

DROIT ADMINISTRATIF COMPARE, EUROPEEN ET GLOBAL

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Transnational administrative law sanctioning

(Preliminary version)

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I. Introduction

To clarify the subject of my contribution today a little I would like to start with a few examples..

The USA Securities exchange commission (SEC) requests the Dutch Authority for the Financial Markets in Amsterdam, AFM, to formally ask the Dutch ING bank, formally setaed in Amsterdam, to give data of certain accountholders in Greece, and in another procedure, in the Dutch Antilles. The SEC request is based on a treaty between the Netherlands and the USA. Is AFM allowed to act this way? Should the SEC not have asked the greek authority and the one in the Dutch Antilles? The Greek and Dutch Antilles seats of ING had to respect national duties of the bank secrecy. Could the formal request of AFM be considered a breach of national sovereignty of Greece? Was it even possible for ING to deliver the data considering the national duties to secrecy I just mentioned?

A german driver has been fined for exceeding the speed limit. His adress was found by his number plate and the decision to impose the fine was sent to him directly, in Dutch offcourse. Under Dutch law this fine is an administrative fine, and it is considered to be punitive (french would say a puniton). One has to appeal against this decision within six weeks (which is the time limit for appeal in all administrative law procedures). The public prosecutor decides on this appeal. There is a possibility for appeal at the district courts and after that the Court of Appeal in Leeuwarden, a town in the north of the Netherlands. All the german driver did was send in a letter too late stating “Ich verstehe nichts davon.” In the end the Court of Appeal decided that the fact that the German was too late with his appeal could not lead to *niet-ontvankelijkheid* as he did not understand the important letter because it was written in a language he did not understand and he hat taken the initiative to contact the sender of the letter.

The Luxemburg companies CLT-UFA S.A. and RTL/HMG did run two TV stations RTL 4 and RTL 5 with programms for the Dutch public. The Dutch Council of State decided that HMG should be considered to be acting on Dutch territory as the editingactivities and the decisions on the substances of the programms took place in the Netherlands. Therefore the Dutch regulatory authority should be considered to be responsible. This conclusion causes the problem of double regulation, regulation by the Luxembourg authority and regulation by the Dutch authority according to Directive 89/552/EEG.

In the Netherlands there is a very strict policy on gaming. In short, it is forbidden to offer certain gaming without permit. This will be a permit difficult to get due to this strict policy. The English company Ladbrokes offers games on her website without Dutch permit. One of the bets one could place is on Dutch football games. The civil appeals court of Arnhem decided that this website was also aimed at the Netherlands, as a Dutch interested person will look at this website from a computer in the Netherlands, he will fill out forms in the Netherlands and he or she will pay for it in the Netherlands with his Dutch creditcard.

It is forbidden to offer financial services, such as banking services, insurances, *effectendiensten*, without permit. This permit is a permit given by a national authority with European effect. It gives permission to offer these services all over the EU.¹ It is an example of what the Germans call “transnationale Verwaltungsakt”, a transnational European administrative act.² It is a single licence and the directives create a system of home state control. A foreign company without Dutch permit, or a company with a EU licence without notification can act on the Dutch market via Internet.

All examples, and it is easy to find more, have in common that they raise questions on the territorial limits of administrative law. My contribution today will be limited though to the question of imposing sanctions on the foreign natural persons or companies involved. Indeed, it is not that difficult to impose rules as well as obligations to apply for permits, admissions and notifications on whomever. Even the imposition of sanctions is relatively easy. Nothing more happens there than changes in the imaginary world of legal rights and obligations, in real life it is nothing more than paper. The problems start with the execution of sanctions: if an administrative sanction is imposed it should be paid by the natural or legal person on whom it is imposed. Unfortunately, he or she is living abroad. My contribution of today will not have tips and tricks to have people to pay their bills, it is concerned with legal instruments to supply the authorities with the instruments to recover administrative sanctions consisting of financial public law claims. I will focus on administrative fines. The focus on this administrative sanction enables me to occupy myself with the three branches of law involved: private law (private international law), Administrative law and criminal law.

The systems of single licence and home state control I described an example of, almost never state anything about the authority competent to impose sanctions nor on the way the financial sanctions are to be recovered abroad, for example by the home state control authority.

Before I focus on the recovery of administrative fines, I will expand a bit on international administrative law. In the final version of this contribution this part shall be more developed I hope.

¹ See the directives 2006/48/EG and 2000/46/EG.

² See Matthias Ruffert, *Der transnationale Verwaltungsakt*, *Die Verwaltung* 2001, p. 453-485; Eberhard Schmidt-Assmann, *DVBLL* 1993, p. 924, especially p. 935 ff, as well as his *Verwaltungskooperationsrecht in der Europäische Gemeinschaft*, *Europarecht* 1996, p. 300-301; Volker Nessler, *Europäisches Richtlinienrecht wandelt deutsches Verwaltungsrecht*, PhD 1994, p. 5 ff and 54 ff; Thomas Gross, *Die administrative Föderalisierung der EG*, *JZ* 1994, p. 599; Pascal Royla, *Grenzüberschreitende Finanzmarktaufsicht in der EG*, p. 48 ff, Martin Schlag, *Grenzüberschreitende Verwaltungsbefugnisse im EG Binnenmarkt*, p. 45 ff

II. Jurisdiction in administrative law

a. Territory and how to define *locus acti*

A few of the examples I just gave show the role of territory in administrative law. It determines whether a certain regulative system applies or not, and whether the regulator of State A is competent or the one in State B. How harmonized law can be in the EU, the territory of States still determines the competence of the administrative authorities involved. This applies very strongly to the sanctioning powers of these administrative authorities.

It is easy to find literature on the territoriality principle in international public law. Private international law and international criminal law. Interestingly enough in administrative law this is not the case. It seems to be a underdeveloped part of administrative law, at least the general part of administrative law.³ I would say that the topic is part of general administrative law.

I would say that administrative law should as another branch of public law be inspired by international criminal law. This means that the territorial principle is the most important one, and the personality principle as far as nationals, civil servants and military servants are concerned, and in a way ships and aircrafts as well. In economic administrative law these ways of determining jurisdiction are not allways sufficient. The protective principle is determining jurisdiction as well, or should it be considered as the effect principle, which is in fact a variety of the territoriality principle. The principle is know in competition law.⁴

I hope to work this out in more detail in the final version of my paper.

III. Inspection and investigation abroad

Non compliance should be discovered, and inspection powers are tools to enable the public administration to do so. If foreign nationals are subject to this investigation, the act of inspectors towards these nationals have impact on the national sovereignty of an other State. This is even the case of the inspector empowered to search for data in a database is doing this research on the computer standing at a location in his own country linked to a server abroad where the data is stalled. We need cooperation between authorities base upon European legislation and/or treaties to solve this problem. I will give just a few examples.

³ The literature I found, limited as I am by my language skills, is mainly German and seems rather old. A few interesting examples in this stage of my contribution seem to be: K. Neumeyer, Internationales Verwaltungsrecht, 1936; Klaus Vogel, Der räumliche Anwendungsbereich der Verwaltungsnorm, Alfred Metzner Verlag, Frankfurt/Berlin 1965; Werner Meng, Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht, Springer-Verlag, Berlin 1994; Gunnar Schuster, Die internationale Anwendung des Börsenrechts, Springer-Verlag 1994, p. 4-75 and a few contributions in R. Bernardt (ed.), Encyclopedia of Public International Law.

⁴ See for example K.M. Meessen, Völkerrechtliche Grundsätze des internationalen Kartellrechts, Baden-Baden 1975, p. 152; D. Bowett, Jurisdiction: changing Patterns of Authority Over Activities and Resources, British Yearbook of International Law 53 (1983), p. 5.

a. extraterritorial inspections

It seems to be quite common that inspectors check production processes, safety standards abroad, and that the state involved agrees with their visit because of the trade interests of export at stake.⁵ In EU law this is quite common too, even outside the EU.

The inspectors of the Dutch Aviation authority have the power to fly along with airplanes, even if it flies to the Middle East or Europe. Admittedly this power is restricted to national airplanes or foreign airplanes flying above Dutch territory.⁶ Inspectors of the Dutch *Scheepvaartinspectie* have the power to inspect ships wherever they are, in the Netherlands or abroad.⁷ Off course these powers only apply to ships that belong to the Netherlands, Aruba and the Dutch Antilles. I know these are Dutch examples, but I assume comparable extraterritorial powers can be found elsewhere. I hope to add some of them in the final version of this paper.

b. cooperation between law enforcement authorities / home state control/ guest state control

The European Convention on the obtaining abroad of information and evidence in administrative matters (15 March 1978)⁸ involves another important element of an effective system of the transnational exchange of information and the recovery of public law claims: the exchange of information, documents and requests to carry out enquiries. The convention does not provide for the duty of a Contracting State to use compulsory powers in order to comply with a request to carry out enquiries, however.¹⁵ As long as national law provides for these powers they can be used, but there is no obligation to do so. This Convention can be used for cases where periodic penalty payments are involved and it has a provision to use it for cases where administrative fines are involved.

EU legislation provides for a lot of examples of cooperation between inspections, both the national and the EU ones. They consist of obligations on member states to allow foreign inspectors to join certain investigations and obligations to act themselves on the request of a foreign authority. Sometimes even the obligation to provide for certain investigative powers can be identified. Let me restrict myself again in this stage to a few examples.

Administrative investigations against EU fraud

As I have described in more detail with my colleague Langbroek elsewhere⁹ OLAF, the European antifraud office has the power to carry out on-the-spot checks and inspections on the premises of so called economic operators. OLAF and the national authorities concerned need to collaborate

⁵ Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, Springer-Verlag, Berlin 1994, p. 122.

⁶ Article 94 Regeling Toezicht Luchtvaart, as well as the Regeling inzake personen aan boord luchtvaartuig tijdens vlucht voor uitoefening overheidstoezicht-1988.

⁷ Article 10 Schepenwet, art. 4 Instructie Ambtenaren Scheepvaartinspectie.

⁸ Council of Europe, Strasbourg, 15 March 1978. Entry into force 1 January 1983. ratified by Azerbaijan, Belgium, Germany, Italy, Luxembourg and Portugal.

⁹ Oswald Jansen and Philip M. Langbroek (eds.), *Defence Rights during Administrative Investigations*, Intersentia, Antwerpen/Oxford 2007;

closely in conducting these on-the-spot-checks.¹⁰ The results of this investigation will be presented to national authorities in order to enable them to sanction the irregularities found.

Competition Law

Regulation 1/2003 provides for investigative powers for the Commission (art. 17ff), for the obligation to conduct investigations on the request of the Commission and the possibility to conduct investigations according to their national procedural laws. It also prescribes close cooperation between the Commission and the national competition authorities (vertical cooperation) and horizontally between these NCA's. It is possible to arrange for an investigation team operating on the territory of one state consisting of inspectors from that stat, one or two other ones and the Commission on the basis of this Regulation.

Financial Services

The Directive 2003/6 EC on Market Abuse and Directive 2004/39 Markets in financial instruments directive (MiFID) provide for detailed regulation of the powers the competent national authorities should have, both investigative and sanctioning powers (art. 12 and 14 of the Market Abuse Directive, art. 50 and 51 MiFid). These directives also provide for detailed duties to cooperate (art. 16 Market Abuse Directive, art. 56 and 57 MiFid), this also implies the execution of inspection powers on the request of a foreign authority and the possibility of foreign personal to join an investigation. Article 16 Market Abuse Directive and article 57 MiFid even provide for the possibility to allow the foreign inspectors to investigate on its territory.

IV. The preparation of decisions to impose sanctions

I think it should be considered a standard that the persons concerned have a certain position as far as the preparation of sanctions against them is concerned. If these sanctions should be considered punitive, article 6 of the European Convention on Human Rights, and the case law of the ECtHR guarantees certain defense rights. These rights are part of the legal order of the EU as well (article 6 TEU).

a. the service of documents

In order to effectively profit from defense rights one needs to know that something important is going to happen. Official notifications should be sent to the persons concerned, sometimes in a official way. The same thing applies to the notifications of persons abroad. If these documents are important, the state of the addressee should approve this.¹¹ That's why we see conventions and

¹⁰ See the Regulations 2988/95 on the protection of the European Community financial interests, 1073/1999 concerning investigations conducted by OLAF (and 1074/1999 also concerning investigations conducted by OLAF), 2185/96 concerning on-the-spot-checks and inspections carried out by the Commission in order to protect the European Communities financial interests against fraud and other irregularities, 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

¹¹ See for example Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, Springer, Berlin 1994, p. 123-131, 249-251, Oswald Jansen, *Country Analysis – Germany*, in: John Vervaele and André Klip, *European Cooperation between Tax, Customs and Judicial Authorities*, Kluwer Law International 2002, p. 175-179;

bilateral agreements with provisions on the direct service of these documents to the addressee involved. The European Convention on the Service Abroad of Documentation Relating to Administrative Matters¹² obliges Contracting States to afford each other mutual assistance with regard to the service of documents relating to administrative matters. According to article 15 of this convention the addressee shall be allowed, in the event that such service implies a time-limit effecting him, reasonable time, to attend the proceedings or to be represented or to make representations.

One of the elements of an effective system of transnational exchange of information and recovery of public law claims, such as administrative fines and periodic penalty payments or *astreintes*, is a provision on the service of documents. The convention provides for the service of documents by the central authority of the requested State at the request of another State. The service of a document by the requesting State directly to the addressee is a subsidiary method of transmission.

b. the language of official notifications

Another element of an effective system of the transnational service of documents is the rule that the document shall be translated.

Council of Europe

The European Convention on the Service Abroad of Documentation Relating to Administrative Matters does not have a general rule that documents should be translated. When the document is served by the central authority of the requested State by a method prescribed by its internal law or by delivery to an addressee who accepts it voluntarily a translation is not needed. In the explanatory report it is stated:

‘The basic principle underlying paragraph 1, which has also been recognised by other conventions on international mutual assistance, is the presumption that the addressee of the document knows the language of the requesting authority. Consequently, the central authority has no reason to ask for a translation, especially since, at least so far as it is concerned, it should be able to know the tenor of the contents of the document with the aid of the request form, which provides for a summary of the essential points of the document in its language or in one of the official languages of the Council of Europe (Article 9, paragraph 2). However, an exception in favour of the addressee of the document is provided for in paragraph 2, according to which he may refuse service of the document if he does not understand the language. It is understood that the requested state should see to it that the addressee is informed about his rights and particularly the possibility to refuse the document because he does not understand the language. In case of refusal the central authority should normally have the document translated at its cost into the language or one of the official languages of the requested state. It may also ask for such a translation from the requesting authority.’

I would like to add that as far as the service of documents concerned with administrative fines are involved the principle of fair trial embodied in Article 6 ECHR would demand a translation of important parts of the relevant documents into a language that the addressee understands.

Göhler, OwiG (Administrative Offences Act), Vor § 59, comment E, margin number 17. See also Klaus Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm*, Alfred Metzner Verlag, Frankfurt/Main 1965, p. 346-347

¹² This Council of Europe convention entered into force on 1 November 1982, on 3 June 2007 it was ratified by only 8 States, France is one of them, the Netherlands isn't.

Although one can imagine that this would only be necessary at the addressee's request, I would think a general rule that a translation of the important parts is needed. Although periodic penalty payments do not have a criminal character, I would argue that the principle of fair trial requires the same.

EU Law

In this stage I would only like to point at Article 52 of the Execution Agreement Schengen which provides for the service of judicial documents directly by post. The second paragraph of this Article provides for the obligation to translate at least the essential part of it into one of the languages of the receiving State if there is reason to believe that the addressee will not understand the language. If the sending state knows that the addressee only understands a third language this state is obliged to translate essential pieces of it into that language. I think this should be a general principle in administrative law too. I think it can be derived from article 6 ECHR at least as far as administrative fines are concerned.

c. the hearing of foreign interested parties (language, translation, invitation, location)

The right to be heard in national procedures should not be restricted to nationals, also interested parties from abroad should have the right to be heard. If the administrative authority has the intention to impose a sanction of whatever kind, this right should be considerably stronger. If the sanction is a punitive one, this right is part of Article ECHR. I think it even applies as far as a dispute on civil rights and obligations is concerned, which is the case in most administrative law, except for tax law. The language of the hearing and of the invitation, the location (why not videoconferencing), are all matters determining whether the foreign person concerned has had the possibilities required. This also is of importance to the possibilities to have the decision concerned recognized by the State where the person is national of or where he lives.

V. The execution of pecuniary sanctions abroad

a. private law instruments ?

The private international law possibilities to recover sums of money transnationally, such as the Brussels II convention, do not apply, as debts deriving from fines (as well as periodic penalty payments or astreintes) imposed are debts which arise from an act of a public authority and they are therefore not a civil and commercial matter. In the Judgment of the Court of Justice of 16 December 1980 Netherlands *Sae v Reinhold Ruffer*, a decision applying the Brussel I convention, the Court stated:

'The fact that in recovering those costs the administering agent acts pursuant to a debt which arises from an act of public authority is sufficient for its action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the ambit of the Brussels convention.'

Thus, in order to recover fines and astreintes transnationally international or European public law provisions are needed.

As far as financial sanctions imposed by the European Commission are concerned, there is a general provision in Article 256 EC Treaty.

This Article reads:

Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States, shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.

Enforcement may be suspended only by a decision of the Court of Justice. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

Regulation EC 2003/1 has some additional provisions on limitation periods in Article 25 and 26. The Regulation does not contain any provisions on the service of documents, such as the Commission's decision to impose a fine or an astreinte.

b. criminal law instruments ?

The most interesting general instruments on mutual assistance in criminal matters can be found at the level of the Council of Europe and the European Union.

Council of Europe

Within the Council of Europe I should point to the European Convention on Mutual Assistance in Criminal Matters (20 April 1959), the European Convention on the punishment of road traffic offences (30 November 1964), the European Convention on the International Validity of Criminal Judgments (28 May 1970) and the European Convention on the Transfer of Proceedings in Criminal Matters (Strasbourg 15 May 1972).

As far as the European Union is concerned and focussing on the instruments which have entered into force,¹³ the Agreement on Cooperation in Proceedings for Road Traffic Offences and the Enforcement of Financial Penalties imposed in respect thereof,¹⁴ which is part of the *Schengen Acquis*, should be mentioned, as well as the Convention on mutual assistance in Criminal Matters.

¹³ This means that I will not discuss The Agreement between Member States on the Transfer of Proceedings in Criminal Matters (Rome 6 November 1990) and the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences (Brussels 13 November 1991) although they may provide an interesting example for the design of a general regulation.

¹⁴ OJ 22.9.2000 L 239 p. 429-434.

Agreement on Cooperation in Proceedings for Road Traffic Offences and the Enforcement of Financial Penalties imposed in respect thereof

The Agreement on Cooperation in Proceedings for Road Traffic Offences and the Enforcement of Financial Penalties Imposed in respect thereof is part of the Schengen acquis. Its scope is limited to road traffic offences. They are described as conduct which infringes road traffic regulations and which is considered a criminal or administrative offence, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods. 'Decision' is described as the act by the competent authorities (a judicial or administrative authority) of one of the Contracting Parties establishing a road traffic offence in respect of which a financial penalty has been imposed on a person, against which an appeal may be or could have been lodged. Although this convention only applies to sanctions such as fines imposed for traffic infringements, this agreement sets an interesting example for our subject. The agreement provides for the exchange of information between the competent authorities, the service of documents directly on the person suspected of having committed a road traffic offence, and the enforcement of decisions.

Competent authorities can exchange information by communicating the vehicle registration number through their national registration authorities. The competent authority of one Contracting Party may request information concerning the type and make of the motor vehicle corresponding with the registration as well as the identity and address of the person or persons with whom the motor vehicle in question was registered when the road traffic offence was committed (Article 3). The requesting State may send all communications concerning the consequences and decisions relating to the road traffic offence directly to the persons suspected of having committed a road traffic offence. The provisions of Article 52 of the Schengen Convention shall apply by analogy.

The aforementioned communications and decisions shall contain or be accompanied by all the information which the recipient needs in order to react thereto, in particular the information mentioned in article 4, second paragraph:

- (a) the nature of the road traffic offence, the place, date and time at which it was committed and the manner in which it was established;
- (b) the registration number and, where possible, the type and the make of the motor vehicle with which the road traffic offence was committed or, in the absence of this information, any means of identifying the vehicle;
- (c) the amount of the financial penalty which may be imposed, or, where appropriate, the financial penalty which has been imposed, the deadline within which it has to be paid and the method of payment;
- (d) the possibility of invoking exonerating circumstances, as well as the deadlines and procedures for presenting these circumstances;
- (e) the possible channels of appeal against the decisions, the procedures and deadlines for lodging an appeal if it should be lodged.'

If the addressee does not respond to these communications within the stipulated period or if the requesting authority considers further information necessary to apply this agreement, the latter may directly seek further information necessary to apply this agreement, and this authority may directly seek assistance from the requested authority (Article 5).

The transfer of the enforcement of decisions may only be requested where the conditions of Article 6 are met. The request for the transfer of enforcement of a decision shall be accompanied by a copy of the decision and a declaration by the competent authority of the requesting Contracting Party certifying that the conditions laid down in subparagraphs a, b, and c of Article 6 (1) have been fulfilled.

The conditions mentioned in article 6, first paragraph, are:

- (a) all channels of appeal against the decision have been exhausted and the decision is enforceable in the territory of the requesting Contracting Party;
- (b) the competent authorities have, in particular in accordance with Article 4, requested the person concerned to pay the financial penalty imposed but to no avail;
- (c) the financial penalty is not statute-barred by limitation under the law of the requesting Contracting Party;
- (d) the decision concerns a person who resides or who has his habitual residence in the territory of the requested Contracting Party;
- (e) the amount of the fine or financial penalty imposed is at least Euro 40.⁵²

The transfer of the enforcement of a decision may not be refused if the situations mentioned in article 7, first paragraph, are at hand.

These are:

- (a) the road traffic offence giving rise to the decision is not provided for under the law of the requested Contracting Party;
- (b) enforcement of the request runs counter to the principle of ne bis in idem pursuant to Articles 54 to 58 of the 1990 Convention;
- (c) the financial penalty is statute-barred by limitation under the law of the requested Contracting Party;
- (d) the person concerned would have been granted an amnesty or a pardon by the requested Contracting Party if the road traffic offence had been committed on the territory of the requested Contracting Party.'

The decision shall be enforced by the competent authorities of the requested Contracting Party without delay (Article 8, first paragraph).⁵³ The financial penalty shall be payable in the currency of the requested Contracting Party. If the financial penalty imposed by the decision exceeds the maximum amount of the financial penalty prescribed in respect of the same type of road traffic offence by the law of the requested Contracting Party, the enforcement of the decision shall not exceed this maximum amount (Article 8, third, paragraph). The enforcement is governed by the law of the requested Contracting Party. Any part of the financial penalty already enforced in the requesting Contracting Party shall be deducted in full from the penalty to be enforced in the requested Contracting Party. The financial penalty and the cost of the proceedings incurred by the requesting Contracting Party shall be enforced. Monies obtained from the enforcement of decisions shall accrue to the requested Contracting Party (Article 15). Where a financial penalty cannot be enforced, either totally or in part, an alternative penalty involving deprivation of liberty or coercive detention may be applied by the requested Contracting Party if provided for in both Contracting States, unless expressly excluded by the requesting Contracting Party (Article 9).

The requesting Contracting Party may no longer proceed with the enforcement of the decision once it has requested the transfer of enforcement. The right of enforcement shall revert to the requesting Contracting Party upon its being informed by the requested Contracting Party of the latter's refusal or inability to enforce (Article 10). The requested Contracting Party shall terminate the enforcement of the decision as soon as it is informed by the requesting Contracting Party of any decision, measure or any other circumstance as a result of which the enforcement of the decision is suspended or the decision ceases to be enforceable (Article 11).

According to Article 12 requests for the transfer of the enforcement of a decision and all communications relating thereto shall be made in writing. They may be transmitted through any appropriate channels leaving a written record, including a fax. Documents shall be transmitted directly between the competent authorities of the Contracting Parties.⁵⁴

The request for the transfer of enforcement of a decision shall be accompanied by a copy of the decision and a declaration by the competent authority of the requesting Contracting Party certifying that the conditions have been fulfilled. Where appropriate the requesting Contracting Party shall accompany its request by other information relevant to the transfer of the enforcement of a decision, in particular information regarding the special circumstances of the offence which were taken into consideration when assessing the financial penalty, and, where possible, the text of the legal provisions applied (Article 13).

In short, this Agreement offers an interesting example for a general regulation of mutual assistance in the imposition of pecuniary sanctions, such as periodic penalty payments and administrative fines, imposed by administrative authorities, although its scope is restricted to road traffic offences. Unlike the European Convention on the punishment of road traffic offences which I discussed earlier, the practical impact of this Agreement is great, as almost all EU Member States are bound by it.

What we might learn from this Agreement is that a general agreement on mutual assistance in the imposition of pecuniary sanctions imposed by administrative authorities should at least provide for the exchange of information between competent authorities in a practical way, the service of documents directly on the person suspected of committing the offence and the enforcement of decisions.

Convention on mutual assistance in Criminal Matters

As far as interesting conventions within the EU are concerned, I should discuss the Convention on mutual assistance in Criminal Matters.⁵⁵ This Convention supplements the provisions and facilitates the application between the EU Member States of the European Convention on Mutual Assistance in Criminal Matters, its Additional Protocol of 17 March 1978, the provisions on mutual assistance in criminal matters of the Schengen Implementation Convention and Chapter 2 of the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters.

Article 3 of this Convention states that mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in criminal matters in particular. Mutual assistance shall also be afforded in connection with proceedings which relate to offences or infringement for which a legal person may be held liable in the requesting Member State. The requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless the Convention provides otherwise. If these procedures and formalities are contrary

to the fundamental principles of law in the requested Member State, the latter is not obliged to comply. The requested Member State shall execute the request for assistance as soon as possible, taking as full account as possible of the relevant procedural deadlines (Article 4, second paragraph). Article 5 allows Member States to send and serve documents directly by post on persons who are in the territory of another Member State.⁵⁶ Where there is a reason to believe that the addressee does not understand the language in which the document is drawn up, the document, or at least the important passages thereof, must be translated into (one of) the language(s) of the Member State in the territory in which the addressee is staying. If the authority by which the procedural document was issued knows that the addressee understands only some other language, the document, or at least the important passages thereof, must be translated into that other language (article 5, third paragraph). All procedural documents shall be accompanied by a report stating that the addressee may obtain information from the authority by which the document was issued or from other authorities in that Member State regarding his or her rights and obligations concerning the document. When necessary, this information should also be translated (Article 5, fourth paragraph).⁵⁷

Requests for mutual assistance and spontaneous exchanges of information⁵⁸ shall be made in writing or by any means capable of producing a written record under conditions allowing the receiving Member State to establish authenticity. These requests shall be made directly between judicial authorities with territorial competence for initiating and executing them, and shall be returned through the same channels. As far as requests for mutual assistance in relation to proceedings as envisaged in Article 3, first paragraph, are involved, and the competent authority is a judicial authority or a central authority in one Member State and an administrative authority in another, requests may be made and answered directly between these authorities.⁵⁹

The Convention also has provisions for specific forms of mutual assistance, such as the restitution of articles obtained by criminal means to their rightful owners (Article 8), the temporary transfer of persons held in custody for the purpose of investigation (Article 9), hearing by video conference (Article 10), hearing of witnesses and experts by telephone conferences (Article 11), controlled deliveries (Article 12), joint investigation teams (Article 13) and covert investigations (Article 14). Articles 15 and 16 contain provisions on the criminal and civil liability regarding officials, Articles 17-22 on the interception of telecommunications and Article 23 on personal data protection.

The protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union has provisions on the exchange of information concerning bank accounts in cases where the investigation concerns serious criminal offences (Article 1), the exchange of information concerning banking transactions (Article 2), the request to monitor banking transactions (Article 3), and on the confidentiality of this information (Article 4).

The protocol also limits the possibilities of Member States to refuse cooperation. Member States shall not invoke banking secrecy as a reason to refuse cooperation, and mutual assistance cannot be refused only on the ground that it involves a fiscal or political offence in its own law.⁶⁰

In short, as far as it involves Competition law sanctioning the Convention on Mutual Assistance in Criminal Matters is more important for EU Member States with a criminal law system to enforce competition law. Nevertheless, the provisions on administrative law fines are also important for EU Member States with an administrative law system to enforce competition law. As we have seen, it is possible to use the instruments of mutual assistance which this convention offers in proceedings brought by administrative authorities and where the decisions to impose a sanction may give rise to proceedings before a court having jurisdiction in particular in criminal

matters. Unlike the European Convention on the International Validity of Criminal Judgments, the Agreement between the Member States on the Transfer of Proceedings in Criminal Matters and the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, but in conformity with the Schengen Implementation Convention, the restriction in the scope of the Convention is related to the competence of criminal courts only.

The Framework decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties

At the Tampere summit (15, 16 October 1999) the European Council decided that the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the European Union. This principle should also apply to financial penalties imposed by judicial or administrative authorities. In November 2000 the Council adopted a programme of measures to implement the principle of mutual recognition giving priority to the adoption of an instrument applying this principle to financial penalties.¹⁵

On 10 October 2001 the initiative by the United Kingdom, the French Republic and the Kingdom of Sweden was published¹⁶ and this initiative proposed that the Council of the European Union should adopt a Framework decision on the application of the principle of mutual recognition to financial penalties. The Framework decision was published 22 March 2005.

The Framework decision offers a provision to transmit a judgment to impose a financial penalty to the competent authorities of a Member State in which the natural or legal person against whom a judgment has been delivered has property or income, is normally resident or, in the case of a legal person, has its seat (Article 2, first paragraph).

Article 1 defines the important terms ‘judgement’ and ‘financial penalty’:

“Judgement” shall mean a final decision requiring a financial penalty to be paid by a natural or legal person, where the decision was made either by:

(i) a court in respect of a criminal offence; or

(ii) an administrative authority in respect of an administrative offence or an offence against regulations, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters; a list of such administrative offences is provided in Annex I;

(b) “Financial penalty” shall mean the obligation to pay a sum of money on conviction of a criminal or administrative offence, including orders made in criminal proceedings to pay compensation for the benefit of victims of crime, and orders to pay sums in respect of the costs of court or administrative proceedings; however, it shall not include orders for the confiscation of instrumentalities or proceeds of crime or orders that are enforceable in accordance with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.’

As far as administrative fines are concerned, this Framework decision can only be used to recover them transnationally if they have been imposed to punish administrative offences or offences

¹⁵ OJ, 2001, C 12/10

¹⁶ OJ, 2001, C 278/4

against certain regulations (Ordnungswidrigkeiten), where the decision may give rise to proceedings before a court having jurisdiction in criminal matters in particular.

The Framework decision enables the competent authorities of both the issuing state and the executing state to communicate officially with each other directly.

Article 5 of the Framework decision lists offences which can give rise to recognition and enforcement of decisions imposing financial penalties, if they are punishable in the issuing state. This list resembles the list in the Framework decision on the European Arrest Warrant, and therefore, interestingly enough, it contains quite a large number of offences which, given their serious character, will more likely be punished with liberty depriving sanctions than with financial penalties. The principle of double criminality does not apply to the listed offences, which is a consequence of the system of mutual recognition. The competent authorities in the executing State have to recognise a decision which has been transmitted according to the Framework Decision rules without any formality being required and have to take all the necessary measures for its execution, unless the competent authority would invoke one of the grounds for not recognising execution provided for in Article 7.

Article 7 states the following:

1. The competent authorities in the executing State may refuse to recognise and execute the decision if the certificate provided for in Article 4 is not produced, is incomplete or manifestly does not correspond to the decision.
2. The competent authority in the executing State may also refuse to recognise and execute the decision if it is established that:
 - (a) decision against the sentenced person in respect of the same acts has been delivered in the executing State or in any State other than the issuing or the executing State, and, in the latter case, that decision has been executed;
 - (b) in one of the cases referred to in Article 5(3), the decision relates to acts which would not constitute an offence under the law of the executing State;
 - (c) the execution of the decision is statute-barred according to the law of the executing State and the decision relates to acts which fall within the jurisdiction of that State under its own law.
 - (d) the decision relates to acts which:
 - (i) are regarded by the law of the executing State as having been committed in whole or in part in the territory of the executing State or in a place treated as such, or
 - (ii) have been committed outside the territory of the issuing State and the law of the executing State does not allow prosecution for the same offences when committed outside its territory;
 - (e) there is immunity under the law of the executing State, which makes it impossible to execute the decision;
 - (f) the decision has been imposed on a natural person who under the law of the executing State due to his or her age could not yet have been held criminally liable for the acts in respect of which the decision was passed;
 - (g) according to the certificate provided for in Article 4, the person concerned
 - (i) in case of a written procedure was not, in accordance with the law of the issuing State, informed personally or via a representative, competent according to national law, of his right to contest the case and of time limits of such a legal remedy, or
 - (ii) did not appear personally, unless the certificate states:
 - that the person was informed personally, or via a representative, competent according to national law, of the proceedings in accordance with the law of the issuing State, or

— that the person has indicated that he or she does not contest the case;
(h) the financial penalty is below EUR 70 or the equivalent to that amount.

3. In cases referred to in paragraphs 1 and 2(c) and (g), before deciding not to recognise and to execute a decision, either totally or in part, the competent authority in the executing State shall consult the competent authority in the issuing State, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay.

If offences other than the listed ones are involved, the executing State may make the recognition and execution of a decision subject to the condition that the decision is related to conduct which would constitute an offence under the law of the executing State (Article 8, first paragraph).

The enforcement of the decision shall be governed by the law of the executing State in the same way as a financial penalty of the executing State. The authorities of the executing State alone shall be competent to decide on the procedures for enforcement and to determine all the measures relating thereto.

The Framework Decision also has a provision to enable the competent authorities of the executing State to apply alternative custodial sanctions to enforce a judgement imposing a financial penalty. Where it is not possible to enforce a judgment, either totally or in part, an alternative custodial sanction may be applied by the Executing State if its laws, and those of the Issuing State, so provide in such cases. The length of the custodial sanction shall be determined in accordance with the law of the Executing State, but may not exceed any maximum term stated in the certificate transmitted by the Issuing State (Article 10). The Issuing State may not proceed with the enforcement of a judgement after it has been transmitted to the Executing State to undertake enforcement. The right of enforcement of the judgement, including for the purpose of converting the financial penalty into a custodial sanction, shall revert to the Issuing State upon its being informed by the Executing State of the total or partial non-enforcement of the judgement. Only the Issuing State may grant an amnesty, pardon or commutation of a financial penalty or determine any application for a review of the judgement (Article 11, first paragraph).

Administrative criminal law

Article 1, second paragraph of both the European Convention on the Service Abroad of Documentation Relating to Administrative Matters and the The European Convention on the obtaining abroad of information and evidence in administrative matters sets the general rule that the convention shall not apply to tax or criminal matters. There is an interesting exception though: each state may declare that it shall apply to fiscal matters or to any proceedings in respect of offences the punishment of which does not fall within the jurisdiction of its judicial authorities at the time of the request for assistance. As we have seen, this clause is complementary to the comparable clause in the convention on mutual assistance in administrative matters.

In the Explanatory Report to the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, it was stated that the expression ‘proceedings in respect of offences the punishment of which does not fall within the jurisdiction of its judicial authorities at the time of the request for assistance’ denotes the area between administrative and criminal matters, which in certain States is classified as ‘administrative criminal law’ (such as, for instance, the *Ordnungswidrigkeit* in German law). The expression just cited, which was borrowed *mutatis mutandis* from the European Convention on Mutual Assistance in Criminal Matters, was

chosen to avoid the risk of creating gaps and also in order to ensure complete compatibility between the two Conventions. It refers not only to proceedings which include, after an administrative phase, a judicial phase, but also to proceedings concerning punishable offences which take place exclusively before administrative authorities.

Germany, Italy and Luxembourg declared with respect to both conventions that they shall apply to proceedings in respect of offences the punishment of which does not fall within the jurisdiction of the judicial authorities at the time of the request for assistance. They all reserved the right to refuse to comply with requests for assistance on grounds of non-reciprocity (see Article 1, second paragraph of both conventions). Austria only ratified the Convention on the Service Abroad of Documents relating to Administrative Matters and declared that this convention shall also apply to fiscal matters and criminal matters on the basis of reciprocity. This means that both conventions can be used between Germany, Italy, and Luxembourg if administrative fines are involved. Austria joins these three as far as the Convention on the Service Abroad of Documents relating to Administrative Matters is concerned.¹⁶

c. Administrative law instruments ?

As far as the Council of Europe is concerned, the only interesting instrument I could find is the Recommendation Rec(2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law.

This Recommendation only has recommendations and a judicial design for the enforcement of administrative decisions. These recommendations are concerned with the execution of administrative decisions regarding private persons, and the execution of judicial decisions regarding administrative authorities. As far as the recommendations regarding private persons are concerned, Member States should provide an appropriate legal framework to ensure that private persons comply with administrative decisions that have been brought to their knowledge, notwithstanding the protection by judicial authorities of their rights and interests. Where it is not provided for by law that the introduction of an appeal against a decision does entail automatic suspension, private persons should be able to request an administrative or judicial authority to suspend the implementation of the contested decision in order to ensure the protection of their rights and interests. The use of enforcement by administrative authorities should be expressly provided for by law. Private persons against whom the decision is to be enforced should have the possibility to comply with the administrative decision within a reasonable time except in duly justified cases. The use of and the justification for enforcement shall be brought to the attention of the private persons against whom the decision is to be enforced. The enforcement measures, including the monetary sanctions, should respect the principle of proportionality. Private persons should be able to lodge an appeal before a judicial authority against the enforcement procedure in order to protect their rights and interests.

There are no provisions on international mutual assistance in the enforcement of administrative decisions. The German representative in the Project Group on administrative law withdrew a proposal to design a draft Convention on administrative aid and legal assistance to enforce writs

of execution.¹⁷ Nevertheless, the Recommendation offers a set of rules which can be an example to design a general regulation on the transnational recovery of public law claims.

European Union

The Council Directive of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (76/308/EEC) is an EC instrument (first pillar) which is of interest to our subject.

The general considerations of the Directive clearly describe the problem we are addressing in this contribution and some important general features of a regulation to resolve this problem:

‘Whereas it is not at present possible to enforce in one Member State a claim for recovery substantiated by a document drawn up by the authorities of another Member State;

Whereas the fact that national provisions relating to recovery are applicable only within national territories is in itself an obstacle to the establishment and functioning of the common market; whereas this situation prevents Community rules from being fully and fairly applied, particularly in the area of the common agricultural policy, and facilitates fraudulent operations;

Whereas it is therefore necessary to adopt common rules on mutual assistance for recovery;

(...)

Whereas mutual assistance must consist of the following: the requested authority must on the one hand supply the applicant authority with the information which the latter needs in order to recover claims arising in the Member State in which it is situated and notify the debtor of all instruments relating to such claims emanating from that Member State, and on the other hand it must recover, at the request of the applicant authority, the claims arising in the Member State in which the latter is situated;

Whereas these different forms of assistance must be afforded by the requested authority in compliance with the laws, regulations and administrative provisions governing such matters in the Member State in which it is situated;’

The scope of this directive is quite broad. Its provisions apply to refunds, interventions and other measures that are part of the system of financing the European Agricultural Guidance and Guarantee Fund (EAGGF), levies and other duties under the common organisation for the sugar sector, duties, export duties, value added tax (VAT), excise duties, taxes on income and capital, and taxes on insurance premiums. *The provisions of this directive also apply to the administrative penalties and fines that are incidental to the claims which I have just mentioned. Sanctions of a criminal nature are excluded though.*

At the request of the applicant authority the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim. In order to obtain this information the requested authority must have the same powers as the powers provided for in the law of the requested Member State to recover similar national claims (Article 4, first paragraph).

¹⁷ See the Draft meeting report of the Project Group on administrative law within the European Committee on legal cooperation at their 15th meeting (27, 28 and 29 November 2002). I did not manage to find this draft verifying this information on 4 June 2007.

The requested authority is not obliged to supply information which it would not be able to obtain for the purpose of similar national claims, or which would disclose commercial, industrial or professional secrets. If supplying the information would be liable to prejudice the security of the State or would be contrary to its public policy, the requested authority is not obliged to supply the information either (Article 4, third paragraph).

The addressee is not to be notified directly by the requested authority, but by the requested authority. The latter will notify in accordance with the domestic rules of law for the notification of similar instruments or decisions. It will notify all instruments and decisions, including those of a judicial nature, which emanate from the Member State in which the applicant authority is situated and which relate to a claim and/or to its recovery (Article 5, second paragraph). The request for notification shall indicate the name, address, and other relevant information relating to the identification (to which the applicant authority normally has access) of the addressee and the debtor concerned, the nature and the subject of the instrument or decision to be notified, and any other useful information.

At the request of the applicant authority the requested authority can recover claims which are the subject of an instrument permitting their enforcement. This will be done in accordance with the laws, regulations or administrative provisions applying to the recovery of similar domestic claims. For this purpose any claim shall be treated as a claim of the Member State in which the requested authority is situated (Article 6).²¹ The applicant authority may not make a request for recovery if the claim is contested,²² it has applied appropriate recovery procedures available to it and the measures taken will not result in the payment of the claim in full (Article 7, second paragraph).

1. If, in the course of the recovery procedure, the claim and/or the instrument permitting its enforcement issued in the Member State in which the applicant authority is situated are contested by an interested party, the action shall be brought by the latter before the competent body of the Member State in which the applicant authority is situated, in accordance with the laws in force there. This action must be notified by the applicant authority to the requested authority. The party concerned may also notify the requested authority of the action.

2. As soon as the requested authority has received the notification referred to in paragraph 1 either from the applicant authority or from the interested party, it shall suspend the enforcement procedure pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the second subparagraph. Should the requested authority deem it necessary, and without prejudice to Article 13, that authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the Member State in which it is situated allow such action for similar claims.

Notwithstanding the first subparagraph of paragraph 2, the applicant authority may in accordance with the law, regulations and administrative practices in force in the Member State in which it is situated, request the requested authority to recover a contested claim, in so far as the relevant laws, regulations and administrative practices in force in the Member State in which the requested authority is situated allow such action. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for the reimbursement of any sums recovered, together with any compensation due, in accordance with the laws in force in the Member State in which the requested authority is situated.

3. Where it is the enforcement measures taken in the Member State in which the requested authority is situated that are being contested the action shall be brought before the competent body of that Member State in accordance with its laws and regulations.

4. Where the competent body before which the action has been brought in accordance with paragraph 1 is a judicial or administrative tribunal, the decision of that tribunal, in so far as it is favourable to the applicant authority and permits recovery of the claim in the Member State in which the applicant authority is situated shall constitute the 'instrument permitting enforcement' within the meaning of Articles 6, 7 and 8 and the recovery of the claim shall proceed on the basis of that decision.

Upon a reasoned request by the applicant authority, the requested authority shall take precautionary measures to ensure recovery of a claim in so far as the laws or regulations in force in the Member State in which it is situated so permit (Article 13, first paragraph).

Article 14 provides for the possibilities of a Member State not to comply with a request to recover claims:

The requested authority shall not be obliged: (a) to grant the assistance provided for in Articles 6 to 13 if recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties in the Member State in which that authority is situated, in so far as the laws, regulations and administrative practices in force in the Member State in which the requested authority is situated allow such action for similar national claims;

The instrument permitting enforcement of the claim will be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated (Article 8, first paragraph).

The second paragraph of Article 8 continues:

Notwithstanding the first paragraph, the instrument permitting enforcement of the claim may, where appropriate and in accordance with the provisions in force in the Member State in which the requested authority is situated, be accepted as, recognised as, supplemented with, or replaced by an instrument authorising enforcement in the territory of that Member State.

Within three months of the date of receipt of the request for recovery, Member States shall endeavour to complete such acceptance, recognition, supplementing or replacement, except in cases where the third subparagraph is applied. They may not be refused if the instrument permitting enforcement is properly drawn up. The requested authority shall inform the applicant authority of the grounds for exceeding the period of three months. If any of these formalities should give rise to contestation in connection with the claim and/or the instrument permitting enforcement issued by the applicant authority, Article 12 shall apply.

Claims shall be recovered in the currency of the Member State in which the requested authority is situated. The entire amount of the claim that is recovered by the requested authority shall be remitted by the requested authority to the applicant authority. The requested authority may, where the laws, regulations or administrative provisions in force in the Member State in which it is situated so permit, and after consultations with the applicant authority, allow the debtor time to pay or authorise payment by instalments. Any interest charged by the requested authority in respect of such extra time to pay shall also be remitted to the Member State in which the applicant authority is situated (Article 9).

Article 12 plays a crucial role in safeguarding the legal position of the addressee:

(b) to grant the assistance provided for in Articles 4 to 13, if the initial request under Article 4, 5 or 6 applies to claims more than five years old, dating from the moment the instrument permitting the recovery is established in accordance with the laws, regulations or administrative practices in force in the Member State in which the applicant authority is situated, to the date of the request. However, in cases where the claim or the instrument is contested, the time limit begins from the moment at which the applicant State establishes that the claim or the enforcement order permitting recovery may no longer be contested.

The requested authority shall inform the applicant authority of the grounds for refusing a request for assistance. Such reasoned refusal shall also be communicated to the Commission.

Questions concerning periods of limitation shall be governed solely by the laws in force in the Member State in which the applicant authority is situated. Steps taken in the recovery of claims by the requested authority in pursuance of a request for assistance, which, if they had been carried out by the applicant authority, would have had the effect of suspending or interrupting the period of limitation according to the laws in force in the Member State in which the applicant authority is situated, shall be deemed to have been taken in the latter State, in so far as that effect is concerned (Article 15). Documents and information sent to the requested authority pursuant to the Directive may only be communicated by the latter to the person mentioned in the request for assistance, those persons and authorities responsible for the recovery of the claims, and solely for that purpose, and the judicial authorities dealing with matters concerning the recovery of the claims (Article 16). The instrument permitting the enforcement and other relevant documents shall be accompanied by a translation in the official language, or one of the official languages of the Member State in which the requested authority is situated, without prejudice to the latter authority's right to waive the translation (Article 17).

The requested authority shall recover from the person concerned and retain any costs linked to recovery which it incurs, in accordance with the laws and regulations of the Member State in which it is situated that apply to similar claims (Article 18, first paragraph).

Article 18 continues:

2. Member States shall renounce all claims on each other for the refund of costs resulting from mutual assistance which they grant each other pursuant to this Directive.
3. Where recovery poses a specific problem, concerns a very large amount in costs or relates to the fight against organised crime, the applicant and requested authorities may agree reimbursement arrangements specific to the cases in question.
4. The Member State in which the applicant authority is situated shall remain liable to the Member State in which the requested authority is situated for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument issued by the applicant authority are concerned.

Although the scope of this directive is quite broad, it does not apply to public law claims deriving from financial sanctions in many fields, such as competition law, financial services law or traffic fines. Nevertheless, it sets an interesting example for the design of a general regulation on mutual assistance for the recovery of claims relating to financial sanctions.

Summary

The general instruments of mutual assistance in criminal matters are clearly better developed than the ones which I discussed on mutual assistance in administrative matters. There is obviously a longer tradition in mutual assistance in criminal and civil matters than in administrative matters.

As we have seen, in the field of mutual assistance in administrative matters the only effective instrument to recover public claims deriving from administrative law sanctions, such as periodic penalty payments and administrative fines, is EC directive 76/308/EC. It has rather advanced provisions and legal safeguards. Unfortunately, it does not apply to all administrative sanctions. Its provisions can be an example, though, for the design of an instrument which will be applicable to the recovery of these pecuniary sanctions. The Draft Recommendation on Execution of Administrative and Judicial Decisions only applies to the national execution of decisions. There must have been some debate within the Council of Europe to elaborate an instrument to execute decisions transnationally, but without tangible results.

In 1978, the explanatory report to the European Convention on the obtaining abroad of information and evidence in administrative matters²⁴ stated the following:

‘Save for some international conventions, each of which binds only a more or less restricted number of the member States of the Council of Europe, mutual assistance between administrative authorities of different states is based mainly on informal or ad hoc arrangements which have been prompted by practical necessity as well as by neighbourliness. Mutual assistance in administrative matters is less developed than mutual assistance in civil, commercial or criminal matters: it has seldom been systematised except in some narrowly defined fields.’

I think that mutual assistance in administrative matters is still less developed than mutual assistance in civil and criminal matters. All the parties concerned should make more of an effort to develop general instruments of cooperation in administrative matters.

The instruments which I discussed on mutual assistance in criminal matters can of course be used to cooperate with the imposition of criminal sanctions to enforce criminal law. Concerning sanctions to be imposed by administrative authorities, in most cases the scope of the Convention involved is related to the national jurisdiction of criminal courts to review these sanctions. The instruments on mutual assistance in criminal matters which I discussed above are not suited to cooperation where periodic penalty payments are involved. In sanctioning systems where administrative (for example, Belgium, France, the Netherlands and Spain) or civil courts (for example, Austria) offer legal protection against administrative fines the provisions of the conventions which I discussed can not be used. The European Convention on the International Validity of Criminal Judgements offers the possibility to enforce administrative fines susceptible to an appeal to a court of law if they are listed in Appendix II. This possibility has only been used by France, Germany and Italy. Only in the case of Germany do all its administrative fines fall within the scope of this Convention. It does not apply in Germany, though, as Germany did not ratify. The same is the case with the European Convention on the Transfer of Proceedings in Criminal Matters.

The scope of the Agreement between the Member States on the Transfer of Proceedings in Criminal Matters also involves administrative fines, as long as the offender has the possibility to bring the case before a judicial body, which could, if I am not mistaken, well be an administrative court. The scope of the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences is comparable on this point: the individual concerned should have had the opportunity to bring the matter before a court. Both the Agreement and the Convention never entered into force, as they have not been ratified by any State.

Both the European Convention on the punishment of road traffic offences and the Agreement on Cooperation in Proceedings for Road Traffic Offences and the Enforcement of Financial Penalties imposed in respect thereof have a limited scope (road traffic offences) but are interesting examples for the design of a general instrument to assist mutually in the imposition of sanctions by administrative authorities. Those who will design this general instrument can learn a great deal from the body of agreements in the field of mutual assistance in criminal matters. An example is the distinction between the exchange of information, the service of documents, the transfer of proceedings and the transfer of enforcement of final decisions. Another example is the provision on the translation of documents which we have seen in the Schengen Implementation Agreement and the Convention on mutual assistance in Criminal Matters. On a more detailed level there are many examples of how to design a comparable provision in such a general instrument.

Concluding Remarks and a Few Recommendations

Within the European Union there are no general instruments of mutual assistance in administrative matters available or in force to enable administrative authorities to exchange information, to cooperate with inspection powers, to serve official documents, to transfer proceedings and to transfer execution or to execute transnationally as far as administrative sanctions are involved, such as periodic penalty payments and administrative fines. Although there are general instruments of mutual assistance in criminal matters available and in force which can be used in proceedings where administrative fines are involved, the scope of the relevant conventions is related to the jurisdiction of criminal courts. Systems where legal protection against decisions imposing administrative fines is offered by administrative courts, fall outside the scope of these instruments of mutual assistance in criminal matters. As we have seen some of these instruments are in force and can be used between very few EU Member States. Of course these instruments can be used to cooperate in criminal proceedings.

As many EU Member States have systems that fall outside the scope of the useable conventions and there exist no general instruments to cooperate in administrative proceedings imposing other administrative sanctions, such as periodic penalty payments, and the free movement of persons, goods and capital is for a long time an already existing reality within the EU, I argue that it is necessary to develop a general instrument as soon as possible. It is my opinion that there are important issues of effective law enforcement within Europe at stake. We could of course think of a system where active officers in every Member State compel offenders or representatives of offenders who are legal persons to pay all debts deriving from these pecuniary sanctions as soon as offences are discovered or later at some moment at the borders of each EU Member State. I think that this system is not very attractive, however.

The end-result of this regulatory activity should be a system, where it is possible to exchange information, to serve documents, to transfer proceedings and/or to enforce final decisions imposing administrative sanctions. The body of conventions and agreements which I discussed above gives a good impression of the way this system should be designed.