raising once again, but in a whole different manner, the challenging questions of extraterritoriality and jurisdiction.

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Concept of (Foreign) Administrative Act

Administrative acts are long defined in Portugal as "*…decisions of organs of the Administration that, under the rules of administrative law, aim to produce legal effects in an individual and particular situation*"[1] (Article 120 of the Portuguese Code of Administrative Procedure, CPA[2]).

However, this definition has never settled or crystalized the possible conceptions of those acts.

A traditional view distinguished between a broad and a strict notion of administrative act. The first would include all unilateral and individual actions from the public Administration and the second would include only definitive and executory (acts that could be subject to forcible execution) administrative acts (Caetano 1973, p. 427).

Another notion was proposed by Soares (1978, p. 76), according to whom "*administrative act is an authoritative decision, concerning a particular case, delivered by an administrative entity, in the use of administrative powers and that produces external, negative or positive, legal effects*". This notion emphasises the external effect of an administrative act, and therefore its binding nature towards third parties, not including the internal (instrumental and auxiliary) activity of the public Administration.

Some authors who embrace the notion of administrative act laid down in the CPA consider that the concept of "*decision*" from a teleological point of view was meant to cover only acts intended to produce external transformations (Amaral 2013a, b, p. 250; Almeida 2012, p. 115). Another position refuses to constrict the notion of administrative act due to the widespread number and type of administrative actions that demand an open concept as the one enshrined in Article 120 of the CPA (Silva 2010d, p. 81).

In constitutional terms, the Portuguese Constitution has in its 1989 revision eliminated the reference to the judicial scrutiny of definitive and executory acts (Ribeiro 1992, p. 365; Soares 1990, p. 25) and has focused on guaranteeing the right of access to Courts to all administrative acts who harm any rights or protected legal interests (Article 268 (4)).

Also in the Portuguese Code of Procedure in Administrative Courts (CPAC),[3] the notion of administrative act for the purpose of contentious reaction has been

[1] The English versions of Portuguese law and authors are unofficial translations from the rapporteur.

[2] Code adopted by Decree-Law no. 442/91, 15 November (rectified by Declarations no. 265/91, 31 December and 22-A/92, 29 February), and modified by Decrees-Law no. 6/96, 31 January and no. 18/2008, 29 January. Recently a new Code of Administrative Procedure (New CPA) was adopted (Decree-Law no. 4/2015, 7 January), that will enter into force 3 months after its publication. Since the lastest substantial revision to this article was performed in January, we will on focus both legal regimes.

[3] Adopted by Law no. 15/2002, 22 February (Rectified by Declaration no. 17/2002, 6 April) and modified by Laws no. 4-A/2003, 19 February; 59/2008, 11 September and 63/2011, 14 December.

expanded in order to include all acts that produce external effects, specially the ones whose content might harm any rights or protected legal interests (Article 51(1)). Therefore, traditional views that distinguished a broad notion of administrative act and a restrictive one were, at least for contentious purposes, abandoned.

It should be mentioned that the legal definition of administrative acts is traditionally only applicable to the Portuguese Public Administration or entities that participate in the exercise of Portuguese Public Power (Article 2 of the CPA). Also the doctrinal definitions of administrative acts (except the ones that refer to transnational and international administrative acts, see *infra*) are thought over as being applicable to "national" administrative acts, as the ones originating in Portuguese administrative bodies or adopted under the powers conferred by them (Sampaio 2014, p. 71).

Despite this organic reduction of the notion of administrative act (limited to the ones emanating from Portuguese administrative entities), we cannot find similar limits in what regards the types of disputes or situations decided. In fact, Portuguese law does not distinguish whether an administrative act regulates an internal or an international situation. The absence of the requirement of a specific contact with the Portuguese legal order (nationality or habitual residence, for instance) shows that the Portuguese legislator adopted a *monistic* approach on this behalf.

This discussion on the concept of administrative acts had a recent follow up in Article 148 of the New CPA, according to which "*For the purposes of the present law, administrative acts shall be the decisions that, within the exercise of administrative legal powers, intend to produce external legal effects in an individual and particular situation*".

One of the novelties of this notion resides on the elimination of the requirement that the administrative act is produced by an organ integrated in the public administration; being therefore a material notion and not an organic one (Caupers 2013, p. 157).

Furthermore, the proposal of the New CPA tries deliberately to link the internal exercise of administrative power to the European Union framework and therefore shows more openness to the international dimensions of the exercise of public power (Article 19).

This reference is seen, nevertheless, as unsatisfactory by part of the doctrine due to the fact that it lacks reference to other situations of co-administration between the European Union and member States (Freitas 2013, p. 162), to the circumstance that it forgets other levels of administrative cooperation beyond the European Union and doesn't regulate the internal structure of the Portuguese administration when acting within transnational *fora* (Roque 2014a, p. 12), and to the fact that it ignores the complex area of transnational legal situations (Sampaio 2013, p. 24).

On this respect, we might be lead to believe that the redaction of Article 2 (3) of that New CPA can also be applicable to all administrative acts, either national or foreign, if they are to produce effects in Portugal: "*The dispositions of this Code regarding the general principles, the procedure and the administrative activity are applicable to the conduct of all entities when, regardless of their nature, they find themselves in the exercise of administrative authoritative powers or regulated spe-*

cifically by administrative law provisions" (also, Roque 2014a, p. 13). However, in the absence of specific rules on international administrative competence and on recognition of foreign acts in the current and in the New CPA, it is difficult to ascertain the true extent of the submission of foreign acts to national procedural and substantive rules.

As a final note, accompanying a tendency to divert from administrative acts to other forms of administrative behaviour towards private parties – as happens with the concept of procedural/legal administrative relations, considered as the new core of administrative law (Silva 1998, p. 14 ff. and Article 65 of the New CPA); or with simplified forms of action, such as communications to the Administration that have legal effects (Article 134 New CPA) –, some authors consider that the best suited notion to cover all dimensions of the forming transnational law is the one of "transnational international situations", including not only administrative acts, but also contracts and other actions from the administration that have international projection (Roque 2014b, pp. 301–375).

General Procedure for the Adoption of Administrative Acts

The Law that governs the habitual administrative procedure for adopting administrative acts is the CPA, in Articles 52–113 (and soon, the New CPA, in Articles 53–95 and 102–133).

A first stage corresponds to the initiative – either public or private – of the procedure; followed by the instruction of the procedure – gathering of evidence, delivery of legal opinions, collection of participations and the production of a decision report or proposal. The constitutive stage follows with the adoption of the administrative act, whose effects might be dependent upon a stage that allows for the adopted act to be effective (Oliveira et al. 2010, p. 373).

Within this framework, the rights of interested parties in the administrative procedure for the adoption of administrative acts are guaranteed and have constitutional ranking (Article 267 (5) of the Portuguese Constitution).

However, the Portuguese Legal Framework on the participation of interested parties in the administrative procedure is only developed in what regards the participation of citizens and the associations that represent their interests, in the form of a previous hearing (either oral or written) regarding the projected decision (Article 100 and ff. CPA; Article 122 and ff. New CPA), which requires the interested or interested parties to be previously identified as such.

With some explicitly laid down exceptions,[4] no public hearing is held on the procedure of adoption of an administrative act. Also, there isn't a general proce-

[4] For instance in what concerns major land parcelling decisions (article 7 and 22 of Decree-Law no. 555/99, 16 December), and Environmental Impact Assessment Decisions (Article 39 of Decree Law no. 151-B/2013, 31 October). A public hearing can also be held whenever the number of

dural stage that envisages the intervention of interested foreign public administrations in the procedure.

Of course, some administrative procedures such as the Environmental Impact Assessment include the possibility for other interested States to participate in a decision that will have extraterritorial effects, without the need to use traditional public international law instruments (Article 32 ff. of Decree Law no. 151-B/2013, 31 October). Article 8 of Decree-Law no. 232/2007, 15 June enlarges this obligation to all procedures of programmes, plans or projects with environmental impacts in other European Union Member States (followed by a Protocol between the Portuguese and the Spanish Government, of 19 February 2008, defining the terms of this participation). This participation corresponds to a European Union law obligation and is seen as an example of a transnational administrative act (Silva 2010b, p. 79; Antunes 2013, p. 157).

Besides this legal framework, other types of transborder cooperation have been introduced through public international law instruments, for instance the Albufeira Convention of 30 November 1998 between Portugal and Spain on cooperation for the protection and sustainable use of the waters of the mutual river basins and the Valencia Convention of 3 October 2002 between Portugal and Spain on the transborder cooperation between territorial instances and entities (regulated by Decree-Law no. 161/2009, 15 July).

Lastly, although the CPA (and the New CPA) does not ensure the participation *as such* of foreign public administrations, authors consider that it should also include the relations between Public Administrations when one of the Administrations presents itself as an administrated party or when inter-organic or inter-administrative relations are at stake (Oliveira et al. 2010, p. 290). Therefore if an administration of another Country or another international entity intervenes in an on-going administrative procedure, demonstrating interest to do so, that participation should be recorded and taken into account. This approach seems to find some support in Article 68 (4) of the New CPA that recognizes to administrative bodies of other public entities legitimacy to intervene in procedures, whenever their rights or duties are affected or collective interests are at stake. Also it should not be debarred that the Portuguese public administration asks foreign administrations to deliver legal opinions or to participate in procedural conferences.

Moreover, a recent doctrinal tendency goes beyond this possibility of intervening in procedures abroad and defends the internalization of foreign interests that should be ensured in all relevant administrative procedures, creating a culture of reciprocal consideration (Fernandes 2010, p. 403) or even developing a set of administrative conflict of (bilateral) law rules, through which the *forum* State would apply the law of the most connected State to a transnational international situation (Roque 2014b, p. 599–737).

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interested parties is so high that a previous hearing would be impractical (Article 103 (1c) of the CPA; Article 124 (1d) of the New CPA).

Enforcement of Administrative Acts

In order to be effective from the date it is adopted, a national administrative act must have essential structural elements: subject, object and content. However, the effects of administrative acts that require publication only take place after it occurs. There is also extravagant legislation that demands, besides publication in the official journals, the publication in web portals or in the sites of the issuing authority (see, for instance, Decree-Law no. 48/2011, 1 April). This "double" publication will be extended under the New CPA (Article 159). Also the opposability of acts, imposing duties or obligations on their addressees, is dependent upon their serving.

If those acts need to be executed, i.e. if they need the performance of tasks in order for them to be fully operational (if a sum needs to be paid, for instance) the question of their execution arises. Naturally, those acts can be complied with voluntarily.

In the event of failure to comply with an administrative act, the Portuguese public administration can, in most cases, under the CPA, enforce compliance without going through courts.

Article 149 CPA establishes a general principle of coercive execution of administrative acts, with the exception of the acts that determine the satisfaction of pecuniary obligations, which are executed in Tributary Courts (Articles 149 (3) and 155), the acts that impose non fungible personal obligations (since they are only allowed whenever a legal authorization exists, according to Article 157 (3) as happens with some cases of commitment, detention and expulsion), and acts that are necessarily executed through a judicial order, such as mandates to enter in a domicile (for this reserve of judge, see Fonseca 2012, p. 676).

In any case, the administrative execution procedure demands the practice of an explicit administrative act (Article 151 of the CPA, except in necessity situations; Article 177 (1) of the New CPA), an autonomous decision to execute that act and its service (Article 152 of the CPA; Article 177 (2) (3) of the New CPA), and also proportionality in the choice of the type of coercive execution adopted (Article 151 (2) and 157 (3) of the CPA and Article 178). Also intimations (to execute the act in a certain delay) and the establishment of penalties in the case of non-fulfilling non-fungible obligations are possible (Andrade 2010, p. 167). The execution act is accordingly qualified as an autonomous act, that can be judicially disputed.[5]

Over the years there has been a doctrinal dispute (Machete 1994, p. 448–470) between the position according to which forcible execution of administrative acts

[5] The jurisprudence of the Portuguese Supreme Administrative Court still seems to adopt a restrained view on the judicial revision of executive acts since the invalidity of executive acts is appraised only in case of a deviation from an abstract normal procedure of execution [Decision of 11 October 2007, case n.º 0478/07, accessible from www.dgsi.pt]. This has been nevertheless a considerable improvement from the days where execution was not reviewable, because it was logically and necessarily comprehended in the previous act (the one that defined the legal situation). See Decision of the Supreme Court of Justice from 25 January 1984, in *Revista de Legislação e Jurisprudência*, 1984–1985, n.º 3727, pp. 302 ff.

Recently, the New CPA has generously recognized the possibility of judicial review of enforcing acts (Article 182).

was considered the epitome of administrative power (Caetano 1973, pp. 26, 33–36, 447–451; Amaral 2013a, b, p. 32), and the position according to which execution should only possible in urgent situations duly justified or whenever law so prescribed (Soares 1978, p. 191; Correia 1982, p. 341; Almeida 2012, p. 170; Machete 1992, p. 81). For some, the solution embodied in the CPA (that excludes some situations from the scope of that general authorisation) made a reasonable balancing of interests between the rights and interests involved (Pereira 2010, p. 807).

In the New CPA it is explicitly established that a direct administrative execution is only possible in the situations established by law or in cases of "extreme urgency" (Article 176 (1)).[6] Also Article 183 of this New CPA states that whenever coercive enforcement isn't possible (which might happen in a broader set of cases) public authorities may resort to the competent administrative courts that will determine the execution of the administrative act. This legal option has been welcomed by some, but criticized by others: either calling it a "mercy blow" to the privilege of previous execution, raising concerns in terms of separation of powers (Fonseca 2013); either considering that the principle of previous execution, being no longer a fundamental principle of the Portuguese administrative system, transforms this into an Anglo-Saxon type of administration, without sufficient justification to do so (Amaral 2013b, p. 151); either preferring that the legislator would have structured a common executive procedure (Machete 2013, p. 40–45).

Service Abroad of Administrative Acts

The service of administrative acts is defined in the CPA (Articles 66–70). The means to serve administrative acts are the following: (a) by post, if there is post distribution; (b) in person, if this form of service does not impair the celerity of the procedure or serving by post is impossible; (c) by telephone, telegram, telex or telefax, whenever urgency so demands; (d) or through written public announcements.

In what regards service by post, despite the fact that it was defended that the registered form was not necessary but advisable (Gonçalves 1998, p. 1116–1117), the Portuguese Constitutional Court recently considered that the interpretation of Article 70 (1) (a) CPA not requiring a registered post service in the case of serving the withdrawn of judiciary support was unconstitutional.[7]

Nowadays extravagant legislation already establishes the preference for electronic service of acts through email (see, for instance, Article 121 of Decree-Law no. 555/99, 16 December). Again, the New CPA (Articles 112) will allow more generally the use of electronic means of service (email or electronic service), in the case of legal persons (whenever their email is indicated in the procedure, and

[6] A specific legal diploma will, according to Article 8 (2) of Decree-Law no. 4/2015, 7 January, define the terms according to which the Portuguese Administration can directly enforce administrative acts.

[7] Decision of 21 October 2013, case no. 636/2013, published in the Portuguese official journal *Diário da República*, Series I, No. 203, 21 October 2013.

without the need for previous consent) or natural persons (as long as they consent on that form of service) (Carvalho 2013, pp. 98–108).

In Portugal, the following administrative acts should be notified: acts that decide private applications; acts that impose duties, sanctions or cause harm; acts that create, terminate, improve or diminish rights or legally protected interests and the conditions for their exercise (Article 66 of CPA; Article 114 (1) New CPA). Which means that almost all administrative acts that touch legal positions (from the applicant or interested parties) must be served. The service of restrictive acts is considered a constitutional guarantee and a warranty of the knowledge of such acts, as demanded by adequate administrative procedure (Correia 2006, p. 584).

The notification (service act) must contain: the integral text of the administrative act; the identification of the administrative procedure, including the author of the act and the date; and the mention of the administrative organ of appeal and the respective delay for that appeal, whenever it is necessary (Article 68 of CPA; Article 114 (2) New CPA).

For the demands of the notification procedure to be met the service should be made individually, formally and intentionally (Correia 2006, p. 587). In case of omission, inexistence or insufficiency of the service, where the notification does not include the content of the decision or it is in such a way contradictory or insufficient that a normal person would not recognize that content, the service does not produce effects; in cases where some doubts may arise or some elements are missing the recipient may ask for the service to be completed (Article 60 CPAC).

No rule is provided as to service of acts abroad or the reception of such acts. The only rule that can be remotely applicable is referred to the presentation of applications in the Portuguese diplomatic and consular representations (Article 78 CPA; Article 103 (4) (5) New CPA). Besides, the European Convention on the Service Abroad of Documents relating to Administrative Matters of 24 November 1977 (CETS 94) was signed by Portugal in 1980, but never ratified, remaining therefore inapplicable.

We believe, however, that the definition of the types of acts that should be served and also their content is applicable for service in other countries. In what regards the means of service, if the recipient is also the applicant of the administrative procedure or if his address is officially known, no obstacle seems to exist to the service of documents directly through the post on a person within the territory of other States.

In other cases, beyond consular and diplomatic means (that might be used although not directly ascribed in the CPA and the New CPA), also public announcements have been used in situations where administrative action must be taken and the whereabouts of the interested party is unknown (for instance in what regards the demolishment of buildings threatened of ruin). The end result is therefore very similar to the applicable to service of notifications abroad in judicial procedures, according to Article 239 and ff. of the Civil Procedure Code, CPC.[8]

[8] Law no. 41/2013, 26 June. For instance, according to the Decision of the Coimbra Appeals Court of 17 January 2006 (proc. 3824/05), accessible from www.dgsi.pt, a defendant resident abroad should be served according to the rules defined in international instruments applicable. If inexistent, service can be made by post, by rogatory letter or by public announcements.

In what regards administrative sanctions, the situation, however, might not be similar, since Decision n.º 5/2014 of the Portuguese Supreme Court of Justice,[9] that harmonised jurisprudence in criminal matters, decided that a rogatory letter sent to the authorities of the place where the defendant is found isn't enough to allow for him to be later on judged *in absentiam*. Also the plurality, with two dissenting opinions, went on to say that sending post abroad doesn't amount to adequate service, since foreign post officers aren't "judiciary agents" of the issuing country (they do not have the legal and functional duty to certify the delivery). Given the subsidiary application of criminal guarantees to administrative sanctions, some major effects of service regarding the possibility of coercive enforcement may therefore not apply to service abroad.

Unlike what happens in criminal and civil matters,[10] the right to receive documents in a language the parties understand isn't legally guaranteed in administrative procedures (except in the cases where judiciary support is at stake, Article 7 ff. Decree-Law no. 71/2005, 71 March). However, the rules in criminal and civil matters should be subsidiarily applicable to administrative procedures (Roque 2014b, p. 777).

Recently in the Recommendation of the Portuguese Ombudsman n.º 2/B/2013 in case Q-3365/12 (A5),[11] it was advocated that besides the right to receive a translated sanctioning act in a understandable language, the formularies of such acts "*should be translated into English language whose universality and global nature is today unanimously recognized…"*.

As a conclusion remark, due to its fragmentary nature, we find that the Portuguese Law is insufficient in what regards service of acts in other countries or their reception by the Portuguese Authorities. Therefore it should be changed in order to adjust administrative procedures to an international setting. Also a Council Regulation that would apply in the administrative sphere rules similar to the ones established in Council Regulation (EC) No 1348/2000 of 29 May 2000 would be welcomed.

Recognition and Execution of Foreign Administrative Acts

Although no general administrative or judicial procedure aiming at the recognition and execution of administrative acts was introduced in the CPA (or in the New CPA) and in the CPAC, it isn't excluded that some level of receptivity exists in what regards recognition and execution of foreign administrative acts.

Indeed, there are special rules, either legislative (either conventional, see *infra)* that lay down recognition regimes. Some of them find their basis in the will of the

[9] Delivered in case n.º 2911/09.9TDLSB-A.E1-A.S1 and published in *Diário da República*, I Series, No. 97, 21 May 2014.

[10] See Council Regulation (EC) No 1348/2000 of 29 May 2000, Article 20 of Law no 144/99, 31 August; Article 92 of the Criminal Procedure Code; Article 133 and 134 of the CPC.

[11] Accessible from http://www.provedorjus.pt/site/public/archive/doc/Rec__2B2013.pdf.

receiving State and in the balancing of interests (public and private) it makes[12]; but most of them are influenced by or result from the process of European integration (and in some cases from international conventional instruments) that prompted a wave of mutual recognition.[13]

Depending on the effects sought and the level of harmonisation and functional equivalence between national provisions (from the issuing and the receiving State) the type of recognition adopted varies from automatic recognition (compensated by the possibility of a *a posteriori* opposition to the recognition and execution of the administrative act) to conditional recognition (requiring a preventive procedure and a reception act from the receiving State).

However, in cases where no legislative or conventional answer to recognition is found, uncertainty settles.

Sampaio (2014, p. 93–99) advances that it is possible to establish automatic recognition rules even in what regards third countries (non-EU) as long as there is a sufficient harmonisation between legal orders and under the condition of reciprocity. Nevertheless, the author also considers that this method might be disputed – given the principle of national sovereignty. This means that there isn't sufficient reassurance for administrative entities to recognise the effects of foreign administrative acts in the absence of explicit laid down rules.

As a way forward, the definition, by the issuing State, of general internal rules on the subject of recognition and execution of foreign administrative acts would be welcomed. This doesn't mean that a certain level of approximation of legal systems shouldn't exist through conventional efforts or international regimes but we do not believe this should impair the definition of national recognition frameworks.

Indeed in some cases – unlike of what usually happens within the European Union, with the widespread recognition of the effects of transnational acts – a high and differentiated level of disposition powers and control must be recognised to the receiving State, leaving it to him to define if recognition takes place and under which conditions. It is up therefore to each State to define such regimes in order to

[12] For instance, the Law of Hunting (Law no. 173/99, 21 September) exempts strangers not resident in Portugal from obtaining a hunting permit as long as they have a title to hunt in their country of nationality or residence. However, a special permit should be delivered under condition of reciprocity (Article 22). Also in the Portuguese Law on Cultural Goods (Law 107/2001, 8 September) a special judicial action for restitution of illegally foreign imported goods was introduced, although it is only applicable to non-EU member States under the condition of reciprocity (Article 69).

[13] The examples are various (as conversely happens in EU Law): in the shares market, regarding the approval of the prospect of public offers of acquisition (Articles 146 to 147-A of Decree-Law no 486/99, 13 November), in the credit institutions and insurances arena (Article 44 ff. of Decree-Law no 298/92, 31 December, and Article 10 of Decree-Law no 94-B/98, 17 Abril), in the migration realm, regarding return decisions from another Member State (Article 169 of Law no 23/2007, 4 July), in the driving permits field (Article 125 of Decree-Law no 114/94, 3 May), etc.

In terms of recognition a model based on mutual recognition of diplomas was introduced under the influence of EU Law (Decree-Law no 341/2007, 12 October), but a specific recognition regime still exist conferring competence to universities for the decision to give or deny a request of equivalence (Decree-Law no 283/83, 21 June) (Otero 2007, p. 499; Roque 2014b, pp. 1206–1209).

establish a comprehensive and stable framework on recognition and enforcement, by defining the applicable requirements, procedures, authorities and effects.

This recognition framework could benefit highly from the input brought by private international law procedures for the recognition and/or execution of court decisions, mainly the ones laid down in Articles 978 ff. of the CPC. In these cases the control is only residually of substantial nature, and the criteria to refuse recognition are very approximate to the ones usually relevant in the administrative sphere (authenticity of the act, public policy, regularity of the procedure in what regards defence safeguards and the stability of the decision).[14]

It might even be argued, due to the constitutional guarantee of access to courts for the appraisal of all relevant legal claims (Article 20 of the Portuguese Constitution), that such procedure already exists, since the procedure of formal revision established in Articles 978–985 of the CPC should also be made available (in Administrative Courts and with due adaptations) in the cases of recognition of foreign administrative acts.[15] This goes along the line that recognises that civil procedure law and administrative procedure law have great affinity, therefore civil procedure law is applicable, when necessary, with due adaptations (Amarala 2012, p. 188).

A different proposal originates from Colaço Antunes, who suggests the application of the common administrative action (Article 37 ff. CPAC) to situations where the recognition of a transnational act is being opposed – since what is at stake is not the act itself but its legal effects – while recognising that judicial protection is still the Aquiles heel of transnational acts (Antunes 2013, pp. 160–164).

Miguel Prata Roque, on the other hand, considers that the judicial revision procedure regulated in the CPC should be reserved to parajudicial acts (for instance of regulatory agencies), while in all other cases the autonomous recognition of an act should be made available either under a special administrative action that condemns the Administration to issue a (due) act (Article 66 ff. CPAC) or under a common administrative action (Article 37 ff. CPAC). In cases of opposition, the pertinent

[14] It is interesting to remark that the preamble of Decree-Law 4/2015, 7 January, that adopts the New CPA explicitly refers the paradigm of the CPC: the exercise of responsibility between citizens and the Administration.

[15] Lima Pinheiro considers that the procedure of revision of foreign court decisions is applicable (in Judicial Courts, so it seems) in the case of administrative decisions in the private law area (Pinheiro 2012, p. 547 ff.). In a recent case, the Supreme Court of Justice in 25 of June 2013 (case no. 623/12.5YRLSB.S1), considered that the decision of a foreign administrative authority – a notarial act – over private rights (*in casu*, the conversion of a separation in divorce in Brazil included in a public deed) should be considered as included under the scope of the internal recognition procedure for judicial decisions.

See, however, the Decision of the Supreme Court of Justice of 22 May 2013, case 134/12.9YFLSB (Decisions accessible from www.dgsi.pt). In this case it was refused that an administrative act as such has the same strength of a reviewed and confirmed foreign judicial decision and it was remarked that no administrative decision may impose itself in the legal order of another State due to the territoriality principle (although it might be taken into consideration). The Court went on to say that the decision could not be subject to the confirmation and revision procedure because it didn't regulate private legal positions.

action would be a special administrative action to challenge the administrative act of recognition (Article 50 ff. CPAC) (Roque 2014b, pp. 1211–1213).

Also the requirements for foreign acts to be effective and recognised in Portugal (or for opposing an automatic recognition) aren't legally established. However, we tend to believe that the essential requirements for foreign acts to be (or remain) effective[16] are their *authenticity* and *stability*.

(i) The recognition of administrative acts is dependent upon their real public nature (which is particularly important since evidentiary or indirect effects of foreign administrative acts can be drawn without specific procedures). According to Article 365 (1) and Article 371 (1) of the Portuguese Civil Code (CC), applicable also to the administrative realm, the authentic or particular acts passed abroad, in conformity with the respective law, have similar evidentiary value as documents of the same nature issued in Portugal.

Only if founded doubts arise over the authenticity of the document should, according to Article 365 (2) CC, its legalisation is demanded. In this case, Article 440 CC establishes that "*Without prejudice to the prescriptions of European regulations and other international instruments, the authentic documents passed in foreign country, in conformity with the law of that country, are considered to be legalised as long as the signature of the public officer is recognised by a Portuguese consular or diplomatic agent in the respective State and the signature of this agent is authenticated with the respective white consular stamp*".

Additionally, it is necessary, in most cases, the public certification of the translation of the documents, done by notaries or by lawyers, solicitors or chambers of commerce and industry, according to Articles 5 and 6 of the Portuguese Notarial Code and of Decree-Law no. 237/2001, 30 August). One exception to this rule resides in Article 43 (3) of the Code of Land Registry, according to which "*the documents written in foreign language can only be accepted when translated according to the law, except if they are written in English, French of Spanish language and the competent public officer dominated that language*". However, the New CPA adopts a more traditional approach, considering explicitly that Portuguese is the language of the procedure (Article 54).

This legalisation is a very bureaucratic, expensive and time-consuming procedure, but nonetheless important in the Portuguese sphere since most of the Portuguese speaking Countries like Angola, Mozambique, Brazil and Guinea aren't a part of the Apostille Convention.

The Apostille, other conventional instruments and the efforts of the European Union both in patterning public documents and promoting their circulation

[16]There is a wide diversity of extraterritorial effects of administrative acts, since, depending on each case, evidentiary or incidental effects; constitutive effects or requests for enforcement (or forcible execution) might be at stake.

have, in many other cases, simplified and expedited the control of their authenticity.[17]

(ii) Regarding the stability of foreign administrative acts, it is established that the recognition of effects of transnational acts should only be granted or allowed for if and until those acts are final and effective in their countries of origin (Roque 2014b, pp. 837–849; Sampaio 2014, p. 105).

However, there are several answers in what regards the importance of validity and constitutionality requirements in this field.

Answering whether the validity of those acts should be a requirement for recognition Paulo Otero (2007, p. 504) considers that since the application of foreign law is seen, in Portugal, as a matter of law and not only as a fact, the validity (nullity or inexistence) of a foreign administrative act should *always* be analysed by the competent authorities in order to refuse its internal relevance.[18]

It might also be questioned whether to support recognition there should be an equivalence or comparability of substantial solutions (between the issuing and the receiving State). In fact, in some cases, regulatory harmonisation is a prerequisite to establish certain types of recognition,[19] while in others recognition could be called upon when those rules are extremely distinct or even when the foreign administrative act doesn't have a *proxy* in the receiving State.

This leads to the question of the eventual constitutionality control of the foreign administrative act according to (exogenous) constitutional parameters of the receiving State. Jorge Sampaio allows for it in cases of *a posteriori* control of transnational acts automatically recognised; for in cases of conditional recognition, since a specific procedure exists, the use of the public policy clause (*ordre public*) is upheld (because this is a requirement established for judicial recognition of foreign decisions) (Sampaio 2014, p. 111–131). Miguel Prata Roque, considers that the control of exogenous constitutionality should only exist as a last resort, in order to guarantee the fundamental (essential core) values of the receiving State and at the same time allows for a control under the public policy scheme but conceives it in an original way, by embracing common fundamental values to the State and to the cosmopolitan society (Roque 2014b, pp. 1005–1032).

However, adopting the traditional notion according to which the concept of public policy is more restrictive than the control of constitutionality (comprising only

[17] See COM(2010) 747 final and COM(2013) 228 final. Also the Court of Justice has recognised that public documents produced in one Member State shouldn't be disputed in another Member State unless there would be concrete indicators that were able to raise doubts about its accuracy (see Decision of 2 December 1997, in case C-336/94 *Eftalia Dafeki*/*Landesversicherungsanstalt*).

[18] Also defending the inapplicability of such acts, in case of grave vices, that generate nullity (Antunes 2013, p. 160).

[19] Even in these cases the test applied would be according to Miguel Prata Roque, the moderate substantial equivalence: the refusal to recognize an act is legitimate only if the administrative act violates manifestly the European constitutionality/illegality bloc (Roque 2011a, p. 606).

intolerable incompatibilities with the *forum* State conceptions[20]) (Ramos 1980, p. 216), those positions seem contrary to the spirit of recognition.

(i) For one, it seems odd that the level of control in situations of automatic recognition (where, in principle, there is more harmonisation, even from a constitutional point of view) is wider than in the cases of conditional recognition where the control is performed under more restrictive considerations (public policy).
(ii) It has the setback of contradicting the evolution line within European Union Law, where in cases of opposition to automatic recognition (in civil and commercial areas) the concept of public policy continues to be used.
(iii) It contraries the distinction between applying foreign law (through a national adjudicative act) and recognising effects to a foreign administrative act that already performed that task. In this case, the criteria used in the recognition of foreign decisions (namely the control through the public policy clause) are more adjusted.
(iv) The flexibility inherent to the public policy clause allows for it to take into consideration specificities linked to the exercise of national public powers and the national public interest[21] and also to intervene more stringently whenever the situation has a closer connection to the *forum* State.
(v) Also the public policy clause is indifferent to the striking differences in the systems of constitutional control, since it is a methodological part of the recognition reasoning, and therefore more adjusted to an area where the procedures of recognitions aren't yet settled, nor even established.

Indeed we believe that public policy should constitute a limiting factor in all recognition regimes (Pinheiro 2012, p. 347). The ways the receiving State might accredit fulfilment of public policy requirements would be through a primary or

[20] State that is however included in a (sterner or looser) web of legal interdependencies at an international and global level, which also influences the concept (or concepts) of public policy.

[21] Besides the traditional public policy in the cases of foreign acts, we believe that also considerations related to the preservation of the public interests of the executing State might play a role in limiting the recognition and effects of foreign administrative acts. This is explicitly so in the case of Article 7 (1) (b) of the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, applicable in Portugal: refusal to comply is possible whenever "*that compliance with the request might interfere with the sovereignty, security, public policy or other essential interests of that State*".

Miguel Prata Roque considers that in the present stage, the application of a foreign administrative rule by national courts is limited to two fundamental requirements (i) the application of the foreign administrative rule cannot affect the whole exercise of sovereignty from the Forum State; (ii) The administrative rule to be applied should not intend, exclusively, the protection of public interests of the State of origin (or his citizens) in relation to foreign interests (Roque 2011b, p. 153). Colaço Antunes also defends that, despite the fact that duplication of control isn't desirable, whenever there is a violation of primary public interests, that might implicate the national control and inapplicability of transnational acts (Antunes 2013, pp. 163–164).

direct recognition procedure of the foreign decision or through an incidental analysis of such decision.[22]

Specifically in the field of administrative penalties, and in the absence of special rules on the causes for refusal of recognition and execution – such as the ones laid down in Articles 14 and 15 of Law no. 93/2009, 1 September[23] –, we lean towards the following minimum content of the public policy clause: appraisal of the rights of defence and of the type of sanctions applied (if they lead to imprisonment, if they are degrading, if they deprive the person of minimum means of subsistence), of their application to persons not able to understand the content of the illicit act; and of the excessive length of the prescription period.[24]

The lack of international competence of the issuing Administration constitutes another arguable cause for refusal of recognition.[25] However, since the exercise of extraterritorial (legislative and adjudicative) jurisdiction is generously allowed, as long as there is a connection between the State and the relevant extraterritorial event, and because it is hard to find explicitly laid down rules on international administrative competence,[26] the control of competence of the State that dictated the administrative act should be possible only in limited situations (as also happens with the control of the judicial competence of the Court of origin).[27]

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[22] As an example, the Portuguese Courts were called to adjudicate a situation involving confiscatory measures in Cuba and its effects in property detained in Portugal (in relation to the trademark H. Upmann of the firm Menendez, García y Compañia). However, the judicial decision (Decision of 6 June 1989, case 076578, *Boletim do Ministério da Justiça*, 388, p. 537) was not as interesting as the legal opinions delivered in the case, which considered the conformity of such a measure with constitutional law, public international law, private international law and also the general public policy clause. João Baptista Machado and Rui Manuel Moura Ramos, considered that the principle of inapplicability of political foreign laws conduces to the fact that executive support or "legal enforcement" should be refused to them, not allowing them to constitute, modify or terminate new legal situations that violate the expectations protected by private international law. These authors consider that the international public policy is not applicable because the foreign law is not called upon the conflict of law rules, but continue to uphold that the public policy of the Portuguese Constitution of 1933 would have opposed such confiscatory measure (Machado 1985, p. 11 ff.), José de Oliveira Ascensão, considers that the confiscatory act cannot be effective towards property situated in Portugal in two senses: because the Cuban rules are not applicable (they refer themselves to an object that is in another State borders) and also because it infringes the Portuguese public policy (Ascensão 1986, p. 15 ff.).

[23] That implements Council Framework Decision 2005/214/JHA of 24 February 2005.

[24] The principle of double incrimination and the rule *ne bis in idem* have been reconfigured at least in the European Union arena, deserving a specific dogmatic treatment.

[25] As does fraud, mostly according to European Union Law (see Decision of 23 September 2003, in case C-109/01, *Akrich;* Decision of 25 July 2008, in case C-127/08, *Metock*; Decision of 26 June 2008, in joined cases C-329/06 and C-343/06, *Wiedemann;* Decision of 2 March 2010, in case C-135/08, *Rottman*).

[26] Double functionality of the internal rules of competence seems to be the preferred criterion to fill in this gap (Silva 2010a, p. 12; Roque 2013, p. 173).

[27] Ferrer Correia considers that a State should only demand that a judicial decision respects the exclusive competence of the recognising State. Beyond this criteria only exorbitant competences (the ones that are not based in a sufficient link between the State jurisdiction and the dispute) can be used to refuse recognition (Correia 2000, p. 479; Roque 2014b, pp. 1170–1175).

Lastly, in what regards enforcement, a State should only enforce an act that is enforceable under the law of the issuing Member State, as happens in civil and commercial areas covered by European Union Law. This can lead to distinctions within execution procedures whenever the coercive enforcement of foreign administrative acts should be taken to Court, according to the law of the issuing State. Furthermore, according to Paulo Otero, there is a certain distribution of competences in the area of recognition and enforcement of foreign administrative acts: it is up for the receiving State's law to establish the title that allows for the extraterritorial reach of foreign decisions. But it is in the issuing State that the definition of the relevant terms and formalities of the adopted act are found (Otero 2005, pp. 781 ff.).

International Conventions on Recognition and Execution of Administrative Acts

There is a wide number of conventions that directly or indirectly regulate the recognition and execution of foreign administrative acts in Portugal. We will mention only the most relevant,[28] not including conventions on subjects that might require the adoption of a public act but that are substantially of a civil nature (protection of minors or incapable persons, for instance).

As multilateral instruments, the Convention on the Recognition of University Qualifications, 11 April 1997, the Agreement on the Transfer of Corpses, 26 October 1973,

The European Agreement on the Abolition of Visas for Refugees, 20 April 1959, the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe, 13 January 1957, the Chicago Convention on International Civil Aviation, 7 December 1944, the Vienna Convention on Road Traffic, 8 November 1968, all presuppose the recognition of foreign acts and public documents.

In what regards bilateral instruments, the complexity is even wider. There are Readmission Agreements regarding persons in irregular situation (with Bulgaria, Spain, Estonia, France, Hungary and Lithuania); Agreements on mutual administrative assistance to prevent, investigate and repress customs infractions (with Spain and Morocco); Agreements on reciprocal recognition of driving licenses (with Mozambique and São Tomé and Principe); Repatriation/Deportation Agreements

This is not, however, undisputed. Paulo Otero considers that the control of competence is relevant as a requisite of validity and recognition of the act according to the foreign administrative laws (Otero 2007, p. 503). Lima Pinheiro, criticizes the lack of compete control, defending that foreign authorities should be considered to be competent if the title for their competence is similar or equivalent to the competence of Portuguese judicial authorities and there is no exclusive competence of the Portuguese authorities (Pinheiro 2012, p. 553).

[28] A listing is available at the official site of the Portuguese Documentation and Comparative Law Cabinet, an organ of the Portuguese General Attorney (http://www.gddc.pt).

with Canada and the United States; Agreement regarding transborder pursuit with Spain; Agreement on reciprocal treatment regarding residence permits with Switzerland. Also there are a widespread number of conventions (within the Council of Europe and with third countries) regarding the coordination of social security systems.

In what concerns legalisation of public documents, Portugal is a part of the following Conventions: European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers, 7 June 1968; Convention on the issue of certain extracts from civil status records for use abroad, 27 September 1956; Convention on the issue free of charge and the exemption from legalisation of copies of civil status records, 26 September 1957; Convention on the issue of multilingual extracts from civil status records, 8 September 1976; Convention on the exemption from legalisation of certain records and documents, 15 September 1977; Convention on the issue of a Certificate of Legal Capacity to Marry, 5 September 1980 and the Hague Convention abolishing the requirement of legalisation for foreign public documents, 5 October 1961. Regarding the Apostille, there is a specific regulation in Portugal of its procedure and costs, established by Dispatch no 18897/2009, 14 August and by Decree-Law no. 86/2009, 3 April. Surprisingly – because of the long-standing advances regarding e-Administration – Portugal hasn't yet adhered to the Electronic Apostille programme, which involves the issuance of Apostilles in electronic format, a digital certificate and an online verification.

The Specificity of Transnational Acts

The European Union has a pivotal role in what concerns the recognition of foreign administrative acts. This influence – that is closely linked with the phenomena of harmonisation and mutual recognition – has usually been detached from the general doctrine of *foreign acts* and referred to the dogmatic of *transnational acts* (precisely the one that has gained most attention, in recent years, in the Portuguese doctrine).

Not being possible, within the limits of this article, to define the concept of transnational acts as opposed (and if opposed) to foreign ones, we believe that the term "foreign" continues to be comprehensive enough to include alternate forms of administrative acts that aren't necessarily transnational because they do not have an intrinsic or typical vocation of extraterritoriality within an integrated area. And transnational acts do not consume all types of acts whose recognition is sought for.

Indeed, there is still a great difference between the recognition of an act adopted by another Member State of the European Union, within an area relevant to the EU (where there is an obligation or at least a principle of recognition, accompanied by systems or mechanisms of administrative cooperation) and the recognition of an act adopted by the authorities of a third country whose system – even at a constitutional level – might be quite distinct from the State of reception. Differences that influence the possibilities of intervention of the State of reception towards the foreign admin-

istrative act and translate to the method of recognition used (automatic, conditional, under an *exequatur* or certification procedure, under the requirement of reciprocity, etc.).

Main Doctrinal Tendencies Regarding Foreign Administrative Acts

Initially, this area was dealt under the umbrella of private international law, as shown by the doctrinal elaboration on the territorial application of law (private and public).[29] This is particularly visible in the writings of João Baptista Machado (Machado 1970), Marques dos Santos (Santos 1991), and Rui Moura Ramos (Ramos 1991).

In the public law arena, Marcello Caetano summarised that exceptions to the territoriality rule must be established in Treaties, Conventions or international law uses (Caetano 1973), while Afonso Queiró developed the analysis of the territoriality principle and of its detours or exceptions, identifying laws of personal applicability, "exportable laws" anchored in international law situations (ships, military forces, public services abroad); "importable laws" in the same conditions of the export of Portuguese law; non application of administrative law to property located in Portugal (ships flying over Portuguese territory); and differentiated application of administrative law in Portuguese territorial circumscriptions (Queiró 1980).

Most recently Paulo Otero (Otero 2005, 2007) and Miguel Prata Roque (Roque 2011b, 2013a) recover the subject, of territoriality in administrative law, adapting administrative and private international law concepts, such as conflict of laws and recognition.

Also the subject of international and mostly European influence over Portuguese administrative law has been widely recognised and dealt with by Portuguese authors.

In fact, this has been an area where much as been studied and analysed, although generally focusing on the overall organizational, procedural and normative links and convergence between the European Union and the national level. Without exhaustion, we point out the following writings: (Moniz 1996; Quadros 1999; Martins 2001; Otero 2002; Otero 2013; Silva 2006; Gonçalves 2006; Silva 2009; Roque 2010; Andrade 2010; Roque 2011a; Piçarra 2011; Moniz 2011; Silva 2011a; Silva 2011b).

Another perspective particularly close to the one of foreign administrative acts relates to *international* and *European administrative acts* (the ones that are adopted within the framework of international organisations or the European Union). In this specific area we can point out, within the European Union, the following essays: (Quadros 2005; Antunes 2005, 2008; Duarte 2008; Silva 2010b). For acts of other international organisations and their effects, see (Lopes 2010; Silva 2012).

[29] There is also more literature on extraterritoriality and recognition not only in the commercial and competition areas, but mainly in the realm of criminal and taxation law.

However, the nowadays focus of the Portuguese doctrine has been heading towards *transnational acts*, subject that a considerable range of authors have been systematically accompanying and developing. The names of Nuno Piçarra (Piçarra 2010a, b),[30] Suzana Tavares da Silva (Silva 2010b, c),[31] Colaço Antunes (Antunes 2013),[32] Miguel Prata Roque (Roque 2014b),[33] and Jorge Sampaio (Sampaio 2014),[34] immediately come to mind due to their eminent writings and teachings in the field.

Conclusion

The subject of recognition and enforcement of foreign administrative acts is not new, but is being renewed. May it be as such or under the dogmatic of transnational acts, this subject is in the order of the day. However not always greater attention means better regulation. And this is a field were, unlike what should be expected (or desired), plurality and fragmentation are still the rule and the need for clarification, either at a conventional or at a national level, of recognition procedures is crucial.

References

Almeida, Mario Aroso de. 2012. *Teoria Geral do Direito Administrativo: Temas Nucleares*, 329. Coimbra: Almedina.

Amaral, Diogo Freitas do. 2012. *Curso de Direito Administrativo*, vol. I, 3rd ed, 926. Coimbra: Almedina.

Amaral, Diogo Freitas do. 2013a. *Curso de Direito Administrativo*, vol. II, 2nd ed, 840. Coimbra: Almedina.

Amaral, Diogo Freitas de. 2013b. Breves Notas sobre o Projecto de Revisão do Código do Procedimento Administrativo. In *Direito & Política.* 2013, July-Oct, No 4, pp. 149 ff.

Andrade, José Carlos Vieira de. 2010. *Lições de Direito Administrativo*, 242. Coimbra: Imprensa da Universidade de Coimbra.

[30] The author defines and exemplifies the notion (mostly in the migration field) and notices that transnational acts although based, direct or indirectly on European Union Law, continue to be State administrative acts and not supranational forms of action, which still showcases the continuous importance of States in the administrative sphere.

[31] The author exposes several types of transnational acts and their link to mutual recognition, focusing also in the interconnections between several types and levels of administration.

[32] The author prefers the terminology transterritorial acts in order to avoid the traditional State stigma and deepens the dogmatic behind them.

[33] In his Phd thesis, the author does a comprehensive study of transnational legal situations, departing from the study of transnational situations (in terms of conflict of laws, competence and recognition) to the analysis of the possibility of a *cosmopolitan* administrative law.

[34] In this book, the author approaches systematically this new form of administrative action, giving indications for its legal development.

Antunes, Luís Filipe Colaço. 2005. Um Tratado Francês Lido em Alemão? O Acto Administrativo no Direito Comunitário e na sua Jurisprudência. In *Colóquio Luso-Espanhol: o Acto no Contencioso Administrativo: Tradição e Reforma*, eds. Luís Filipe Colaço Antunes, Fernando Sáinz Moreno 75 ff. Coimbra: Almedina.

Antunes, Luís Filipe Colaço. 2008. *O Direito Administrativo sem Estado: Crise ou Fim de um Paradigma*, 172. Coimbra: Coimbra Editora.

Antunes, Luis Filipe Colaco. 2013. *A Ciência Jurídico-Administrativa*, 760. Coimbra: Almedina.

Ascensão, José de Oliveira. 1986. O confisco realizado no estrangeiro e a titularidade de marca registada em Portugal. In *Colectânea de Jurisprudência*, 15 ff. Year 11, Tomo II.

Caetano, Marcello. 1973. *Manual de Direito Administrativo*, vol. I, 10th ed, 640. Coimbra: Coimbra Editora.

Carvalho, Carlos. 2013. O procedimento administrativo – tramitação e formalidades. Algumas questões e reflexões a propósito da revisão do CPA. In *Cadernos de Justiça Administrativa*, 98 ff, No 100.

Caupers, João. 2013. Comentários ao Projecto de Revisão do Código do Procedimento Administrativo. In *Direito & Política*, 157 ff. 2013, July-Oct, No 4.

Correia, J. M.Sérvulo. 1982. *Noções de Direito Administrativo*, vol. I, 575. Lisboa: Editora Danúbio.

Correia, António Ferrer. 2000. *Lições de Direito Internacional Privado*, vol. I, 546. Coimbra: Almedina.

Correia, J. M. Sérvulo. 2006. Inexistência e Insuficiência de Notificação do Acto Administrativo. In *Estudos em Homenagem ao Professor Doutor Marcello Caetano – No Centenário do Seu Nascimento*, vol. I, eds. Jorge Miranda, 583 ff. Coimbra: Coimbra Editora.

Duarte, Maria Luísa. 2008. *Direito Administrativo da União Europeia*, 187. Coimbra: Coimbra Editora.

Fernandes, Sophie Perez. 2010. As administrações públicas nacionais perante as situações residuais transnacionais de direito da União Europeia. In *Direito da União Europeia e Transnacionalidade*, eds. Alessandra Silveira, 403 ff. Lisboa: Quid Iuris.

Fonseca, Rui Guerra da. 2012. *O Fundamento da Autotutela Executiva da Administração Pública – Contributo para a sua compreensão como problema jurídico-político*, 862. Coimbra: Almedina.

Fonseca, Rui Guerra da. 2013. *A execução do acto administrativo – Revisão do Código de Procedimento Administrativo.* [online] Published 28.10.2013 [citied 10.5.2014]. Accessible from http://www.icjp.pt/debate/4268/4285.

Freitas, Lourenço Vilhena de. 2013. Comentários ao Projecto de Revisão do Código do Procedimento Administrativo. In *Direito & Política*, 162 ff. July-Oct, No 4.

Gonçalves, Pedro. 1998. Notificação dos Actos Administrativos (Notas sobre a Génese, Âmbito, Sentido e Consequências de uma Imposição Constitucional). In *Ab Uno ad Omnes – 75 Anos da Coimbra Editora 1920–1995*, ed. Jorge Miranda, 1091 ff. Coimbra: Coimbra Editora.

Gonçalves, Pedro. 2006. *Direito Administrativo da Regulação, Estudos em Homenagem ao Professor Doutor Marcello Caetano – No Centenário do Seu Nascimento*, vol. II, 535 ff. Coimbra: Coimbra Editora.

Lopes, Dulce. 2010. Direito Administrativo das Organizações Internacionais. In *Tratado de Direito Administrativo Especial*, vol. III, eds. Paulo Otero, Pedro Costa Gonçalves, 99 ff. Coimbra: Almedina.

Machado, João Baptista. 1970. *Âmbito de Eficácia e Âmbito de Competências das Leis– Limites das Leis e Conflitos de Leis: limites das leis e conflitos de leis*, 461. Coimbra: Almedina.

Machado, João Baptista, and Rui Manuel Moura Ramos. 1985. Parecer. In *Colectânea de Jurisprudência*, 11 ff. Year 10, Tomo V.

Machete, Rui. 1992. A execução do acto administrativo. In *Direito e Justiça*, 65 ff. Ano 65, 6.

Machete, Pedro. 2013. Eficácia e Execução do Ato Administrativo. In *Cadernos de Justiça Administrativa*, 40 ff. No 100.

Machete, Rui Chancerelle. 1994. Privilégio da Execução Prévia. In *Dicionário Jurídico da Administração Pública*, Vol. VI, 448 ff. Lisboa: Coimbra Editora.

Martins, Afonso D'Oliveira. 2001. A europeização do Direito Administrativo Português. In *Estudos em Homenagem a Cunha Rodrigues*, ed. Jorge de Figueiredo Dias, 999 ff. Coimbra: Coimbra Editora.

Moniz, Ana Raquel. 2011. Traços da Evolução do Direito Administrativo Português. In *Boletim da Faculdade de Direito*, vol. LXXXVII, 243 ff.

Moniz, Carlos Botelho, and Paulo Moura Pinheiro. 1996. Rapport Portugais. In *Administrative law under European influence – on the convergence of the Administrative Laws of the EU Member States*, ed. Jürgen Schwarze, 657 ff. Baden-Baden: Nomos Verlag.

Moura Ramos, Rui. 1991. *Da Lei Aplicável ao Contrato de Trabalho Internacional*, 956. Coimbra: Almedina.

Oliveira, Mário Esteves de, Pedro Gonçalves, and João Pacheco de Amorim. 2010. *Código do Procedimento Administrativo Anotado*, 2nd ed, 927. Coimbra: Almedina.

Otero, Paulo. 2007. *Legalidade e Administração Pública – O sentido da vinculação administrativa à juridicidade*, 1192. Coimbra: Almedina.

Otero, Paulo. 2013. *Manual de Direito Administrativo.* vol. I, 596. Coimbra: Almedina.

Otero, Paulo. 2002. A Administração Pública Nacional como Administração Comunitária: os Efeitos Internos da Execução Administrativa pelos Estados-membros do Direito Comunitário. In *Estudos em Homenagem à Professora Doutora Isabel de Magalhães Collaço*, vol. I, ed. Rui Manuel de Moura Ramos, 817 ff. Coimbra: Almedina.

Otero, Paulo. 2005. Normas Administrativas de Conflitos: As situações jurídico-administrativas transnacionais. In *Estudos em Memória do Professor Doutor António Marques dos Santos*, vol. I, eds. Luís de Lima Pinheiro, Dário Moura Vicente, Jorge Miranda, 781 ff. Coimbra: Almedina.

Pereira, Ravi Afonso. 2010. A execução do Acto Administrativo no Direito Português. In *Estudos em Homenagem ao Professor Doutor Diogo Freitas do Amaral*, eds. João Caupers, Maria da Glória F. P. D. Garcia, Augusto de, 793 ff. Coimbra: Almedina.

Piçarra, Nuno. 2010a. A eficácia transnacional dos actos administrativos dos Estados-Membros como elemento caracterizador do direito administrativo da União Europeia. In *Estudos em Homenagem ao Professor Doutor Diogo Freitas do Amaral*, eds. João Caupers, Maria da Glória F. P. D. Garcia, Augusto de Athayde, 585 ff. Coimbra: Almedina.

Piçarra, Nuno. 2010b. "União Europeia e acto administrativo transnacional". In *Direito da União Europeia e Transnacionalidade",* Alessandra Silveira (coord.), 297 ff. Lisboa: Quid Iuris.

Piçarra, Nuno, and Francisco Pereira Coutinho. 2011. The "Europeanization" of the Portuguese courts. In *Revista de Direito Público*, 157 ff. No 5, Jan-June.

Pinheiro, Luís de Lima. 2012. *Direito Internacional Privado. Vol III – Competência Internacional e Reconhecimento de Decisões Estrangeiras*, 2nd ed, 618. Coimbra: Almedina.

Quadros, Fausto de. 1999. *A Nova Dimensão do Direito Administrativo – O Direito Administrativo Português na Perspectiva Comunitária*, 52. Coimbra: Almedina.

Quadros, Fausto de. 2005. O acto administrativo comunitário. In *Colóquio Luso-Espanhol: o Acto no Contencioso Administrativo: Tradição e Reforma*, eds. Luís Filipe Colaço Antunes, Fernando Sáinz Moreno, 63 ff. Coimbra: Almedina.

Queiró, Afonso. 1980. Eficácia Espacial das Normas de Direito Administrativo. In *Direito Administrativo*, 87 ff. Year 1, N.° 2.

Ramos, Rui Moura. 1980. *Direito Internacional Privado e Constituição – Introdução a uma Análise Geral das suas Relações*, 274. Coimbra: Coimbra Editora.

Ribeiro, Maria Teresa. 1992. A eliminação do acto definitivo e executório na Revisão Constitucional de 1989. In *Revista da Faculdade de Direito da Universidade Católica Portuguesa*, vol. VI, 365 ff.

Roque, Miguel Prata. 2010. O Direito Administrativo Europeu – Um Motor da Convergência Dinâmica dos Direitos Administrativos Nacionais. In *Estudos em Homenagem ao Prof. Doutor Sérvulo Correia*, Vol. II, ed. Jorge Miranda, 903 ff. Coimbra: Coimbra Editora.

Roque, Miguel Prata. 2011a. *Direito Processual Administrativo Europeu*, 677. Coimbra: Coimbra Editora.

Roque, Miguel Prata. 2011b. As Novas fronteiras do Direito Administrativo – Globalização e mitigação do princípio da Territorialidade do Direito Público. In *Revista de Direito Público*, 107 ff. No 5, Jan-June.
Roque, Miguel Prata. 2013. Mais um passo a caminho de uma administração globalizada e tecnológica? In *Direito & Política*, 166 ff. July-Oct, No 4.
Roque, Miguel Prata. 2014a. O Nascimento da Administração Eletrónica num Espaço Transnacional (Breves Notas A Propósito Do Projeto De Revisão Do Código do Procedimento Administrativo). In *E-Pública – Revista Electrónica De Direito Público* [online], 1 ff. 2014, No 1, [Citied 15.6.2002]. Accessible from http://e-publica.pt/pdf/artigos/onascimento.pdf.
Roque, Miguel Prata. 2014b. *A Dimensão Transnacional do Direito Administrativo – Uma visão cosmopolita das situações jurídico-administrativas*, 1405. Lisboa: AAFDL.
Sampaio, Jorge Silva. 2013. Um novo Código. In *Advocatus*, 24. Sept 2013.
Sampaio, Jorge Silva. 2014. *O Acto Administrativo pela Estrada Fora – Os Efeitos Transnacionais do Acto Administrativo*, 202. Lisboa: AAFDL.
Santos, António Marques dos. 1991. *As Normas de Aplicação Imediata no Direito Internacional Privado – Esboço de uma Teoria Geral*, vol. II, 691 ff. Coimbra: Almedina.
Silva, Vasco Pereira da. 1998. *Em Busca do Acto Administrativo Perdido*, 777. Coimbra: Almedina.
Silva, Vasco Pereira da. 2006. Viagem pela Europa das formas de actuação administrativa. *Cadernos de Justiça Administrativa*. No 58, July/Aug, 60 ff.
Silva, Vasco Pereira da. 2009. "A Caminho!" Nova Viagem pela Europa do Direito Administrativo. In *Portugal, Brasil e o Mundo do Direito*, 9 ff. Coimbra: Almedina.
Silva, Paula Costa e. 2010a. Jurisdição e Competência Internacional dos Tribunais Administrativos: a propósito do Acórdão do STA n.° 4/2010. In *Cadernos de Justiça Administrativa*, 3 ff. n.° 84.
Silva, Suzana Tavares da. 2010b. *Um Novo Direito Administrativo?* 98. Coimbra: Imprensa da Universidade de Coimbra.
Silva, Suzana Tavares da. 2010c. *Direito Administrativo Europeu*, 108. Coimbra: Imprensa da Universidade de Coimbra.
Silva, Vasco Pereira da. 2010d. Acto Administrativo e Reforma do Processo Administrativo. In *Estudos em Homenagem ao Professor Doutor Diogo Freitas do Amaral*, eds. João Caupers, Maria da Glória F. P. D. Garcia, Augusto de Athayde, 81 ff. Coimbra: Almedina.
Silva, Vasco Pereira da. 2011a. Continuando A Viagem Pela Europa Do Direito Administrativo. In *Direito Público Sem Fronteiras*, *ICJP*, 2011. [Citied 30.6.2014]. Accessible from http://www.icjp.pt/sites/default/files/media/ebook_dp_completo2_isbn.pdf.
Silva, Vasco Pereira da. 2011b. Do Direito Administrativo Nacional ao Direito Administrativo sem Fronteiras (Breve Nota Histórica). In *Direito Público Sem Fronteiras*, *ICJP*, 2011. [Citied 30.6.2014]. Accessible from http://www.icjp.pt/sites/default/files/media/ebook_dp_completo2_isbn.pdf.
Silva, Suzana Tavares da. 2011c. Direito Administrativo dos Transportes. In *Tratado de Direito Administrativo Especial*, Vol. V, eds. Paulo Otero, Pedro Costa Gonçalves, 425 ff. Coimbra: Almedina.
Silva, Suzana Tavares da. 2012. Acto Administrativo de "Faca e Garfo". In *Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, Vol. IV, 617 ff. Coimbra: Coimbra Editora.
Soares, Rogério. 1978. *Direito Administrativo – Lições Policopiadas*, 317. Coimbra.
Soares, Rogério. 1990. Acto Administrativo. *Scientia Iuridica* Tomo *XXXIX*(223/228): 25 ff.

Chapter 14
Searching for Foreign Administrative Acts in Spanish Law

Carlos Aymerich Cano

Abstract Although in Spain there is no explicit reference in the legislation of administrative procedure to the validity, efficacy and enforceability of foreign administrative acts, the international and european framework provides for instruments to fix most of the problems raised by foreign administrative acts, their service and their efficacy.

Administrative Acts in the Spanish Legal System

Concept

An administrative act can be defined as a unilateral decision subject to administrative Law that executively creates, modifies or extinguishes a subjective juridical relationship, exercising an administrative power through the legally established procedure. From this concept, the main distinguishing features of administrative acts can be extracted, which are:

> *Declaration:* an administrative act is a "declaration" which creates, modifies or extinguishes a subjective juridical relationship. However, the scope of this statement needs to be explained, because not all administrative declarations are administrative acts. Therefore, an administrative act, in the strict sense, should be understood exclusively as the resolutions, that is, the decisions that terminate an administrative process. A different matter is that on certain occasions, procedural acts can be appealed (those known as "qualified procedure acts"), either because they have effects that are identical to those of the "decisions" or because they have a negative effect on the juridical sphere of the interested parties (hastening, in a way, the effects of the resolution: as in the case, for example, of the exclusion of a participant in a competitive tender process).

To profess the "declarative" character of administrative acts means to exclude the "material actions for the execution of resolutions". These actions do not create,

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modify or extinguish a juridical situation; instead, they are limited to carrying out and implementing the juridical situation created, modified or extinguished by a previous resolution that serves as a cause.

Unilateralism Administrative acts are valid through the mere will of the Administration. Thus, it is possible to exclude from the concept a "bilateral" action—contractual, conventional—by the Administration which, as its name suggests, represents the integration of the will of more than one party.

Without doubt, the clearest example of a bilateral action by an Administration are the contractual and conventional ones, through which the Administration and a third party agree on the execution of legal matters. Together with contracts and agreements, there are other types of actions that are harder to fit in because of their apparent bilateral character. This is the case, for example, of public domain concessions or the granting of subventions: in both cases there is an administrative resolution (are, therefore, administrative acts in the strict sense) whose efficacy requires acceptance or collaboration by the interested party (acceptance of the Tender concession, acceptance of the grant or subvention, etc.). It consists of unilateral decisions that are perfectly valid because they have all the validity requirements demanded by the norm, but whose efficacy depends on the receiver's attendance of an act.

Subjugation to Administrative Law This characteristic excludes from the concept of "administrative act" those Public Administration actions that are subject to labour, civil or trade Law. But, what is even more important is that it allows the inclusion of actions by persons or entities that, although they are not part of the organic complex that the Public Administration represents, they are still subject to administrative Law. For example, the providers of public services (private individuals who are authorised to manage a public service) and the administrative acts of certain State organs that are not part of the Administration, such as, among others, the Court of Auditors, the Congress of Deputies, the Senate, the General Council of the Judiciary, on issues regarding staff and procurement.

This demand makes it possible to exclude from the concept of administrative act those known as "Government political acts", which are those that strictly emanate from the Government—that is, from the Council of Ministers—and not from each of its members considered individually, in the exercise of the competencies constitutionally assigned to it. In any case, despite the fact that the nucleus of this political decision cannot be subject to judicial review, the jurisprudence has established different control routes, that have finally become positive, in Art. 2.a of the Law on Administrative-Contentious Jurisdiction (Spanish acronym "LJCA"), by virtue of which The Administrative-Contentious Jurisdiction system shall hear issues that are related to: "… The protection of fundamental rights, the regulated elements and the determination of the applicable compensations, all of the above with relation to the acts of the Government or of the Government Councils of the Autonomous Communities, regardless of the nature of the acts".

The Efficacy of Administrative Acts in the Spanish Legal System

Administrative acts are immediately enforceable (*ejecutividad*), that is, effective immediately. The enforceability of administrative acts means that they are considered valid and produce effects from the date they are issued, unless otherwise provided therein. This assertion, which reproduces the content of Article 57.1 of the Law on the Legal System of Public Administrations and Common Administrative Procedure (Spanish acronym "LPAC"), establishes a *iuris tantum* presumption of the administrative act, which allows the act to deploy all its possible effects as long as they are not cancelled, therefore transferring to the recipient the burden of proving the invalidity through the corresponding appeal in an administrative or judicial procedure, as the case may be.

The Enforcement of Administrative Acts in the Spanish Legal System

The feature of "enforceability" (*ejecutoriedad*) adds to the peculiarities of an administrative act. In the event that the recipients do not voluntarily comply with them, the Administration itself, without the need to ask for judicial relief, can carry out the material actions necessary for its effective execution (constraint on property, ancillary execution, penalty payment or compulsion on individuals), as per the procedure established and bearing in mind that there exists the legal obligation of opting for the means of enforcement that is least restrictive to individual freedom, as per the principles of *favor libertatis* and of proportionality that must govern administrative action, in accordance with what is stipulated in Art. LPAC 93–101.

Foreign Administrative Acts in the Spanish Legal System

In general, and without prejudice to the clarifications that will be made at a later stage, a foreign administrative act must be understood as that enacted by the authority of another State (or international organization) and subject to the juridical system of another State (or international organization). From this general definition, these foreign administrative acts enjoy a different efficacy, and likewise demand different requirements for that efficacy, ranging from direct efficacy (by virtue, for example, of mandates for mutual recognition derived from European Community Law) to the need for accreditation.[1]

[1] On this matter see. R. Bocanegra Sierra and J. García Luengo, "Los actos administrativos transnacionales", *RAP* No. 177, 2008, p. 9 et seq.

Procedure for the Adoption of Administrative Acts in the Spanish Legal System

In general, administrative procedure is regulated by Law 30/1992, of 26 November, for the *Regime* of *Public Administrations* and *Common Administrative Procedure* (LPAC), enacted by the State in the exercise of the powers that are recognised by Art. 149.1.18 of the Spanish Constitution regarding the "Bases for the *Regime* of *Public Administrations*" and of the "*Common Administrative Procedure*". This basic regulation is developed through different sector norms (concerning contract awarding, subventions, sanctions, etc.) that are either national, regional or local. Due to its special relevance and transversal nature, it is worth mentioning in this section Law 11/2007, of 22 June, on the Citizen Electronic Access to Public Service, and Law 19/2013, of 9 December, on Transparency, Access to Public Data and Good Governance.

Art. 35–37 LPAC outline what is known as "rights of citizens" in their relationship with the Public Administrations, many of which are of a procedural nature and are developed under other Law titles, especially Title VI on the general regulation of the administrative process. Regarding our current concern, Art. 35 LPAC recognises for citizens, as parties in an administrative process, the following rights:[2]

- *"To know, at any given time, the status of a process in which they are interested parties and obtain copies of the documents contained in the process"*, a right developed with a general character in Art. 37 LPAC—on the "right to access files and records"—and, specifically regarding the right to be heard, in 84, which provides that "*with the procedures having been conducted and immediately prior to the drafting of the response to the resolution, the interested parties, or their representatives, as the case may be, will be informed*".
- *"To identify the authorities and personnel in the service of the Public Administration who are responsible for the processing"*, a situation that connects with the one contained in Article 41 LPAC, which attributes to *"the holders of administrative units and personnel at the service of the Public Administration who are in charge of the resolution or the dispatch of the matters"* the direct responsibility of its processing, entrusting them with the removal of *"the obstacles which impede, hinder or delay the full exercise of the rights of the persons concerned or the respect for their legitimate interests"*.
- "*To obtain a stamped copy of the documents presented along with the originals, as well as their recovery except when the originals are required to act in the procedure*", situation developed in Art. 38.5 LPAC.
- "*To use the official languages in the territory of the Autonomous Communities, in accordance with the provisions of this Act and the rest of the Legal System"*, a right developed in Article 36 LPAC and in the language regulations for the Autonomous Communities that have their own co-official language (Basque

[2] In the field of taxation, Art. 34 of Law 58/2003, of 17 December, regulates the so-called "rights of tax debtors".

Country, Galicia, Catalonia, Navarre, Balearic Islands and Community of Valencia).

- "*To plea and present documents at any stage of the procedure prior to the hearing, which must be taken into account by the competent body when drafting the resolution proposal*", a situation that must be completed with the provision in Art. 79 LPAC.
- "*To not present documents that are not required by the rules applicable to the proceedings of the case, or that are already in the hands of the acting Administration*", a right whose effectiveness is far from being full. As an example of the practical recognition of this right, apart from the requirements for citizens to present documentation, eliminated after the replacement of licenses and authorizations by previous communications and responsible statements, we can cite Royal Decree 523/2006, of 28 April, which eliminates the requirement of presenting a census certificate as a document that proves domicile or residence, in administrative procedures by the Government Agencies and its dependent or connected public bodies.
- "*To obtain information and guidance on the legal or technical requirements that the existing provisions impose on projects, performances or requests that the interested party intends to engage in*", whose effectiveness depends, to a large extent, on the guidance and information services for citizens established by the different administrations and the fulfilment of the obligation to provide active information as established by Art. 5 et seq. of the Law of Transparency.
- "*To access public information, files and records*", a right with a constitutional base (Art. 105.b EC) developed in Art. 37 and, especially, in the mentioned Law 19/2013, of Transparency.
- "*To be treated with respect and deference by the authorities and civil servants, who must enable citizens to exercise their rights and the fulfilment of their obligations*".
- "*To demand responsibility form the Public Administrations and from the staff under its service, when it is legally required"*, a situation with a constitutional base (Art. 9 and 106 of the Spanish Constitution guarantee the liability of the public powers), developed, as regards the Public Administration, in Art. 139 et seq. LPAC.
- "*Any others recognised by the Constitution and the Laws*", with special emphasis on those specifically recognised for the parties within the sanctioning proceedings (Art. 135 and 137 LPAC).

The International Gathering of Evidences Proof in the Context of Sanctioning Procedures

On 6 May 2014, the EU Court of Justice cancelled, due to the lack of a legal basis, Directive 2011/82/EU, of the European Parliament and of the Council, which enabled the cross-border exchange of information on traffic violations in the field of

road safety[3]—it was adopted on the basis of police cooperation, while for the Court of Justice of the European Union (CJEU), as the purpose of the Directive was road safety, its legal basis should be the common transport policy. In spite of the fact that the deadline for the transposition had expired on 7 November 2011, the Spanish law had not yet been adapted to its demands that, in short, implied the establishment of a system of exchange of data between Member States in relation to certain serious offenses in the area of road safety. It should be borne in mind that, in a somewhat questionable manner, given the importance of the objectives of the Directive, the sentence limits the effects of the cancelling of the norm, establishing its transitional validity for a year so that the community authorities can approve a new Directive.

Apart from traffic fines, another field in which there is, especially after 11 September 2001, close international cooperation with regard to administrative penalty—and criminal—procedures is money laundering and the financing of terrorism. In this sense, Art. 48.3 of Law 10/2010, of 28 April, for the Prevention of Money Laundering and the Financing of Terrorism, regulates the system of collaboration between the Spanish authorities and those of other countries, differentiating between community and non-community members,[4] which transposes the Community and international rules in this regard.[5]

[3] The reference of the sentence can be consulted at http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140069es.pdf.

[4] "In accordance with the guidelines established by the Anti-Money Laundering Commission, the Executive Service of the Commission and, as applicable, the Secretariat of the Commission shall cooperate with the authorities of other States who carry out analogous functions. The exchange of information will be governed by the provisions of the relevant International Conventions and Treaties or, as the case may be, by the general principle of reciprocity, as well as by the subjugation of these foreign authorities to the same obligations of professional secrecy that are applicable for Spain.

The exchange of information between the Executive Service of the Commission and foreign Financial Intelligence Units will be carried out in accordance with the principles of the Egmont Group or in the terms of the corresponding memorandum of understanding. The memoranda of understanding with Financial Intelligence Units will be signed by the Director of the Executive Service, having received prior authorization from the Anti-Money Laundering Commission.

The exchange of information between the Executive Service of the Commission with Financial Intelligence Units of European Union states shall be carried out in accordance with the Council Framework Decision 2000/642/JHA, of 17 October 2000, concerning the provisions for cooperation between the Financial Intelligence Units of the member States for the exchange of information, or by the norm that substitutes it".

[5] We have not included in this list Council Framework Decision 2005/214/JHA, of 24 February, on the application of the principle of mutual recognition of financial penalties because it only refers, as provided in Art. 1 of Law 1/2008 which transposes it to the Spanish system, to the sanctions imposed as a result of committing a criminal offense, which must be understood as those imposed by judicial or administrative authorities, provided that the resolution "could have been appealed before courts with jurisdiction in criminal matters" which, as can be clearly seen, is not the case of the administrative sanctions that can be appealed, in the case of Spain, before the contentious-administrative jurisdiction or before the criminal one.

The Service of Administrative Acts: Special Consideration for International Notification

General Regulation of the Notification of Administrative Acts in the Spanish Legal System

In general, the notification and, if applicable, the publication of administrative acts is regulated by Art. 58–61 LPAC. Art. 59.1 LPAC establishes the general principle that the publication must be done "*by any means that will permit proof of receipt by the person or representative, as well as of the date, the identity and content of the act notified*". In this way, compared to the traditional notification method of certified mail[6] provision contained in Article 28 of Law 11/2007, on Citizen Electronic Access to Public Services. It should be noted that in accordance with this Law, electronic notification requires that, previously, the interested parties declare their compliance, except in the cases in which the Public Administrations establish this means as mandatory, a requirement that can only affect legal persons or certain categories of individuals who have guaranteed availability and access to the necessary technological means "due to their financial or technical capacity, career or other accredited reasons" (Art. 27.6 Law 11/2007).

Besides these means, another means of notification that is becoming widespread is through edicts, which Art. 59.5 LPAC refers to cases in which the interested parties are unknown or personal notification has not been possible, a situation that must be completed with the provisions in Art. 12 of Law 11/2007, that is, with the possibility that publication in the notice or edicts board can be replaced or supplemented by the notification in the web site of the body that is the author of the resolution. Pursuant to this authorization, Law 18/2009, of 23 November, which modifies the full text of the Law on Traffic, Circulation of Motor Vehicles and Road Safety, created the Traffic Fine Notice Board (*Tablón Edictal de Sanciones de Tráfico (TESTRA*)), managed by the General Directorate of Traffic and where local authorities with powers of sanction in terms of traffic can also publish their edicts, in accordance with the Single Transitional Provision of Order INT/3022/2010, of 23 November, for the regulation of the TESTRA.

The International Notification of Administrative Acts

As per the second paragraph of Article 59.5 LPAC, if the last known address of the recipient is abroad, "the notification shall be made through its publication in the bulletin board of the Consulate or Consular Section of the corresponding Embassy".

Obviously, the regulation of the notification of administrative acts abroad does not meet the requirements of the mentioned Agreement, signed and ratified by the

[6] Procedure regulated in Art. 39–44 of RD 1829/1999, of 3 December.

Kingdom of Spain without prejudice to understanding, as per Article. 96.1 EC,[7] that the Agreement is directly applicable in Spain since 2 October 1987, date of publication in the Official State Gazette of the instrument for ratification.

The Language of International Notifications

The only provisions on the language which administrative acts have to be notified in—contained in Article 36 LPAC, 6th Additional Provision of Law 11/2007 and in the regional linguistic regulation—refers to the official languages of the Spanish State. In accordance with what has already been pointed out regarding the efficacy of Agreement of 24 November 1977, that which is stipulated in its Art. 7 is also applicable.

De lege ferenda, the transition, still unfinished, carried out in the domestic sphere from physical means of notification to electronic, is still pending in the international sphere. It would be convenient, from this point of view, to update the Council of Europe Agreement of 24 November 1977 and envisage, on a community level, a general regulation that goes beyond the sphere of sanctioning, whether it is criminal or traffic related.

On the Recognition and Execution of Foreign Administrative Acts in Spain

General Considerations

In Spain there is no explicit reference in the legislation of administrative procedure to the validity, efficacy and enforceability of foreign administrative acts. The LPAC applies exclusively to inner Administrations with a state, regional and local scope (Article 2).

In our view, it does not seem appropriate that a national standard incorporates general situations on this matter, especially because the reality is quite complex and it would be very difficult to find a common set of rules that would justify a general regulation, with the exception of the minimums that will be pointed out later.

This does not mean that it is not convenient to clarify the issue that is being analyzed. The recognition of foreign administrative acts needs deep thinking to be able to solve certain problems, which are often simply of definition, that spoil or hinder its analysis.

[7] According to which "the duly concluded international treaties, once they have been officially published in Spain, will become part of the internal system".

Therefore, first of all, it would be necessary to clarify what we mean by the expression "foreign administrative acts". In fact, in some cases there seems to be a great deal of confusion that is not only related to terminology, but that goes beyond its legal regime.[8]

A foreign administrative act is, in our view, an act issued by an administrative authority of another country in accordance with its own public legal system. Excluded from the concept are, therefore, administrative acts issued by Spanish authorities based in other countries,[9] as well as private acts, even when they are supported by a public document, and judicial resolutions, which we will briefly refer to through the analogy that we will later apply to bridge certain gaps in this theme.

A. With respect to the *recognition of sentences and foreign judicial resolutions* in Spain, and without prejudice to what will be provided later on the Community framework, we will point out that, in general, a foreign sentence, or the equivalent resolution that is subject to enforcement, as an act of sovereignty by another State, does not constitute an enforceable document in Spain, unless the Spanish judicial authorities grants it that character or executive force in a specific and determined manner, under the terms set forth in Article 22.1 of the Organic Law of the Judiciary. This precept establishes that in Spain, the power to recognize and enforce judgments and decisions made abroad, corresponds to the judges and courts of Spain. On the other hand, the Civil Procedure Law regulates in its Article 523 the enforceability of judgments and foreign executive titles in Spain, pointing out, first, that "so that final sentences and other foreign executive titles include enforceability in Spain, the provisions in international Treaties and the legal provisions on international legal cooperation will be abided by"; and, secondly, that "In all cases, the execution of sentences and foreign executive titles will be carried out in Spain in accordance with the provisions of this Law, except as otherwise provided in the international Treaties applicable in Spain".[10]
B. The recognition of *foreign documents* is subject to the procedure of the Hague Apostille, established as of the signing of the XII Hague Convention on the abolishment of the requirement for the legalization for foreign public documents of 5 October 1961 (ratified by Spain on 10 April 1978, Official State Gazette of 25 September).[11] The process of single legalization—known as Apostille—consists

[8] In fact, one of the criticisms made by the doctrine that has studied these issues is the existing confusion regarding the actual concept of "act" and the tendency to confuse it with other different concepts, such as judgment and document. The lack of precision in the use of the concepts has led to a complex distinction of the various recognition problems that each one entails.

[9] See for example, the order of 16 April 1990 on the legalization of Spanish academic documents that are meant to be effective abroad (Official State Gazette of 19 April), which regulates the procedure for the recognition of signatures of the Spanish educational authorities as a prior requirement to their legalization.

[10] See extensively Moreno Catena, V., *La ejecución forzosa*, en *La nueva Ley de Enjuiciamiento Civil*, t. IV, Madrid, 2000.

[11] In addition to the Hague Convention of 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, see Royal Decree 2433/1978, of 2 October, which determines the officials who are competent to perform the single legalisation or Apostille provided for in the XII

of placing on the public document itself, or on an extension of it, an Apostille or annotation to certify the *authenticity of the signature* of the public documents issued in a country which is party to the Convention and which is to be effective in another country signatory of the Convention. The signatory countries of the Apostille Convention recognize *the authenticity* of the documents that have been issued in other countries and that bear the Apostille. The Hague Apostille suppresses the requirement of diplomatic or consular legalization of public documents originating in a signatory State and that are intended to be effective in another State that is also signatory. Documents issued in a country member of the Convention that have been certified by an Apostille must be recognized in any other country member of the Convention without the need of any other type of authentication.[12] However, we must not overlook the fact that the Apostille means recognizing the authenticity of a document issued abroad, but it does not imply recognizing its content nor does it declare its efficacy in Spain.

Jurisdictional Aspects

In Spain there is no provision on the authorities that are competent to request the recognition and enforcement of administrative acts of other States.

The only existing provisions, which are pointed out because they could serve as models, refer to the recognition and enforcement of *judicial resolutions* and *public documents* of other States that, as we have pointed out, are not the purpose of our study.

As a proposal of *de lege ferenda*, the establishment of a clear and simple procedure to receive or to study the applications for recognition of foreign administrative acts could be considered. For example, the Minister of Justice could carry out this function, which would be of mere receipt of applications for recognition or presentation of their own in foreign countries. Further actions that may be necessary to carry out, having received a request for recognition of a foreign administrative act, will be addressed and processed before an organ with competence depending on the matter.

Hague Convention of 5 October 1961, appointing the Ministry of Justice as the competent authority to perform the Apostille; and Order JUS/1207/2011, of 4 May, which creates and regulates the electronic registration of Apostilles by the Ministry of Justice and regulates the procedure for the issuing of Apostilles on paper and electronically.

[12] This Apostille can be applied to documents arising from an authority or civil servant linked to a State jurisdiction, including those from the Public Prosecutor's Office or a secretary, judicial officer or agent; in administrative documents; and in official certifications that have been placed on private documents, such as the certification of registration of a document, the certification on the certainty of a date and the authentications and notary official signatures on documents of a private nature. However, it shall not apply to documents issued by diplomatic or consular officials, or to administrative documents directly related to a commercial or customs transaction.

The Hague Apostille can be requested by anyone who wishes to certify the authenticity of a public document. For apostilles in electronic format, citizens, after making the request before the relevant competent authority, can download the Apostille via the Electronic Headquarters of the Ministry of Justice.

Requirements for the Validity and Efficacy of Foreign Acts

In our view, it is not the role of the national Legal System to question the validity of foreign acts. Its role is limited, as far as validity is concerned, to certify that they have effectively been signed by a competent authority in the country of origin. The Apostille is enough for the countries signatories of the Hague Convention.[13]

Further to this recognition of the authenticity of the signatures, the validity of the administrative act must be measured according to the standards of legality of the law of the country of origin, a matter that must be kept separate from the national recognition procedure, with the material limitations that are set forward in the epigraphs below.

A different matter is that referred to the efficacy of a foreign administrative act. The conformity of the act with its domestic law, which should not be questioned by

[13] Royal Decree 1497/2011, of 24 October, determines the officials and authorities competent to perform the single legalization or Apostille provided for in the XII The Hague Convention on Private International Law, 5 October 1961. Depending on the nature of the public document in question, in Spain there are three "Apostille authenticating authorities", whose competence for each case in particular is established as per the following rules:

(1st) To authenticate documents issued by a judicial authority: the competent apostille authenticating authority is the Secretary of the Administrative Division of the High Court of Justice of the corresponding Autonomous Community, who is competent to authenticate documents such as orders, judgments and other orders issued by any judicial authority, in any instance (courts, Provincial Courts, Superior Courts of Justice) and all the branches of the jurisdiction (civil, criminal, social, contentious-administrative, etc). In addition, the Government Chamber Secretaries are also the competent authorities for authenticating administrative documents issued by the bodies of their own Autonomous Community, with the exception of official academic documents, and by the Community's local entities.

(2nd) To authenticate notary authorised documents and private documents whose signatures have been legitimized by a Notary: The competent authority to authenticate is the Dean of the College of Notaries or respective member of its Board of Directors.

(3rd) To authenticate documents from the main organs of the General State Administration: the competent authority to authenticate is the Head of the Legalization Section of the Deputy Secretary of the Ministry of Justice.

(4th) To authenticate public documents from peripheral organs of the General State Administration as well as public documents from the other Public Administrations (Autonomous Communities and Local Organizations): Citizens may choose go to any of the competent authorities referred to in sections 1 and 2, that is to say, to the Government Chamber Secretary of the Administrative Division of the High Court of Justice or to the Dean of the corresponding College of Notaries.

At the moment, a new system for the issuing Apostilles is being implemented in Spain, which allows issuing Apostilles both on paper and electronically, and incorporates a single electronic record of all the Apostilles issued through the new system (see the Ministerial Order JUS/1207/2011 of 14 May, establishing the electronic registration of Apostilles from the Ministry of Justice and regulating the procedure for the issuing of Apostilles on paper and electronically). This system for the issuing of electronic Apostilles has been developed through a joint initiative with the Hague Conference on Private International Law, which has received the support of the European Commission and is already partly implemented in various Competent Judicial and Administrative Authorities.

the Spanish authorities, does not simply endow such an act with efficacy under domestic law. The efficacy of the act shall be conditioned to the adequacy of the act (not to its formal support, but to its material content) to the law of the country in which it intends to be effective.

Under this perspective, it could be argued—with great caution, and with the knowledge that in this matter, it is necessary to flee from prescriptive generic statements—that a foreign administrative act that seeks to be effective in Spain must be subject to an internal process that makes it possible to verify that the minimum thresholds for the protection of the general interest required by the internal rules are respected. This assertion leads to the first important consequence: there does not exist, as a general rule, an automatic recognition system for foreign administrative acts or, in the terms we are analyzing, foreign administrative acts are not automatically effective in Spain.

Next, it could be argued that, with due caution, the efficacy of foreign administrative acts should be subject to a procedure of prior administrative recognition of the equivalence of the act with a corresponding national one. It would then be the domestic law that would determine the scope of the efficacy of the foreign administrative act in the national sphere.

All of the above could change when there exists among the countries involved (the country issuing the act and Spain) a bilateral or multilateral international agreement, in which the operation of the verification of equivalence would have already been made at the moment of negotiation and signing of the convention; and, of course, when there is an international treaty that grants effectiveness to the administrative act abroad within the signatory countries.

Limitations on the Recognition of the Effects of a Foreign Administrative Act

In the Spanish legal system there is no specific regulation that makes it possible to determine beforehand the limits to the recognition of the effects of foreign administrative acts, although it is possible to affirm that the public order is a limit to the efficacy of foreign administrative acts. The Spanish civil code states something similar with respect to the private sphere (Art. 11[14] and 12) and it is a meeting point in the scientific doctrine.

[14] Article 11 of the Civil Code:

1. The forms and solemnities of contracts, wills and other legal acts shall be governed by the laws of the country in which they are granted. However, those celebrated with the forms and solemnities required by the applicable law regarding their content will also be valid, as well as those celebrated in accordance with the personal law of the expeditor or the common law of the grantors. Likewise those acts and contracts relating to real estate granted in accordance with the forms and solemnities of the place in which they reside will also be valid.

Beyond this concept of public order, it could be said that a foreign administrative act must respect the imperative rules of the Spanish public Legal System, which include respect for the fundamental rights recognized by the Spanish Constitution of 1978 and the human rights recognized in the International Treaties ratified by Spain. Regarding this statement, the fact should be taken into account that in matters of sanctioning, the right to defence of someone allegedly responsible has a very special significance.

Undoubtedly, there is unanimity in the doctrine when it states that in the Spanish Constitution, rights and liberties not only enjoy a series of guarantees in their development and protection, but also, during their interpretation, the hermeneutical principle of *favor libertatis* is of constant application, whereby rights must be interpreted in the widest possible manner, in the manner that most favours their efficacy. Along with this principle, there is another of unquestionable application which the Constitution includes in the juridical system: the principle by which the interpretation of rights must conform to the International Treaties on human rights ratified by Spain. Thus, Art. 10.2 of the Spanish Constitution imposes the requirement, by the legislative and government organs, of carrying out the interpretation of the international treaties in a favourable in sense for the exercise and amplitude of fundamental rights and political liberties.[15]

Specifically, Art. 60 of the European Convention on Human Rights establishes that "none of the provisions of this Agreement shall be construed as limiting and harm those human rights and fundamental freedoms which may be recognized in accordance with the laws of any High Contracting Party or in any other convention to which it is a party". It is, as pointed out by the doctrine, a rule with a character of "minimums", so it is the responsibility of the domestic legislation to increase, through rules of application and the jurisprudence of the Courts, the standard of protection established within them.

Finally, it may be interesting to develop the community concept of "overriding reasons of public interest" as the limit to the recognition of foreign administrative acts. That is, foreign administrative acts will not applied in EU member States if they do not reach the level of protection that is bestowed by the community system to the citizens of a member State. The statement is especially relevant in certain

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If such acts were granted on board vessels or aircrafts during their navigation, they shall be understood to be held in the country of the vessel's flag, license or registration. Military ships and aircrafts are considered as part of the territory of the State to which they belong.

2. If the law regulating the content of acts and contracts requires for their validity a particular form or solemnity, it will be always applied, even in the case of their being granted abroad.
3. The Spanish Law will be applicable to contracts, wills and other legal acts authorized by diplomatic or consular officials from Spain abroad.

[15] See: D. Liñán Nogueras, "Efectos de las Sentencia del Tribunal Europeo de Derechos Humanos y Derecho Español", in *REDI*, Vol. XXXVII 1985/2, p. 367; M. J. Agudo Zamora, "La interpretación de los derechos y libertades constitucionales a través de los Tratados Internacionales: La técnica del artículo 10.2", in *Estudios Penales y Jurídicos. Homenaje al Prof. Dr. Enrique Casas Barquero* (coord. por Juan José González Rus), Córdoba, 1996, pp. 38 et seq.; J. Ruiz-Giménez Cortés, "Artículo 10. Derechos fundamentales de la persona", in *Comentarios a las leyes políticas. Constitución española de 1978*, Vol. II, p. 137.

sectors such as health, food, environmental or security. It would also make it possible to avoid recognising foreign administrative acts whose internal validity is unquestionable and that are dictated by competent organs in their countries of origin when because of their content they do not reach a minimum level or a minimum standard as is required by community Law.

A perfect test bed for what has been stated is the Sanctioning Administrative Law, where the rights of the person allegedly responsible must come to the fore in order to grant validity and efficacy to a foreign act. The Spanish doctrine has manifested the convenience of establishing a European system of recognition and execution of this specific type of administrative acts, the sanctioning type, in order to avoid certain repeated situations that are clearly against the general interest of States.[16]

In the Spanish system, the combination of articles 6 of the European Convention on Human Rights and 24.2 of the Spanish Constitution grant the guarantees for the allegedly responsible person the nature of principle of obligatory fulfilment or unbridgeable limit for the recognition of a sanctioning act issued by foreign authorities. As per Art. 6 of the ECHR, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". And by virtue of Art. 24.2 of the Spanish Constitution, "Likewise, all have the right to the ordinary judge predetermined by law; to defence and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent".

Reference to Criminal Law must also include the exercise of the sanctioning power whose principles must also inspire the legal sanction system, as the Spanish Constitutional Court has stated on several occasions.

Demands for the Enforceability of Foreign Administrative Acts

The execution of administrative acts deserves a differentiated treatment with respect to the previously analysed features for validity and efficacy.

As per our judgement, the implementation should be carried out by the national authorities which are appointed and in accordance with the internal juridical rules contained in the basic regulation for administrative acts. Thus, the principle of *favor libertatis* and the principle of proportionality set out in articles 90 and following of the Law 30/1992 must be respected.

[16] See extensively the work by M.J. Agudo Zamora, "El derecho a ser informado de la acusación en la jurisprudencia del Tribunal Europeo de Derechos Humanos y del Tribunal Constitucional español", *UNED. Teoría y Realidad Constitucional*, No. 23, 2009, pp. 189–221.

Should there be no recognition of the principle of liability of legal persons, use could be made, as has been done so many times by Spanish courts, of the "piercing the corporate veil" doctrine, in order to identify the individuals responsible for the action to be sanctioned. This situation would not occur in Spain when it happens to be the country of implementation, as is recently established by the principle of legal liability (criminal and administrative) of legal persons.[17]

Analysis of Situations for the Recognition of Foreign Administrative Acts by the Spanish Legal System

In the Spanish Legal System there does not exist a general procedure for national recognition and/or execution of foreign administrative acts. There are, on the other hand, certain sector procedures.

Even if it is not essential to have a procedure that is common to all situations, it would be desirable to have a certain degree of uniformity, which would also grant legal certainty and would make it possible to speak of a standard procedure, adaptable to the various sectors of administrative activity.

We can point out, to exemplify sector procedures in which the recognition of foreign acts are regulated, the following:

[17] See a general work on this matter in A. Diaz Gomez, " El modelo de responsabilidad criminal de las personas jurídicas tras la Ley orgánica 5/2010", *Revista electrónica de Ciencia Penal y Criminología*,13/08/2011: " … there has been an extensive discussion on the political-criminal desirability of the criminal punishment of legal persons, on the possibilities of applying a *societas delinquere potest* model in the modern European systems and on the dogmatic disadvantages and problems that can be found along the way. Beyond these considerations, whose tenets can be found in numerous published works, at the present time, the problem seems to have overcome the dogmatic debate—at least partly—to move on to a more practical level. This is also substantiated by the very recent paradigm shift experienced by our Criminal Law, resulting from the reform of the Penal Code carried out in 2010. Now legal persons may commit a crime in the strict sense and consequently it will be possible to impose penalties for this reason. This closes, at least on paper, the old discussion on whether the Spanish Legal System should forget about the traditional legislative model based on *societas delinquere non potest* and the debate on the most appropriate method to do so. As it happens, it will no longer be necessary to insist on searching for the criminal liability of legal persons through precepts such as 31, 31.2 or 129 of the Penal Code, because, as stated in the preamble of Organic Law 5/2010, now "the criminal liability of legal persons is regulated in detail".

It is precisely the preamble which recognizes that under the current regulation the many international legal instruments that demand a penal response to legal persons have turned out to be of great importance, especially in the business field. Similarly, within the European Union, the legislation has been urging the States in one way or another to take the appropriate measures in its domestic Law for the punishment of legal persons. The trend, which has also involved Spain, is the progressive expansion of the model of criminal liability of legal persons across Europe".

The Recognition of Official Degrees

A very recent norm (Royal Decree 967/2014, of 21 November) regulates the procedures for the accreditation and validation of degrees and the statement of equivalence of foreign university courses.[18]

The "accreditation" of a foreign degree to an enabling Spanish degree is understood as the official recognition of the training completed for the obtaining of a foreign degree, comparable to that required for obtaining a Spanish degree that enables the holder to exercise a regulated profession. The "validation" is the official recognition, for academic purposes, of the validity of higher studies carried out abroad, whether they have been completed or not with the purpose of obtaining a degree, with respect to Spanish university studies that enable the holder to continue these studies in a Spanish university. The "equivalence to a degree and to an official university level of studies" is the official recognition of the training completed to obtain a foreign degree, as an equivalent to that required for obtaining an academic level inherent to any of the levels that Spanish university studies are structured in, excluding the professional effects with respect to those degrees that are likely to be obtained through accreditation.

The effects of each of the previous statements are different[19] but, without the need to specify their scope at this point, it is important to note that both the accreditation, and the recognition or the equivalence represent the recognition of foreign administrative acts. The competent authority is different in each case, where

[18] Royal Decree 967/2014, of 21 November, which lays down the requirements and the procedure for the accreditation and statement of equivalence of formal qualification and to official university academic level and for the validation of foreign higher education studies, and the procedure for determining the correspondence to the levels of the Spanish qualifications framework for higher education of the official degrees of Architect, Engineer, Graduate, Technical Architect, Technical Engineer and Three-year Graduate Degree ("Diplomado").

[19] Article 5. "Effects of the accreditation and equivalence for degrees to official university academic level:

1. The accreditation grants the foreign degree, as of the date it is granted and the corresponding credential is issued, the same effects as the Spanish degree to which it is accredited in all the national territory, in accordance with the applicable legislation.

   The accreditation of a foreign degree obtained in accordance with the procedure established in the present Royal Decree to a Spanish degree that allows access to a regulated profession, will involve the possibility of exercising of the regulated profession in question under the same conditions as for the holders of Spanish degrees that empower to practice it.
2. The equivalence to a formal qualification gives the foreign degree, throughout the national territory, from the date it is granted and the corresponding credential is issued, the same effects of the degrees that are included in the area and specific field of training to which the equivalence has been declared, with the exclusion of the professional effects with respect to those degrees that are likely to be obtained through accreditation.

   The equivalence to academic level gives the foreign degree, throughout the national territory, from the date it is granted and the corresponding certification is issued, the effects for the academic level with respect to which the equivalence has been declared.
3. Validation has the effects that correspond to the passing of the university courses that it is granted for".

approval and the statement of equivalence corresponds to the Minister of Education (Art. 13) and the recognition of studies corresponds to the Rector of the University of destination (Art. 17).

Road Traffic

In general, driving licenses issued in EU countries and in the EEA (Iceland, Liechtenstein and Norway)[20] are valid for driving in Spain.

In addition, under certain conditions, the following licenses are also valid for driving in Spain: (a) National licenses from other countries that are issued in accordance with certain requirements laid out in Annex 9 of the Geneva Convention or in Annex 6 of the Vienna Convention, or that differ from those models only in the adoption or deletion of non-essential items; (b) National licenses from other countries that are written in English or accompanied by an official translation of the same. (c) International licenses issued abroad in accordance with the requirements laid out in Annex 10 of the Geneva Convention, or as per the model in Annex E of the Paris Convention, if they are nations adhering to this Convention which have not signed or adhered to the Geneva Convention; (d) Those recognized in specific international conventions that Spain is party to[21] and under the conditions indicated in the same.[22] In all these cases, the interested parties must initiate an "exchange"

[20] Driving licenses issued in any member State of the European Union or in States party to the Agreement on the European Economic Area (Norway, Iceland and Liechtenstein) in accordance with Community law will remain valid in Spain, under the conditions which they were issued in their place of origin, with the proviso that the minimum age for driving corresponds to the one required to obtain the equivalent Spanish license.

However, driving licenses issued by any of those States that are restricted, suspended or withdrawn in any of them or in Spain will not be valid for driving in Spain.

The holder of a driving license issued in one of these States who has obtained their normal residence in Spain, will be subject to the Spanish provisions relating to its period of validity, for the control of their psycho-physical skills and for the allocation of credit points.

In the case of a driving license not subject to a period of specific validity, holders shall proceed to its renewal, 2 years after having established their normal place of residence in Spain.

[21] There is an exchange agreement with the following countries: Democratic and Popular Republic of Algeria, Republic of Argentina, Republic of Bolivia, Republic of Chile, Republic of Colombia, Republic of Ecuador, Kingdom of Morocco, Republic of Nicaragua, Republic of Peru, Dominican Republic, Republic of Panama, Republic of Paraguay, Republic of Uruguay, Bolivarian Republic of Venezuela, in the Federative Republic of Brazil, Republic of El Salvador, Republic of the Philippines, Republic of Guatemala, Republic of Serbia, Turkey, Tunisia, Ukraine, Macedonia.

[22] The requirements for driving licenses from Andorra, Korea, Japan, Switzerland and Monaco are: certification of identity and residence, going to a centre for the recognition of drivers for the issuance of a report regarding psycho-physical aptitude and having a valid driving license. Interested parties must submit a written statement of not being legally deprived of the right to drive motor vehicles and motorcycles, or legally banned or suspended from their driving license, as well as declaration of not being the holder of another driving permit or license, whether it has been issued in Spain or in another EU country, of the same class as the one requested.

In the case of permissions from Korea and Japan also requires, an official translation of the permission.

procedure for the foreign license into the equivalent Spanish permit, a procedure which is processed and resolved before the Ministry of Interior (Directorate-General for Traffic).

The validity of the different licenses will depend on whether they are within the period of validity, if the holder is of the age required in Spain to obtain the equivalent Spanish license and, in addition, that a period of 6 months, at most, beginning when the holders acquire their normal residence permit in Spain has not elapsed. After this period, the licenses are no longer valid for driving in Spain and, if the holders wish to continue driving, they must obtain a Spanish driving license, after verification of the requirements and the passing of the relevant tests, unless there is an agreement with the country that issued the license, making it possible to exchange it for the Spanish equivalent.

The Execution of Foreign Administrative Acts

Private International Law could serve as a guide for the further development of this matter regarding foreign administrative acts, but bridging the essential differences between the situations presented, that could be redirected to there being, in these latter cases, a general interest that does not need to be present in the private sphere.

The Spanish Law on Civil Procedure regulates foreign public documents (Article 323), noting that "for procedural purposes the consideration of public documents will be given to those foreign documents which, by virtue of international treaties or conventions or special laws, must be attributed the probative force provided for in article 319 of this Law" (section 1); when no international treaty or convention or special act is applicable, public documents shall be considered those that meet the following requirements: (1st) That in the granting or drafting of the document, the requirements of the country where it has been granted so that the document is full proof in court have been observed; (2nd) That the document " contains the legalization or apostille and other necessary requirements to establish its authenticity in Spain" (section 2); and, most importantly, "when the foreign documents referred to in the preceding paragraphs of this article incorporate statements of will, the existence of these will be considered to be proven, but their effectiveness will be that determined by the applicable foreign and Spanish norms in terms of capacity, object and form of the legal matters". The distinction between existence and efficacy is that which has been pointed out in another section of this report, to indicate that in issues regarding foreign administrative acts, the rule of not prejudging the validity of the act must prevail, but it must, nevertheless, condition its efficacy in the compliance of certain requirements.

In addition, there is a consideration that could be taken into account when dealing with the recognition of foreign administrative acts. In Private International Law, the rule of the absence of substance review of foreign judgments as a fundamental principle is assumed: the substance review would be contrary to the function of the recognition process as it is inspired on the postulate of international cooperation and

in the continuity of legal relations in the area. Thus, it is stated that based on the requisite regarding recognition that the authority that dictates the resolution is competent for this purpose, a subsequent review of the substance of the resolution dictated by that authority cannot be permitted. To elude reviewing the substance of the case involves turning the recognition into a formal control and accreditation procedure which prevents analysing once again the facts and recitals of the foreign decision. A similar consideration could be made regarding the administrative decision issued by a foreign authority, and subject to a recognition procedure based on international cooperation. It would not make sense in these cases to review substance of the case, completing the recognition procedure through a formal accreditation control.

Having said this, it should be borne in mind that the international conventions include as condition for recognition the respect for procedural safeguards and the defence of the parties, and the regularity of the procedure followed abroad. In the Brussels Convention of 1968 and in bilateral agreements signed by Spain with States such as Italy or France, the need for there having existed a regular notification and that provided sufficient time to the respondent is expressed. They also refer to the guarantee of the right of representation and defence at trial and to a fair procedure and without defencelessness.

In reality, the same considerations would apply to foreign administrative acts on the basis, already mentioned, that they must respect the constitutional rights, including the rights of defence established in the Constitution, which would make an application for recognition of a administrative act that rendered the defencelessness of the recipient unviable.

As far as public order is concerned, the Constitutional Court originally set up the concept of constitutional public order as a limit to the recognition and enforcement of foreign resolutions. Hence the appropriateness of rejecting foreign decisions whose rationale or procedure violate the fundamental rights guaranteed by the Constitution. It is said that in these cases there is a substance examination, but that it does not involve a review, whereby it is approached exclusively on the basis of Art. 24.

Bibliography

Agudo Zamora, M.J. 2009. El derecho a ser informado de la acusación en la jurisprudencia del Tribunal Europeo de Derechos Humanos y del Tribunal Constitucional español. *UNED. Teoría y Realidad Constitucional*, No. 23.

Agudo Zamora. 1996. La interpretación de los derechos y libertades constitucionales a través de los Tratados Internacionales: La técnica del artículo 10.2. In *Estudios Penales y Jurídicos. Homenaje al Prof. Dr. Enrique Casas Barquero* (coord. por Juan José González Rus), Córdoba.

Bocanegra Sierra, R, and García Luengo, J. 2008. Los actos administrativos transnacionales, *Revista de Administración Pública*, No. 177.

Diaz Gomez, A. El modelo de responsabilidad criminal de las personas jurídicas tras la Ley orgánica 5/2010, *Revista electrónica de Ciencia Penal y Criminología*, 13/08/2011.

Liñán Nogueras, D. Efectos de las Sentencia del Tribunal Europeo de Derechos Humanos y Derecho Español. *REDI* XXXVII, 1985/2.

Moreno Catena, V. 2000. *La ejecución forzosa*, en *La nueva Ley de Enjuiciamiento Civil*, t. IV, Madrid.

Ruiz-Giménez Cortés, J. 1978. Artículo 10. Derechos fundamentales de la persona, in *Comentarios a las leyes políticas. Constitución española de*, vol. II.

Chapter 15
The Recognition of Foreign Administrative Decisions in Sweden

Henrik Wenander

Abstract This contribution describes some basic features of the procedure relating to the recognition of foreign administrative decisions under Swedish law. After some comments on the general legal and theoretical framework relating to administrative decisions in Swedish law, the article discusses the preconditions for service of documents, including international aspects. The subsequent section discusses matters of validity, efficacy, and enforcement in relation to foreign administrative decisions. Thereafter, special attention is given the impact of EU law and international conventions. In the subsequent section, the development of doctrinal treatment of matters relating to recognition of foreign administrative decisions is described. Some general comments conclude the article.

Introduction

The process of internationalisation of legal relations influences also Swedish administrative law. One part of this development is the growing importance of rules and principles on recognition of foreign administrative decisions. This mechanism means that administrative decisions issued by foreign public bodies are treated as valid in the Swedish legal system.[1] Occassionally, Swedish law unilaterally calls for recognition of foreign decisions. However, in most cases, the recognition duties follow from reciprocal arrangements under EU law or public international law.[2] A special element in the Swedish context is the Nordic cooperation with Denmark,

The basic outline of this contribution roughly follows the questionnaire for the country report on Sweden for the 19th International Congress of Comparative Law, Vienna 2014, Topic IV D., Administrative law, which also forms the basis for the article.

[1] See Wenander 2013, p. 47 f., 62 ff.

[2] See Wenander 2011, p. 763.

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Finland, Iceland, and Norway. Within this structure for cooperation on different political and administrative levels, there are examples of recognition duties between the involved countries.[3]

Administrative Decisions in Swedish Law

To understand the recognition of foreign administrative decisions in Swedish law, it is necessary to touch upon the Swedish legal understanding of administrative decisions in general. Below, some fundamental matters relating to the terminology, the procedure for adopting administrative decisions, and their enforcement of decisions are outlined. Especially, the importance of these rules and principles for foreign administrative decisions is highlighted.

Terminology

Swedish administrative law scholarship by an administrative decision (*förvaltningsbeslut*) understands a pronouncement by a public body with the purpose of affecting existing conditions.[4] Under the influence of Scandinavian legal realism, this term has replaced the previously used term administrative act (*förvaltningsakt*) since the 1970s.[5]

Concerning the classification of a decision as domestic or foreign, the difference between a national administrative decision and a foreign one is the affiliation of the administrative body issuing the decision: if that body is part of the Swedish public sector, it qualifies as a Swedish administrative decision. If a decision categorised as administrative has been issued by a public body of another state, that decision should be seen as foreign.[6] In difference to certain foreign legal systems, Swedish legal scholarship has not used the terms international, supranational or global administrative act. Neither has the concept of transnational administrative act been established in Swedish law. Rather, phenomena described through these terms have been seen as situations of recognition of foreign administrative decisions.[7]

[3] See examples in Wenander 2011, p. 762 ff.

[4] See Ragnemalm 1991, p. 216 ff.

[5] See e.g., Strömberg and Lundell 2011, pp. 59–66.

[6] See Wenander 2010, p. 25 ff.

[7] See for a discussion on this term Wenander 2010, p. 21.

Adoption

The general procedure for adopting administrative decisions is regulated in the Administrative Procedure Act.[8] However, if there are provisions in other acts of law or governmental ordinances, they take precedence to the rules of the Administrative Procedure Act.[9] The provisions of this act of law give certain rights to affected parties to have insight into the documents in the administrative matter and to be informed on the development of the matter through communication by the administrative authority.[10] Furthermore, persons adversely affected by an administrative decision are entitled to appeal decisions, provided that these decisions as such are considered appealable.[11] Through the requirements of judicial review under Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the possibility of judicial review of administrative decisions has been expanded. For the most part, this review is carried out by administrative courts.[12]

When it comes to the role of foreign administrative bodies in the administrative procedure, there are no general rules in Swedish legislation. In some situations, a foreign administrative body may initiate an administrative matter in Sweden. This applies to matters involving recognition of burdensome foreign decisions. In such situations, the foreign administrative body should be entitled to act as a party to the procedure, for example to appeal a decision. Also in other situations, a foreign administrative body may be allowed to intervene as a party to an administrative matter. The principles of sovereignty and state immunity under public international law would not seem to limit these possibilities under Swedish law.[13] In general, also interested persons, who are not parties to the proceedings, should have a possibility to give their view on the matter.[14] Naturally, however, it is for the administrative authority to decide to what extent such opinions should be taken into account. This also applies to foreign public authorities. Furthermore, a Swedish authority may of its own motion refer an issue to a foreign authority for views, for example concerning administrative matters relating to border regions.[15]

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[8] Förvaltningslag (Administrative Procedure Act), *SFS [Svensk författningssamling – Swedish Code of Statutes*] 1986:223. More important pieces of legislation in Sweden are published in unofficial English translations on the Internet site of the Government Offices, see http://www.government.se (accessed 1.10.2014).

[9] Sec. 3 of the Administrative Procedure Act.

[10] Secs. 16 and 17 of the Administrative Procedure Act.

[11] Sec. 22 of the Administrative Procedure Act; Ragnemalm 1991, p. 215 ff.

[12] See Secs. 3 and 22 a of the Administrative Procedure Act; Lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna [Act on the European Convention for the Protection of Human Rights and Fundamental Freedoms], *SFS* 1994:1219; Lavin and Malmberg 2010, p. 80 ff.

[13] See Wenander 2010, pp. 252 ff. and 298.

[14] See Ragnemalm 1991, p. 168 ff.

[15] Cf. on reference for views between (Swedish) authorities Sec. 13 of the Administrative Procedure Act.

In some instances, there are special statutory rules on the position of foreign administrative authorities in administrative proceedings. In this way, environmental authorities of other Nordic countries (Denmark, Finland, Iceland, and Norway) may intervene and take other forms of action in environmental matters before Swedish authorities.[16] A similar arrangement is found in the border river cooperation between Sweden and Finland.[17]

As to the taking of evidence, there are special provisions in legislation transforming international agreements into Swedish law.[18] It could be questioned, if there is a need for EU rules on this matter. However, this question primarily relates to criminal law. It is thus beyond the scope of this contribution on the recognition of foreign administrative decisions.

Enforcement

There are no generally applicable rules as to when Swedish administrative decisions are effective, in the sense that they may legally be enforced by an administrative body. Legal scholarship has identified two main aspects of this matter, which is only partially regulated in legislation. First, it is normally considered that the individual affected by a decision should be notified of it, before it can be enforced against him or her. Second, in some situations, the time of appeal of the decision must have expired, in order not to make the possibility of appeal illusory. However, in other situations, the urgency of the matter may call for rapid enforcement of a decision.[19] Concerning the recognition of foreign administrative decisions, a third aspect should be considered, namely if the foreign decision is enforceable in the legal system where it was issued. Normally, this should be required, since the foreign decision should not have more far-reaching effects in Sweden as a recognising state than in the issuing state.[20]

The enforcement measures include using the threat of punishment. Furthermore, the competent authority may impose a conditional fine (*vite*) as a means of bringing pressure to bear on a person. In some situations there is also the possibility of actually carrying out enforcement measures by force, for example removing a building or expelling a foreigner who does not have the right to remain in the country. Enforcement measures by force are normally carried out by the Swedish Enforcement Authority (*Kronofogdemyndigheten*) or the police on request by the relevant

[16] See Art. 4 of the Nordic Environmental Protection Convention, Stockholm 19.2.1974, 1092 *UNTS* 279, incorporated into Swedish law through *SFS* 1974:268.

[17] See Arts. 17 and 18 of the Agreement between Finland and Sweden concerning Frontier Rivers, Stockholm 11.11.2009, incorporated into Swedish law through *SFS* 2010:897.

[18] See Lag om internationell rättslig hjälp i brottmål [Act on International Legal Assistance in Criminal Matters], *SFS* 2000:562.

[19] See Ragnemalm 1991, p. 220 ff.

[20] See Wenander 2010, p. 302 ff.

administrative body. Decisions on enforcement of conditional fines have to be made by a court. In other situations, the individual affected may appeal the enforcement decision to a court.[21]

Service of Documents

The service of administrative decisions and other official documents in general is regulated in the Act on Service of Documents.[22] Under the act, several forms of service are possible, such as service by mail, personal service, or service by publication (e.g., in local newspapers). The choice of form of service shall depend on the character of the documents and the administrative matter concerned. In this way, it is thought, the authorities may choose the most convenient form of service without jeopardising the interests of legal certainty of the individual. Concerning service of documents in other countries, Sweden has acceded to various international agreements. However, these agreements do not explicitly cover administrative matters. Sweden is not a party to the European Convention on the Service Abroad of Documents relating to Administrative Matters. The Act on Service of Documents has recently been amended concerning international aspects relating also to administrative law. The new provisions clarify that the general framework of the Act on Service of Documents may be used also for service abroad, provided that the foreign state allows for this.

Service of documents on the request of other states may also take place. If the documents are in another language than Swedish or a language stipulated in an international agreement binding to Sweden, the consent of the recipient is required, unless it is clear that he or she understands the other language.[23] In the view of the Government, the amendments of the act will be sufficient for international cooperation on service of documents in administrative matters. However, as is acknowledged by the Government in the *travaux préparatoires*, a problem might be that the foreign state in the absence of an international agreement with Sweden does not wish to cooperate.[24] A Swedish accession to the European Convention on the Service Abroad of Documents relating to Administrative Matters, or other forms of European cooperation in this field, could therefore simplify international cooperation in this field.

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[21] See Ragnemalm 1991, p. 205 f.

[22] Delgivningslag [Act on Service of Documents], *SFS* 2010:1932.

[23] See Secs. 3 and 4 a of the Act on Service of Documents.

[24] See Prop. [Proposition – Government Bill] 2012/13:182 *Internationell delgivning* [International Service of Documents], p. 22 ff.

Validity, Efficacy, and Enforceability

There is no general legislation on matters relating to the validity, efficacy and enforceability of foreign administrative acts. In some instances, applicable rules are found in sectorial legislation. To a large extent, the position of foreign administrative acts in general is unclear. The academic writing in the field has sought to establish general principles (see below). It would probably be very difficult to generally regulate recognition of foreign administrative decision in an international agreement. In administrative law, already on the national level the variations between specialised fields present challenges to attempts of general legislation. This is the reason that the Swedish Administrative Procedure Act is formulated in very broad terms.[25] The international dimension makes such endeavours even more difficult. Not least, the definition of what constitutes administrative matters and decisions may vary considerably.[26] Also, the differences between the administrative systems, and perhaps diverging views on what constitutes problems, make an international agreement unlikely. It is doubtful if it is necessary to try to reach such an agreement.

In many instances, it would be the individual who requests recognition of a Swedish administrative decision in a foreign country or vice versa, for example concerning academic qualifications. In situations of a public authority initiating an administrative matter concerning recognition abroad, the competence varies dependent on the field of law. The same applies to the question of competent authorities for receiving such requests.[27]

Concerning formal requirements for an administrative decision to be effective and enforceable within Swedish law, there are very few general requirements. Naturally, a decision must emanate from a competent authority and a public official acting within his or her competence. Furthermore, the individual affected must normally be notified of the administrative proceedings. Important errors in a decision in those respects may lead to it being viewed as a nullity.[28] Much in the same fashion, foreign administrative decisions, which otherwise should be recognised in Sweden, may be erroneous in relation to European or international law to an extent that they should be considered nullities. This view is also supported by the case-law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). However, errors in relation to the domestic law of the state issuing the decision should not have nullity as a consequence.[29]

The confirmation of authenticity of administrative decisions has not been a major concern in Swedish administrative law. Consequently, there is no requirement of

[25] See Ragnemalm 1991, p. 155.

[26] Cf. Loebenstein 1972, pp. 18–36; Schwarze 2006, p. 11 ff.

[27] See further Wenander 2011, p. 778.

[28] See Ragnemalm 1991, p. 207 f.

[29] See Wenander 2011, p. 776; see, e.g., C-5/94 *Hedley Lomas* [1996] *ECR* I-2553 para. 20; *Pellegrini v. Italy*, No. 30882/96, *ECHR* 2001-VIII paras. 40 and 47.

authentication of foreign administrative decisions.[30] This might be explained by the high degree of openness in the Swedish administration; if someone is uncertain as to the authenticity of an official document, he or she may turn to the authority and have access to the decision. The Swedish constitution bases on a principle of public access to official documents, where confidentiality is an exception subject to limitations in the Freedom of the Press Act, one of the fundamental laws of Sweden.[31] Furthermore, for every decision in an administrative matter, there must be a document stating the date and content of the decision, the deciding official, and other officials involved in the final proceeding of the matter.[32] The notarial traditions in continental Europe of authentication of documents are unknown to Swedish law.[33] The authenticity of a foreign administrative decision is assessed in the legal context where it is invoked. This means for example that the authenticity of a foreign driving license may be assessed in a criminal proceeding, according to the rules on evidence and burden of proof applicable in such proceedings. A Swedish authority may request the individual invoking a foreign decision to verify that this decision is authentic.[34] Importantly, however, Swedish authorities may also contact the alleged issuing foreign authority to ascertain that a foreign decision is authentic. Already now, EU law calls for direct contacts between national authorities in order to clarify matters, among other things in such situations.[35] Possibly, the EU legislator could act in order to make national administrations more aware of this duty.

Concerning requirements on the substance of foreign administrative decisions, the point of departure must be that recognition duties shall be followed. Also foreign decisions that are questionable should be recognised. However, in situations of obvious errors in relation to substantial EU law or international conventions, the foreign decision may be disregarded. This view reflects the case-law of the CJEU. It might be added that substantial errors in relation to Swedish law should not be considered a valid reason for disregarding a foreign decision, which otherwise should have been recognised. However, if the foreign administrative decision bases on a violation of fundamental rights, both Swedish constitutional requirements and the ECHR, may call for the foreign administrative decision not being recognised.[36]

The international competence of the state issuing the administrative decision should be assessed in accordance with the rules and principles of public international

[30] See Berglund 1999, p. 40.

[31] See Ch. 2 of the Tryckfrihetsförordning [Freedom of the Press Act], *SFS* 1949:105; Offentlighets- och sekretesslag (Public Access to Information and Secrecy Act), *SFS* 2009:400; see further Nergelius 2010, p. 58.

[32] Sec. 21 of the Myndighetsförordning (Government Agencies ordinance), *SFS* 2007:515.

[33] See, concerning private law, the contribution by Hans-Heinrich Vogel on Sweden in Council of the Notariats of the European Union 2008.

[34] See Berglund 1999, p. 40.

[35] See Wenander 2010, p. 262 ff.; Wenander 2011, p. 778 f.; Art. 4(3) of the Treaty on European Union.

[36] See Wenander 2010, p. 213 ff. (public international law) and 215 ff. (EU law); Wenander 2011, p. 775 ff.

law and EU law. If a foreign decision, which should otherwise be recognised, is issued without a sufficient link to the person affected, that decision may be set aside. Here, discussions on circumvention of law (*fraude à la loi*) in parallel to principles in private international law may be relevant. Furthermore, in situations of unlawful occupation, administrative decisions enforcing the occupation may be disregarded. After World War II, Soviet Union decisions on Soviet citizenship for inhabitants of the occupied Baltic countries in some cases were not recognised in Swedish law.[37]

Public order as a limiting factor for the effect of domestic decisions has not been a central topic in Swedish administrative law. In analogy with private international law, public order or *ordre public* may occasionally be relevant. The legal framework for *ordre public* assessments is, however, uncertain.[38] The concept of public order could be clarified if it was linked to the fundamental aims of public activity laid down in the central constitutional act.[39] As far as known to this author, there is no court ruling in the administrative field concerning public order as a limiting factor for foreign administrative decisions. When it comes to burdensome foreign decisions, such as penalties of different kinds, it is especially important that the *ordre public* mechanism is used, if so needed. This might for example be the case if the foreign decision bases on racial discrimination.[40]

Concerning the performance of foreign administrative decisions, Swedish administrative authorities always apply Swedish administrative law, also when enforcing foreign decisions or supervising activities basing on foreign decisions. Also legal persons may be liable for administrative penalties such as sanction fees or conditional fines.[41]

The requirements under Swedish law for execution of a foreign administrative decision have been touched upon above in relation to the efficacy and enforceability of foreign decisions, and in relation to formal and material requirements.

The procedure for recognition and execution of foreign administrative acts is to a large extent sector-specific. In many instances, the Swedish Enforcement Authority (*Kronofogdemyndigheten*) is responsible for enforcing administrative decisions by coercive means. This applies for example to the collection of unpaid taxes or other public claims. Given the close relationship of such issues to the administrative structure of the public sector of a state, it is natural that the procedures are decided on the national level. In EU law, the principle of procedural autonomy bases on this kind of reasoning.

In general, the rules and principles under private international law to a large extent have served as references for the scholarly development of international administrative law in Sweden, including matters of recognition and execution. However, private international law models might not always be suitable for

[37] See Wenander 2010, p. 209 ff.; Wenander 2011, p. 778; Swedish Supreme Court Cases *NJA* 1948 p. 805 and 1949 p. 82.

[38] See Wenander 2010, p. 231; Wenander 2011, p. 776.

[39] See Ch. 1, Art. 2 of the Regeringsform [Instrument of Government], *SFS* 1974:152.

[40] See Wenander 2010, p. 232.

[41] See Ragnemalm 1991, p. 203 f.

recognition of administrative decisions. An important aspect in international administrative law is the cross-border cooperation between authorities in the adoption of rules, decision-making, and establishment of *best practices*. This for example means that legal problems in individual cases could be solved in cooperation between national authorities in different countries. In this way, the establishment of administrative networks is a central feature to today's international administrative law. This kind of solution seems to be rather rare in private international law.

EU Law

EU law is central to the recognition of foreign administrative decisions. Although there are examples of recognition duties based on international conventions or Swedish law, the majority of recognition duties are found in EU law.

Already the treaty provisions on free movement and equal treatment imply recognition duties. Especially, the principle of mutual recognition established in the case-law of the CJEU is important in this context. Furthermore, secondary law concretises those rules and principles concerning a duty to recognise favourable decisions from other member states. Although much rarer, there are also examples of duties under secondary EU law to recognise burdensome decisions.[42]

An example of EU secondary legislation related to recognition is found in Council framework decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties. In Swedish law, this framework decision is implemented through the Act on recognition and enforcement of fines within the European Union.[43] Under the act, the Swedish Enforcement Authority shall consider if a decision on a fine should be sent to another member state with a request for recognition and enforcement there. Such a request may be sent if it corresponds with the provisions of framework decision 2005/214/JHA and it could bring advantages for the enforcement of the fine (Ch. 2, Sec. 1 of the act).

International Conventions

Sweden is a party to several international conventions related to the recognition and execution of administrative decisions in various fields.[44] Some such conventions have been prepared in Nordic cooperation between Sweden, Denmark, Finland,

[42] See Wenander 2013, p. 63 f.

[43] Lag om erkännande och verkställighet av bötesstraff inom Europeiska unionen (Act on recognition and enforcement of fines within the European Union), *SFS* 2009:1427.

[44] See Wenander 2011, p. 765 f.

Iceland and Norway.[45] There are international and Nordic convention rules on recognition of foreign administrative decisions concerning citizenship,[46] higher education,[47] transport,[48] and international trade.[49]

Concerning matters of legalisation and similar procedures, Sweden has signed and ratified the European Convention on Diplomatic and Consular Instruments.[50] She is also a party to the Apostille Convention.[51] Swedish law does not require the legalisation of foreign public documents in the field of administrative law.[52] Depending on the character of the document and the administrative matter, the individual may be asked to provide a translation into Swedish of a foreign decision invoked in Swedish proceedings.[53]

Matters relating to legalisation for use in foreign countries are handled by the Ministry for Foreign Affairs and Swedish embassies abroad. In some situations a *notarius publicus* [Notary Public] must certify a document before it is legalised. Only a Notary Public has the competence to issue apostilles.[54] There is no e-apostille procedure.

Doctrinal Treatment

Over the last decade, the internationalisation of Swedish administrative law has attracted growing attention in legal scholarship. The recognition of foreign administrative decisions has been a special point of interest in this line of research.

[45] See on Nordic legal and administrative cooperation within the framework of the Nordic Council, the Nordic Council of Ministers and other bodies, see Wenander 2014, pp. 16–36.

[46] See Art. 1 of the Convention on Certain Questions Relating to the Conflict of Nationality, The Hague 12.4.1930, 179 *LNTS* 89; Art. 3(1) of the European Convention on Nationality, Strasbourg 6.11.1997, *CETS* 166.

[47] Agreement between Denmark, Finland, Iceland, Norway and Sweden on the Access to Higher Education, Copenhagen 3.9.1996, 1984 *UNTS* 27; Arts. IV-VI Convention on the Recognition of Qualifications concerning Higher Education in the European Region, Lisbon, 11.4.1997, *CETS* 165.

[48] Art. 24 of the Convention on Road Traffic, Geneva 19.9.1949, 125 UNTS 3; Art. 41 of the Convention on Road Traffic, Vienna, 8.11.1968, 1042 *UNTS* 17; Art. 1 of the Nordic Agreement on Recognition of Driving Permits and Vehicle Registration, Mariehamn 12.11.1985, 1600 *UNTS* 265; Art. 33 of the Convention on International Civil Aviation, Chicago, 7.12.1944, 15 *UNTS* 295.

[49] Art. 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) within the WTO framework.

[50] European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers, London, 7.6.1968, *CETS* 63, *SÖ [Sveriges internationella överenskommelser – Sweden's International Agreements*] 1973:60.

[51] Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, the Hague, 5.10.1961, *SÖ* 1999:1.

[52] See Wenander 2010, p. 266; Berglund 1999, pp. 31–41.

[53] See Secs. 4 (service duty) and 8 (the right to interpretation and translation) of the Administrative Procedure Act; cf. the Language Act (Språklag), 2009:600.

[54] See the practical information on legalisation and apostille provided on the web page of the Swedish Government Offices, http://www.government.se (accessed 1.10.2014).

Especially, docent (associate professor) Vilhelm Persson and the present author, both from Lund University, have been active in this field.

A pioneering work is (Persson 2005). This book explores the legal framework for co-operation with foreign administrative authorities, including certain aspects of recognition of foreign administrative decisions. The topic of recognition is dealt with more in-depth in the specialised study (Wenander 2010). Certain matters dealt with in this work are also dealt with in an international perspective in (Wenander 2011). In (Wenander 2013) the recognition of foreign decisions is discussed as one of several means for international cooperation in administrative law. The latter publication is part of an anthology edited by scholars from Uppsala University (Lind and Reichel 2013) on the internationalisation of administrative law. This anthology may be seen as an indication of an increased Swedish research interest in international aspects of administrative law, including recognition of foreign decisions.

Concluding Remarks

In this final section some general remarks are made on the legal framework for recognition of foreign administrative decisions in Swedish law as described in the preceding sections. Below, certain characteristic features of the administrative procedure, the role of EU law and international conventions, and the doctrinal treatment are summarised.

Concerning the administrative procedure, the recognition of foreign administrative decisions may be seen as integrated in the general legal structures for administrative law. There are no general rules applicable to the procedures for recognition. Instead, such matters will have to be dealt with under the general administrative law principles, the rules of the Administrative Procedures Act, and rules found in special legislation. Of course, directly and indirectly applicable EU legislation as well as international conventions are important in this context. For example, it has been noted above that a Swedish accession to the European Convention on the Service Abroad of Documents relating to Administrative Matters might simplify international cooperation in administrative law.

As has been put forward above, the wide range of topics covered by administrative law probably would make it difficult to adopt general international conventions on recognition of foreign administrative decisions. Presumably, the same kind of difficulties would arise in relation to general national administrative legislation in this field. There are no indications that such legislation would be necessary at the present stage of development.

Furthermore, it has been noted that the procedure for recognition of foreign administrative decisions does not normally involve authentication measures by notaries or similar official bodies. The Swedish legislation does not require the use of legalisation or apostille for foreign decisions to take legal effects in Sweden.

The phenomenon of recognition of foreign administrative decisions is to a great degree linked to the Swedish membership of the European Union. The bulk of recognition regimes are found in EU law, including the treaty provisions on free move-

ment. As has been mentioned, however, recognition duties to some extent also follow from international agreements, including ones entered within the framework of Nordic cooperation.

As stated above, there have been a number of studies on the internationalisation of administrative law in Sweden, including matters relating to recognition of foreign administrative decisions. Although this line of research has been limited to a small research environment, there are indications that there now is a greater interest in the wider Swedish legal research community.

To conclude, the legal mechanism of recognition of foreign administrative decisions is today a well-established feature of Swedish administrative law. As stated at the outset, it constitutes an important example of the internationalisation of administrative law. It is plausible that the development of this legal mechanism will continue in legislation, case law, and legal doctrine.

Bibliography

Berglund, M. 1999. Recognition and enforcement of foreign judgements outside the scope of the Brussels and Lugano conventions. In *Rättsvetenskapliga studier tillägnade minnet av Knut Rodhe* [Legal studies dedicated to the memory of Knut Rodhe], ed. P.J. Nordell, 31–41. Stockholm: Mercurius. ISBN 91-973587-2-X.

Council of the Notariats of the European Union. 2008. *Comparative study on autenthic instruments. National provisions of private law, circulation, mutual recognition and enforcement, possible legislative initiative by the European Union – United Kingdom, France, Germany, Poland, Romania, Sweden*. Brussels: European Parliament. Publication Number PE 408.329. XXI+194 p.

Lavin, R., and L.-G. Malmberg. 2010. Administrative law. In *Swedish legal system*, ed. M. Bogdan, 66–94. Stockholm: Norstedts Juridik. ISBN 978-91-39-01489-8.

Lind, A.-S., and J. Reichel (eds.). 2013. *Administrative law beyond the state : Nordic perspectives*, 363 p. Leiden/Stockholm: Martinus Nijhoff Publishers/Liber. ISBN 978-9004-26502-8.

Loebenstein, E. 1972. *International mutual assistance in administrative matters*, 93 p. Wien/New York: Springer. ISBN 0-387-81120-6.

Nergelius, J. 2010. Constitutional law. In *Swedish legal system*, ed. M. Bogdan, 39–65. Stockholm: Norstedts Juridik. ISBN 978-91-39-01489-8.

Persson, V. 2005. *Rättsliga ramar för gränsöverskridande samarbete: Förvaltningsmyndigheters internationella avtalsförhållanden* [Legal frameworks for cross-border co-operation: International agreements between administrative authorities], 379 p. Lund: Juristförlaget i Lund. ISBN 91-544-0352-9.

Ragnemalm, H. 1991. *Administrative justice in Sweden*, 262 p. Stockholm: Juristförlaget JF. Also published in Wade, W., Piras, A. (Eds.) Administrative law – The Problem of Justice. Vol. 1, Anglo-American and Nordic systems. Milan : Giuffrè, 1991. ISBN 88-14-02339-5. ISBN 91-7598-505-5.

Schwarze, J. 2006. *European administrative law*, Rev. 1st ed. London: Sweet and Maxwell. CCXXXII+1562 p. ISBN 978-0-421-96560-7.

Strömberg, H., and B. Lundell. 2011. *Allmän förvaltningsrätt* [General administrative law], 25th ed, 272 p. Malmö: Liber. ISBN 978-91-47-09594-0.

Wenander, H. 2010. *Erkännande av utländska förvaltningsbeslut [Recognition of Foreign Administrative Decisions]*, 404. Lund: Juristförlaget i Lund. ISBN 978-91-54-40115-4.

Wenander, H. 2011. Recognition of foreign administrative decisions – balancing international cooperation, national self-determination, and individual rights. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*. 71:755–785. ISSN 0044-2348.

Wenander, H. 2013. A toolbox for administrative law cooperation beyond the state. In *Administrative law beyond the state: Nordic perspectives*, ed. A.-S. Lind and J. Reichel, 47–74. Leiden/Stockholm: Martinus Nijhoff Publishers/Liber. ISBN 978-9004-26502-8.

Wenander, H. 2014. *Fri rörlighet i Norden. Nordiska gränshinder i rättslig belysning* [Free movement between the Nordic Countries. Nordic border barriers in legal perspective], 154 p. Lund: Juristförlaget i Lund. ISBN 978–91–544–0566–4.

Chapter 16
The Recognition of Foreign Administrative Acts in Switzerland

Myriam Senn

Abstract The article focuses on the Recognition of Foreign Administrative Acts according to Swiss law. The Federal Act on Administrative Procedure delineates the concept of administrative act. It does not specifically mention foreign administrative acts. Their treatment is not unified in Switzerland. Much more it depends on the area concerned and blocking statutes may apply. With view to the role of the issue in Switzerland, efforts are underway to reconsider the regulatory situation. Overall, the doctrinal treatment of the subject is not very elaborated.

Introduction[1]

The recognition of foreign administrative acts in Switzerland is an issue due to the existence of a range of rationales. The country is largely interconnected with other countries, mainly by virtue of its geographical situation. Some relations are bilateral while others are trilateral, being at the border of two countries, such as Valais with France and Italy or Basle with France and Germany. A number of international organisations and multinational companies have established their headquarters or branches in the country. Thus, cooperation across borders and finding adequate ways to collaborate with other countries is an important matter.

Cross-border activities regularly require the intervention of authorities and the number of foreign administrative acts addressed to private persons or companies increases. Along with it, administrative relationships among authorities and with international organisations intensify and networks of administrative authorities are

[1] In this contribution, Swiss legal acts and articles are cited in English. However, it should be noted that translations into English are provided for information purposes only and do not have any legal effect. English is not an official language of the Swiss Confederation.

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constituted. A body of global administrative law is emerging.[2] In this context, the issue regarding the recognition of foreign administrative acts is a pivotal one.

This report provides an overview of governing rules and points to ambiguous matters and to some regulatory changes currently being considered in Switzerland. It proceeds as follows: The concept of administrative act according to Swiss law, its classification as foreign, and the description of the administrative procedure applied to its adoption. It then concentrates on the service of administrative acts and their recognition and execution in other countries. The next part deals with international conventions on the recognition and execution of administrative acts and the legalisation of public documents. Finally it takes a look at the doctrinal treatment of the topic.

The Concept of Administrative Act and Its Classification as 'Foreign'

Definition of Administrative Act

In Switzerland, a civil law country, administrative matters pertain to public law. Specifically, they are governed by the Federal Act on Administrative Procedure.[3] The APA applies to the procedure in administrative matters that are to be dealt with by administrative acts of federal administrative authorities of first instance or on appeal (Art. 1, Para. 1). Instead of using the term 'administrative act' similarly to Germany (Verwaltungsakt), the Swiss legislation uses the generic term of 'Verfügung' in German, 'décision' in French and 'decisione' in Italian.[4] An administrative act or decision is an instruction or command issued by an authority implementing public law in an individual case and governing a legal relationship unilaterally and bindingly.[5]

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[2] On the concept, see Sabino Cassese, 2005. Administrative Law without the State? The Challenge of Global Regulation. In 37 *New York University Journal of International Law and Politics*, 2005, pp. 663–694; Benedict Kingsbury, Nico Krisch, Richard B. Stewart, 2005. The Emergence of Global Administrative Law? In 68:3–4 *Law & Contemporary Problems*, 2005, pp. 15–61. Linked to the concept of global administrative law, the notion of transnational administrative acts as used in the European Union regarding the treatment and effect of administrative acts of one member states in the other member states should be mentioned. As far as Switzerland is not directly concerned by this issue, it is not dealt with with more details at this place.

[3] Federal Act on Administrative Procedure of 20 December 1968 (Administrative Procedure Act, APA, SR 172.021).

[4] In the following the terms administrative act, administrative order and decision are used interchangeably.

[5] Pierre Tschannen, Ulrich Zimmerli, Markus Müller, 2009. *Allgemeines Verwaltungsrecht*, 3rd ed. Bern, 2009, p. 225; Pierre Moor, Etienne Poltier, 2011. *Droit Administratif*, *Volume II*: *Les actes administratifs et leur contrôle*. Berne, 2011, pp. 174 et seqq.; Ulrich Häfelin, Georg Müller, Felix Uhlmann, 2010. *Allgemeines Verwaltungsrecht*, 6th ed., Bern 2010, pp. 193 et seqq.

The APA defines the concept of administrative act in its Art. 5. The legal definition reads as follows:

1. Administrative acts are decisions of the authorities in individual cases that are based on the public law of the Confederation and have as their subject matter the following:
   (a) The establishment, amendment or withdrawal of rights or obligations;
   (b) The finding of the existence, non-existence or extent of rights or obligations;
   (c) The rejection of applications for the establishment, amendment, withdrawal or finding of rights or obligations, or the dismissal of such applications without entering into the substance of the case.
2. Administrative acts are also enforcement measures (Art. 41, para. 1 Let. a and b); interim orders (Art. 45); decisions on objections (Art. 30 para. 2, Let. b, 46 Let. b, and 74 Let. b); appeal decisions (Art. 61 and 70); decisions in a review (Art. 68) and on explanatory statements (Art. 69).
3. Declarations made by authorities on the rejection or raising of claims that must be pursued by taking legal proceedings do not constitute administrative acts.

Six characteristics can be made out. An administrative act:

Is a measure issued by an administrative authority,
Is a measure based on public law, as opposed to private law,
Is a unilateral measure, as opposed to bilateral, i.e. an administrative agreement,
Regulates a behaviour, i.e. it may create, modify, or cancel the rights of persons,
Has an individual concrete character, as opposed to a general abstract character,
Produces direct external legal effects, i.e. external to the administrative body concerned.[6]

In administrative practice, a decision can be expressly designated as such or as an administrative act. It can also take the form of a certificate, a license, an authorisation, a permit, an approval, a prescription, a clearance, or a prohibition, to name a few. Thus, an administrative act can involve diverse forms of administrative relations.[7] Both according to the doctrine and in legal practice, the delimitation of the notion of administrative act in application of the APA is not always obvious. Recurrently, it must be ascertained on a case-by-case basis by courts. In the case of the denial of the existence of an administrative act, they will not rule on the cause.[8]

[6] Alexandre Flückiger, 1998. *L'extension du contrôle juridictionnel des activités de l'administration – un examen généralisé des actes matériels sur le modèle allemand*? Bern, 1998, pp. 134–136, with further references; Tschannen, Zimmerli, Müller, supra note 5, pp. 229–236.

[7] Tschannen, Zimmerli, Müller, supra note 5, pp. 225–226.

[8] E.g. Federal Supreme Court case 109 Ib 253; Federal Supreme Court case 132 V 93. Flückiger, supra note 6, pp. 5 et seqq., 134–137.

Characteristics of a Foreign Administrative Act

While administrative acts issued by the competent Swiss authorities are national acts and recognised as such within the Swiss territory, foreign administrative acts are those passed by authorities or agencies in a third country, recognised as valid and enforceable in that country. The Swiss legislation does not explicitly lay down which specific features differentiate a national administrative act from a foreign one. Basically, all acts issued by foreign authorities, addressed to citizens or legal entities in Switzerland, and which shall have legal effects on the addressees in Switzerland shall be considered to be foreign administrative acts.

Not all foreign administrative acts are subject to recognition and are enforceable in Switzerland. While any decision passed by a foreign authority or court can qualify as a decision under international private law, this is not the case in administrative law.[9] Its structure and aims are different and the nature of the administrative acts may vary. The issue regards their qualification. In addition to the decision, the concept also encompasses substantive acts, administrative ordinances, plans or agreements under administrative law. Substantive acts do not primarily deploy legal effects and therefore raise the issue of recognition or execution. Neither do administrative ordinances. They do not represent any individual and concrete act and do not qualify as decisions. The same applies to plans, which are linked to a specific territory and are not subject to recognition in Switzerland. As far as administrative agreements are concerned, they represent bilateral agreements. In some cases, they may involve individuals or firms in charge of fulfilling public tasks. As such, the acts they pass are subject to recognition.[10]

Effectiveness Requirements for National and Foreign Administrative Acts

National Acts

At a national level, all activities of the state and its competent authorities and the issuance of administrative acts or decisions shall be based on the rule of law. They are limited by the statute and conducted in the public interest. They shall respect the

[9] Federal Supreme Court case 122 III 344; Bernard Dutoit, 2005. *Droit international privé Suisse*. Basel, Geneva, Munich, 2005. 98; Minh Son Nguyen, 2006. Droit administratif international. In Zeitschrift für Schweizerisches Recht, Bd. 125 (2006) II, p. 125.

[10] For more details see Nguyen, supra note 9, pp. 125–128.

principle of proportionality and the authorities shall act in good faith. In addition, international law shall be respected (Art. 5 FConst).[11]

Under formal aspects, administrative acts must be designated as such, even if the competent authority passes them in the form of a letter (Art. 35, Para. 1 APA). They are notified to the parties in writing and must include the date, place and signature. With the consent of the party, notification by electronic means is possible (Art. 34, Para. 1bis APA). The act shall state the rationales for its issue. In case an application of the parties is granted in full and no party requests the rationales leading to it, the authority may be dispensed from stating them. The instructions regarding the legal remedies must be provided, indicating the ordinary remedies, the competent authority for an appeal and the applying time limit (Art. 35, para. 2–3 APA). However, for an act to qualify as administrative act, the formal aspects are not a prerequisite, but rather the consequence of the act. Regarding its effectiveness, its content is determining. Wrong or disregarded formal aspects of a notification will not lead to the nullity or invalidity of an administrative provided no party is prejudiced by the defect, but its effect will be limited (Art. 38 APA).[12]

Under substantive aspects an administrative act shall represent a measure implementing public law. It governs a legal relationship between the state and natural or legal persons. It shall be sufficiently specified to apply a public law rule directly in an individual concrete case. It shall be legally effective as soon as it has been notified to the parties or it has been delivered to them. However, its effectiveness can be delayed due to a special statute or when stipulated by the responsible authority. Its effectiveness may then depend on practical rationales, such as instructions for traffic circulation, which have to be organised first. Finally, an appeal shall delays its effectiveness. In case the responsible authority has deprived an administrative act from the suspensive effect, the court of appeal may decide to restore it (Art. 55 APA).[13]

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[11] Art. 5 of the Federal Constitution of the Swiss Confederation of 18 April 1999 (FConst, SR 101), Rule of law, reads as:

1. All activities of the state shall be based on and limited by law.
2. State activities must be conducted in the public interest and be proportionate to the ends sought.
3. State institutions and private persons shall act in good faith.
4. The Confederation and the Cantons shall respect international law.

[12] Tschannen, Zimmerli, Müller, supra note 5, pp. 260–262; Häfelin, Müller, Uhlmann, supra note 5, pp. 215–219.

[13] Moor, Poltier, supra note 5, pp. 179 et seqq.; Tschannen, Zimmerli, Müller, supra note 5, pp. 282–284; Häfelin, Müller, Uhlmann, supra note 5, p. 220.

Foreign Acts

Foreign acts cannot be directly effective in Switzerland. Basically, the international law principles of sovereignty and territoriality apply. The sovereignty of the Swiss state has to be protected. To this end, Switzerland has laid down some blocking statutes. These statutes apply on a continuous basis and are addressed to an undefined group of persons. The basic rule, Art. 271 CC,[14] for Unlawful activities on behalf of a foreign state, reads:

1. Any person who carries out activities on behalf of a foreign state in the Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, Any person who carries out such activities for a foreign party or organisation,

   Any person who encourages such activities, is liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.

2. Any person who abducts another by using violence, false pretences or threats and takes him abroad in order to hand him over to a foreign authority, party or other organisation or to expose him to a danger to life or limb is liable to a custodial sentence of not less than one year.
3. Any person who makes preparations for such an abduction is liable to a custodial sentence or to a monetary penalty.

This rule pursues the aim of protecting Swiss sovereignty, independence, and autonomy. It is addressed to persons carrying out activities and acting on behalf of a foreign state in the Swiss territory and prohibits them. Another blocking statute is Art. 273 CC, which protects from industrial espionage.[15] Still another blocking statute is Art. 47 of the Banking Act regarding banking secrecy.[16]

However, in addition to these blocking statutes, the Swiss state has also defined special statutes and/or signed international agreements to co-operate with foreign

[14] Swiss Criminal Code of 21 December 1937 (CC, SR 311.0).

On the blocking statutes, see Claudia M. Fritsche, 2013. *Interne Untersuchungen in der Schweiz*. Zurich, St.Gallen, 2013, pp. 228 et seqq.

[15] It reads: Any person who obtains a manufacturing or trade secret in order to make it available to an external official agency, a foreign organisation, a private enterprise, or the agents of any of these, or any person who makes a manufacturing or trade secret available to an external official agency, a foreign organisation, a private enterprise, or the agents of any of these, is liable to a custodial sentence not exceeding 3 years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year. Any custodial sentence may be combined with a monetary penalty.

[16] Federal Act on Banks and Savings Banks of 8 November 1934 (BA, SR 952.0). Art. 47 reads:

1. Persons who deliberately do the following will be imprisoned up to 3 years or fined accordingly:

authorities, for instance with regard to criminal matters.[17] Contrary to the Mutual Assistance Act, no general statute on international administrative assistance exists. Proper rules on administrative assistance have been introduced on a case-by-case basis in special statutes. In these cases, the recognition can occur based on the legal basis, which means that no proper recognition is necessary. It can also occur through a specific administrative act or a judgment. This is the case in the financial sector for instance. Cooperation with foreign authorities responsible for financial market supervision is regulated in Art. 42 FINMASA,[18] on Administrative assistance. It reads:

In order to enforce the financial market acts, FINMA may request foreign authorities responsible for financial market supervision to provide information and documents.

FINMA may hand over information and documents that are not publicly accessible to foreign authorities responsible for financial market supervision only if the foreign authorities are bound by official or professional secrecy and the information:

is used exclusively for the direct supervision of foreign institutions; and

is passed on to competent authorities or to bodies that are entrusted with supervisory duties that lie in the public interest only on the basis of a general authorisation in an international treaty or with the consent of FINMA.

FINMA shall refuse consent if the information is intended to be passed on to prosecution authorities and mutual assistance in criminal matters would be excluded. It decides in agreement with the Federal Office of Justice.

(a) Disclose confidential information entrusted to them in their capacity as a member of an executive or supervisory body, employee, representative, or liquidator of a bank, as member of a body or employee of an audit firm or that they have observed in this capacity;
(b) Attempt to induce an infraction of the professional secrecy.

2. Persons acting in negligence will be penalized with a fine of up to 250,000 francs.
3. In the case of a repetition within 5 years of the prior conviction, the fine will amount to a minimum of 45 daily fines in lieu of jail time.
4. The violation of professional confidentiality remains punishable even after a bank license has been revoked or a person has ceased his/her official responsibilities.
5. The federal and cantonal provisions on the duty to provide evidence or on the duty to provide information to an authority are exempt from this provision.
6. Prosecution and judgment of offences pursuant to these provisions are incumbent upon the cantons. The general provisions of the Swiss Penal Code are applicable.

[17] Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981 (Mutual Assistance Act, IMAC, SR 351.1).

[18] Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007 (Financial Market Supervision Act, SR 956.1).

Where the information to be passed on by FINMA relates to individual clients, the Federal Act of 20 December 1968 on Administrative Procedure applies.

A more detailed rule on administrative assistance is laid down in Art. 38 SESTA.[19] In addition, both Art. 43 FINMASA and Art. 38a SESTA[20] regulate the conduct of cross-border audits.

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[19] Federal Act on Securities Exchanges and Securities Trading of 24 March 1995 (Securities Exchange Act, SR 954.1). Due to the fact that it was not possible to meet the requests for administrative assistance based on the former rules on SESTA, in particular those coming from the Italian Commissione Nazionale per le Societa e la Borsa (Consob) and the US Securities and Exchange Commission (SEC), the statute was revised in 2005 and a new rule has been introduced in order to facilitate the exchange of information with foreign authorities. A large practice exists in that field and a range of decisions has been rendered, formerly by the Federal Supreme Court and later on by the Federal Administrative Court. Art. 38 SESTA, Administrative assistance, now reads:

1. FINMA may request from foreign financial market supervisory authorities such information and documents as may be necessary for the enforcement of this Act.
2. It may forward publicly inaccessible information and case-related documents to foreign financial market supervisory authorities only where:
   (a) This information is used solely to enforce regulations governing securities markets, securities trading and securities traders, or is forwarded to other authorities, courts or bodies for this purpose;
   (b) The applicant authorities are bound by official or professional secrecy, notwithstanding provisions on the public nature of proceedings and the notification of the general public about such proceedings.
3. Subject to Para. 4 and 5, should the information that FINMA is to pass on individual clients of securities traders, the Federal Act on Administrative Proceedings of 20 December 1968 shall apply.
4. Administrative assistance proceedings shall be carried out swiftly. FINMA shall observe the principle of proportionality. The transmission of information on persons evidently not involved in the matter under investigation is prohibited.
5. The decision of FINMA on the transmission of information to the foreign financial market supervisory authority may be challenged by the client before the Federal Administrative Court within 10 days. Art. 22a of the Federal Act on Administrative Proceeding of 20 December 1968 does not apply.
6. Provided judicial assistance in criminal matters is permitted. FINMA may, in agreement with the Federal Office of Justice, grant consent for transmitted information to be forwarded to criminal prosecution authorities for a purpose other than that stated in para. 2a. The Federal Act on Administrative Procedure of 20 December 1968 is applicable.

[20] Art. 43 FINMASA reads:

1. In order to enforce the financial market acts, FINMA may itself carry out direct audits at the foreign establishments of supervised persons and entities where it is responsible for their consolidated supervision as part of home country supervision, or have such audits carried out by audit companies or mandataries.
2. It may permit foreign authorities responsible for financial market supervision to carry out direct audits at Swiss establishments of foreign institutions, provided these authorities:
   (a) Are responsible for the consolidated supervision of the audited institutions as part of home country supervision; and

Hence, administrative assistance requests and administrative acts enacted by foreign authorities must be submitted to the responsible national public administration authority. That authority will be in charge of handling the matter with the addressee of the request or act in Switzerland if it recognises it. Then, it informs the foreign authority accordingly or transmits the requested information or documents, i.e. renders the foreign act effective. These acts are then effective in accordance with the rules of the foreign state concerned (exequatur).[21]

Due to the increasing number and diversity of administrative acts and administrative assistance requests submitted by foreign authorities, a report on the opportunity to introduce a federal statute with the aim of protecting and reinforcing Swiss sovereignty was established. It was submitted to the consultation of a broader public

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(b) The requirements for administrative assistance under Article 42, Paragraphs 2 and 3 are fulfilled.

3. Information may only be collected through cross-border direct audits if it is required for the consolidated supervision of foreign institutions. This includes, in particular, information on whether an institution throughout its group structure:

   (a) Is appropriately organised;
   (b) Records, limits and monitors in an appropriate manner the risks inherent in its business operations;
   (c) Is managed by persons who offer a guarantee of proper business conduct;
   (d) Fulfils the equity capital and risk diversification regulations on a consolidated basis; and
   (e) Properly complies with its reporting obligations vis-à-vis the supervisory authorities.

4. FINMA may accompany the foreign authorities responsible for financial market supervision on their direct audits in Switzerland or arrange for them to be accompanied by an audit company or third party. The supervised persons and entities concerned may request such accompaniment.
5. Establishments organised under Swiss law must provide the foreign financial market supervisory authorities and FINMA with the information required to carry out the direct audits or the information that FINMA requires to provide the administrative assistance, and must permit the inspection of their books.
6. Establishments are defined as:

   (a) Subsidiaries, branch offices and representative offices of supervised persons and entities or of foreign institutions; and
   (b) Other companies, provided their activity is included by a financial market supervisory authority in the consolidated supervision.

Art. 38a SESTA reads:

1. Insofar as foreign supervisory authorities responsible for stock exchanges and securities dealers wish, in the course of direct inspections within Switzerland, to have access to information which concerns individual clients of securities dealers, FINMA shall gather such information itself and shall transmit it to the applicant authorities.
2. The procedure is in accordance with the Federal Act on Administrative Procedure of 20 December 1968.
3. The transmission of information on persons evidently not involved in the matter under investigation is prohibited.

[21] Nguyen, supra note 9, pp. 121–122; Christine E. Linke, 2011. *Europäisches Internationales Verwaltungsrecht*. Frankfurt am Main, 2011, p. 31.

in 2013. After the compilation of the results the Federal Council finally declared not to pursue the project in February 2015.[22]

Failure to Comply: Role of the Public Administration

Possibility to Intervene

The principles of the rule of law, legal security, and equal treatment all require that public law orders, in particular administrative acts or decisions, be binding. They have to be complied with. As public law acts, their nature is mandatory. The competent administrative authority issuing an administrative act is also responsible for its enforcement. Possible means administrative authorities can adopt to enforce decisions in the event of failure to comply with them constitute administrative constraint measures. Two main categories of constraint measures can be distinguished: Measures leading to the execution of the administrative act and repressive measures. Executory measures apply to enforce the administrative rules directly. They can comprise execution by substitution, legal compulsion, or default execution when a monetary payment is concerned. Repressive measures apply when the redress of a misconduct is not possible following a breach of rules.[23]

Authorisation Requirements

As far as the competent authority issuing an administrative act is responsible for its enforcement, no legal authorisation is required in the event of failure to comply. The issue is best illustrated with an example: The supervisory authority of financial markets passes decisions to appoint observers. They are in charge of establishing reports

[22] Bericht des Bundesamtes für Justiz zu Rechtsfragen im Zusammenhang mit der Zusammenarbeit mit ausländischen Behörden (Amtshilfe, Rechtshilfe, Souveränitätsschutz), Federal Department of Justice, 14 March 2011; Erläuternder Bericht zum Entwurf für ein Bundesgesetz über die Zusammenarbeit mit ausländischen Behörden und über den Schutz der schweizerischen Souveränität sowie zum Entwurf für einen Bundesbeschluss über die Genehmigung von zwei Europäischen Übereinkommen in Verwaltungssachen, February 2013; http://www.ejpd.admin.ch/content/ejpd/de/home/themen/sicherheit/ref_gesetzgebung/ref_zssg.html; Förderung der Zusammenarbeit und Schutz der Souveränität grundsätzlich begrüsst; http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2013/2013-12-132.html (last visited 20 July 2015); Verzicht auf Zusammenarbeits- und Souveränitätsschutzgesetz, 11 February 2015, https://www.bj.admin.ch/bj/de/home/aktuell/news/2015/ref_2015-02-11.html (last visited: 20 July 2015).

[23] In the doctrine, they are also considered to represent sanctions. Moor, Poltier, supra note 5, pp. 133–135; Häfelin, Müller, Uhlmann, supra note 5, pp. 260 et seqq.; Tschannen, Zimmerli, Müller, supra note 5, pp. 300 et seqq.; Tobias Jaag, 2001. Sanktionen im Verwaltungsrecht. In Festschrift für Niklaus Schmid. Jürg-Beat Ackermann, Andreas Donatsch, Jörg Rehberg (eds.), Wirtschaft und Strafrecht, Zurich, 2001, pp. 559–583; Tobias Jaag, 2002. Verwaltungsrechtliche Sanktionen und Verfahrensgarantien der EMRK. In Festschrift für Stefan Trechsel. Andreas Donatsch, Marc Forster, Christian Schwarzenegger (eds.), Strafrecht, Strafprozessrecht und Menschenrechte, Zurich, 2002, pp. 151–168.

on the operations of firms suspected to infringe a financial market statute. Based on the results of the report, it may issue a decision to wind up the firm. Hence, no prior authorisation is required, because it is the statutory responsibility of the authority to enforce the financial market statutes, protect the creditors, investors, insured persons, and to ensure the proper functioning of the financial market.[24] If the firm does not accept the decision, it may appeal before the responsible court.

Enforcement Measures

In case of failure to comply with an administrative order, the measures a responsible administrative authority may adopt depend on the matter of the decision and the concrete circumstances. In case of an administrative agreement, a decision is passed to order its enforcement. It is also possible to enforce compliance by entering an action.[25]

For the enforceability of an administrative act, some basic prerequisites must be fulfilled first and a determined procedure must be complied with in case of non-compliance: A decision will be enforceable provided an appeal is no longer possible and due process is complied with. The administrative act will then be formally legally binding and enforceable. It is also enforceable when it can still be contested or it can still be possible to appeal, but the permitted legal remedy does not have any suspensive effect, or it has been deprived from the suspensive effect (Art. 39 APA).

In case of an administrative act concerning a monetary payment, a bail-out, or the provision of security, non-compliance leads to debt enforcement. It will be enforced by means of debt collection procedures in accordance with the Fadeb[26] (Art. 40 APA).

A responsible authority shall also adopt other measures to enforce its acts. It shall substitute performance by itself or by delegation to a third party at the expense of the liable party. The costs must then be determined in a distinct administrative act (Art. 41, para. 1 Let. a APA). It shall enforce it directly against the party liable in person or against her property (Art. 41, para. 1, Let. b APA). It shall adopt a measure of prosecution in the event that another federal act provides for a penalty (Art. 41, para. 1, Let. c, APA). It shall prosecute the addressee of the act for contempt of official orders according to Art. 292 of the Criminal Code[27] if no other criminal law provision applies (Art. 41, para. 1, Let. d APA). Before the responsible authority

[24] Art. 5 FINMASA.

[25] Art. 35 Let. a, Art. 36 Federal Act on the Federal Administrative Court of 17 June 2005 (Administrative Court Act, ACA, SR 173.32); Art. 120, para. 1, Let. b, para. 2 Federal Act on the Supreme Court of 17 June 2005 (Supreme Court Act, SCA, SR 173.110); Tschannen, Zimmerli, Müller, supra note 5, p. 301.

[26] Federal Act on Debt Collection and Bankruptcy of 11 April 1889 (SR 281.1).

[27] It reads: Any person who fails to comply with an official order that has been issued to him by a competent authority or public official under the threat of the criminal penalty for non-compliance in terms of this Article is liable to a fine.

adopts any enforcement measure, it shall give notice thereof to the party liable and allow her a suitable period in which to comply, indicating the statutory penalties in the cases referred to in para. 1, Let. c and d (Art. 41, para. 2 APA). In the cases referred to in para. 1 Let. a and b, it may not give notice of the potential enforcement measure and not fix any compliance period for compliance if there is a risk in any delay (Art. 41, para. 3 APA).

If a decision entails an order to execute, tolerate, or refrain from something, then compliance concerns the actual delivery or 'Realerfüllung'. However, it is not always possible to enforce an administrative order. In practice, there exist a range of measures. They can be applied to directly and effectively enforce a decision. There are also indirect measures, whose aim is to pressure or motivate the addressees to fulfil their obligations or adapt their behaviour to the rules in the future.[28] Enforcement will then be indirect.

Still another possible measure consists in the direct enforcement of administrative law. It is not considered to represent an administrative constraint measure, but it can accompany or be combined with enforcement measures. Possible measures are: administrative disadvantages under the law, disciplinary measures such as naming and shaming, according to Art. 34 FINMASA, administrative sanctions including fines, threat of criminal penalties for non-compliance with an official order issued by a competent authority or public official (Art. 292 Criminal Code).[29]

Differences Among Categories of Foreign Administrative Acts

The generic term of foreign decision or foreign administrative act applies to all administrative acts which do not qualify as national or are not enacted by Swiss authorities. The following categories can be distinguished:

International Administrative Act

As a preliminary remark, a distinction must be made between foreign, i.e. international administrative acts passed by third countries and international administrative acts passed by an international organisation with a public international law statute,[30] and where Switzerland is a member of the organisation.

International administrative acts issued under international administrative law regard, for instance, employment disputes between an international organisation and its employees or other internal matters linked to the operations of an interna-

[28] Tschannen, Zimmerli, Müller, supra note 5, pp. 300 et seqq.

[29] Tschannen, Zimmerli, Müller, supra note 5, pp. 300 et seqq.

[30] To the concept see Andreas R. Ziegler, 2011. *Einführung in das Völkerrecht*. 2nd ed., Bern, 2011, pp. 4–5.

tional organisation. In this case, proper procedural and substantive rules apply. National administrative law is not concerned with these issues.[31]

Other administrative acts issued by third countries have to be recognised by the Swiss authorities first.

Supranational Administrative Act

Supranational administrative acts are those emanating from the European Union (EU) or its member states in the name of the EU. From a Swiss point of view, the bilateral agreements with the EU are determining. Specific recognition requirements and procedures for the execution of decisions may apply based on these agreements. An example is the agreement concluded between Switzerland and the EU on the mutual recognition of conformity evaluations,[32] which covers a wide range of products.

Global Administrative Act

A final category is that of global administrative acts, which design acts subsumed under the emerging concept of global administrative law, which is currently the object of a lively debate.[33] The designation of global indicates that the means and approaches used to resolve issues linked to the recognition of foreign administrative acts do not apply. They would need to be adapted. Due to the increasing number of cross-border relationships and transnational exchanges, both public and private new modes of interactions emerge. They lead to the emergence of alternative forms of transnational decisions. Currently, their status in relation to either national or international law and their possible linkage to them remains unclear in the doctrine.

In summary, international, supranational and global administrative acts present fundamental differences with regard to their definition, status, and recognition.

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[31] It should be noted that Art. 5, para. 4 and Art. 190 FConst determine that the Federal Supreme Court and other judicial authorities shall apply the federal acts and international law. In Switzerland, the adoption of international law rules is based on the monistic approach. Binding international law rules apply automatically. This practice has been confirmed by the Federal Supreme Court. See Yvo Hangartner, Martin E. Looser, 2014. Annotations to Art. 190 FConst. In Die Schweizerische Bundesverfassung, St. GallerKommentar. Bernhard Ehrenzeller et. al. (eds.), 3rd ed., Zurich: St. Gallen, 2014, pp. 3047 et seqq.; Ziegler, supra note 30, pp. 116–117.

[32] Agreement between the Swiss Confederation and the European Community on mutual recognition in relation to conformity assessment, Swiss instrument of ratification deposited on 16 October 2000, entered into force on 1st June 2002 (Accord entre la Confédération suisse et la Communauté européenne relatif à la reconnaissance mutuelle en matière d'évaluation de la conformité. Instrument de ratification suisse déposé le 16 octobre 2000, Entré en vigueur le 1er juin 2002 [RS 0.946.526.81]).

[33] Cassese, supra note 2; Kingsbury, Krisch, Stewart, supra note 2.

General Considerations on the Usual Administrative Adoption Procedure of Administrative Acts

Application of the Federal Act on Administrative Procedure

The administrative procedure for the adoption of administrative acts is governed by the APA. It applies to procedures in administrative matters that are to be dealt with by decisions of federal administrative authorities of first instance or on appeal (Art. 1, para. 1 APA), as already mentioned.[34] There are also exceptions. They concern either partial application (Art. 2 APA) or non-applicability (Art. 3 APA). This may be the case in relation to the administration of military justice, social insurance matters, or the procedure for customs clearance, for instance. In addition, proper provisions of federal law regulating a procedure with more detail apply provided they are not in contradiction with the provisions of the APA (Art. 4 APA). Then, Art. 5 APA provides a definition of the decision as mentioned.[35]

Rights of Interested Parties Regarding the Adoption of Administrative Acts

According to Art. 6 APA, parties are persons whose rights or obligations shall be affected by a decision and other persons, organisations or authorities who have a legal remedy against it. Thus, they are the interested parties or groups of interest. Their interest has to be demonstrated in order to be recognised by an administrative authority and to file an appeal. According to Art. 48 APA, the following conditions must be fulfilled to qualify as an interested party:

1. A right of appeal is accorded to anyone who:

   Has participated or has been refused the opportunity to participate in proceedings before the lower instance;
   Has been specifically affected by the contested administrative act; and

[34] Authorities are the Federal Council, its departments, the Federal Chancellery, the services subordinate to it, businesses, institutions, and other public offices of the Federal Administration (Art. 1, para. 2 Let. a APA), organs of the Federal Assembly and of the federal courts responsible for administrative acts in first instance and appeal decisions in accordance with the Federal Personnel Act of 24 March 2000 (SR 172.220.1) (Let. b), autonomous federal institutions or businesses (Let. c), the Federal Administrative Court (Let. cbis), federal committees (Let. d), other authorities or organisations outside the Federal Administration, provided they are issuing an administrative act in fulfilment of the federal public law duties assigned to them (Let. e).

[35] See supra point 2.1. For a general introduction see for instance Moor, Poltier, supra note 5, pp.174 et seqq., 209 et seqq.; Tschannen, Zimmerli, Müller, supra note 5, pp. 224 et seqq.; Häfelin, Müller, Uhlmann, supra note 5, pp. 192 et seqq.

Has an interest that is worthy of protection in the revocation or amendment of the administrative act.

2. Persons, organisations, and authorities who are granted a right of appeal by another federal act shall also be entitled to appeal.

The right of interested parties is a core issue of administrative procedure. In a broad sense it can be subsumed under the right to be heard as laid down in the Federal Constitution and constitutes a fundamental right in Switzerland. Art. 29, para. 2 FConst regarding the General procedural guarantees states that each party to a case has the right to be heard. In addition, when human rights are concerned, complaints can be submitted to the European Court of Human Rights.[36] Art. 26-33b APA concretises this right. Art. 29 APA expressly lays down a right for parties to be heard. As a general rule, the competent authority hears the parties before issuing a decision (Art. 30, para. 1 APA). However, it is not required to hear them before issuing a decision when it is an interim order that cannot be appealed separately (para. 2, Let. a), a decision contestable by objection (Let. b), a decision granting the application of the parties in full (Let. c), enforcement measures (Let. d), or other decisions in proceedings of first instance if there is a risk in any delay, the parties have the right to appeal against the decision and no other provision of federal statute guarantees the right to preliminary hearing (Let. e).

Intervention of Parties

Intervention of Interested Parties

The intervention of interested parties is possible at different stages of the procedure. However, the procedural aspects of the intervention are not always identical. As a rule, interested parties have the right to be heard before an administrative act is passed. Then, in case they have objections to that act, they can file an appeal. According to the statute, the appeal may be introduced within a period of 30 days from the day of the notification of the act. Before the appellate authority or court, the interested parties to the procedure have the right to be heard and the court will initiate an exchange of written submissions.[37]

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[36] See e.g. Ziegler v. Switzerland, 33499/96 33499/96 of 21 February 2002 regarding the violation of Art. 6 European Convention on Human Rights of 4 November 1950, ECHR; Peter Goldschmid, 2002. Auf dem Weg zum endlosen Schriftenwechsel? In *Zeitschrift des Bernischen Juristenvereins* 138, 2002, pp. 281–284; Myriam Senn, 2003. Droit à un procès équitable. Violation de l'article 6 paragraphe 1 CEDH. Qualité de partie, CEDH Affaire Ziegler c. Suisse, Requête no 33499/96, Arrêt du 21.2.2002. In *Aktuelle Juristische Praxis* No. 7, 2003, pp. 862–865.

[37] Art. 57 APA, Exchange of written submissions, reads:

1. The appellate authority shall immediately notify the lower instance and any respondents or other parties involved of an appeal that is not prima facie inadmissible or unfounded, give them

The options of interested parties to intervene will depend on the issue at stake. At the federal level, the statute on the Federal Administrative Court lays down in which cases it is competent to rule on a case.[38] It is the last instance for recourses in cases concerning the granting of subventions, take-overs bids, or administrative assistance cases apart from administrative assistance regarding taxes, for instance.[39] In the other cases it handles, it issues judgements after hearing the parties and the interested parties are in a position to file an appeal to the Federal Supreme Court.

Both national and foreign private persons are also legitimated to file an appeal provided they fulfil the criteria of Art. 48 APA.[40]

In practice, the procedure may vary depending on the issue at stake, although the same APA rules basically apply. For instance, in the case of a finance institute requiring an authorisation to operate as a bank under the Banking Act, the responsible authority will pass a decision granting a license to the institute. Usually, no appeal is filed then. In case the authority declines granting the license, it first informs the applicant verbally in the course of a meeting or in the form of a written communication and suggests withdrawing the application. In this way, it does have to issue a decision and the applicant may resubmit the request later on. In case the applicant refuses, the authority makes a decision, which is challengeable at the next instance. The APA rules apply.

Intervention of Third Parties

Any third party intervening in a procedure has to demonstrate its interest in the matter and that it fulfils the conditions laid down in Art. 48 APA. However, to be recognised as an interested third party, the test is very high. Indeed, in the jurisprudence, a large number of Federal Supreme Court judgements deal with this issue. In particular, third parties must demonstrate that they have a current and legitimate interest to be protected by the statute (aktuelles Rechtsschutzinteresse). A recurrent and typical example concerns the recognition of a status as interested party of associations. They represent the interests of groups of persons and file appeals before a court to defend their members' interests. But, are they themselves directly interested? An example is the case of the introduction of a limit on the number of

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a period within which to respond and at the same time request the lower instance to produce its files.

2. It may invite the parties to exchange written submissions at any stage of the procedure or organise an oral hearing with them.

[38] Art. 31-33 ACA.

[39] Art. 82 SCA.

[40] Federal Supreme Court case 124 II 293, with further references; Hans Rudolf Trüeb, 1990. Rechtsschutz gegen Luftverunreinigung und Lärm, Thesis, Zurich, 1990, pp. 202–203; Gerhard Schmid, 1983. Grenzüberschreitende Verfahrensbeteiligung im Umweltschutzrecht, In Mélanges André Grisel, Neuchâtel, 1983, pp. 770 et seqq.; Nguyen, supra note 9, pp. 134–135; Markus Kriech, 1986. *Grenzüberschreitender Umweltschutz im schweizerischen Recht*. Zurich, 1986, pp. 65–71.

students to be admitted in the faculty of medicine of the University of Basle (i.e. numerus clausus), the Federal Supreme Court recognised the status of interested party for the students filing the appeal. However, it did not recognise the status of interested party for the association filing the appeal along with them. In particular, it was not specifically affected by the decision.[41]

Intervention of Foreign Public Administrations

As far as foreign public administrations are concerned, the statute does not mention any right of foreign public administrations to intervene. The situation is assessed on a case-by-case basis by the Federal Supreme Court. For example, it dealt exhaustively with the issue in the case of the dispute opposing Germany, mainly the neighbouring South German municipalities, to the Zurich canton due to aircraft noise caused by the Zurich Airport air traffic. The Zurich canton argued that these municipalities had no legitimation to introduce a complaint before the Swiss Federal Supreme Court. It would contradict the public law principle of territoriality. Swiss law would apply solely to and on the Swiss territory and its application could not be extended across the border. Indeed, this would also exclude private persons living abroad from making complaints to Swiss courts. According to the Supreme Court, the legitimation of a party is determined by its effective interests and not by its legal status. The person must have an unequivocally close relationship to the matter, which also includes a territorial relationship. In this specific case, the situation of the German municipalities was similar to the situation of the Swiss ones. They are only separated by the Rhine and the aircraft noise is no different. However, the Federal Supreme Court stated that it would not take a definitive stance on that matter. But, due to the fact that the commune also owned parcels of land and therefore it had to be treated similarly to a private party. Hence, it was legitimated anyway.[42] In the Swiss doctrine some authors argue that foreign municipalities could intervene with regard to any issue worthy of protection, such as environmental ones.[43]

In the case of administrative assistance in relation to securities transactions (Art. 38 SESTA) for instance, the foreign financial market supervisory authority first

[41] Federal Supreme Court case 125 I 173.

[42] Federal Supreme Court case 124 II 293 E. 3c; supra point 3.3.a. and note 40. On the attitude of the Federal Supreme Court see also the interesting article by Thomas Merkli, 2003. Internationales Verwaltungsrecht: Das Territorialitätsprinzip und seine Ausnahmen, In *Liechtensteinische Juristenzeitung* No. 3, 2003, pp. 82–90.

[43] Attilio R. Gadola, 1993. Die Behördenbeschwerde in der Verwaltungsrechtspflege des Bundes – ein "abstraktes" Beschwerderecht? In *Aktuelle Juristische Praxis*, 1993, p. 1464; Thierry Tanquerel, Robert Zimmermann, 1992. Les recours, In Droit de l'environnement: mise en oeuvre et coordination. Charles-Albert Morand (ed.), Basle, Frankfurt a.M., 1992, p. 138; Felix Matter, *Kommentar zum Umweltschutzgesetz*, 1986, note 8 to Art. 57; Hansjörg Peter, 1987. *Umweltschutz am Hochrhein/Rechtsfragen grenzüberschreitender Umweltbelastungen zwischen Deutschland und der Schweiz*. Diss. Lausanne, 1987, pp. 57 et seqq.

addresses a request for assistance to the responsible authority for financial matters in Switzerland, and requests information. Following the recognition of the act, the Swiss authority finds out who the addressee is – a securities dealer's client – and then issues a decision either supporting or rejecting its request. The decision's addressee is the client. If it decides to transmit the information and the addressee does not agree with the decision, the client appeals to the Federal Administrative Court. The foreign supervisory authority does not have any status as party to that procedure, only the Swiss authority.

International Taking of Evidence in Penalty Procedures

The statute does not contemplate the international taking of evidence in penalty procedures. Art. 271 of the Criminal Code applies. However, it does not mean that the state cannot adopt measures.

In exceptional cases, the Federal Council acts in accordance to Art. 184, para. 3 and 185, para. 3 FConst.[44]

It means that the Federal Council can forbid activities of foreign bodies on the Swiss territory on the one side. On the other side, the Federal Council may simply decide to adopt measures to support a foreign procedure on an ad hoc basis when crucial interests of the country are at stake.[45]

In addition, foreign authorities can chose to submit requests in application of the Mutual Assistance Act. Still in other cases – however not directly regarding the taking of evidence in penalty procedures – special statutes expressly foresee the intervention of foreign authorities. It has to occur under the conditions specified in the statute, for instance in relation to the mentioned cross-border audits according to Art. 43 FINMASA or Art. 38a SESTA.[46]

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[44] Art. 184, para. 3 FConst reads:

> Where safeguarding the interests of the country so requires, the Federal Council may issue ordinances and decisions. Ordinances must be of limited duration.

Art. 185, para. 3 FConst reads:

> It may in direct application of this Article issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security. Such ordinances must be limited in duration.

See Markus Husmann, 2013. Annotations to Art. 271 CC. In Basler Kommentar Strafrecht II, Art. 111-392 StGB. Marcel Alexander Niggli, Hans Wiprächtiger (eds.) 3nd ed., Basel, 2013, pp. 2358–2359.

[45] Felix Schwendimann, Binh Tschan-Truong, Daniel Thürer, annotations to Art. 184 FConst. In Ehrenzeller et al., supra note 31, pp. 2950-2955.

[46] See supra point 2.3.b.

The Service of Administrative Acts, Particularly in Other Countries

Statute and Means Governing the Service of Administrative Acts

The service of administrative acts is part of the procedure of notification of administrative acts to the parties concerned. It is regulated in the APA. In order to deploy its effects, the act must be notified in writing (Art. 34, para. 1 APA). The period for filing an appeal begins as of the moment of notification. The act of servicing a decision is a procedural and also a technical matter.[47]

Service of Acts to Other Countries

States measures or acts passed by public authorities are subject to service in other countries provided they deploy legal effects. They can be: official, administrative acts or decisions, court rulings or judgements which are addressed to persons, companies, or bodies abroad, or other acts.[48]

There is no proper statute governing the service of administrative acts to other countries. Unless there is a treaty with another state or a special statute ruling on the issue, the direct service of administrative acts abroad is not possible. It is assumed that it would infringe the international law principles of sovereignty and territoriality. Hence, federal and cantonal authorities solve the matter by using either the diplomatic or consular way.[49] Only communications without any legal effect or consequences can be transmitted abroad directly by postal mail.[50] The Federal Supreme Court has confirmed that if it were to officially service its judgements to a domicile or address abroad directly, it would represent an illegal act under international law. In such cases, it publishes the judgement in the Official Journal where the appellant is able to find it.[51] Usually, administrative authorities enjoin foreign parties to a

[47] Felix Uhlmann, Alexandra Schwank, 2009. In Bernhard Waldmann, Philippe Weissenberger (eds.), Praxiskommentar VwVG, Zurich, 2009, Art. 34 APA, pp. 781–783; see also supra point 2.3.a

[48] To the subject of legalisation, see point 6 hereinafter.

[49] In cases of uncertainty, requests can be addressed to the Direction for International Law of the Department of Foreign Affairs or to the Department of Justice. Uhlmann, Schwank, supra note 47, Art. 34 APA, pp. 781–783; Bericht of 14 March 2011, supra note 22, pp. 43–45.

[50] Federal Supreme Court case 2C_182/2009 of 13 May 2009, point 3; Vera Marantelli-Sonanini, Said Huber, 2009. In Praxiskommentar VwVG, supra note 47, Art. 11b APA, pp. 238–240; Res Nyffenegger, 2008. In Kommentar zum Bundesgesetz über das Verwaltungsverfahren (VwVG), Christoph Auer, Markus Müller, Benjamin Schindler, (eds.), Zurich, St.Gallen, 2008, Art. 11 b, pp. 184–187; Bericht of 14 March 2011, supra note 22, p. 43.

[51] Federal Supreme Court case 2C_182/2009 of 13 May 2009, point 3; Bericht of 14 March 2011, supra note 22, p. 43.

procedure to designate an address for the delivery of documents in Switzerland within a reasonable period of time (Art. 11b APA). This written injunction does not represent an informal communication anymore. It has to be transmitted via the diplomatic or consular way.[52] In addition, these communications must state expressly in all cases, the consequences of their disregard.[53] If no such address is provided, the responsible authority must publish its decisions and orders in an official journal in Switzerland (Art. 36 APA).[54] However, in such cases it is also argued that the opportunity to initiate a postal delivery by diplomatic or consular way should be considered first.[55]

Overall, it should not be overlooked that an increasing number of provisions allow the direct delivery of administrative documents by postal mail in accordance with proper rules laid down in federal statutes or treaties concluded between the Swiss Confederation and other states on specific matters. For instance, the Supplementary Agreement to the Double Taxation Agreement with France allows the direct postal delivery of acts concerning the opening of tax receivables.[56]

Language of Documents

The language of the documents to be serviced is determined by the Federal Constitution and agreements concluded by the Swiss state.

According to Art. 4 of the Federal Constitution, the official languages in Switzerland are German, French, Italian, and Romansh. Pursuant to this, Art. 70 FConst, Languages, reads:

1. The official languages of the Confederation are German, French and Italian. Romansh is also considered an official language of the Confederation when communicating with persons who speak Romansh.
2. The Cantons shall decide on their official languages. In order to preserve harmony between linguistic communities, the Cantons shall respect the traditional territorial distribution of languages and take account of indigenous linguistic minorities.
3. The Confederation and the Cantons shall encourage understanding and exchange between the linguistic communities.

[52] Federal Supreme Court case K 18/04 of 18. July 2006; Marantelli-Sonanini, Huber, supra note 50, pp. 238–239; Bericht of 14 March 2011, supra note 22, p. 44, mentioning the case of the Federal Act on Asylum of 26 June 1998 (AsylA, SR 142.31) as a special rule. Art. 12, para. 3 AsylA states that persons introducing an asylum request from abroad do not have to design an address for service in Switzerland.

[53] Marantelli-Sonanini, Huber, supra note 50, pp. 240–241; Bericht of 14 March 2011, supra note 22, p. 43.

[54] Nyfenegger, supra note 50, pp. 185–186; Marantelli-Sonanini, Huber, supra note 50, p. 242.

[55] Bericht of 14 March 2011, supra note 22, pp. 43–44.

[56] Message on the approval of the new additional agreement on double taxation with France of 6 March 2009 – Message concernant l'approbation du nouvel avenant à la convention contre les doubles impositions avec la France du 6 mars 2009, FF 2009 pp. 1399–1400.

4. The Confederation shall support the plurilingual Cantons in the fulfilment of their special duties.
5. The Confederation shall support measures by the Cantons of Graubünden and Ticino to preserve and promote the Romansh and the Italian languages.

For official acts of the state, state bodies and in particular the judiciary, each use their own official language. There is no constitutional duty to translate documents into other languages. Similarly, translations of legal acts into English are not recognised and are not valid as such.

As a signatory of the Schengen Agreement supplemented by the Schengen Convention of 1990, Switzerland applies the rule laid down in its Art. 52, para. 2, which reads:

> Where there is reason to believe that the addressee does not understand the language in which the document is written, the document—or at least the important passages thereof—must be translated into (one of) the language(s) of the Contracting Party in whose territory the addressee is staying. If the authority forwarding the document knows that the addressee only understands a different language, the document—or at least the important passages thereof—must be translated into that other language.[57]

Adequateness of the Current Means

Statute

At the federal level, there is the recognition that the current legal situation is not always clear and is somewhat insecure, though there is a similar situation in other countries. No general rule exists applying to the service of documents abroad. As of today, not only the administrative offices, but also the courts still have not developed a consistent practice. The Federal Council argues that it should be possible to transmit administrative documents legally in a rapid and reliable way abroad. Linked to this, an important subject, the electronic transmission of documents abroad, also needs to be resolved.

A debate took place on the issue of either modifying existing statutes or introducing a proper federal statute. In an analysis of the situation, the Federal Council considered the opportunity for Switzerland to ratify the European Convention of 24 November 1977 on the Service Abroad of Documents relating to Administrative Matters.[58]

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[57] Agreement between the Swiss Confederation, the European Union and the European Community on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis of 26 October 2004, ratified on 20 March 2006, in force since 1 March 2008, SR 0.362.31; The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of 19 June 1990.

[58] See supra point 4.3; Bericht of 14 March 2011, supra note 22, pp. 46–48; Erläuternder Bericht of February 2013, supra note 22, pp. 47–49.

European Convention on the Service Abroad of Documents

The European Convention on the Service Abroad of Documents relating to Administrative Matters, of 24 November 1977 (Convention européenne sur la notification à l'étranger des documents en matière administrative) requires that the contracting states undertake to afford each other mutual assistance with regard to the service of documents relating to administrative matters. The Convention does not apply to fiscal or criminal matters. However, states ratifying it may choose to declare that it shall apply to fiscal matters or any proceedings in respect of offences the punishment of which does not fall within the jurisdiction of their judicial authorities at the time of the request for assistance. These states may specify in the declaration that it is conditional on reciprocity. In addition, each contracting state may claim reciprocity at the time of signature or ratification of the Convention (Art. 1). However, the Convention does not offer any definition of the administrative matter.

According to Art. 2 of the Convention, the contracting states shall designate a central authority. This authority will receive and take action based on requests for service of documents relating to administrative matters emanating from other contracting states. They shall also be free to designate more than one central authority. It shall be either a ministerial department or official bodies. Contracting states may also designate a forwarding authority to centralise requests from their own authorities and transmit them to the competent central authority abroad.[59]

The Convention entered into force in 1982. As of today it has been ratified only by a few states: Austria, Belgium, Estonia, France, Germany, Italy, Luxembourg, and Spain. Switzerland signed the Convention on 24 November 1977, but did not ratify it. In its ninth Report on the Conventions of the Council of Europe, the Federal Council declared it was examining the opportunity of ratification of the Convention.[60] It concluded that a ratification would be recommendable, but not a first priority for the country. In addition, in case of ratification, it would have to be submitted to the facultative referendum.[61]

Indeed, prima facie, in the light of the provisions of that Convention, it can be stated that the means for service in other countries are sufficient in Switzerland.

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[59] It should be noted that the Convention offers diverse options to the ratifying states regarding the service of documents. A state may opt for a service of documents by the consular employees of the requesting state or directly by postal mail, or on the contrary simply decline this option.

[60] In the case of ratification, Switzerland would have to decide on the possible choice of options and which ones. Neunter Bericht über die Schweiz und die Konventionen des Europarates of 21 May 2008, BBl 2008, p. 4555.

[61] Simultaneously, the Federal Council considered the opportunity of ratifying the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters of 15 March 1978, which it signed on the same year and which entered into force in 1983. However, it came to a similar conclusion. That Convention has been ratified by Aserbaidschan, Belgium, Germany, Italy, Luxemburg and Portugal. Neunter Bericht über die Schweiz und die Konventionen des Europarates of 21 May 2008, BBl 2008 pp. 4556–4557; Bericht of 14 March 2011, supra note 22, pp. 46–48.

Nevertheless, the Federal Council also argues that four neighbour countries signed the Convention and many deliveries concern precisely these countries. Following a ratification, administrative cooperation with them would be easier.[62] However, cooperation with these countries is already working well. Moreover, the Federal Council also does not mention if and which statutes would then have to be adapted.[63]

Altogether, it has to be admitted that a ratification of the Convention would not at all contribute to improve the situation decisively and its added value would be limited. It must also be taken into account that the number of requests for service of administrative acts is relatively small and probably not sufficient to justify a ratification. Besides, an international convention would definitively make more sense than a convention limited to Europe. It is also more urgent to focus on the issue of the international electronic transmission of documents.

Recognition and Execution of Administrative Acts in Other Countries

Regulation Applicable to Foreign Administrative Acts

In Switzerland there is no general statute governing matters relating to the validity, efficacy and enforceability of foreign administrative acts. Art. 271 of the Criminal Code sets the limits. It defines the framework applying to the treatment of foreign administrative acts in Switzerland. In particular, the service of foreign documents by mail or post represents an interference in the state sovereignty in principle.[64] At the same time, depending on the sector, some statutes contain distinct rules applying to the recognition and execution of decisions.

As a matter of principle, foreign decisions have to be submitted to the competent authority, which would be in charge of either forwarding the act to the addressee or adopting adequate measures according to the statute. In application of Art. 31, Para. 1 FOOGA[65] the federal departments and the federal chancellery decide in their respective field on the granting of authorisations in accordance to Art. 271 of the Criminal Code on the possible performance of an official act on behalf of a foreign state.

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[62] According to the statistics of the Department of Justice, 119 requests for the transmission of administrative acts coming from foreign states have been registered in 2011. Of these, 118 came from signatories of the Convention. In the same year, 128 requests have been addressed from Switzerland to foreign states. More than half of them, that is 76, involved signatories of the Convention. See Erläuternder Bericht of February 2013, supra note 22, p. 49.

[63] Bericht of 14 March 2011, supra note 22, pp. 46–48.

[64] Husmann, supra note 44, pp. 2337–2362; Stefan Trechsel, Hans Vest, 2013. In Schweizerisches Strafgesetzbuch, Praxiskommentar. Stefan Trechsel, Mark Pieth (eds.), 2nd ed., Zurich, 2013, note 2 to Art. 271 Criminal Code; supra point 2.3.b.

[65] Federal Ordinance on the Organisation of the Government and of the Administration of 25 November 1998 (SR 172.010.1).

The decisions they adopt shall be submitted to the Office of the Federal Attorney General and to the departments with an interest in the matter (Art. 31, para. 3 FOOGA). Cases of political or other fundamental significance shall be submitted to the Federal Council (Art. 31, para. 2 FOOGA). In practice, the application of Art. 271 of the Criminal Code is controversial.[66]

International Law Provisions

Under public international law there is no obligation for states to recognise administrative acts passed by foreign countries. They are sovereign on their territory and free to determine whether a foreign administrative act shall produce legal effects on their territory or not.[67] However, some public international law conventions include recognition clauses for foreign administrative acts.[68]

Governing matters relating to the validity, efficacy and enforceability of foreign administrative acts have been recognised as an issue in Switzerland. The process of globalisation has given rise to an even higher number of requests from other countries and a diversification of cases. In particular, the developments in the financial sector following the financial crisis of 2007–2009, the increasing role of administrative assistance both in the fields of finance and taxes represent important economic issues. Thus, on the one hand, the sovereign position of the state should be reinforced, on the other hand, the country should be in a position to cooperate with other countries and to handle transnational matters.

In view of this situation, diverse political interventions finally led to the elaboration of a report in 2011.[69]

However, it has been severely criticized by some participants in the consultation with good reason.[70] Indeed, its purpose and potential effectiveness are highly questionable.

In addition, with a view to the interests pursued by states at the international level and the diverse political regimes of states, an internationally accepted and enforceable regime would probably not be realistic or difficult to carry out. Basically, it

[66] Husmann, supra note 44, pp. 2353–2359.

[67] Nguyen, supra note 9, p. 129; Christine Breining-Kaufmann, 2006. Internationales Verwaltungsrecht. In Zeitschrift für Schweizerisches Recht, Bd. 125 (2006) II, pp. 28–32.

[68] Nguyen, supra note 9, pp. 129–130.

[69] Bericht of 14 March 2011, supra note 22.

[70] See the very good comment by Marcel Alexander Niggli, Markus Husmann, 2013. Vernehmlassung zum Entwurf für ein Bundesgesetz über die Zusammenarbeit mit ausländischen Behörden und über den Schutz der schweizerischen Souveränität, May 2013, http://www.unifr.ch/ius/assets/files/chaires/CH_Straf_und_Rechtsphilo/files/PDFs/vernehmlassungzssg.pdf (last visited 20 July 2015).

would require the readiness of states to cooperate. As an alternative, a more realistic approach would be to define and implement a regime based on reciprocity on a case-by-case basis.

Competent Authorities

Request for Recognition and/or Execution Abroad

The competent authorities for requesting the recognition and execution of administrative acts in other countries in Switzerland are either the Federal Department of Justice, the Federal Department for Foreign Affairs and/or the specialised competent authorities based on the application of the federal statutes they are in charge of.[71] Accordingly, the latter is empowered to request the recognition and execution of administrative acts in other countries, but they must work closely with the Department of Justice and the Federal Department for Foreign Affairs.

Handling Requests from Other Countries

As already stated, Art. 271 of the Criminal Code requires an authorisation to operate in the name of a foreign country in Switzerland. The territorial jurisdiction of the state shall not be violated.[72] Solely representatives of the Swiss state and its institutions shall operate in its territory. Exceptions may be based on international law agreements or shall be granted by an authority.[73]

As a matter of principle, the Federal Department of Justice is responsible for handling requests from other countries. Other authorities are competent on a case-by-case basis depending on the subject-matter of the request. For example, foreign requests may by based on special administrative assistance rules. In the financial sector the requests of foreign authorities led to the adoption of Art. 38 SESTA.[74] In the field of recognition of diplomas, a similar situation exists.[75] Notwithstanding these rules, they will have to cooperate with the Federal Department of Justice.

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[71] For instance, the Swiss Financial Market Supervisory Authority FINMA.

[72] Trechsel, Vest, supra note 64, note 1 to Art. 271 Criminal Code; Bericht of 14 March 2011, supra note 22, p. 20.

[73] Husmann, supra note 44, pp. 2353–2359.

[74] Supra note 19.

[75] http://www.sbfi.admin.ch/diploma/index.html?lang=en de (last visited: 20 July 2015).

Formal Requirements

Formal requirements applying to foreign administrative acts are not laid down in the statute. In practical cases, the rules of the APA applying to national decisions will serve as a reference. Hence, to be effective, the following basic requirements must be fulfilled: The act must have been passed by a competent authority in the third country or in the country requesting assistance. In form and character it must be similar to that of decisions as laid down in the APA.[76]

To accredit the authenticity of a decision, a differentiation must be made among the authorities concerned, the issues raised, and also whether special statutes and rules apply. In the case of financial services, regarding securities regulations matters in particular, a large number of administrative assistance requests are submitted to the supervisory authority based on Art. 38 SESTA. Consequently, the supervisory authority keeps in close contact with the corresponding competent foreign authorities. Then, the process of accreditation of the authenticity of the acts first consists in checking the validity of the acts and in particular the ability of the employees to sign them. The supervisory authority is in possession of a list of valid signatures provided by the requesting authority in order to control their authenticity and competencies. In other cases, the competence of the authority must be clarified and the rules of the APA apply in an analogous way.

It should also be noted that no difference is made regarding the addressee of a foreign decision. The request for administrative assistance may be addressed either to national citizens or to foreign addressees established in the country. In this case, no distinction is made provided the request concerns matters which will deploy effects in the country.

Material Requirements

In Switzerland, no general statute on the subject exists. Art. 271 of the Criminal Code applies, as mentioned. In addition, even in the case that there were a statute committing to recognise foreign administrative acts, the recognition and execution of a foreign decision would have to be denied by the competent authority if it were contrary to the public order or if it impinges public international law. The basic principles of law must be respected. The recognition or execution of a foreign administrative act should not lead to any breach of the Swiss statutes. It shall not be contrary to Swiss interests. Neither should it infringe Swiss law, in particular the prerequisite of double criminality.[77] Moreover, the willingness of the state to recognise foreign administrative acts will depend on the positive or negative effects to be

[76] Supra point 2.3.a.; Tschannen, Zimmerli, Müller, supra note 5, pp. 253–262.

[77] It applies both to cases of legal and administrative assistance. Nguyen, supra note 9, p. 132; Linke, supra note 21, p. 30.

expected for the addressee of the act. In case a positive effect is expected, an act would most probably be recognised. In case of a negative effect, a special statute would be necessary.[78] In case of doubt, both the Department of Justice and the Department of Foreign Affairs will provide assistance.

International Competence of the State

The international competence of the state dictating the administrative act is a core requirement for the recognition of any foreign decision. The issue belongs to the basic recognition prerequisites. It must be a recognised state under the statute of international law.[79] Furthermore, the authority must be competent to handle the matter and issue the decision in that state, which must first be recognised as valid there.

Role and Requirements of Public Order

The public order must be respected in all cases, including those related to the effects of foreign administrative acts. They shall not contravene the public order and they should not be in conflict with the values and principles of the country. Therefore, public order is a limiting factor in relation to the recognition of foreign decisions. The competent authority is in charge of determining the conditions applying to the recognition of foreign administrative acts. The foreign state is not in a position to submit claims to that procedure. However, in case of agreements or of special statutes on administrative assistance, the competent authority will have to recognise these acts provided the conditions laid down in the agreements or statutes are fulfilled.[80]

National statutes are determining for the recognition of foreign decisions. According to international law, the competent authority decides on the extent of a recognition (full or partial) or may also deny a recognition. The doctrine of the Act of State applies. As a result of the application of this doctrine, two elements crystallize. First, there are no general and secure criteria to appreciate the validity of foreign decisions. Second, any contradiction between the appreciation of a decision by an authority and other, third authorities within a state shall be avoided.[81]

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[78] Linke, supra note 21, p. 130.

[79] Four criteria have to be fulfilled: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states, as laid down in Art. 1 of the Montevideo Convention on the Rights and Duties of States of 26 December 1933.

Due to the limited space of this article, special cases such as the treatment of organisations or states in the process of being constituted are not addressed here.

[80] On the issue of legitimation of foreign administrations, see also supra point 3.3.c.; Nguyen, supra note 9, pp. 130–133.

[81] Nguyen, supra note 9, pp. 130–133, with further reference; Linke, supra note 21, p. 111.

When an authority takes a stance or recognises a foreign decision, the procedural rights of the addressee of the decision play an important role. In particular, the general procedural guarantees of Art. 29 FConst[82] and the guarantee of access to the courts as per Art. 29a FConst[83] apply. The addressee will have the opportunity to appeal, which is especially important in the case of a foreign administrative act relating to penalties. Based on these rules and the special statute, a range of judgements both by the Federal Supreme Court and by the Federal Administrative Court have been passed in the field of administrative assistance.

Law Applicable to the Performance of Foreign Administrative Acts

The APA is applicable to the performance of foreign administrative acts. Their performance will depend on the extent of the recognition and the special statutes which apply on a case-by-case basis. Regarding the execution of these acts it can be mentioned that the Swiss state admits the principle of liability of legal persons in matters of administrative penalties too, but it is limited by their legal capacity.[84]

Recognition and/or Execution Procedure for Foreign Administrative Acts

The procedure for the recognition and/or execution of foreign administrative acts is largely characterised by its distinctive sector and statute-based approach. Particularly concerned are, for example, sectors or matters in relation to the recognition of foreign diplomas or the supervision of financial markets. Consequently, the rules are

[82] It reads:

1. Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.
2. Each party to a case has the right to be heard.
3. Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.

[83] It reads:

> In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case.

[84] Heinz Hausheer, Regina E. Aebi-Müller, 2005. *Das Personenrecht des Schweizerischen Zivilgesetzbuches*. Bern 2005, no. 17.92; Jörg Schmid, 2001. *Einleitungsartikel des ZGB und Personenrecht*, Zurich, 2001, note 1176.

already well developed in these sectors. At the same time, there is no general statute applying to the recognition and/or execution of any foreign administrative act and the laying down of general rules, as mentioned. Up to now, a sectoral approach dominates.

Whether common criteria should be adopted in a statute both for the recognition and/or execution of foreign administrative acts at the national level is questionable. The requirements are proper to the sector and depend on the emergence of global standards, such as in the field of taxes. Thus, a general statute would not contribute to regulate all matters satisfactorily.

Requirements for the Execution of Foreign Administrative Acts

Once a foreign administrative act is recognised, the requirements for its execution will depend on the extent of the recognition. The national legislation is determining and the national authorities are bound in the same way as for the execution of national administrative acts.[85] Here again, no unified procedure applies. The principle of proportionality shall apply to constraint measures and the sector specific benchmarks and values shall be observed.[86]

It is generally admitted that the revocation of a recognised foreign administrative act is not possible. It would offend the sovereignty of the foreign state. However, this may be limited to the effects on the territory of that state.[87]

Competent Authorities for the Execution of a Foreign Administrative Act

Although no central competent authority has been designated statutorily or officially for the execution of foreign administrative acts, the Federal Department of Justice usually serves as a reference. It is responsible for enforcing legal and administrative assistance matters unless special statutes and rules apply. It is also in charge of coordinating the procedures with the specialised authorities in case several authorities are involved in a matter, or if there are any doubts as to the application

[85] Nguyen, supra note 9, pp. 132–133; Linke, supra note 21, pp. 30–31.

[86] Art. 5 para. 2 FConst and specifically: Art. 42 APA, which reads: The authority must not use a more rigorous enforcement measure than required by the circumstances. See Tschannen, Zimmerli, Müller, supra note 5, pp. 152–160; Tobias Jaag, 2009. annotations to Art. 42 APA. In Praxiskommentar VwVG, supra note 47, pp. 869–875.

[87] Nguyen, supra note 9, p. 133; Linke, supra note 21, p. 112.

of the statutes. Furthermore, depending on the statute, administrative bodies and/or courts are also in charge of the execution of foreign administrative acts.

In practice, the legal situation is not always clear and must be appreciated on a case-by-case basis. For instance, due to the difficulty of differentiating between requests concerning legal and administrative assistance in securities regulation matters and the recognition of the corresponding foreign administrative acts, clarification may be necessary. In such cases the cooperation of the representatives of the Federal Department of Justice and the supervisory authority of financial markets is laid down in the statute. They must assess the situation together, determine the responsibilities and coordinate their activities.[88]

Private International Law as a Model for Administrative Law?

Switzerland is a civil law country. There is a basic distinction between private international law and public international law. The purpose and structure of the private international law statute is to regulate relationships regarding all private law matters.[89] An exception is laid down in Art. 13 FAIPL, which establishes that the application of a foreign norm is not solely excluded due to its public law character.[90]

In administrative matters, the interests and aims pursued are different. The protection of the state interests, in particular the public interest, is a major rationale. Therefore, an approach based on the private international law model most probably would not represent an adequate approach or it would need to be adapted considerably.

Court decisions recognised under private international law could be a reference for the development of recognition and execution procedures for foreign administrative acts. This law has developed mechanisms of recognition and execution which have proved their worth in the meantime. However, the fact that administrative acts are mainly concerned with the relationships between the state and private or legal persons should not be overlooked. Thus, the approach of private international law could hardly be a reference under that aspect either.[91]

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[88] Art. 38, para. 6 SESTA.

[89] Federal Act on International Private Law of 18 December 1987 (FAIPL, SR 291).

[90] This can be the case in relation to the application of public law rules to private companies, such as the supervision of banks or insurances by state agencies. See Breining-Kaufmann, supra note 67, pp. 21–22.

[91] On the relationship between the two fields of law see also Breining-Kaufmann, supra note 67, pp. 21–22; Nguyen, supra note 9, p. 81.

International Conventions on the Recognition and Execution of Administrative Acts and on the Legalisation of Public Documents

Switzerland has signed and ratified international conventions on the recognition and execution of administrative acts in the context of its bilateral relations with the European Union. This refers to the mentioned mutual recognition of conformity evaluations,[92] or also the convention on the transport of goods and persons, for instance.[93] Switzerland is also a party to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents concluded on 5 October 1961, The Apostille Convention, which it ratified on 10 January 1973. It entered into force on 11 March 1973.[94]

For states which are party to the Apostille Convention, certification in the form of an apostille is sufficient. Documents do not need to be certified by a consular agent and are otherwise recognised in the country for which they are intended.[95] For all the other states which are not party to the Apostille Convention, the normal certification process without apostille applies, in which the authentication by a consular or diplomatic agent is required.[96]

At the moment, Switzerland does not have an electronic apostille procedure, but it will most probably introduce it at some point in the future.[97]

The legalisation of documents is regulated in Art. 8 of the Ordinance on the Organisation of the Federal Chancellery of 29 October 2008.[98] It lays down that the Federal Chancellery is competent for:

The legalisation of the last signature of a document of administrative bodies of the federal administration, including that of Swiss embassies and consulates, of for-

[92] Supra note 32; Nguyen, supra note 9, pp. 129 et seqq.

[93] Agreement between the Swiss Confederation and the European Community on the Carriage of Goods and Passengers by Rail and Road of 21 June 1999, Swiss instrument of ratification deposited on 16 October 2000. Entered into force on 1st June 2002, SR 0.740.72 (Accord entre la Confédération suisse et la Communauté européenne sur le transport de marchandises et de voyageurs par rail et par route. Conclu le 21 juin 1999. Instrument de ratification suisse déposé le 16 octobre 2000 Entré en vigueur le 1er juin 2002 [RS 0.740.72]); Nguyen, supra note 9, pp. 129 et seqq.

[94] SR 0.172.030.4.

[95] Art. 2 Apostille Convention.

[96] Legalisations, http://www.bk.admin.ch/dienstleistungen/legal/index.html?lang=en# (last visited: 10 June 2014).

[97] In relation to private law matters, the Federal Ordinance on the Electronic Public Certification lays down rules regarding the technical requirements to be fulfilled to issue electronic public documents, the electronic authentification of copies and signatures, and the certification of hardcopies of electronic documents. Verordnung über die elektronische öffentliche Beurkundung vom 23. September 2011 (EÖBV, SR 943.033).

[98] SR 172.210.10.

eign diplomatic missions and consulates in Switzerland and the chancelleries of cantons and organisations in charge of public duties in the interest of the whole country;

Issuing the apostille according to Article 2 of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents and according to the resolution of the Confederation of 27 April 1972 regarding the authorisation of the said Convention.[99]

In practice, the Legalisation Office of the Federal Chancellery is responsible for certifying the authenticity of original signatures on documents required abroad. However, it does not take a stance with regard to the content or translations of the document. It is also responsible to execute the service of the administrative acts abroad.[100]

Doctrinal Treatment of the Subject

The subject of the recognition of foreign administrative acts as such has not been dealt with by faculty and researchers in the area of public law and especially administrative law. It is also interesting to note that the existing exhaustive commentaries do not even mention these aspects. They all focus on the national issues linked to the treatment of the diverse questions raised by the decisions.

A general study on international administrative law authored by Minh Son Nguyen,[101] deals with the subject of recognition of foreign administrative acts from a Swiss perspective.

The subject of administrative assistance requests by foreign authorities regarding banking and financial matters has been dealt with extensively by faculty and researchers.[102] It is also largely documented by cases of the Federal Supreme Court and recently of the Federal Administrative Court. However, in these contributions, the focus has first been placed on the attitude of the foreign authorities once they receive information from the Swiss authorities. They disregard or perhaps take the question of recognition of the foreign decisions for granted.

In turn, the issue of a possible ratification of both the European Convention on the Service Abroad of Documents relating to Administrative Matters of 24 November 1977 and the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters of 15 March 1978 has been hardly commented by faculty and researchers, which indicates that it does not represent an important issue at all.

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[99] AS 1973 347.

[100] Supra note 91.

[101] 104 Nguyen, supra note 9.

[102] A large number of studies has been published on the subject. For an overview of some issues see for instance as a substitute for others: Stephan Breitenmoser, Bernhard Ehrenzeller (eds.), *Aktuelle Fragen der internationalen Amts- und Rechtshilfe*. St.Gallen, 2009.

Conclusion

The recognition of foreign administrative acts is a challenging issue. It is becoming even more important in the context of the increasing number of international exchanges and the process of globalisation. The brief overview provided by this contribution has shown that the statutes currently applying in Switzerland do not address issues regarding the validity and enforceability of foreign decisions as such in a general way. Their legal treatment is not unified either. In addition to the presence of blocking statutes, a sectoral approach dominates.

This sectoral approach is translated by diverse forms of codification as well as specific procedural rules which have crystallized in the course of time. In fact, they are based on proper, well-functioning concepts. It can also be reasonably assumed that the approach will remain sectoral in the future. As a result, the overall picture presents several facets.

References

Breining-Kaufmann, C. 2006. Internationales Verwaltungsrecht. In *Zeitschrift für Schweizerisches Recht*, Bd. 125, II.

Breitenmoser, S., Ehrenzeller, B. (eds.). 2009. *Aktuelle Fragen der internationalen Amts- und Rechtshilfe*. St.Gallen.

Cassese, S. 2005. Administrative law without the state? The challenge of global regulation. *New York University Journal of International Law and Politics* 37.

Dutoit, B. 2005. *Droit international privé Suisse*. Geneva: Basel.

Flückiger, A. 1998. *L'extension du contrôle juridictionnel des activités de l'administration – un examen généralisé des actes matériels sur le modèle allemand?* Bern.

Fritsche, C.M. 2013. *Interne Untersuchungen in der Schweiz*. St.Gallen: Zurich.

Gadola, A.R. 1993. Die Behördenbeschwerde in der Verwaltungsrechtspflege des Bundes – ein "abstraktes" Beschwerderecht? *Aktuelle Juristische Praxis.*

Goldschmid, P. 2002. Auf dem Weg zum endlosen Schriftenwechsel? *Zeitschrift des Bernischen Juristenvereins* 138.

Häfelin, U., Müller, G., and Uhlmann, F. 2010. *Allgemeines Verwaltungsrecht*, 6th ed. Bern.

Hangartner, Y., Martin E. Looser, 2014. Annotations to Art. 190 Fconst. In *Die Schweizerische Bundesverfassung, St. Galler Kommentar*, eds. Bernhard Ehrenzeller et al., 3rd ed. Zurich: St. Gallen.

Hausheer, H., Aebi-Müller, R.E. 2005. *Das Personenrecht des Schweizerischen Zivilgesetzbuches*. Bern, no. 17.92.

Husmann, M. 2013. Annotations to Art. 271 CC. In *Basler Kommentar Strafrecht II*, Art. 111–392 StGB. eds. Marcel Alexander Niggli, Hans Wiprächtiger, 3rd ed. Basel.

Jaag, T. 2002. Verwaltungsrechtliche Sanktionen und Verfahrensgarantien der EMRK. In Festschrift für Stefan Trechsel, eds. Andreas Donatsch, Marc Forster, Christian Schwarzenegger, *Strafrecht, Strafprozessrecht und Menschenrechte*. Zurich.

Kingsbury, B., N. Krisch, and R.B. Stewart. 2005. The emergence of global administrative law? *Law & Contemporary Problems* 68: 3–4.

Kriech, M. 1986. *Grenzüberschreitender Umweltschutz im schweizerischen Recht*. Zurich.

Marantelli-Sonanini, V., and Huber, S. 2009. In *Praxiskommentar VwVG*. Zurich.

Matter, F. 1986. *Kommentar zum Umweltschutzgesetz*.

Merkli, T. 2003. Internationales Verwaltungsrecht: Das Territorialitätsprinzip und seine Ausnahmen. *Liechtensteinische Juristenzeitung*, No. 3.

Moor, P., and Poltier, E. 2011. *Droit Administratif, Volume II: Les actes administratifs et leur contrôle*. Berne.

Nguyen, M.S. 2006. Droit administratif international. *Zeitschrift für Schweizerisches Recht*, Bd. 125, II.

Niggli, M.A., and Husmann, M. 2013. Vernehmlassung zum Entwurf für ein Bundesgesetz über die Zusammenarbeit mit ausländischen Behörden und über den Schutz der schweizerischen Souveränität, http://www.unifr.ch/ius/assets/files/chaires/CH_Straf_und_Rechtsphilo/files/PDFs/vernehmlassungzssg.pdf (last visited 20 July 2015).

Nyffenegger, R. 2008. In *Kommentar zum Bundesgesetz* ü *ber Das Verwaltungsverfahren (VWVG)*, eds. Christoph Auer, Markus Müller, Benjamin Schindler. St.Gallen: Zurich.

Peter, H. 1987. *Umweltschutz am Hochrhein/Rechtsfragen grenzüberschreitender Umweltbelastungen zwischen Deutschland und der Schweiz*. Diss., Lausanne.

Schmid, G. 1983. *Grenzüberschreitende Verfahrensbeteiligung im Umweltschutzrecht*. Neuchâtel: Mélanges André Grisel.

Schmid, J. 2001. *Einleitungsartikel des ZGB und Personenrecht*. Zurich.

Senn, M. 2003. Droit à un procès équitable. Violation de l'article 6 paragraphe 1 CEDH. Qualité de partie, CEDH Affaire Ziegler c. Suisse, Requête no 33499/96, Arrêt du 21.2.2002. *Aktuelle Juristische Praxis*, No. 7.

Tanquerel, T., and Zimmermann, R. 1992. Les recours. In *Droit de l'environnement: mise en oeuvre et coordination*, eds. Charles-Albert Morand. Frankfurt a.M.: Basle

Thürer, D., Truong, B., and Schwendimann, F. 2008. Annotations to Art. 184 FConst. In *Die Schweizerische Bundesverfassung, Kommentar*, eds. Bernhard Ehrenzeller et al., 2nd ed. Zurich.

Trechsel, S., and Vest, H. 2013. In *Schweizerisches Strafgesetzbuch, Praxiskommentar*, eds. Stefan Trechsel, Mark Pieth, 2nd ed. Zurich.

Trüeb, H.R. 1990. *Rechtsschutz gegen Luftverunreinigung und Lärm*. Thesis, Zurich.

Tschannen, P., Zimmerli, U., and Müller, M. 2009. *Allgemeines Verwaltungsrecht*, 3rd ed. Bern.

Uhlmann, F., and Schwank, A. 2009. In *Praxiskommentar VwVG*, eds. Bernhard Waldmann, Philippe Weissenberger. Zurich.

Ziegler, A.R. 2011. *Einführung in das Völkerrecht.* 2nd ed. Bern

Chapter 17
Les actes administratifs étrangers et le droit turc

Çağla Tansuğ

Abstract In Turkish Administrative Law, although the "administrative act" is a subject matter of a rich and detailed treatment, the same cannnot be said for the "foreign administrative act". Thus, concerning foreign administrative acts neither positive law nor legal doctrine give precise explanations. This approach requires, therefore, to keep some distance between foreign administrative acts "and" Turkish (Administrative) Law. So, in order to explain the state of the Turkish Administrative law regarding foreign administrative acts, this study will first address the concept of administrative act and its qualification of "foreign" (1) then the legal framework regarding the notification of administrative decisions and foreignness (2) and finally the details of the Turkish Law on recognition, enforcement and legalization for foreign administrative acts (3).

Résumé
En droit administratif turc, bien que l'« acte administratif » soit un sujet traité d'une manière riche et détaillée, il n'en est pas de même pour l'« acte administratif étranger ». Ainsi, concernant les actes administratifs étrangers, ni le droit positif, ni la doctrine juridique n'avancent d'explications précises. Cette approche oblige, donc, à garder une certaine distance entre les actes administratifs étrangers « et » le droit (administratif) turc. Eu égard à ladite distance et dans le but de faire le point sur l'état du droit administratif turc quant aux actes administratifs étrangers, cette étude abordera en premier lieu la conception d'acte administratif et sa qualification d'« étranger » (1), ensuite, le cadre juridique concernant la notification des actes administratifs et son caractère étranger (2) et, enfin, les précisions du droit turc concernant la reconnaissance, l'exécution et la légalisation des actes administratifs étrangers (3).

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La conception d'acte administratif et sa qualification d'« étranger »

Selon sa définition « traditionnelle », l'acte administratif est une manifestation de volonté qui émane unilatéralement d'une autorité administrative en vue de modifier l'ordonnancement juridique par les obligations qu'il impose ou par les droits qu'il confère (Erkut 1988 : 101).

Comme il est signalé auparavant, l'acte administratif est un sujet traité en droit turc d'une manière riche et détaillée alors que l'acte administratif étranger reste un terme rarement mentionné. Ainsi, avant de tenter de définir l'« acte administratif étranger » du point de vue du droit administratif turc (section « Une tentative de définition de l'« acte administratif étranger » »), il convient de donner certaines explications concernant l'acte administratif (section « L'acte administratif en droit administratif turc »).

L'acte administratif en droit administratif turc

Afin d'expliquer en substance ce qu'est un acte administratif en droit turc, l'on mentionnera d'abord sa définition (section « La définition ») et ensuite ses caractéristiques (« Les caractéristiques »). Enfin, l'absence, en droit turc, d'un code de procédure administrative générale pour l'adoption d'actes administratifs (section « L'absence d'un code de procédure administrative générale pour l'adoption d'actes administratifs ») sera constatée.

La définition

En droit turc, la jurisprudence et la doctrine permettent de sélectionner les éléments cumulatifs suivants afin de définir l'acte administratif :

l'acte administratif est effectué unilatéralement par une autorité figurant dans l'organisation administrative turque,
l'objet de l'acte administratif concerne le domaine de la fonction administrative,
l'acte administratif produit des effets juridiques qui sont exécutoires et directement applicables par l'Administration (Candan 2012 : 62).

Les caractéristiques

La littérature juridique turque apporte plusieurs précisions concernant les caractéristiques de l'acte administratif ; celles-ci peuvent être résumées comme il suit :

> L'unilatéralité est le caractère le plus significatif de l'acte administratif qui le distingue de l'acte juridique, puisque l'acte administratif se réalise par l'unique volonté de l'Administration, sans le consentement des tiers (Erkut 1988 : 104).

> Les actes administratifs sont effectués en fonction des règles prévues et pour l'intérêt public (Tan 2013 : 227).
>
> Les actes administratifs bénéficient de la présomption de légalité. Ainsi, une fois que l'acte administratif entre en vigueur, il est considéré comme légal tant qu'une précision contraire n'est pas donnée par l'Administration ou par le juge (Bülbül 2010 : 2).

Les actes administratifs ont un caractère exécutoire. Le caractère « exécutoire » de l'acte administratif montre que l'acte administratif est capable de produire ses effets juridiques dans l'ordre juridique de ses intéressés et n'a pas besoin pour cela d'une décision juridictionnelle (Tan 2013 : 104). Seuls les actes qui sont définitifs et exécutoires peuvent faire l'objet d'un recours contentieux (art.14/(3) de la loi n° 2577 sur la procédure administrative contentieuse). L'acte administratif acquiert un caractère « définitif » par l'accomplissement de toutes les étapes concernant son apparition dans le milieu juridique. Autrement dit, l'acte administratif devient définitif à la suite de l'approbation de la dernière autorité compétente pour la mise en place de cet acte.[1] Dans ce cadre, les actes effectués par l'Administration publique turque d'une manière unilatérale dans le domaine de la fonction administrative et disposant simultanément de ces deux caractéristiques sont qualifiés d'« actes administratifs ». Alors que les actes tels que les actes préparatifs, les prédécisions, les circulaires internes de l'Administration, les rapports d'investigations n'ont pas un caractère définitif et ne sont pas exécutoires. Par conséquent, ils ne sauraient être qualifiés d'actes administratifs même s'il s'agit d'« actes » effectués par l'« Administration ».

En cas de manquement à un acte administratif, l'Administration publique turque peut procéder à l'exécution forcée dudit acte, sous réserve que la loi lui attribue une telle compétence, d'une manière conforme à la Constitution ainsi que dans le respect du principe de proportionnalité (Duran 1982 : 416 ; Gözler et Kaplan 2013 : 392).

L'absence d'un code de procédure administrative générale pour l'adoption d'actes administratifs

En droit administratif turc (bien que la préparation d'une loi de procédure administrative ait été abordée), il n'existe aucune règle générale régissant la procédure administrative sur l'adoption d'actes administratifs.[2] Pourtant, pour l'adoption des sanctions administratives qui font partie de la catégorie des actes administratifs, la Constitution de 1982 prévoit dans son article 129 (alinéa 2) qu'« il est défendu d'imposer une sanction disciplinaire aux fonctionnaires ainsi qu'aux autres agents publics et aux membres du personnel des organisations professionnelles ayant le

[1] Décision de la 2e Section du Conseil d'État turc, n° 2007/4240 du 9 novembre 2007. *Revue du Conseil d'État turc* 118 : 109.

[2] La doctrine admet que la notion de « procédure administrative » figure dans la législation turque d'une manière sous-entendue au sein de l'élément de « forme » d'acte administratif cité dans la loi du contentieux administratif (Loi n°2577, art.2) qui définit, entre autres, les éléments de contrôle de la légalité des actes administratifs (Duran 1998: 27).

caractère d'établissements publics et de leurs unions, sans avoir connu leur droit de défense ».

Cependant, en l'absence d'une telle règle « générale », l'on peut voir que les lois sur l'expropriation, l'urbanisation, l'adjudication et la collecte des impôts mettent en place des procédures administratives différentes pour l'adoption d'actes administratifs concernant leur domaine d'application. Ainsi, ces textes qui définissent des procédures administratives différentes pour l'adoption d'actes administratifs concernant leur domaine d'application reconnaissent, en principe, les droits des intéressés dans les domaines concernés.

Quant à l'intervention des administrations publiques, des intéressés ou de tiers étrangers au processus d'adoption d'actes administratifs, nous constatons que le « Règlement relatif à la procédure et aux principes de préparation de législation » contient des dispositions concernant la prise d'avis. Ainsi, en fonction du projet d'acte administratif règlementaire, la prise d'avis des administrations publiques concernées, citées dans l'article 6 dudit règlement est obligatoire. On y prévoit également la possibilité de prendre l'avis des collectivités locales, des universités, des syndiques, des organisations professionnelles ayant le caractère d'établissement public et des organisations non gouvernementales. Ledit règlement prévoit un délai de 30 jours pour la transmission des avis aux autorités administratives concernées. Le silence des parties susmentionnées, une fois ces 30 jours écoulés, vaut un avis positif. Cependant, sauf les cas prévus par la loi, l'avis des intéressés n'est pas coercitif pour l'Administration et, donc, il ne joue pas un rôle décisif.

En droit turc, en l'absence d'un code de procédure administrative générale, il conviendra de mettre en question, au moins, l'existence d'une règlementation concernant l'accomplissement international des mesures d'instruction dans le cadre des procédures de sanction. La Turquie est signataire de plusieurs conventions internationales (bilatérales et multilatérales) concernant l'accomplissement international des mesures d'instruction dans le cadre de procédures de sanctions pénales. Pourtant, nous constatons que ces textes, qui ont force de loi en droit turc, prévoient souvent des mesures d'instruction relatives aux procédures de sanctions pénales et/ou judiciaires.[3] Parmi ces textes, la Convention des Nations Unies contre la criminalité transnationale organisée (et les protocoles s'y rapportant)[4] prévoit des mécanismes concernant l'exercice de coopération entre les autorités administratives des pays signataires et la mise en œuvre des mesures administratives destinées à lutter contre les différents types de crimes organisés.

Quant à l'instruction des sanctions administratives, les conventions internationales en matière d'entraide administrative signées par la Turquie trouvent leur champ

[3] Pour la liste de ces textes, voir le site de la Direction générale des affaires juridiques et des relations internationales du ministère de la Justice turc : http://www.uhdigm.adalet.gov.tr/english/Criminal_Rogatory.html (date d'accès : 1er février 2014)

[4] Office des Nations Unies contre la drogue et le crime http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-f.pdf (date d'accès : 1er février 2014).

d'application.[5] Cependant, sauf les conventions concernant le domaine fiscal[6] (finances publiques), l'absence de textes spécifiques des procédures de préparation et d'exécution des sanctions administratives crée des difficultés aux administrations concernées. Il conviendra d'ajouter que la Turquie a signé la Convention européenne sur l'obtention à l'étranger d'information et de preuves en matière administrative, mais elle ne l'a pas ratifiée.[7]

En droit turc, les dispositions concernant les mesures d'instruction dans le cadre de procédures de sanction administrative figurent souvent dans les « règlements » (qui trouvent une assise juridique dans les lois, alors que les dispositions concernées de ces lois se limitent souvent à des précisions superficielles) sur la démarche des unités administratives concernées. Ces règlements ne contiennent pas de dispositions sur l'accomplissement des procédures d'instruction dans les pays étrangers.

Une tentative de définition de l'« acte administratif étranger »

En ce qui concerne les actes administratifs effectués par les administrations publiques étrangères, le Conseil d'État turc précise que de tels actes ne peuvent pas faire l'objet d'un recours en annulation devant les tribunaux administratifs turcs.[8] Cet arrêt qui déclare irrecevable un acte effectué par l'Ambassade des Pays-Bas permet de constater que la qualification d'« étranger » des actes administratifs dépend, pour le Conseil d'État turc, de l'origine étrangère de l'Administration qui effectue ledit acte.

Par conséquent, il ne serait pas faux d'admettre qu'en droit administratif turc, le caractère étranger d'un acte administratif résulte de l'origine étrangère de l'Administration publique qui l'effectue. Une définition plus complète serait peut-être la suivante : selon le droit administratif turc, un acte administratif étranger est un acte dont l'objet concerne la fonction administrative, effectué par une Administration publique étrangère d'une manière unilatérale et produisant des effets juridiques sur les intéressés.

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[5] Direction générale des affaires juridiques et des relations internationales du ministère de la Justice turc. http://www.uhdigm.adalet.gov.tr/english/legal_assistance.html (date d'accès : 1er février 2014).

[6] Par exemple, la Turquie est signataire de la Convention concernant l'assistance administrative mutuelle en matière fiscale (http://www.oecd.org/ctp/exchange-of-tax-information/MAC_Background_Brief_for_Jounalists_November_2013.pdf, (date d'accès : 2 février 2014).

[7] Comme cette convention n'a pas été ratifiée, elle ne figure pas sur le site de la Direction générale des affaires juridiques et des relations internationales du ministère de la Justice turc. Cette donnée est citée dans le « Dixième rapport sur la Suisse et les conventions du Conseil de l'Europe ».

[8] Décision de la 10e Section du Conseil d'État turc, n°1992/697 du 10 février 1992 (Candan 2012 : 69).

La notification des actes administratifs et son caractère étranger

En droit turc, la notification des actes administratifs (internes) par chacune des unités administratives figurant dans l'organisation administrative turque est effectuée en fonction des dispositions de la loi n° 7201 sur la notification (Kanlıgöz 1998 : 177). La même loi définit « la notification administrative » sous la forme de « notification qui reste hors des champs de la notification juridictionnelle et financière » (art.45). Dans ce cadre, elle prévoit la réalisation de la notification des actes concernant les opérations de douanes par les fonctionnaires responsables sur place (art.48) et l'obligation de communiquer l'adresse actuelle des intéressés au registre foncier afin de recevoir les notifications sans problème (art.49). Selon les dispositions générales de la loi n° 7201, la notification des actes administratifs est effectuée soit par l'intermédiaire d'un fonctionnaire de l'unité administrative ou des agents de police liés à la collectivité locale concernée, soit par l'intermédiaire de la Poste turque (art.1 et 2). Dans ce cadre, les documents à notifier peuvent être envoyés par avion, par les différents moyens qui sont à disposition de la Poste turque (art.7) ou (depuis 2011) par des moyens électroniques (art.7/a).[9]

Auprès de loi n° 7201, les dispositions concernées de la loi n° 213 sur la procédure fiscale ou celles de la loi n° 2886 sur l'adjudication étatique sont également en vigueur dans leurs domaines d'application et elles ont le caractère de *lex specialis* dans ces domaines (Candan 2012 : 346). Dans ce cadre, la notification est réalisée par avion ou par les autres moyens rapides dont la poste dispose ; l'autorité compétente de la notification choisit l'un de ces moyens.

En présence de ce cadre règlementaire prévu pour la notification interne des actes administratifs, le caractère étranger de la notification des actes administratifs sera traité en prenant comme référence la « Convention européenne sur la notification à l'étranger des documents en matière administrative » et selon les deux étapes suivantes : l'objet, la procédure et l'exécution de la notification aux pays étrangers (section « L'objet, la procédure et l'exécution de la notification aux pays étrangers ») et le droit de recevoir des notifications internationales en une langue compréhensible (section « Sur le droit de recevoir des notifications internationales dans une langue compréhensible »).

[9] La notification électronique est obligatoire pour les sociétés anonymes, les sociétés à responsabilité limitée et les sociétés en commandite (art.7/a de la loi n°7201).

L'objet, la procédure et l'exécution de la notification aux pays étrangers

Les actes effectués par l'Administration turque font l'objet d'une notification internationale si leur destinataire réside en dehors de la Turquie. En présence d'une convention internationale multilatérale[10] ou bilatérale entre la Turquie et le pays destinataire, la notification internationale est effectuée, en principe, selon les dispositions de la convention concernée. En cas d'absence d'une telle convention, la notification internationale est effectuée dans le cadre des relations multilatérales, en fonction du principe de réciprocité et selon les dispositions de la loi n°7201 ainsi que de celles du règlement basé sur cette loi.[11]

Selon la loi n° 7201, la notification des documents aux ressortissants et aux non-ressortissants de la République de Turquie dans les pays étrangers (État requis) est effectuée, en principe, par l'intermédiaire des autorités compétentes dudit pays. Dans ce but, si les conventions ou la législation locale de l'État requis le permettent, les responsables de la mission diplomatique turque situés dans ce pays étranger (consul ou autre fonctionnaire compétent) demandent aux autorités étrangères compétentes la mise en œuvre de la notification (art.25/1). L'autorité administrative turque qui produit le document à notifier l'envoie d'abord au Ministère turc des Affaires étrangères par l'intermédiaire du ministère auquel elle est rattachée. Ensuite, ledit document est envoyé à l'ambassade ou au consulat de la Turquie situé dans l'État requis (art.25/2). Dans certains cas, l'entremise du Ministère turc des Affaires étrangères n'est pas nécessaire et les documents sont envoyés directement aux missions diplomatiques de la Turquie par le biais du ministère concerné (art.25/3).

La loi n° 7201 prévoit également différentes procédures pour les ressortissants de la République de Turquie résidant dans l'État requis. Ainsi, la notification peut être effectuée également par l'ambassade ou le consulat de la Turquie situé dans ledit État (art.25/a/1 et 2).[12] Si le destinataire est un ressortissant de la République

[10] Entre autres, la Turquie a signé et ratifié la Convention du 1er mars 1954 sur la procédure civile (Journal officiel de la République de Turquie du 28 mai 1973, n° 14547) et la Convention du 15 novembre 1965 relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale (Journal officiel de la République de Turquie du 17 juin 1972, n° 14218).

[11] Direction générale des affaires juridiques et des relations internationales du ministère de la Justice turc. http://www.uhdigm.adalet.gov.tr/adli_yardimlasma/adli_isbirligi_hukuk/hukuk_tebligat.html (date d'accès : 12 janvier 2014).

[12] Dans ce cas, un document qui déclare l'objet de la notification et l'autorité qui l'a préparée ainsi que l'avertissement concernant l'obligation pour le destinataire de s'adresser à l'autorité compétente dans les trente jours suivants la certification de l'accomplissement de la notification est notifié avec un moyen conforme à la législation de l'État requis. Si destinataire n'en fait pas la demande auprès du consulat ou de l'ambassade de la Turquie à l'issue de ce délai (de trente jours), la notification est considérée comme dument exécutée. Si l'intéressé s'adresse à la représentation diplomatique turque, mais il refuse d'accepter la notification, la notification est considérée comme dument exécutée à la date de rédaction du procès-verbal et le document à notifier est rapidement renvoyé à

de Turquie qui est en mission militaire ou officielle en dehors de la Turquie, la notification peut être effectuée par l'intermédiaire des forces armées turques concernées, dans le premier cas, et par le Ministère turc des Affaires étrangères, dans le deuxième cas (art.27).

Quant aux documents en provenance de l'étranger à notifier aux résidants de nationalité turque et étrangère en Turquie, la loi prévoit une procédure différente. Dans le respect des dispositions des accords et du principe de réciprocité, le document à notifier est envoyé par l'ambassade ou le consulat du pays étranger au Ministère turc des Affaires étrangères. Le Ministère envoie le document à l'autorité compétente pour la notification, par l'intermédiaire du ministère concerné. Quand la notification est effectuée, une copie attestée dudit document retourne à l'État requérant, en passant par les mêmes étapes (art.26).

La fonction exercée par le Ministère turc des Affaires étrangères comme « autorité centrale » et le renvoi d'une attestation à l'État requérant à la suite de la notification sont deux aspects de la loi n° 7201 qui ressemblent aux dispositions de la Convention européenne sur la notification à l'étranger des documents en matière administrative. Pourtant, en raison des diverses étapes prévues, le mécanisme de notification de la loi n° 7201 restera beaucoup plus long que celui de ladite Convention.

Sur le droit de recevoir des notifications internationales dans une langue compréhensible

Quand la notification internationale est en question, la littérature juridique turque traite souvent le sujet du point de vue du droit international privé. Dans ce cadre, l'on se réfère souvent à la loi n° 7201 et aux deux conventions suivantes : la Convention du 1er mars 1954 relative à la procédure civile et la Convention du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale.

Pour ce qui est de l'application, la « Circulaire concernant les actes de notification judiciaire dans le domaine juridique »[13] et la « Circulaire concernant la notification internationale dans le domaine pénal »,[14] toutes les deux publiées par la

l'autorité administrative turque concernée. Les documents préparés pour la notification par les autorités juridictionnelles à notifier selon la présente disposition de la loi n° 7201 peuvent être envoyés directement au consulat ou à l'ambassade de la Turquie situés dans pays étranger concerné (art.25/a/3 à 5).

[13] Circulaire n ° 63/3 concernant les actes de notification judiciaire dans le domaine juridique du 16 novembre 2011, publiée par la Direction générale des affaires juridiques et des relations internationales du ministère de la Justice turc, http://www.uhdigm.adalet.gov.tr/genelgeler/63-2%20Hukuki%20Konularda%20Uluslararas%C4%B1%20%C4%B0stinabe%20Taleplerine%20Uygulanacak%20Esaslar.pdf (date d'accès : 10 janvier 2014).

[14] Circulaire n° 69/3 concernant la notification internationale dans le domaine pénal du 16 novembre 2011, publiée par la Direction générale des affaires juridiques et des relations internationales

Direction générale des affaires juridiques et des relations internationales du ministère de la Justice turc, apportent plusieurs précisions à propos des textes susmentionnés. Selon ces circulaires, les documents à notifier en fonction des deux conventions internationales citées ci-dessus doivent etre également traduits dans la langue de l'État de résidence du destinataire et ceux qui sont notifiés selon les dispositions des traités bilatéraux doivent etre traduits soit dans la langue de l'État de résidence du destinataire soit dans l'une des langues étrangères mentionnées dans les traités. Cependant, elles n'exigent pas la traduction des documents dans une langue « compréhensible » pour le destinataire. Cependant, la « Circulaire concernant les actes de notification judiciaire dans le domaine juridique » précise qu'en cas d'absence de traduction en turc des documents en provenance de pays étrangers pour être notifiés sur le territoire de la Turquie,[15] la notification sera effectuée à condition que le destinataire l'accepte « particulièrement et clairement ». Autrement dit, dans ladite Circulaire, il est clairement mentionné que « la notification n'aura pas lieu au sens strict, sauf si le destinataire accepte le document qui n'est pas traduit en turc et donne son consentement ».

Eu égard à ces règles découlant des circulaires précitées, il sera utile de transposer en droit interne la disposition[16] figurant dans l'article 7/2 de la Convention européenne sur la notification à l'étranger des documents en matière administrative.

Reconnaissance, exécution et légalisation des actes administratifs étrangers en droit turc

Le droit interne[17] ne règlemente pas d'une manière générale les questions relatives à la validité, l'efficacité et l'exécution des actes administratifs étrangers(section "L'absence d'une réglementation générale en droit interne"), alors qu'un certain nombre de conventions internationales signées par la Turquie et dûment mises en

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du ministère de la Justice turc, http://www.uhdigm.adalet.gov.tr/genelgeler/69-3%20Cezai%20Konularda%20Uluslararas%C4%B1%20Tebligat%20Hakk%C4%B1nda%20%20Genelge.pdf (date d'accès : 10 janvier 2014).

[15] Dans ce cas, la notification sera faite par le Procureur de la République, par l'intermédiaire de la Poste et selon les dispositions de la loi n° 7201.

[16] Ladite disposition stipule ce qui suit : « … en cas de refus de la notification du document par son destinataire pour le motif qu'il ne connaît pas la langue dans laquelle il est établi, l'autorité centrale de l'État requis fait effectuer la traduction du document dans la langue officielle ou dans l'une des langues officielles de cet État. Elle peut également demander à l'autorité requérante que le document soit traduit ou accompagné d'une traduction dans la langue officielle ou dans l'une des langues officielles de l'État requis. »

[17] On entend par « Droit interne » les lois préparées et mises en vigueur par le législateur turc ainsi que les actes administratifs règlementaires mis en vigueur par l'Administration turque. Les conventions internationales signées par la Turquie et dûment mises en vigueur ayant, en principe, force de loi sont donc hors sujet.

vigueur mettent en place des mécanismes de « reconnaissance directe » et de légalisation. Elles jouent donc un rôle efficace en définissant des autorités administratives compétentes pour la mise en œuvre des actes administratifs (section « Le rôle efficace joué par les conventions internationales »).

Le rôle efficace joué par les conventions internationales

Le rôle efficace joué par les conventions internationales concernant les actes administratifs étrangers se focalise sur deux champs principaux : leur reconnaissance et exécution (section « Pour la reconnaissance et l'exécution des actes administratifs étrangers ») ainsi que leur légalisation (section « Pour la légalisation des actes administratifs étrangers »).

Pour la reconnaissance et l'exécution des actes administratifs étrangers

Au cours de nos recherches, nous n'avons pas eu accès à une liste officielle des autorités turques concernant les conventions internationales signées par la Turquie pour la reconnaissance et l'exécution des actes administratifs.

Cependant, nous avons constaté que les conventions suivantes figurent parmi les conventions signées et ratifiées par la Turquie pour la reconnaissance et l'exécution des actes administratifs :

- La Convention sur la reconnaissance des qualifications relatives à l'enseignement supérieur dans la région européenne,[18]
- La Convention n° 9 de la Commission internationale de l'État civil relative aux décisions de rectification d'actes de l'État civil,[19]
- La Convention du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale,[20]
- La Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.[21]

Les conventions suivantes sont signées et ratifiées par la Turquie pour la reconnaissance et l'exécution d'actes administratifs et elles prévoient l'application du mécanisme de « reconnaissance directe » (Şensöz 2012 : 402–403) :

- La convention d'entraide judiciaire et juridictionnelle entre la République de Turquie et la République d'Iran,[22]

[18] Conseil de l'Europe. http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?CL=FRE&CM=&NT=165&DF=&VL= (date d'accès : 11 janvier 2014).

[19] http://ciec1.org/SignatRatifConv.pdf

[20] http://www.hcch.net/index_fr.php?act=conventions.text&cid=69

[21] http://www.hcch.net/index_fr.php?act=conventions.text&cid=39

[22] Journal officiel de la République de Turquie, 02-08-1992, n°21203.

- La Convention relative à la constatation de certains décès, signée à Athènes le 14 septembre 1956,[23]
- La Convention du 10 septembre 1970 sur la légitimation par mariage,[24]
- La Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants,[25]
- La Convention relative aux décisions de rectification d'actes de l'État civil,[26]
- La Convention de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale,[27]
- La Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.[28]

Néanmoins, il faut ajouter qu'en application de ces conventions internationales prévoyant le mécanisme de « reconnaissance directe », les autorités (administratives) concernées, notamment la Direction générale des affaires de l'État civil, n'exécutent que des décisions étrangères qui ont force de preuve définitive selon la Convention de La Haye 1961 (art.7) et la Convention de La Haye 1980 (art.14). Pour les autres cas, la Direction générale des affaires de l'État civil ne fait pas de modifications sur les registres (en raison d'une disposition de la loi sur les services de l'État civil) en l'absence de décision de reconnaissance émanant des juridictions turques (Şensöz 2012 : 438).

Pour la légalisation des actes administratifs étrangers

La Turquie est signataire de nombreuses conventions destinées à assurer la légalisation, entre autres, des actes administratifs étrangers. Parmi ces conventions signées par la Turquie sur la légalisation d'actes publics figurent la Convention européenne relative à la suppression de la légalisation des actes établis par les agents diplomatiques ou consulaires[29] ainsi que les conventions de coopération ou d'entraide judiciaire bilatérales en matière civile, commerciale et/ou pénale signées avec

[23] Journal officiel de la République de Turquie, 26-12-1971, n°14054.

[24] Journal officiel de la République de Turquie, 22-09-1975, n°15364.

[25] Journal officiel de la République de Turquie, 15-02-2000, n°23965.

[26] Journal officiel de la République de Turquie, 21-12-1966, n°12483.

[27] Journal officiel de la République de Turquie, 19-04-2004, n°25438.

[28] Journal officiel de la République de Turquie 21-02-1983, n°17966.

[29] Conseil de l'Europe. http://conventions.coe.int/Treaty/FR/Treaties/Html/063.htm (date d'accès : 11 janvier 2014).

l'Autriche,[30] la Pologne,[31] la Hongrie,[32] le Koweït,[33] l'Ouzbékistan,[34] l'Albanie,[35] la Géorgie,[36] le Tadjikistan,[37] l'Ukraine,[38] la Croatie,[39] la Macédoine[40] et la Lituanie.[41,42]

La Turquie a également signé la XII Convention de La Haye du 5 octobre 1961 supprimant l'exigence de la légalisation des actes publics étrangers (dite « Convention Apostille ») le 8 mai 1962 et elle l'a ratifiée par la loi n° 3028 publiée dans le Journal officiel turc du 20 juin 1984. En Turquie, cette convention est entrée en vigueur le 29 septembre 1985. Dans ce cadre, les autorités turques compétentes pour émettre des Apostilles sont les préfets, à savoir, les chefs des départements pour les documents administratifs (et les présidences des commissions de justice de juridiction civile pour les documents judiciaires).[43] En ce qui concerne la compétence de ces autorités, la Circulaire n° 68/1 du 3 mars 2008 concernant la Convention sur la suppression de l'exigence de la légalisation des actes publics étrangers, publiée par la Direction générale des affaires juridiques et des relations internationales du ministère de la Justice turc, répète l'article 3 de ladite Convention.

Cependant, la traduction des documents judiciaires sur lesquels on apposera ou on a apposé l'apostille a fait l'objet d'une discussion résolue par un avis du ministère des Affaires étrangères turc du 4 janvier 2006.[44] Selon cet avis, la compétence des présidences des commissions de justice de juridiction civile est limitée à l'apposition de l'apostille sur « l'original » de documents judiciaires, alors que les préfets sont compétents également pour apposer l'apostille sur « la traduction de documents judiciaires » attestée par un notaire.

En ce qui concerne la procédure électronique d'apostille en Turquie, une présentation[45] faite en 2012 au sein du Ministère de l'Intérieur montre que toutes les

[30] Journal officiel de la République de Turquie, 23-09-1991, n° 21000.

[31] Journal officiel de la République de Turquie, 23-07-1990, n°20583.

[32] Journal officiel de la République de Turquie, 23-07-1990, n°20583.

[33] Journal officiel de la République de Turquie, 30-05-1997, n°23165.

[34] Journal officiel de la République de Turquie, 07-11-1997, n°23163.

[35] Journal officiel de la République de Turquie, 09-11-1997, n°23165.

[36] Journal officiel de la République de Turquie, 24-09-1997, n°23090.

[37] Journal officiel de la République de Turquie, 30-05-2000, n°24064.

[38] Journal officiel de la République de Turquie, 22-12-2003, n°25324.

[39] Journal officiel de la République de Turquie, 24-05-2000, n°24058.

[40] Journal officiel de la République de Turquie, 14-05-2000, n°24049.

[41] Journal officiel de la République de Turquie, 20-04-2004, n°25439.

[42] *v.* la Circulaire du ministère des Affaires étrangères n°2009/412955 du 23 octobre 2009.

[43] Circulaire n° 68/1 du 3 mars 2008 concernant la Convention sur la suppression de l'exigence de la légalisation des actes publics étrangers, publiée par la Direction générale des affaires juridiques et des relations internationales du ministère de la Justice turc sur le site de la Direction générale des affaires juridiques et des relations internationales du ministère de la Justice turc. http://www.uhdigm.adalet.gov.tr/genelgeler/68.1.pdf (date d'accès : 10 janvier 2014).

[44] Avis de la Direction de la section des principes des consulats du ministère des Affaires étrangères turc du 4 janvier 2006 concernant l'apostille. http://www.illeridaresi.gov.tr/ortak_icerik/www.icisleri/Genelgeler/15238-Apos.pdf (date d'accès : 11 janvier 2014).

[45] Préfecture de *Kocaeli*. http://www.kocaeli.gov.tr/ortak_icerik/www.icisleri/apostil_sunumu/Apostille%20Presentation.pptx (date d'accès : 11 janvier 2014).

infrastructures sont terminées. Cependant, ce service ne figure toujours pas sur le site de « E-État » de la Turquie, ni sur le site concernant la Conférence de La Haye de Droit international privé.[46]

L'absence d'une réglementation générale en droit interne

En dehors des règles prévues par les conventions internationales dont la Turquie est l'un des pays signataires, le droit interne[47] turc ne prévoit pas de conditions formelles ou matérielles pour qu'un acte administratif étranger déploie ses effets sur le territoire de la République de Turquie.

Au niveau sectoriel figurent quelques exemples exceptionnels comme le Conseil Interuniversitaire, qui décide l'équivalence des degrés académiques obtenus dans les pays étrangers, ou l'Autorité de Qualification professionnelle[48] (fondée en fonction de la transposition de l'acquis communautaire en droit interne turc), qui décide la validité des certificats professionnels des étrangers voulant être embauchés en Turquie. Cependant, il n'existe pas de procédure générale pour la reconnaissance et/ou l'exécution des actes administratifs étrangers. En droit privé turc, en revanche, selon la loi n° 5718 sur le droit international privé et procédure,[49] les juridictions judiciaires sont compétentes pour la reconnaissance et l'exécution des décisions juridictionnelles étrangères.

Pour que le juge turc décide la reconnaissance d'une sentence étrangère, il faut, entres autres, que « la sentence ne soit pas clairement non conforme à l'ordre public » [Loi n° 5718, art.54/(c)]. Une telle non-conformité est identifiée à la lumière de la jurisprudence de la Cour de cassation. Selon la Cour de cassation turque, pour qu'une demande de reconnaissance soit rejetée, il faut que la sentence de la cour étrangère « contienne un ordre d'exécution entraînant une conséquence contrevenant clairement les règles juridiques, morales et conscientielles fondamentales qui sont à respecter obligatoirement pour que la vie de la société soit harmonieuse et béate » (Nomer 2013 : 509). Ainsi, le juge turc décide le respect des exigences de l'ordre public au cas par cas et en limitant l'application de ce critère aux cas qui sont « clairement » non conformes à l'ordre public turc (Nomer 2013 : 512).

Les décisions des cours étrangères qui sont clairement non conformes aux « principes indispensables » du droit turc ne sont, donc, ni reconnues, ni exécutées. Parmi

[46] Conférence de la Haye de Droit international privé. http://www.hcch.net/upload/impl_chrt_e.pdf (date d'accès : 11 janvier 2014).

[47] Comme il a été signalé auparavant, on entend ici par « Droit interne » les lois préparées et mises en vigueur par le législateur turc ainsi que les actes administratifs règlementaires mis en vigueur par l'Administration turque. Les conventions internationales signées par la Turquie et dûment mises en vigueur et ayant, en principe, force de loi sont donc hors sujet.

[48] Vocational Qualifications Authority. http://www.uyep.net/web/en-us/home.aspx (date d'accès : 3 février 2014).

[49] Loi n°5718 sur le Droit international privé et procédure, Journal officiel de la République de Turquie 12-12-2007, n°26728.

ces principes, ceux qui sont destinés à assurer la protection des droits de l'Homme, notamment ceux découlant de la CEDH, revêtent une importance particulière (Nomer 2013 : 507). Dans son article 54/(d), la loi n° 5718 accorde une importance particulière au respect du droit de la défense. Selon cette disposition, pour la reconnaissance d'une sentence étrangère, il faut que la personne concernée par cette décision soit dûment appelée ou conformément représentée devant la juridiction étrangère et que le verdict soit prononcé conformément à ces lois et en sa présence. Si la personne concernée formule un recours devant une juridiction turque contre la demande d'exécution en alléguant la violation de l'une de ces conditions, ladite demande doit être rejetée.

Étant donné que la loi n° 5718 ne prévoit aucune règle concernant la reconnaissance et l'exécution des actes administratifs et qu'il est clairement signalé par la doctrine que « les actes administratifs purs » ne font pas l'objet de reconnaissance dans le cadre de cette loi (Nomer 2013 : 489), il est possible de soumettre à la discussion la préparation d'un mécanisme pour la reconnaissance et l'exécution des actes administratifs étrangers.

La mise au point d'un mécanisme de reconnaissance et/ou d'exécution d'actes administratifs étrangers peut être utile pour préserver les droits des intéressés, éviter les pertes de temps et assurer la rapidité indispensable de nos jours dans les affaires liées à différents domaines tels que l'investissement, la protection de la concurrence, l'éducation, la police administrative et le droit de la famille. En droit communautaire, la publication d'un certain nombre de directives[50] montre la présence d'une initiative positive destinée à minimiser les difficultés résultant de la coexistence des Administrations des différents pays dans les mêmes domaines. Cependant, les problèmes apparus au stade de la transposition de ces directives aux droits internes prouvent bien la difficulté de l'adoption des règlementations relatives à la reconnaissance des actes administratifs étrangers.

Les mécanismes de reconnaissance des décisions juridictionnelles développés par le droit international privé peuvent être une source d'inspiration pour la création d'un mécanisme de reconnaissance des actes administratifs étrangers. Pourtant, dans le domaine du droit public et, plus spécifiquement, lorsque la reconnaissance et l'exécution des actes administratifs étrangers sont en question, il faudra sans doute prendre en compte les caractéristiques du droit administratif.

Conclusion

Cette étude montre que ni l'identification ni le régime des actes administratifs étrangers ne sont aisément perceptibles en droit administratif turc. Les rares précisions apportées dans ce domaine figurent soit dans les œuvres concernant le droit privé ou le droit public international, soit dans des conventions internationales. Cet

[50] Comme la Directive 2005/36/CE du Parlement européen et du Conseil du 7 septembre 2005 relative à la reconnaissance des qualifications professionnelles.

état de fait n'est pas étonnant puisque l'acte administratif est l'un des aboutissements des missions confiées à l'Administration (Yayla 2009 : 108), une manifestation de volonté de la puissance publique (Seiller 2010). Du point de vue de l'Administration, c'est, en principe, un domaine qui lui est réservé, dans le cadre de compétence conférée par le législateur. Cependant, ce domaine commence à devenir un champ ouvert aux interventions des Administrations étrangères par l'intermédiaire des conventions internationales. Cette évolution peut amener une transformation importante en droit administratif. Cette transformation peut survenir dans un avenir proche, puisque les discussions autour du terme « assez marginal » de « droit administratif international » (Nguyen 2006 : 135) sont ouvertes depuis longtemps.

Bibliographie

Bülbül, Erdoğan. 2010. *İdari İşlemlerin Yürürlükten Kaldırılması* [Abrogation des actes administratifs]. Beta: İstanbul.

Candan, Turgut. 2012. *Açıklamalı İdari Yargılama Usulü Kanunu* [Loi de procédure administrative contentieuse, Commentée]. Adalet: Ankara.

Duran, Lütfi. 1982. İdare Hukuku Ders Notları [Notes des cours de droit administratif]. Fakülteler Matbaası: İstanbul.

Duran, Lütfi. 1998. İdari usulün ilkeleri ve kapsadığı konular [Principes et contenu de la procédure administrative]. In *İdari Usul Kanunu Hazırlığı Uluslararası Sempozyumu – Bildiriler* [Comptes-rendus du symposium international sur la préparation de la loi sur la procédure administrative], 26–34. Ankara : T.C. BaŞbakanlık Basımevi (Maison d'édition du premier ministère)

Erkut, Celâl. 1988. L'identification de l'acte administratif selon la recevabilité d'un recours pour excès de pouvoir. *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 53(1–4): 101–137.

Gözler, Kemal and Kaplan, Gürsel. 2013. *İdare Hukuku Dersleri* [Cours de Droit administratif]. Bursa: Ekin.

Kanlıgöz, Cihan. 1998. İdari iŞlemlerde yazılı bildirim [La notification écrite des actes administratifs]. *AÜHFD* [Revue de la Faculté de Droit de l'Université d'Ankara] 40(1–4) : 173–192.

Nomer, Ergin. 2013. *Devletler Hususi Hukuku* [Droit international privé]. Beta: İstanbul.

Nguyen, Minh Son. 2006. Droit administratif international. *Revue de droit suisse* 125 II: 75–136.

Seiller, Bertrand. 2010. Acte administratif (I - Identification). Répertoire de contentieux administratif. http://www.dalloz.fr/documentation/Document?id=CONT#TargetSgmlIdENCY/CONT/RUB000098 (date d'accès : 29 novembre 2014).

Şensöz, Ebru. 2012. Türkiye'nin taraf olduğu bazı milletlerarası sözleŞmeler çerçevesinde doğrudan tanıma usulü [La procédure de la reconnaissance directe dans le cadre d'un certain nombre de conventions internationales dont la Turquie est signataire]. *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi* [Revue des Sciences sociales de l'Université de Commerce d'Istanbul] 22(2) : 389–444.

Tan, Turgut. 2013. *İdare Hukuku* [Droit administratif]. Turhan Kitabevi: Ankara.

Yayla, Yıldızhan. 2009. *İdare Hukuku* [Droit administratif]. Beta: İstanbul.

Chapter 18
Recognition of Foreign Administrative Acts in the United States

John C. Reitz

Abstract The legal rules governing recognition in the United States of foreign administrative acts vary sharply depending on whether the foreign administrative act in question is covered by a mutual recognition agreement (MRA), which seeks to eliminate duplicative assessments in international trade of conformity of goods and services with applicable product and service standards, or similar treaties. Such agreements and their implementing legislation and regulation give a clear legal basis for recognition to the extent that they cover foreign administrative acts though in fact many do not. Otherwise, recognition is based on the common law, which provides for recognition--chiefly enforcement of money judgments or collateral estoppel on common issues, but excluding fines and penalties--in order to avoid duplicative litigation in situations in which there has already been a full and fair opportunity to litigate all relevant issues in connection with the issuance of the foreign administrative act. The common law is subject to exceptions to protect crucial U.S. public policies, but the act of state doctrine extends the scope of administrative acts that may be granted recognition in the United States by eliminating the defense of public policy in certain cases.

The Concept of Administrative Act

In order to permit comparison between U.S. and other countries' administrative law, it is first necessary to define a few terms.

This report is a substantially revised presentation of the national report for the United States on this topic originally submitted to the General Reporter and published in the collection of U.S. national reports. See Reitz, J.C. 2014. Recognition of Foreign Administrative Acts. In *American Journal of Comparative Law*, 2014, vol. 62 (Supplement), pp. 589–615.

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Federal and State Administrative Law

Instead of defining the exercise of public power in an abstract way in order to subject all exercises of public power to standard rules of procedure, as one might expect under legal science, U.S. law proceeds with particularity. Reflecting the U.S. form of federalism, the chief source of generally applicable administrative law at the federal level, the federal Administrative Procedure Act (APA), applies only to "agencies" of the federal government, defined as "authorities" of the federal government, except for a specific list of exempted authorities, such as Congress, the federal courts, military courts, territorial governments, and so forth.[1] It does not apply to bodies of state or local government, which are largely subject to their own bodies of administrative law, though there are many similarities among the federal and the various different versions of state APAs. The due process clause of the federal Constitution provides a modicum of uniformity because it applies to all levels of government in the United States,[2] but the APAs lay down many procedural requirements that are not clearly required by due process. Administrative law at the state level may therefore differ in important ways from federal administrative law or the law of other states. For clarity, this report will focus on federal administrative law in presenting specifics of administrative law rules, but the rules governing recognition of foreign administrative acts are largely the same at the federal and state levels.

Administrative Act

U.S. law does not use the term "administrative act." Nevertheless, for many purposes, we can say that the U.S. federal administrative law concept of an "order" is largely the functional equivalent of the civil law tradition's concept of an administrative act, which I understand to refer to an action by an administrative body determining the public law rights and obligations of specific, identifiable parties in concrete situations.[3]

There are, however, two important ways in which the U.S. concept of an order is quite different from that of an administrative act in the civil law. First, private parties are not subject to the APA, even if they in some sense exercise public power, and

[1] 5 U.S.C. § 551(1)(2012).

[2] The Fifth Amendment's due process clause in the federal Constitution applies to the federal government, and the Fourteenth Amendment's due process clause applies to the states.

[3] Cf. Nigel, G.F., Satish S. 2002. *German Legal System and Laws*. New York: Oxford University Press, 2002, pp. 3–585, at 259. ISBN 0199254834 (administrative act is "an order, decision or other sovereign measure . . . taken by an authority for the regulation of an individual case in the sphere of public law and directed at immediate external legal consequence."). For an explanation of how the federal APA definitions may be read to support this claim of similarity, despite the literal wording which seems to belie the assertion, see Asimow, M., Levin, R.M. 2009. *State and Federal Administrative Law*. 3rd ed. St. Paul, Minnesota: Thomson/West, 2009, pp, 1–779, at 200. ISBN 978-0-314-15928-1.

constitutional due process applies to action by non-governmental bodies only in rather extreme cases of private involvement with the state.[4]

Second, administrative acts in countries that provide for de novo trial of the legal and factual issues upon judicial review may actually provide greater opportunities for the private parties to contest the basis for the government's action than U.S. law does in many cases. Under U.S. federal law, an "order" is the product of "adjudication"[5] which usually involves decision, in the first instance, by lower level officials within the administrative agencies themselves, subject to final decision by the heads of the agencies, and further subject to judicial review by regular courts.[6] For many types of agency determinations, there is a statute (other than the APA) requiring that the agency adjudication be conducted under the APA's formal level of process, and in that case, the adjudication must follow many of the essential requirements of court process.[7] Subsequent judicial review, if any, is restricted to the record made by the agency, at least with respect to issues committed in the first instance to adjudication by the agency, and is moderately deferential to the agency, both with respect to the facts and, especially in cases subject to formal process, the agency's interpretation of the law it has authority to administer.[8] If no statute requires formal process and due process does not apply, the requirements concerning the adjudicatory process before the agency are quite minimal,[9] but judicial review is just as restricted, with the result that private parties' opportunities to challenge the agency's view of the facts and its exercise of discretion pursuant to the law are restricted to a process in which the agency enjoys a moderately strong presumption in its favor on its determinations of fact and law and no new evidence can be introduced. This characteristic of U.S. administrative law means that orders issued in cases not covered by due process or formal process under the APA are not the functional equivalent of administrative acts in countries that provide for de novo judicial review of administrative acts by administrative courts. This point is relevant to understanding the common law tests for recognition and will be further discussed in Section 4*b* below.

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[4] *See*, e.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (contract with the government to fulfill functions that the government would otherwise provide itself does not subject the private party to the strictures of the Constitution, even though it receives most of its funding from governmental sources, is subject to extensive regulation, and could be said to be performing a public function).

[5] 5 U.S.C. § 551 (7)(2012).

[6] *Id.* §§ 557, 701–706 (2012).

[7] *Id.* §§ 554, 556, 557 (2012).

[8] *See id.* § 706(2)(E)("substantial evidence" test for review of fact-finding in formal process); Camp v. Pitts, 411 U.S. 138 (1973)(judicial review based on agency record, not on new evidence). Moderate deference to agency interpretations of the law, especially—but not only—those imposed through formal adjudication and notice-and-comment rulemaking, is required wherever the relevant statute is ambiguous or vague or otherwise can be read as delegating policy-making discretion to the agency. *See* 5 U.S.C. § 706(2)(A)(2012)("arbitrary and capricious" general standard for review of rationality of agency action); Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); United States v. Mead Corp., 533 U.S. 218 (2001).

[9] *See*, e.g., Pension Benefit Guaranty Corporation v. LTV, Inc., 496 U.S. 633 (1990).

Validity of Administrative Action

The most important requirements for the validity of an order issued by a federal administrative agency are (1) that the agency have been delegated the power to issue such orders and (2) that the agency has acted in accordance with the Constitution, the delegating statutes, the APA, and relevant regulations issued by the agency, and (3) that the agency has not acted so unreasonably that its decisions are arbitrary and capricious. In the United States, the delegation of power to the agency must be made by statute. Similar requirements would apply to foreign administrative acts—the administrative body issuing the act would have to have acted pursuant to power properly delegated to it and in accordance with the substantive and procedural standards that nation's laws imposes on it. However, if in some foreign countries administrative bodies have certain residual powers under their constitution so that a statutory delegation is not always required for the validity of an administrative act, the constitutional authority should suffice for purposes of recognition or enforcement under U.S. law.

Recognition and Enforcement of Administrative Acts or Orders

The most significant forms of recognition and enforcement involve preclusion. For enforcement,[10] the judgment debtor has to sue on the foreign act or judgment, but the foreign decision is treated as preclusive with respect to the claims and defenses in the foreign proceeding, so the court does not permit the parties to re-litigate the underlying issues.[11] Recognition traditionally refers to res judicata or collateral estoppel. I argue further below in this section that for foreign administrative acts, as a practical matter, res judicata is limited to acts imposing a monetary obligation. Collateral estoppel means in this context treating the conclusions of law or findings of fact made in the course of deciding a case or issuing an administrative act or order as binding in some subsequent court of administrative hearing.[12] There is some dispute about whether to regard non-preclusive treatment of foreign court judgments or

[10] Also called "execution."

[11] Although there are some summary proceedings for the enforcement of sister state judgments and a form of registration of federal judgments in districts other than where it was rendered, there is no special procedure like that of exequatur in many civil law countries for registering judgments of foreign nations for enforcement in U.S. courts, but the provisions for summary judgment may make the U.S. procedure roughly just as expeditious. Ehrenzweig, A., Jayme, E. 1973. *Private International Law*. Leyden: A.W. Sijthoff. 1973, vol. 2, pp. 1–338, at 59–60. ISBN 379-00204-3; Hay, P., Borchers, P.J., Symeonides, S.C. 2010. *Conflict of Laws*. St. Paul, Minnesota: West, 2010, pp. 1–1764, at 1446. ISBN 978-0-314-91160-5.

[12] Ehrenzweig and Jayme, *supra* n. 11, at 59–60; Hay, et al., *supra* n. 11, at 1436–39.

administrative acts as a form of recognition,[13] and Section 1*e* will consider this issue in more detail.

It is also important to distinguish the enforcement of a foreign administrative act or court decision from enforcement of a U.S. domestic administrative order. In the case of federal law, if a domestic administrative order requires or forbids specific action by a regulated party and that regulated party is not willing to comply with the agency's order, the agency must sue in federal court to enforce its order.[14] This kind of lawsuit can provide an alternative form of judicial review, so unless a court has already provided judicial review of the order, the suit to enforce provides the same restricted opportunity to re-litigate the issues that is provided by other forms of judicial review of administrative action.[15] Thus enforcement of a domestic administrative order does not normally involve giving the order preclusive effect unless there has already been judicial review whereas enforcement of a foreign administrative act means giving the foreign act preclusive effect.

Main Fields of Application for Recognition or Enforcement of Foreign Administrative Acts

As discussed in greater detail in section "International conventions on the recognition and execution of administrative acts and on the legalization of public documents" below, recognition and enforcement under international treaties and U.S. implementing statutes generally concern inspection and certification of goods and services in international trade, transborder investment, or transportation under various health, safety, consumer, or environmental protection standards. The primary fields of application of the common law of recognition, discussed below in section "Recognition and execution of administrative acts in other countries – the common law", are much less clearly circumscribed. For example, collateral estoppel, the broadest mode of recognition, may potentially apply to any administrative or court proceeding with respect to a party who has already been the addressee of an administrative act in a foreign country that involved the same legal or factual issues. Of course, there are most likely to be cases similar enough for collateral estoppel when both countries regulate the same kinds of conduct in similar fashion.

Enforcement, however, has a much more restricted application, as a practical matter. First, extraterritorial enforcement of administrative acts or orders is largely restricted to the enforcement of orders to pay money. This result is partly explained by the ancient but contestable view that the courts of each state are not open to the enforcement of the public policy of other states, especially in the case of penal and

[13] *Compare* Ehrenzweig and Jayme, *supra* note 11, at 58–66 (recognition includes non-preclusive forms) *with* Hay, et al., *supra* note 11, at 1442–51(discussing preclusion only).

[14] Strauss, T.D. et al. eds. 2011. *Gellhorn and Byse's Administrative Law*. New York: Foundation Press, 2011, pp 1–1508, at 1194. ISBN 978-1-59941-429-4.

[15] 5 U.S.C. § 703 (2012) (last sentence). For the limits on judicial review, see text at *supra* note 8.

tax law.[16] But this idea is thought not to be applicable to money judgments, because in judgments to pay money any offensive public policy inhering in the cause of action is eliminated by the merger of the cause of action with the money judgment.[17] Courts everywhere have the power to enter money judgments, which is the main and perhaps simplest way they exercise power over parties, so it may be that courts are less troubled by enforcing a monetary obligation than any other kind of obligation.

Second, however, in the United States, for the reasons stated below in Section 4*c*, current law appears to disfavor the enforcement of foreign penalties. It is therefore likely that the only foreign acts requiring the payment of money that will be enforced in U.S. courts are those imposed to provide compensation or restitution, and not for sanctioning a regulated party's violation of civil or criminal rules. This would seem to leave a fairly restricted field of application for the enforcement of foreign administrative orders to pay money.[18]

Collateral estoppel is thus the more expansive form of recognition at common law, but it applies only to those factual findings or legal issues underlying the foreign administrative act that are identical to relevant issues in the United States.[19] Such identity of issues would seem most likely to apply in cases of status determinations, such as determinations of citizenship or family status, but only if the issues are sufficiently similar. Thus although the issue has not been litigated very much, there is case authority in the United States denying preclusive effect to a foreign passport on the issue of citizenship. The result makes sense in those cases in which the issue before the U.S. administrative authority is not identical to the issues involved in the foreign country's issuance of the passport.[20]

With respect to family status, the issues may be identical because the issue in the United States is often simply whether or not the foreign jurisdiction has granted the family status. Foreign court judgments attesting to a valid foreign marriage or divorce are normally recognized as adequate proof of a foreign marriage or divorce, subject to the common law test for recognition discussed below in section "Recognition and execution of administrative acts in other countries – the common

[16] Ehrenzweig and Jayme, *supra* n. 11, at 72–73; Hay, et al., *supra* n. 11, at 1470–78.

[17] Hay, et al., *supra* n. 11, at 1472–73 (arguing that a better policy explanation for the decided cases has to do with preclusion).

[18] For one example, see the *Regierungspraesident* case cited in note 30, *infra.*

[19] For one example, see *Petition of Breau*, cited in note 30, *infra*.

[20] E.g., Palavra v. INS, 287 F.3d 690 (8th Cir. 2002) (Croatian passport is not preclusive proof of Croatian citizenship; immigration authorities must consider asylum applicants' claims that Croatian passport was granted to them on humanitarian grounds because they are ethnic Croats from Bosnia whose own country would not grant them a passport to come to the United States for emergency medical treatment); Kinfe v. Ashcroft, 121 Fed. Appx. 675 (8th Cir. 2005) (citing with approval but distinguishing *Palavra*); Walker v. Ashcroft, 112 Fed. Appx. 243 (3d Cir. 2004) (same). *But see* Ruffert, M. 2012. Recognition of Foreign Legislative and Administrative Acts. In Wolfrum, R. *The Max Planck Encyclopedia of Public International Law*. New York : Oxford University Press, 2012, vol. 8, pp. 1–1138, at 683, ¶ 8. ISBN 9780199291687. (arguing that only international courts should be permitted to refuse preclusive effect to a nation's determinations of citizenship of persons, corporations, vessels or aircraft).

law" (adequate opportunity for full and fair contestation of issues, etc.). It would appear that civil registration or other administrative acts to the same effect would be treated the same, subject to the same common law test for recognition.[21]

No doubt the most common treatment of foreign administrative acts is, however, as mere evidence of the administrative act itself or the facts underlying the administrative act. Since there is no preclusion, one might hesitate to call this a form of recognition, but there are cases recognizing a presumption of regularity for actions and records of public officials, and that presumption "applies to the actions and records of foreign public officials, . . . While not irrebuttable, the presumption may only be rebutted through clear or specific evidence."[22] This rule would seem to require a heightened standard for rebuttal. The presumption appears to constitute an intermediate level of recognition, weaker than enforcement or collateral estoppel, but stronger than treating the foreign act as mere evidence.[23]

International Administrative Acts

International administrative acts are the product of international agreements that tend to commit the member states to comply with or otherwise recognize or enforce the international acts. They are thus similar to the foreign administrative acts discussed below in section "International conventions on the recognition and execution of administrative acts and on the legalization of public documents", the recognition of which is required by international agreement. They are, however, uncommon because most international regulation is confined to the international promulgation of norms, leaving the application of the norms to domestic or private inspectors. A

[21] Estin, A.L. 2012. *International Family Law Desk Book.* Chicago : American Bar Association, 2012, pp. 1–301. ISBN 9781614383178 (administrative registration regimes for opposite-sex and same-sex couples in Europe (at 39); administrative registration of nonjudicial divorce such as Muslim *talaq* or Jewish *get* (at 63); *see also infra* note 23 (claim that civil register from civil law tradition is recognized in the United States)). Some family law issues take us outside the common law because of the force of international treaties. *See* Estin, *op.cit.*, at 237–38, 245 (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, once ratified by the United States, will require enforcement of support orders from other participating states, whether from courts or administrative bodies, but subject essentially to the same requirement for a full and fair opportunity to litigate as under the common law).

[22] Riggs National Corp. v. Commissioner, 295 F.3d 16, 20–21(D.C. Cir. 2002).

[23] For argument that the decision in the *Riggs* case in fact does not seem to have made use of the presumption but instead treated the evidence of the foreign administrative act as mere evidence, see Reitz, *supra* article note, at 614–15. Professors Ehrenzweig and Jayme cited the following family law cases as examples showing that the "civil register of civil law countries now has found recognition even in the United States": Sousa v. Freitas, 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485, 490 (Ct. App. 1970); Caruso v. Lucius, 448 S.W.2d 711 (Tex. Civ. App. 1970); Johnson v. Berger, 273 N.Y.S.2d 484 (Fam. Ct. 1966). Ehrenzweig and Jayme, *supra* note 11, at 72–73 nn. 49, 52. It is, however, difficult to tell how these courts treat the evidence because the evidence of the foreign act affecting family status was either unopposed or the status in question does not appear to have been at issue in these cases.

rare example of an international administrative act is furnished by the freeze orders required by U.N. Security Council Resolution 1267, directing states "to block terrorism financing by freezing the assets of people and groups listed [on Security Council watch lists] . . .," and raising serious issues under domestic human rights protections like due process.[24]

General Considerations on the Habitual Administrative Procedure for Adopting Administrative Acts in US Law

As explained above in Section 1*b* and *c*, the APA sets out the chief procedures governing the adoption of administrative orders in U.S. federal administrative law and the judicial review that may be had thereof. The U.S. Constitution, the federal authorizing statutes, and even specific agency regulations may add more requirements.

Intervention by interested persons is available in U.S. courts and administrative agency adjudications.[25] The United States has ratified the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters,[26] and while it probably does not apply to evidentiary requests from administrative bodies, the much greater flexibility of administrative rules of evidence should mean that obtaining evidence from foreign sources is not so difficult.[27] However, both the need to go to court to enforce a foreign administrative act and the effect of the preclusion of underlying issues involved in either enforcement or recognition through collateral estoppel would seem to obviate the need for either intervention or the taking of evidence abroad in many of these cases.

The Service of Administrative Acts: Special Consideration for Their Service in Other Countries

The service of administrative acts is not regulated by the federal APA. In effect, each agency is left to promulgate its own rules for service. The general concern is to assure reasonable notice, generally through use of the mails. Regulations of the

[24] Scheppele, K.L. 2011. Global Security Law and the Challenge to Constitutionalism after 9/11. In *Public Law*, 2011, vol. 2011, 353, at 370–71. For the similar concerns raised by MRAs, see Section 6*b*, *infra.*

[25] *See*, e.g., Federal Rules of Civil Procedure § 24 (courts); APA, 5 U.S.C. § 555(b)(2012) (agencies).

[26] March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

[27] The hearsay rule does not apply in agency adjudication, so documentary evidence can be used for testimony from absent witnesses but will be evaluated in light of the usual concerns about the trustworthiness of such written evidence. For exceptions to the hearsay rule to facilitate use in court of documentary evidence of foreign administrative acts, see Federal Rule of Evidence 803(8).

International Trade Commission, for example, provide for service by mail but allow extra time for response in the case of mailings to a foreign country.[28]

Recognition and Execution of Administrative Acts in Other Countries: The Common Law

Basic Common Law Rule on Recognition and Enforcement

In the absence of specific treaties and their implementing legislation, the common law provides a basis in American law for the recognition and execution of foreign administrative acts, but the authorities are uncertain and even somewhat contradictory. Some authorities express doubt that foreign administrative acts will generally be recognized in the United States.[29] Yet there are also a few cases recognizing foreign administrative acts.[30]

The basis in the common law for recognition or execution of foreign administrative acts is built on the analogous rules of recognition for foreign court judgments and domestic administrative orders, both of which themselves appear somewhat problematic, so the uncertainty surrounding them naturally affects the extension of those two principles to foreign administrative acts.[31] Nevertheless, if as a general matter, U.S. courts may recognize foreign court judgments and domestic

[28] 19 Code of Federal Regulations § 201.16(d)(2013).

[29] Ehrenzweig and Jayme, *supra* note 11, at 72 (leading comparative treatise of conflicts of laws states that "[a]dministrative acts of foreign governments are quite generally denied the status of 'judgments' for the purpose of recognition . . . ."); Hay et al., *supra* note 11, at 1520 (a leading U.S. conflicts treatise opines that although domestic administrative orders "have been treated and recognized as judgments in the interstate setting, . . . [a]dministrative acts of foreign nations . . . have generally not been treated as judgments . . . ."); Restatement (Third) of Foreign Relations Law § 481 comment f (1987)(foreign court judgments are entitled, as a general matter, to recognition in U.S. courts, but the "rule is less clear with regard to decisions of administrative tribunals"). The Restatements are not statutes. They are the attempt by a prestigious non-governmental body of scholars, judges, and practitioners, the American Law Institute, to state the current law in specific areas; they have the authority that the writings of well-respected legal scholars have in the U.S. legal culture.

[30] *See*, e.g., Regierungspraesident Land Nordrhein-Westfalen v. Rosenthal, 232 N.Y.S. 2d 963 (N.Y. App. Div. 1962)(opinion of New York trial court enforcing repayment order of German public authority against person whom German authority had found to have fraudulently obtained compensation for Nazi persecution), *cited in* Restatement (Third) of Foreign Relations Law § 481 reporter's note 5 (1987); Petition of Breau, 565 A.2d 1044 (N.H. 1989)(New Hampshire Supreme Court upheld N.H. administrative agency's revocation of N.H. teaching license for lack of good moral character on the basis of prior Canadian administrative decision revoking Canadian teaching license on the same grounds; Canadian agency determination applied by collateral estoppel), *cited in* Restatement (Second) of Conflict of Laws § 98 comment b (1971).

[31] For discussion of the uncertainties surrounding both of these rules, see Reitz, *supra* article note, at 604–07.

administrative orders, at least under some conditions, then it is hard to see why foreign administrative acts that meet the same conditions should not be recognized.[32]

The chief condition that must be met in both cases is that the party against whom recognition is sought have had a full and fair opportunity to contest all relevant issues in the process which led to the decision for which recognition is sought.[33] Some of the relevant authorities suggest due process as the touchstone for what counts as a fair opportunity to contest, but it seems clear that the test is concerned with essential fairness, not slavish identity with U.S. concepts of civil procedure. The procedures used in formal administrative adjudication are often quite different from that of U.S. courts. For this reason, I argue that the best statement of the requirements is in Section 83 of the Second Restatement of Judgments, which requires simply adequate notice, the right to present evidence and legal argument and to rebut evidence and argument by opposing parties, and a rule specifying a point in the proceedings when a final decision is rendered.[34] It is also clear that a fair opportunity to contest presupposes judicial and administrative courts and tribunals that are impartial and not infected with fraud.[35] All of these requirements make it clear that the fundamental policy behind the law on recognition and enforcement has to do with avoiding duplicative litigation where it is possible to do so without loss of fairness to the parties.

Significance of De Novo Judicial Review

In one important respect, some of the cases may seem to articulate a much broader rule of recognition than appears warranted by the underlying common law rules of recognition for foreign court judgments and domestic administrative orders. In some cases, the courts recognize or enforce the foreign administrative decision even though it was the product of an informal process that did not involve the kind of court-like procedures that would apply in formal adjudication under the federal APA. As Section 83 of the Second Restatement of Judgments makes clear, this kind of formal administrative process is what is normally required to count as a fair opportunity to contest. Yet U.S. courts have enforced or extended recognition to decisions of a foreign administrative body, even though the procedure actually followed by the foreign administrative body did not provide a full and fair opportunity to the private party to litigate the relevant issues. The U.S. courts gave full

[32] *See*, e.g., Petition of Breau, 565 A.2d 1044, 1049–50 (N.H. 1989)(invoking both of these analogies).

[33] Both of the cases cited in note 32, *supra*, emphasize this point.

[34] Restatement (Second) of Judgments § 83(2)(a), (b), and (d)(1982).

[35] Restatement (Third) of Foreign Relations Law of the United States § 482(1)(a)(1987); s*ee also* Restatement (Second) of Conflict of Laws § 98, comment d (1971)(quoting Hilton v. Guyot, 150 U.S. 113, 202(1895)); *id.* §§ 115, 117 (defenses of fraud and public policy, respectively).

recognition to the foreign administrative body's decision because it was subject to a form of judicial review in which there would have been an opportunity to use full court process to contest the issues.[36]

There is no doubt that the availability of judicial review is important. A Ninth Circuit Court has even held that the findings of a state administrative agency cannot have preclusive effect if they were not subject to judicial review.[37] But should the availability of de novo judicial review suffice for recognition of a foreign administrative act if the act itself was the product of a one-sided, ministerial process, as may generally be the case in many administrative proceedings in many civil law countries and as is the case in much informal agency adjudication in the United States? It seems clear that U.S. law would not recognize domestic administrative orders that are the product of informal agency procedures that do not meet the standards of formal process under the APA.[38]

I would argue that the cases are right. The domestic rule is shaped by the U.S. form of judicial review, which, as explained above in Section 1*b*, does not normally provide de novo determination of facts or even some legal issues. There is, however, no reason to refuse recognition of foreign administrative acts if they are the product of a procedure that does not limit judicial review in same way that U.S. law does. It could also be argued in support of this conclusion that the U.S. law for domestic agency orders does not require that the parties to the administrative process in question actually have used all the elements of full and fair litigation, only that the administrative process used have afforded the rights to all those elements. Allowing recognition on the basis of unexercised rights in judicial review in the foreign system is consistent with that rule. At any rate, the few cases on point appear to treat the possibility of de novo judicial review as the equivalent of something akin to formal process in the U.S. administrative context for purposes of the recognition rule.[39]

Exceptions for Public Policy, Tax, and Penalties

Recognition of foreign court judgments is universally subject to an exception for judgments that violate the enforcing state's public policy (ordre public), so of course the same rule should apply to recognition of foreign administrative acts. International systems of obligation for nations generally provide some kind of escape valve so that nations can protect their most vital interests. Thus the exception for public policy is necessary and reasonable as long as it is construed narrowly so that it

[36] *See*, e.g., cases cited in note 32, *supra*.

[37] Wehrli v. County of Orange, 175 F.3d 692 (9th Cir. 1999) (cited in Pierce, R.J., JR. 2010. *Administrative Law Treatise.* Austin, Texas: Wolters Kluwer Law & Business, 2010, vol. 2, pp. 735–1400, at 1133, § 13.3. ISBN: 9780735580497).

[38] Restatement (Second) of Judgments § 83(2)(a), (b), and (d)(1982).

[39] See cases cited in note 30, *supra*.

applies only to matters that are truly so important that recognition of the foreign administrative act would effectively frustrate the host jurisdiction's protection of its most fundamental values, like basic aspects of democracy and other fundamental human rights, maybe even environmental protection. A leading conflicts treatise states that "[i]n general, it appears to be the modern trend that the public policy defense will lie only in exceptional cases."[40]

Another important defense to recognition is the exception for taxes and penal law.[41] The trend may be against exceptions for penalties and taxes, both with regard to sister state and foreign court judgments,[42] but it is not clear that the matter is settled, and in fact a leading treatise on conflicts, while arguing for the enforcement of sister state money judgments for penalties under the full faith and credit clause of the Constitution, also concedes that the Supreme Court has not yet squarely decided the issue.[43] In fact, both model acts concerning the enforcement of sister-state money judgments and promulgated by the National Conference of Commissioners on Uniform State Laws expressly exempt penalties,[44] and there is authority in the Restatements for denying recognition for administrative fines and penalties,[45] so I have to conclude that the weight of authority still favors denying recognition to administrative acts that impose fines or penalties.

The Act of State Doctrine

The recognition rule's exception for public policy (ordre public) is itself subject to the exception created by the act of state doctrine. The doctrine is said not to be required by the Constitution,[46] but it clearly implicates concerns of the separation of powers doctrine because it reflects "'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder'

[40] Hay, et al., *supra* note 11, at 1517 (footnote omitted); *see also* Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (public policy defense applies only to "forum state's most basic notions of morality and justice").

[41] Ehrenzweig and Jayme, *supra* note 11, at 73; HAY et al., *supra* note 11, at 1514–15 (critical of these exceptions, except for criminal law).

[42] Hay et al., *supra* note 11, at 1476–78, 1514–15.

[43] *Id*. at 1477–78.

[44] *See* Uniform Foreign Money-Judgments Recognition Act (UFMJRA), promulgated in 1962 and adopted in 31 states, and an updated version, the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA), promulgated in 2005 and adopted in about 20 states. Current information and texts of Acts are available on the Uniform Law Commission website, http://www.uniformlaws.org/Default.aspx. For the exemptions for penalties, see UFMJRA §§ 1(2) (1962); UFCMJRA § 3 (2005).

[45] Restatement (Third) of Foreign Relations Law § 483 comment b (1987)(exclusion for agency fines and penalties).

[46] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

the conduct of foreign affairs."[47] The chief effect of the doctrine applied to foreign administrative acts is thus to override the public policy defense and related defenses that challenge the legality of the foreign administrative act like lack of jurisdiction or competence. If the doctrine is not a constitutional requirement, then it is a prudential limitation the federal courts have adopted as part of the federal common law, a limitation that can be changed by Congress.

Since its inception, the doctrine has been controversial, and the courts and Congress have whittled away at the scope of the doctrine, most importantly in the so-called Hickenlooper or Sabbatino Amendment to the Foreign Assistance Act of 1961,[48] which applies to claims of confiscation or other takings by foreign governments. The Supreme Court has never decided whether the Amendment is constitutional,[49] but if the Amendment passes constitutional muster, then it eliminates many of the most important cases covered by the original form of the act of state doctrine, cases involving expropriation of property and asset freezes.[50] The act of state is nevertheless still applied from time to time, and when it is, it forces U.S. courts and administrative agencies to recognize foreign administrative acts.[51]

The EU's Role in Progress Towards the Recognition and Execution of Foreign Administrative Acts: The Principle of Mutual Recognition and the Transnational Nature of Certain Administrative Acts

As an outsider to the EU, the U.S. reporter is not in a position to opine about the EU's role in this regard, but it should be noted that the forms of recognition and enforcement of foreign administrative acts in the United States discussed in the next section are all examples of the principle of mutual recognition, so this principle is also important outside the EU context.

In comparing U.S. and European law on this topic, it is interesting to note that the United States has achieved a very substantial degree of economic, social, and political integration without the development of a clear basis for recognition and enforcement of sister state administrative orders, especially those imposing administrative penalties. In fact, harmonization of state laws has been partial at best,

[47] W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., 493 U.S. 400, 406 (1990) (quoting *Sabbatino*, 376 U.S. at 423).

[48] 22 U.S.C. § 2370(e)(1) & (2) (2012).

[49] *But see* Banco Nacional de Cuba v. Farr, 388 F.2d 166 (2d Cir. 1967)(upholding constitutionality).

[50] For a more detailed discussion of limitations on the act of state doctrine, see Bradley, C.A. and Goldsmith, J.L. *Foreign Relations Law.* New York : Aspen Publishers, 2011, pp. 1–847, at 108–16. ISBN 978-1-4548-0684-4.

[51] *See*, e.g., Riggs National Corporation v. Commissioner of the Internal Revenue Service, 163 F.3d 1363 (D.C. Cir. 1999).

despite considerable efforts, and the United States has never found it necessary to promulgate a broad doctrine of mutual recognition for sister-state administrative orders. There are still many areas of state law that show considerable variation from state to state. For example, various kinds of licensure are still controlled by each state, with little reciprocity in some fields, like bar admissions. Study of the explanations for and ramifications of this comparison would no doubt be worthwhile, but the subject goes well beyond the boundaries of the current topic.

International Conventions on the Recognition and Execution of Administrative Acts and on the Legalization of Public Documents

"[T]here is no general duty of States emanating from public international law to recognize each and every foreign . . . administrative act,"[52] and there is no general statute in the United States providing for the recognition or enforcement of foreign administrative acts. Nevertheless, it has been argued that both NAFTA and the complex of agreements under the World Trade Organization (WTO), especially the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) agreements, put substantial pressure on members states to enter into mutual recognition agreements (MRAs).[53] Be that as it may, the United States has entered into a number of MRAs or other similar international treaties or agreements obligating it to recognize and enforce certain foreign administrative acts or similar actions. To the extent that the United States has adopted implementing legislation, these treaties result in a clear statutory basis for the recognition and enforcement of foreign administrative acts. These international agreements and their implementing statutes have to do principally with international trade, investment, and transportation.

The Nature of MRAs

MRAs are bilateral or multilateral agreements about aspects of international trade. They may commit each participating nation to recognize, with respect to goods and services imported from partner nations under the MRA, the assessments made in the partner nations of the conformity of goods or services under various technical standards and standards concerning health, safety, consumer, or environmental standards. The obligations of an MRA may vary from the exchange of information

[52] Ruffert, *supra* note 20, ¶6, at 685. Ruffert argues, however, for a customary international law obligation on the part of all states to respect a state's recognition of nationality. *Id.* ¶ 8.

[53] For the substance of these arguments, see Reitz, *supra* article note, at 597–99. For the language in statutes, executive orders, and ABA resolutions, urging the U.S. government to expand its use of MRAs and facilitating the use of MRAs, see *id.* at 599–600.

about products, manufacturers, or services among national regulators to recognition of conformity assessments by the partner's regulators, and the conformity assessments may be made pursuant to the host country's regulations or the partner's regulations. Another possibility is a unilateral decision to accept foreign regulation as the equivalent of domestic regulation. A unilateral equivalency determination does not require an international agreement or authorizing legislation, and it may range from a simple exercise of enforcement discretion by the relevant agency to monitor less closely goods and services coming from countries whose regulatory bodies the U.S. agency regards as reliable to a formal determination by the agency to accept inspection and certification by foreign conformity assessment bodies (CABs) under the regulations in their countries as the functional equivalent of domestic inspection and certification under domestic U.S. regulation. No foreign administrative act is involved unless there is an equivalency determination by a foreign administration. Thus the mere exchange of information does not involve any foreign administrative act, but the other two possibilities do.

MRAs require recognition of foreign administrative acts most clearly if the relevant conformity assessments are carried out by government personnel. However, much conformity assessment, especially under technical standards, is carried out by non-governmental conformity assessment bodies (CABs), both in the U.S. and elsewhere,[54] and these CABs may also enter into agreements that may also be referred to as "MRAs" with foreign counterparts.[55] While the assessments of private CABs are clearly not administrative orders under U.S. state or federal APAs and are probably also not subject to constitutional due process,[56] it is possible that in some other countries private CABs would be considered to be performing public functions and therefore subject to administrative law procedural requirements.

Policy Bases for and Policy Concerns About MRAs

MRAs are the product of an effort to avoid duplicative inspections that would otherwise constitute trade barriers. Unlike the common law concerning the recognition of foreign administrative acts, MRAs are not prompted by the typical concern in

[54] Barron, M.R. 2007. Creating Consumer Confidence or Confusion? The Role of Product Certification Marks in the Market Today. In *Marquette Intellectual Property Law Review*, 2007, vol. 11, issue 2, pp. 413–442. (detailed description of roles private conformity assessment bodies play in the United States and Europe). U.S. federal agencies are directed by OMB Circular A-119 to participate with private organizations in developing standards, a process that is overseen by the Interagency Committee for Standards Policy. Office of U.S. trade representative. *2011 Report on the Technical Barriers to Trade.* [online] Accessible from https://ustr.gov/sites/default/files/TBT%20Report%20Mar%2025%20Master%20Draft%20Final%20pdf%20-%20Adobe%20Acrobat%20Pro.pdf [hereinafter: USTR 2011 Report].

[55] *See*, e.g., Horton, L. 1998. Mutual Recognition Agreements and Harmonization. In *Seton Hall Law Review*, 1998, vol. 29, issue 2, pp. 692–735, at 717.

[56] *See* text *supra* at note 4.

conflict of laws to avoid duplicative litigation. As a result, the law governing MRAs does not explicitly focus on fairness of the adjudicatory process for the party against whom the foreign administrative act runs. Perhaps it should.

Where they apply, MRAs and their implementing legislation and regulation can clarify and simplify the legal basis for the recognition of foreign administrative acts in the United States. They can eliminate significant bases under conflicts of laws to refuse recognition, a lack of authority for cross-border recognition, and perhaps also real conflicts as to regulation and inspection methodologies. But it does not always work that way, and one barrier to expanding U.S. use of MRAs is the concern that some agencies have not been given appropriate statutory authorizations to accept foreign regulations or conformity assessments in place of their own, or even to share data with other national regulators.[57] Another concern, as in the case of international administrative acts,[58] is the way that adoption of regulations because of international commitments may undercut the legitimacy of U.S. administrative action by restricting or eliminating those aspects of U.S. administrative law procedures, like notice-and-comment rulemaking, that seek to ensure public participation in the process of promulgating administrative regulations.[59]

Brief Overview of U.S. MRAs

Although the United States has entered into many bilateral and multilateral MRAs,[60] it is difficult to determine how many there are and, more importantly for this report, how many of them actually require recognition of foreign administrative acts. There

[57] McCarthy, M.T. 2011. *International Regulatory Cooperation, 20 Years Later: Updating ACUS Recommendation 91–1*. [online] Accessible from http://www.acus.gov/sites/default/files/documents/International-Reg-Cooperation-Report.pdf; Administrative Conference of the United States (ACUS). 2011. *Recommendation 2011–2016, International Regulatory Cooperation*. [online] Accessible from http://www.acus.gov/sites/default/files/Recommendation-2011-6-International-Regulatory-Cooperation.pdf [hereinafter ACUS Recommendation 2011–2016]. ACUS is a federal administrative agency that functions as a law reform commission for federal administrative law.

[58] *See* text in Section 1*f*, *supra.*

[59] *See*, e.g., Shapiro, S.A. 2002. International Trade Agreements, Regulatory Protection, and Public Accountability. In *Administrative Law Review*, 2002, vol. 54, issue 1 pp. 435–458; *see also* Merrill, R.A. 1998. The Importance and Challenges of "Mutual Recognition." In *Seton Hall Law Review*, 1998, vol. 29, pp. 736–755, at 746–54 (types of MRAs arguably exempt from notice-and-comment rulemaking procedures); Feldman, M.L. 2013. The Domestic Implementation of International Regulations. In *New York University Law Review*, 2013, vol. 88, pp. 401–438 (detailed description of domestic implementation of Basel Accords; arguing that despite international agreement, domestic U.S. notice-and-comment rulemaking procedure still meaningful).

[60] *See*, e.g., Lesser, C. 2007. Do Bilateral and Regional Approaches for Reducing Technical Barriers to Trade Converge towards the Multilateral Trading System? In *OECD Trade Policy Papers*, 2007, No. 58, at 20–21 and 56–60. Accessible from http://dx.doi.org/10.1787/051058723767 (surveying mutual recognition of conformity assessments concerning technical standards in 82 bilateral and regional trade agreements, among which are U.S. agreements with Australia, Chile, Israel, Jordan, Morocco, and Singapore).

are at least two reasons why MRAs may not involve recognition of foreign administrative acts: (1) The foreign CABs may be private bodies whose actions are not considered administrative acts under the law of the country where they operate, or (2) the MRA may call at most for an exchange of the data gathered by inspections, not for any recognition of the assessment the foreign regulator makes on the basis of that data.

Technical standards covered by the TBT are especially likely to have been developed by non-governmental groups, and conformity assessment with respect to such standards in many economic sectors appears to be performed chiefly by non-governmental bodies, so it may be that the vast bulk of conformity assessment under technical standards does not involve administrative acts.[61] The decision to recognize a private body as a CAB is no doubt itself an administrative act or the equivalent, but in some cases the United States has reserved for itself the power to determine whether to recognize a foreign assessment body as a CAB, so to that extent the process may not involve foreign administrative acts. Today, however, increasingly, U.S. and other national regulators are relying on international accreditation systems, such as the International Laboratory Accreditation Cooperation (ILAC) and the International Accreditation Forum (IAF), which establish MRAs with public and private accreditation bodies to establish international standards and procedures for accrediting certification bodies, including peer-to-peer review.[62]

The FDA has used MRAs extensively, and it does not appear to rely as much on private CABs.[63] Most MRAs relevant to FDA appear to be limited to exchange of technical information from inspections,[64] but some appear to go further to require mutual acceptance of assessments based on inspections by regulatory counterparts.[65] More recently, the FDA has conducted a pilot project with European and Australian regulators to rely on each other's inspections of pharmaceutical manufacturing plants in China and other countries,[66] but it is unclear whether that project involved true recognition of foreign administrative acts or just exchanges of data from inspections. Exchange of data and assessment of conformity are so intertwined in some cases, however, that it may make more sense to view some of the agreements as resulting in recognition for foreign governmental conformity assessment, but at a lower level of recognition than the gold standard for MRAs would require. For example, the Pharmaceutical Good Manufacturing Practice Annex to the

[61] *See* text at note 54, *supra.*

[62] USTR 2011 Report, *supra* note 54, at 26.

[63] Horton, *supra* note 55, at 722 (FDA had over 50 agreements with its counterparts in other countries in 1998); Shapiro, *supra* note 59, at 453–57 (overview of the equivalency process with examples from U.S. Department of Agriculture and FDA).

[64] Horton, *supra* note 55 (passim); Merrill, *supra* note 59, at 740 (FDA's MRAs are "contracts for service" because mainly about providing information about conformity inspections).

[65] Horton, *supra* note 55, at 722 (for over quarter century, FDA has had agreements with counterparts in Canada and Sweden providing for mutual acceptance of results of inspections for compliance with standards of good manufacturing practice).

[66] McCarthy, *supra* note 57, at 20; ACUS Recommendation 2011–2016, *supra* note 57, at 4.

U.S.-EU MRA contemplates a series of information exchanges, joint training, and joint inspections between EU and U.S. regulators for the purpose of enabling the FDA and its counterparts in European nations to assess the equivalence of their respective regulations. The Annex provides that the FDA will "normally endorse" a report received from one of the EU CABs finding that the food or drugs intended for import into the United States satisfied U.S. standards, but the FDA retains its power to make the final decision about the conformity of foreign food and drugs with U.S. law if its own review of the inspection data undermines its confidence in the foreign regulator's assessment.[67] The Annex in effect gives to the foreign inspectors' conformity assessments a presumption of regularity similar to the presumption of regularity that common law courts accord to the actions and records of foreign public officials.[68]

The Securities and Exchange Commission (SEC) has experimented with a mutual equivalency regime for stock brokers and stock exchanges regulated by the other party. Under an MRA between the SEC and the Australian Securities and Investments Commission concluded in 2008, Australian exchanges and brokers listed on those exchanges are exempted from the usual SEC registration requirements on the basis that they have already been scrutinized and passed by Australian regulators. U.S. exchanges and brokers receive reciprocal treatment in Australia. [69] It has, however, proven difficult to expand or even sustain this kind of mutual recognition program.[70]

Another example, not termed an MRA but very similar, concerns the Federal Aviation Administration (FAA), which has the statutory responsibility to determine the airworthiness of foreign aircraft permitted to fly into U.S. airports.[71] The FAA recognizes certain foreign determinations of airworthiness through the process of concluding bilateral agreements to that effect with certain other countries. Obtaining these so-called Bilateral Aviation Safety Agreements (BASA) is an eight-step process that includes sending a diplomatic note, approval in the U.S. by the Interagency Group for International Aviation, further negotiation and technical assessments, and a final executive agreement.[72]

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[67] Horton, *supra* note 55, at 729–32.

[68] *See* text at notes 22–23, *supra*.

[69] Verdier, P.H. 2011. Mutual Recognition in International Finance. In *Harvard International Law Journal*, 2011, vol. 52, pp. 55–108, at 82–87; *see also* Wei, T. The Equivalence Approach to Securities Regulation. In *Northwestern Journal of International Law & Business*, 2007, vol. 27, pp. 255–300, at 263–82 (examples of unilateral determinations of equivalence by U.S. regulators in accounting, finance, and securities law).

[70] Verdier, *supra* note 69, at 88–108.

[71] 49 U.S.C. § 44,704 (2006)(amended 2012).

[72] For the FAA's BASA program, see Federal Aviation Admin. *Generic Steps for Obtaining a Bilateral Aviation Safety Agreement —Implementation Procedure for Airworthiness*. [online] Accessible from http://www.faa.gov/aircraft/air_cert/international/bilateral_agreements/media/BASAProcess.pdf.

Another treaty affecting international transportation is the Convention for the Prevention of Pollution from Ships, which requires contracting parties to accept certificates issued by other parties attesting to measures taken with respect to a particular vessel to prevent or minimize marine pollution and accord such certificates the same validity as their own similar certificates.[73] In similar fashion, the United States is party to the Convention on International Trade in Endangered Species (CITES), which allows each contracting party to permit import of endangered species only if, among other requirements, the exporting nation has issued an export or re-export permit, thus in effect requiring recognition of the exporting nation's administrative act refusing to authorize export.[74]

Apostille Convention

Although in general, proof of foreign administrative acts has not appeared to be much of a problem in the United States, adoption of the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the "Apostille Convention"),[75] which the United States adhered to in 1981, has undoubtedly helped facilitate recognition. The Apostille Convention substitutes one single standardized certificate in the place of the multiple certificates from various levels of foreign authorities that some courts and administrative offices used to require to prove the authenticity of a foreign public document.[76] The United States also participates in the Electronic Apostille program, which greatly enhances the utility of the convention.[77]

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[73] Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, February 17, 1978, art. 5 (1), 1341 U.N.T.S. 3. For implementation of this obligation, see Act to Prevent Pollution from Ships, 33 U.S.C. §§1904 (b) (2012).

[74] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3,1973, arts. III, IV, V, 27 U.S.T. 1087, 993 U.N.T.S. 243. For implementation, see the Endangered Species Act of 1973, 16 U.S.C. §§ 1538 (c)(1)(2012).

[75] October 5, 1961, 527 U.N.T.S. 189, T.I.A.S. 10072. The entire text of the treaty is printed in the Advisory Committee's Notes to Federal Rule of Civil Procedure 44.

[76] The Apostille Convention has not attracted much scholarship. Sherry, K.D. [Student Note]. 1998. Old Treaties Never Die, They Just Lose Their Teeth: Authentication Needs of Global Community Demand Retirement of the Hague Public Documents Convention. In *John Marshall Law Review* 1998, vol. 31, pp. 1045–1084. Some of this student note's strongest criticisms of the convention would seem to be mooted to the extent U.S. states have adopted the Electronic Apostille program. *See* text at next note.

[77] *See* Hague Conference on Private International Law, Operational e-Registers by State. [online] Accessible from http://www.hcch.net/index_en.php?act=text.display&tid=146 (last visited February 25, 2014) (seven U.S. states listed as having implemented electronic apostille provisions).

Doctrinal Treatment of the Subject of Foreign Administrative acts

Relevant secondary literature is cited throughout the footnotes in the foregoing sections. It is notable that, just as there are few cases dealing with recognition or enforcement of foreign administrative acts, so, too, there are virtually no significant scholarly investigations into the common law basis for recognition and enforcement of foreign administrative acts. The main focus of the literature to date has been on the MRAs.