CHAPTER 2

Supranational rules governing cooperation in administrative and criminal matters

A.H. Klip/J.A.E. Vervaele

2.1 RULES AND INSTITUTIONAL CONTEXT

Cooperation in criminal and administrative matters involves the application of a variety of legal instruments. International law, Community law and national criminal law, criminal procedure law and administrative law all have an influence on this cooperation. In practice, this is hardly conducive to clarity. This is due not only to the multiplicity of legal instruments but also to the different effect of these instruments in international law and Community law. In addition, the relationship between international law and Community law is diffuse. A few of the terms that are relevant to this subject therefore need further explanation.

2.1.1 International law

Information on foreign law

The European Convention on Information on Foreign Law of 7 June 1968 (*Treaty Series of the Kingdom of the Netherlands* 1968, 142) provides for the possibility of the competent foreign authority obtaining information about the law in the country concerned. Since the Protocol of 15 March 1978 (*Treaty Series of the Kingdom of the Netherlands* 1979, 165) the Convention can also be used to obtain information about foreign criminal law.

Protocol

A protocol supplements a treaty by adding new provisions. It is concluded in the same way and has the same legal force as a treaty.

Treaty

A treaty is an international agreement between two or more States. It is binding on the States that have ratified it. In addition to the generic terms agreement and treaty, other words such as convention or covenant are used for the same term and with the same legal effect. Articles 93 and 94 of the Constitution determine the status of treaties in the Dutch legal system. Provisions of treaties that may be binding on all persons by virtue of their contents have direct effect. Means of enforcement can be applied against citizens only if the obligations contained in a treaty have been converted into an act of parliament (Supreme Court 9 January 1998, NJ 1998, 724). The extent to which a treaty creates rights and/or obligations directly for citizens (i.e. without conversion into national law) differs from State to State depending on the constitutional law arrangements.

Treaty conflicts
The Vienna Convention on the Law of Treaties (23 May 1969, *Treaty Series of the Kingdom of the Netherlands* 1977, 169) includes rules governing the resolution of conflicts between different treaties.

Declaration
A State indicates in a declaration how it interprets a given article or a term in an article.

Reservation
A reservation to a treaty is made by a State which does not wish to apply a given article or part of a treaty.

2.1.2 European Union law

Third Pillar
This pillar has an intergovernmental structure. This means that resolutions and legal instruments come into being only as the result of a unanimous decisions made by the governments of the Member States. Since the Treaty of Amsterdam (1997) the Third Pillar has had four types of legal instruments: namely, common positions, framework decisions, other decisions and conventions (Article 34). In addition, there are still instruments dating from the time of the Treaty of Maastricht, namely joint actions (Article K.3). The Treaty of Amsterdam contains no provisions governing the relationship between Third Pillar instruments or the relationship between First Pillar law and Third Pillar law. The obligation to enforce Community law does not extend to the Third Pillar or to European Union criminal law.

First Pillar
This term is used to designate the classical European Community. The law of the First Pillar comprises the EC Treaty, regulations and directives. The Commission has powers of supervision and control of the enforcement of Community law by the Member States. Since the Van Gend & Loos judgment of the Court of Justice (1962) it has been recognised that Community law is an entirely separate system and has direct effect in national law.

European Political Cooperation (EPC)
This cooperation can be described as a precursor of the European Union. It resulted in six treaties on international cooperation in criminal matters, none of which have entered into force. However, a few of these treaties are provisionally applied by the Netherlands in its dealings with some other Member States.

European Union
The Union was established by the Treaty of Maastricht (1992). Its comprises three pillars. The first is the classical European Community, the second regulates the common foreign and defence policy, and the third relates to judicial and police cooperation in criminal matters.

Directive
A directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves the national authorities free to choose the form and methods (Article 249 (ex-Article 189) EC Treaty). The Member States are allowed a certain period to introduce the necessary implementing legislation. Citizens can derive benefits directly from a directive. However, they may not be subjected to obligations that have not first been included in national legislation.

Schengen
There are two Schengen treaties: the Agreement (1985) and the Convention applying the Agreement (1990). For practical purposes, the latter is of greater importance. The Convention regulates the abolition of border checks (Article 2). The other provisions contain compensatory measures concerning asylum and refugee policy. The Convention also contains important provisions on police and judicial cooperation. Under a Protocol to the Treaty of Amsterdam the part of the Convention that relates to asylum law is has been elevated to the status of First Pillar law. Further development of the provisions governing police and judicial cooperation is taking place in accordance with the decision-making structure of the Third Pillar. A special position has been accorded in this connection to the United Kingdom, Ireland and Denmark and to the non-EU countries Iceland and Norway.

Regulation
A regulation is of general scope. It is binding in its entirety and is directly applicable in each Member State (Article 249 (ex-Article 189) EC Treaty). Depending on the state of national law, implementing legislation may be required.

2.2 MUTUAL ADMINISTRATIVE ASSISTANCE WITHIN THE EUROPEAN UNION

2.2.1 Introduction: historical development

Unlike the position in the civil law and criminal law field, there is no tradition of cooperation in field of administrative law in Europe. Although two conventions concerning cooperation in administrative matters were concluded within the framework of the Council of Europe in the 1970s, they have little value in practice owing to their unduly vague content and the fact they have been ratified by few countries.[1]

Administrative cooperation applies for the most part in two financial fields of substantive law, namely tax and customs matters. It is not by chance that these are the main topics of our survey. A great many double taxation conventions have been con-

1. The European Convention on the Service Abroad of Documents relating to Administrative Matters, Strasbourg, 24/11/1977 and the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, Strasbourg, 15/3/1978.

cluded since the Second World War and an arrangement for customs cooperation was introduced in the 1967 Naples Convention.

At the national level the legal elaboration of the cooperation in administrative matters has proved problematic. There is no formal legislation in this field in many Member States. A general duty of cooperation has been regulated only exceptionally; nor is there general legislation governing the provision of assistance. In the tax and customs field, there are sporadic references in national legislation to mutual administrative assistance.

In Community law too the theme of cooperation in administrative matters has evolved only recently. For many decades attention was paid to the elaboration and institutionalisation of economic integration. Only in the 1990s was attention paid for the first time to the necessity of cooperation between the national authorities in the context of the deepening process of European integration. The Sutherland Report on 'The Internal Market after 1992'[2] and the follow-up, for example the report of 1994 'On the development of administrative cooperation in the implementation and enforcement of Community legislation in the internal market'[3] set the tone in this regard. But even in these reports the emphasis was mainly on administrative implementation and relatively little attention was paid to administrative enforcement. The step from 'economic integration' to 'justice integration' was in fact taken only in the Treaty of Maastricht, in which it was decided that judicial cooperation in civil and criminal law matters should be embedded in the Third Pillar structure.

Nor did the concept of mutual administrative assistance or administrative cooperation obtain a place in the Treaty of Maastricht. Judicial and police cooperation was regulated in the Third Pillar. In addition, customs cooperation is also referred to as one of the matters of common importance in the context of the Third Pillar (Article K.1.). The reference to customs cooperation is in itself astonishing since the customs union and customs cooperation are an integral part of EC law, in other words the First Pillar. Everything therefore points to the fact that the customs cooperation in the Third Pillar should be read as meaning the judicial aspects of this cooperation[4] and the cooperation relating to subject matter that does not form part of the First Pillar (arms, drugs, etc.).

The Treaty of Maastricht does not therefore provide an explicit basis for administrative cooperation. Naturally, the increasing integration is compelling cooperation between the authorities of the Member States, and the regulation of forms of cooperation is based on the substantive principles for the policy field in the First Pillar. For example, ad hoc forms of cooperation have been formulated in the fields of food, veterinary controls, medicines (EMEA), transport of dangerous substances (EVOA), fisheries and the financial sector (stock exchange, banking and insurance). Since these forms of cooperation

2. The Internal Market after 1992, Meeting the Challenge, Report to the EC.
3. COM (94) 29 final; see also Commission by the High Level Group on the operation of the internal market. The operation of the Community's internal market after 1992. Follow-up to the Sutherland Report, SEC(92) 2277; Working Document on a strategic programme on the internal market. Reinforcing the effectiveness of the internal market, COM (93) 256.
4. The customs services have judicial powers in a number of Member States.

have been arranged on an ad hoc basis in each area of policy, a homogenous approach is lacking. Cooperation in both customs and tax matters forms an exception to this.

Does the Treaty of Amsterdam offer new prospects of mutual administrative assistance? First of all, it should be noted that the Treaty finally creates an explicit basis in the First Pillar for cooperation in administrative matters and customs cooperation. The horizontal and vertical aspects of both administrative cooperation and customs cooperation are regulated in Article 66 and Article 135 respectively of the EC Treaty. This means that new rules can be elaborated on the basis of the co-decision procedure. This is in sharp contrast to the situation under the Treaty of Maastricht, in which customs cooperation instruments were based on Article 235,[5] which presupposed unanimity and only consultation of the European Parliament. In addition, Article 135 is not part of the title dealing with the customs union, but is instead given a separate title X, in such a way that customs cooperation can also be employed for other EC fields such as precursors, waste transport, etc. Reference should also be made to the anti-fraud article – Article 280. Unlike Article 209a of the Treaty of Maastricht, a Community policy can now be pursued in order to protect the financial interests of the EU, and the Commission can take initiatives to this effect on the basis of this principle. It should, however, be noted that it is expressly stipulated that application of national criminal law and national administration of justice are expressly excluded from the operation of Article 135 and Article 280. The crucial question is what is meant by the administration of justice. Does this start in the procedural stage or in the preliminary stage? Here too the dividing line between mutual administrative assistance and mutual assistance in criminal matters is therefore of importance. Nor is the scope of the term 'national' criminal law clear.

The Treaty of Amsterdam also provides that an area of freedom, security and justice should be gradually created (Article 2 of the Treaty on European Union and Article 61 of the EC Treaty).[6] This area includes both legislation in the context of both the First Pillar and the Third Pillar. Cooperation in administrative matters and judicial cooperation in civil matters belong to the First Pillar and political cooperation and cooperation in criminal matters to the Third Pillar. Customs cooperation occurs both in the First and in the Third Pillars, depending on the substantive power. In addition, the European Commission has additional powers under the Third Pillar; these are both regulatory and operational.

2.2.2 Mutual administrative assistance as a concept

Defining mutual administrative assistance is not as easy as it might seem at first sight. In any event a number of parameters must be used in the definition. In our view, the

5. The European Parliament challenged this in Case C-209/97, arguing that Articles 43, 100a and 113 should have been used.
6. See J.A.E. Vervaele (ed.), *Transnational enforcement of the financial interests of the European Union. Developments in the Treaty of Amsterdam and the Corpus Juris*, Antwerp-Groningen, 1999.

main parameters are: (1) the authorities; (2) the instruments; (3) the aims of the assistance and under whose authority the assistance is implemented.

The authorities are in principle administrative authorities. This seems at first sight to be a clear concept. However, appearances are deceptive, because the definition of administrative authorities differs greatly from Member State to Member State. The legal status of the reporting centres for the purposes of anti-money laundering legislation varies enormously from one country to the next, but among themselves they have a form of special mutual administrative assistance which is partly based on an EC directive.[7] In addition, the stock exchange regulators that are compulsory under EC law have varying legal forms in the Member States. The question is also whether the police authorities (both regular and extraordinary) can be counted as belonging to the administrative authorities. In a number of countries the police authorities not only have responsibility for enforcing public policy ('police administrative') and regulatory duties, but also have powers of investigation ('police judiciaire'). In practice, use is often made of authorities which are explicitly designated as 'recognised authority' for the purposes of the relevant regulation. Recognised authorities may have a very wide range of statuses in the Member States. In the tax and customs field the tax administration and customs administrations are generally obvious, but the problem of authorities acting in two capacities occurs in relation to extraordinary inspectorates or investigating bodies.

Second, the definition of authorities is not always limited to bodies and institutions of Member States. Some instruments regulating mutual administrative assistance also treat the European Commission as an authority. The cooperation between national agencies and the cooperation between the Commission and national agencies are defined as horizontal cooperation and vertical cooperation respectively.

As regards the instruments of cooperation, the following forms of mutual administrative assistance can be distinguished:

- the exchange of information between inspection services or between these services and the Commission; this can be done automatically, spontaneously or on request;
- the exercise of special surveillance over persons, goods, storage places, movement of goods, means of transport;
- the implementation of administrative investigation;
- the implementation of administrative investigation by multinational investigation teams;
- the establishment of a network of liaison officers in the Member States;
- the establishment of computerised networks.

In terms of its object the principal aim of mutual administrative assistance is to obtain an administrative decision or administrative order, which may include the imposition of a punitive administrative sanction. Mutual administrative assistance is not in principle intended for the disposal of criminal cases; this is the purpose of mutual assistance in

7. Directive 91/308, on the prevention of the use of the financial system for the purpose of money laundering, *OJ* 1991, L 166.

criminal matters. Nonetheless, administrative enforcement is often the precursor of criminal law disposal. It will therefore be necessary to ascertain to what extent information obtained in the course of mutual administrative assistance can and may be used in criminal proceedings.

The Community legislation on mutual administrative assistance contains both rules governing the authorities and instruments and the aims. Community legislation contains sporadic references not only to rules governing the gathering and use of evidence but also to the means of evidence and the probative value of evidence.

2.2.3 Horizontal mutual administrative assistance in customs and agricultural matters

Historical development and present position

Cooperation has occurred within the Benelux customs union since the early 1950s. Reference should be made in this connection to the Treaty on cooperation in the field of customs and excise duties.[8] In 1967 an agreement was concluded between Belgium, West Germany, France, Italy and the Netherlands on mutual assistance between their customs administrations in order to prevent, investigate and counter criminal offences relating to customs matters. This was known as the Naples Convention on Customs Cooperation.[9] This international agreement is not part of EC law. Nor is this altered by the fact that the preamble to the Convention lists as a reason for the agreement that 'criminal offences in the area of the customs legislation (...) jeopardise the objectives of the Treaties for the establishment of the European Communities. Although the fact that the Naples Convention does not form part of EC law, this naturally does not prevent the application of this Agreement in the enforcement of EC law.

The Agreement regulates cooperation with a view to:

- the correct levy of customs duties and all other taxes levied in respect of imports and exports;
- the prevention, investigation and combating of criminal offences in the field of the customs legislation; these offences include offences relating to customs levies and

8. 5 September 1952, *Treaty Series of the Kingdom of the Netherlands* 1953, 136, revised by the Additional Protocol containing special provisions relating to taxation. Agreement in respect of the cooperation in administrative and criminal matters in the field of regulations connected with the achievement of the objectives of the Benelux Economic Union, with Additional Protocols, The Hague, 29 April 1969, *Treaty Series of the Kingdom of the Netherlands*, 1969, 124.
9. Agreement between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands concerning mutual assistance between the various customs administrations, with Additional Protocol, Rome, 7 September 1967, *Treaty Series of the Kingdom of the Netherlands* 1968, 172. This agreement is comparable to the global 'Convention internationale d'assistance mutuelle administrative en vue de prévenir, de rechercher et de réprimer les infractions douanières' (Convention of Nairobi).

other criminal offences relating to the import, export or transit of goods (prohibitions, limitations, surveillance, etc.).

Naturally, this leads to a very broad definition, because both levies and customs legislation are interpreted in the widest sense in this connection. Customs levies relating to agricultural products also come under this definition.

The customs authorities to be designated under the Naples Convention need not be limited to customs services. Other enforcement bodies in the economic and agricultural field are designated as recognised customs authorities in many Member States.

The Convention contains both provisions on mutual administrative assistance and provisions on mutual assistance in criminal matters. Those on mutual administrative assistance deal with the provision of information, special supervision and investigation abroad. Article 12 explicitly regulates directs mutual assistance in criminal matters. However, a clear distinction between mutual administrative assistance and mutual assistance in criminal mayters is not laid down in the providions.

Articles 15 and 20 regulate the use of evidence. Article 20 provides that the information may be used for the purposes of the Convention, which includes a criminal law procedure. In addition, Article 15 provides that the information obtained may be used as evidence in law, including judicial proceedings. The probative value is a matter of national law.

A protocol to the Naples Customs Convention contains two grounds for refusal:
- no obligation to provide information obtained from financial institutions;
- no obligation to provide information which would imply violation of an industrial, trade or professional duty of secrecy.

Directive 76/308 on mutual assistance for the recovery of claims was promulgated by the EC in 1976.[10] Recovery covers both expenditure wrongly incurred (refunds) and income wrongly not received (agricultural levies and customs duties). In the Netherlands the Act to regulate Mutual Assistance in the Collection of various EEC Levies was introduced for this purpose.[11] This Act regulates not only the transnational flow of information but also the transnational recovery of claims and any measures to protect the status quo. To implement Directive 79/107[12] the area of application of the Act to regulate Mutual Assistance in the Collection of various EEC Levies was also extended to include turnover tax.[13]

10. *OJ* 1976, L 73, supplemented by Directive 77/794, *OJ* 1977, L 333, Directive 85/479, *OJ* 1985, L 285 and Directive 86/489, *OJ* 1986, L 283.
11. Act of 24 October 1979, *Bulletin of Acts and Decrees* (Staatsblad) 1979, 572.
12. Directive 79/107, *OJ* 1979, L 331.
13. Act of 4 June 1981, *Bulletin of Acts and Decrees*, 1981, 334.

In the early 1990s the EC, inspired by the Naples Convention on Customs Cooperation, introduced a Community scheme in Regulation No. 1468/81[14] for 'Mutual assistance between the administrative authorities of the Member States and cooperation between these authorities, to ensure the correct application of the law on customs or agricultural matters'. This related not to the recovery of claims but to cooperation in enforcement investigation. The Regulation was naturally limited to the Community subject matter (customs levies, agriculture levies, export refunds); for non-Community customs subject matter the Convention of Naples remains important. This Regulation is a very important instrument since it covers the law on all customs and agricultural matters. In addition, other regulations can make use of this cooperation instrument.[15] Regulation 1468/81 contains instruments relating to the exchange of data and administrative investigation. It does not contain any articles on mutual assistance in criminal matters. The Regulation is therefore limited to horizontal and vertical mutual administrative assistance. The job of the Commission (vertical cooperation) is limited to the gathering and coordination of information. The Regulation was amended in 1987,[16] as a result of which the Commission obtained the power to establish an information system relating to fraud cases. This resulted in SCENT (System of Customs Enforcement Network). SCENT is actually the computerised version of Regulation 1468/81. In addition, the Commission obtains the power under the amendment to exchange information with third countries and to send investigative missions to third countries on its own authority and of its own volition.[17]

In the early 1990s, partly at the instigation of the directors general of the European customs administrations, a sub-group of the MAG (Mutual Assistance Group) intergovernmental working group known as MAG 92 worked on the establishment and operationalisation of the CIS (Customs Information System), which can contain all customs data (including EC fraud, drugs, arms, exotic fauna and flora, etc.), i.e. not only the data relating to EC matters.

The establishment and entry into effect of the Treaty of Maastricht accelerated the process. The intergovernmental working groups on police and judicial cooperation have been integrated into the structure of the Third Pillar and a legal framework has been created within which the instruments can be elaborated. This has resulted in substantial changes in the customs field. Regulation 1468/81 has been replaced by Regulation 515/97,[18] which also regulates the Community window of the CIS. After ratification

14. *OJ* 1981, L 144/1.
15. An example is the problem of the transport of waste substances (EVOA).
16. Regulation No. 945/87, *OJ* 1987, L 90/3.
17. For this purpose the EC has concluded various treaties that contain provisions governing mutual administrative assistance.
18. Regulation concerning mutual assistance between the administrative authorities of the Member States and the cooperation between these authorities and the Commission with a view to the correct application of the law on customs and agricultural matters, *OJ* 1997, L 82. This Regulation, which was the subject of many years of negotiations, entered into effect on 13 March 1998.

Naples I will be replaced by the Naples II Third Pillar Convention,[19] which provides for (a) mutual administrative assistance in non-Community matters and (b) mutual assistance in criminal matters, including far-reaching investigation methods (see 2.3.5 below). The non-Community window of the CIS system has been elaborated in the Third Pillar CIS Convention.[20] This also shows that the customs cooperation has been divided institutionally between the First and the Third Pillars.

The Community rules on mutual administrative assistance in customs and agricultural matters

Mutual administrative assistance in customs/agricultural matters is governed by:
- international treaties
- bilateral treaties (between States and between the Union and third countries)
- the 1969 Benelux Treaty (see note 8)
- Community rules
- Memorandums of Understanding[21]

In this context we will examine the Community rules. The Benelux Treaty is disregarded here, because the scope of this survey does not extend to the Benelux countries. Reference should be made to the country studies for information about the possible importance of international and bilateral agreements. The rules agreed under the Third Pillar (Naples II Convention) are dealt at 2.3.5.

The present Regulation No. 515/97 contains some striking new provisions compared with Regulation No. 1468/81 (see above). These relate both to transnational aspects and to transprocedural aspects of the transition between administrative law and criminal law.

The Regulation contains far-reaching provisions for transnational enforcement. Enforcement bodies of one Member State can take part in administrative enquiries conducted in another Member State (Article 9) and, if desired, liaison officers may be stationed by mutual agreement (Article 10). This therefore establishes the basis for a network of liaison officers and for the operationalisation of mixed inspection teams able to operate across borders. In short, the building blocks for a European horizontal enforcement are becoming clear. In addition, the position of the European Commission and hence of vertical cooperation is being greatly strengthened. On the basis of Article 18 (3) the European Commission has the same position as the national enforcement authorities. This means that the European Commission is regarded as an applicant authority and may therefore itself submit requests for assistance involving the transmission of information (Articles 4-6) or special surveillance of persons, places, goods, goods movements and means of transport the and the carrying out of administrative enquiries (Article 18 (4)).

19. Convention on mutual assistance and cooperation between customs administrations, *OJ* EC 1998 C24.
20. Convention on the use of information technology for customs purposes, *OJ* EC 1995, C 316.
21. As the government ministers were not prepared to make available these sources, they have been disregarded in the survey.

The Commission may also itself take part in the inquiries. It follows that the Commission acts as an enforcement authority in individual cases. This means that a set of special enforcement instruments, including cross-border surveillance and communication subject to supervision etc., is provided for the European Commission and for OLAF, its anti-fraud unit, in particular. Naturally, the power of the European Commission is confined to mutual administrative assistance. The Commission cannot make a request for mutual assistance in criminal matters, since it is not a party to the mutual assistance conventions and therefore lacks the capacity to do so. However, the supervisory powers may be used in many Member States in the context of administrative investigation if there is a 'suspicion of an offence'. The Dutch Supreme Court merely imposes as a condition that the rights of the defence be respected. In short, the Commission may have an interest in exploring the limits of mutual administrative assistance, given its limited powers in the area of mutual assistance in criminal matters. Although these powers are limited they are not non-existent, since OLAF has a coordinating task which extends to judicial enforcement. This is evident from the fact that OLAF has a criminal law unit staffed by experts seconded from judicial circles, including members of the Public Prosecution Service and investigating judges. However, OLAF does not carry out any judicial acts of investigation. Is there a basis in the Regulation for a wide interpretation of the terms watch and mutual administrative systems? Undoubtedly so, since Article 2 defines administrative enquiry[22] as follows: 'all controls, checks and other action taken by the staff of the administrative authorities specified in Article 1 (1) in the performance of their duties with a view to ensuring proper application of customs and agricultural legislation and, where necessary, checking the irregular nature of operations which appear to breach that legislation, except action taken at the request of or under a direct mandate from a judicial authority; the expression 'administrative enquiry' also covers the Community missions referred to in Article 20.' There is therefore no substantive law distinction between mutual administrative assistance and mutual assistance in criminal matters, based on the concept of suspicion; instead there is a functional, hierarchical distinction, since the question is what is understood by direct mandate and judicial authority. As long as no means of coercion are necessary for which a judicial mandate is required, the scope appears to be great. In addition, Article 3 of the Regulation provides that the communication of information in the context of mutual administrative assistance cannot be limited to this administrative enquiry: 'Where national authorities decide, in response to a request for administrative assistance or a communication based on this Regulation, to take action involving measures which may be implemented only with the authorisation or at the demand of a judicial authority: – any information thus obtained concerning the application of customs and agricultural legislation, or at least – that part of the file required to put a stop to a fraudulent practice, shall be communicated as part of the administrative cooperation provided for in this Regulation.' Unlike the Agricultural

22. This term is taken from the Agricultural Control Regulation No. 595/91.

Control Regulation 595/51 (in particular, Article 6)[23] this provision stipulates that 'any such communication must have the prior authorisation of the judicial authority if the necessity of such authorisation derives from national law'. Only in the case of a specific national obligation is a 'nihil obstat' declaration of the judicial authority required. This consent clause has been replaced by a notification clause in many customs agreements with third countries. In such cases the national judicial authorities need not give consent and merely have to be informed.[24]

In addition to the gathering of evidence, the Regulation also contains provisions governing the use of evidence. Findings, certificates, information, documents, certified true copies and any intelligence obtained on a voluntary basis either on request or by investigating missions can be used by the competent bodies of the Member States of the applicant authority (Articles 12, 16 and 21(2)). This is also evident from Article 45 (3), which provides that the confidentiality of information does not preclude the use of information obtained under this Regulation in any legal action or proceedings subsequently initiated in respect of failure to comply with customs or agricultural legislation. This is conditional upon notification of such use to the competent authority which supplied information.

The rules on the use of evidence remain rather vague and have been formulated by the use of the permissive auxiliary 'may' rather than the imperative auxiliary 'shall'. The Regulation contains no rules on the probative value of evidence, a subject which is left to national procedural law. Nonetheless, we can clearly see that the Regulation contains evidence of transition between the administrative and criminal procedures owing to the transprocedural cross-references: (1) mutual administrative assistance can be initiated in certain circumstances even where there is suspicion of a criminal offence; (2) the information obtained from mutual administrative assistance can be used in the context of criminal proceedings instituted by the judicial authorities. If no real means of coercion are necessary for which judicial authorisation is required, the procedure for mutual assistance in criminal matters can be circumvented even though the recitals to the Regulation expressly state that these Community rules are without prejudice to the application of the Naples Convention and must not affect the application of rules on judicial cooperation in criminal cases. Article 51 also provides that the Regulation must not affect the application of the rules on criminal procedure and mutual assistance in criminal matters, including the rules on secrecy of judicial inquiries. The judicial authorities may therefore use, both de facto and de jure, the customs authorities and

23. Article 6 determines the legal status of officials of the Commission in implementing administrative enquiries in cooperation with the national authorities. The Commission must refrain from certain judicial actions such as searches of premises and interviews of suspects, but it does obtain unconditional access (i.e. without the necessity of judicial consent) to the information thus obtained.
24. See for example Article 12(4) of the Agreement between the EU and Korea on cooperation and mutual assistance in customs matters, *OJ* 1997 L 121; this is a good example of the new generation of customs agreements between the EU and third countries.

mutual administrative assistance as an instrument of assistance in criminal proceedings. If the customs authorities have both administrative powers and judicial powers, things are naturally much simplified. Needless to say, the key issue is the extent to which the safeguards of mutual assistance in criminal matters are circumvented (see below 2.3.5)

Second, the Regulation sets out the basis of the CIS system (Articles 23-41). It expressly provides in this connection that the aim of the CIS is to assist in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation. Article 23 (3) also stipulates that the customs authorities of the Member States may use the technical infrastructure of the CIS in the performance of their duties in the framework of customs cooperation (drug trafficking, arms trafficking, etc.). This is elaborated in the CIS Convention of 1995.[25] Article 2 (2) of the CIS Convention defines the aim as 'contributing to the prevention, investigation and production of serious infringements of national legislation'. It should, however, be noted in this connection that the Member States are permitted in Article 8 (3) to communicate this information to non-CIS authorities, i.e. authorities not involved in enforcing customs and agricultural legislation, provided that the consent of the Member State supplying the information has been obtained. Subject to obtaining this consent and respecting the conditions imposed, the recipient of the information may also use it for purposes other than the enforcement of customs and agricultural legislation.

Finally, it should be noted that the Third Pillar of the Naples II Convention[26] on customs cooperation can also be used for mutual administrative assistance for non-Community customs functions in addition to mutual assistance in customs matters. For a discussion of this subject reference should be made to point 2.3.5.

2.2.4 Horizontal mutual administrative assistance in tax matters

Historical development and present position

There is a need in tax matters for cooperation to avoid double taxation, tax evasion and tax fraud. The cooperation therefore relates both to the levy of tax and is to the sanctions imposed under administrative law and criminal law for offences.

The first rules governing mutual administrative assistance in tax matters were established outside the framework of the EC. Reference may be made in this connection to the OECD model conventions of 1963, 1977 and 1992-1997 (in particular Article 26) and is to the Council of Europe/OECD Convention on Mutual Administrative Assistance

25. *OJ* 1995 C 316.
26. Convention on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations, of 18 December 1997, *OJ* 1998, C 24/1; Expansion report on the Convention adopted on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations, *OJ* 1998, C 189.

in Tax Matters of 1988 (referred to below as the Mutual Administrative Assistance Convention).[27] Article 26 (1) of the OECD Model Convention[28] contains the following relevant provision, which has served as a model for the cooperation provisions in double taxation conventions:

> 'The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article 1. Any information received by a Contracting State shall be treated as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of the, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public courts proceedings or in judicial decisions'.

An important provision is that the information may be communicated to administrative and judicial authorities not only for the purpose of determining and collecting the tax debt but also in connection with the imposition of sanctions under administrative and/or criminal law for tax offences. This provides the basis for the use of information from mutual administrative assistance not only for administrative law purposes but also for criminal law purposes.

The Mutual Administrative Assistance Convention of the Council of Europe and the OECD[29] was concluded in Strasbourg on 25 January 1988 and entered into force on 1 April 1995. Article 4 (1) clearly indicates that the Convention is specifically intended for:

- administrative cooperation in the assessment and collection of tax and the recovery and enforcement of tax claims;
- the taking of administrative proceedings or the institution of prosecution before a judicial body.

Use of the evidence obtained in this way for criminal proceedings is subject to prior authorisation, unless two or more Parties waive this provision. In addition, the Parties may also record that an inhabitant or citizen should be notified in advance of the exchange of information. The Netherlands has exercised this right.[30]

The Convention also contains all the classical forms of administrative assistance, including examination of books of account and 'measures of conservancy' in relation to

27. Concluded on 25 January 1988 and signed by the Netherlands on 25 September 1990, Kingdom act approving the Convention, 25 June 1996, *Bulletin of Acts and Deerees* 382, entered into force on 1 February 1997.
28. C. van Raad, *Texts on International and EC Tax Law*, Deventer, 1998, 880.
29. C. van Raad, *op. cit.*, 1345.
30. C. van Raad, *op. cit.*, 1357.

recovery of a claim. It should, however, be noted that the Netherlands has made a reservation to this: recovery is excluded and no assistance is provided for the exchange of documents. The confidentiality rule in Article 22 does not prevent the use of information for criminal proceedings, provided that authorisation has been obtained. In addition, the information may also be used for non-tax purposes and disclosed to third parties, once again subject to prior authorisation. Finally, it is expressly provided that the EC provisions take precedence over the Convention.

For the purposes of the present survey, the Community rules are of decisive importance since the survey is confined to four Member States of the EU. It concerns the guidelines covering assistance in relation to direct taxes and the assistance regulation concerning intra-Community transactions (VAT).

Community rules on mutual administrative assistance in fiscal matters

The assistance directives regulate the mutual assistance of the competent authorities of the Member States in the field of direct taxation (Directive 77/799) and VAT (Directive 79/1070).[31] In fact, the second directive expands the area of application of the first directive to include VAT.

Article 1 of Directive 77/799 defines information very broadly: namely any information that may enable the competent authorities of the Member States to effect a correct assessment of taxes on income and on capital. Provision is made for the classic types of instrument: namely exchange of information on request, automatically and spontaneously. A request may also include the institution of tax enquiries. A special feature is that Article 6 provides for the establishment of mixed committees of investigation. Officials of the requesting Member State may be present in the territory of the requested Member State and take part in acts to determine relevant facts, for example inspection of business records and accounts. The procedural details are left to the tax conventions and national law. This is not a duty but a possibility, which is decided upon in consultation between the Member States.

Article 7 regulates the duty of secrecy. The national provisions governing the duty of secrecy in tax matters are also applicable to information obtained on the basis of the Directive. In addition, Article 7 contains the tax speciality rule. This provides that: (1) the information may be disclosed only to the authorities directly involved in determining the tax claim or in the procedure for the imposition of administrative fines or carrying out judicial procedures in the Member State. The information may, however, be disclosed during public hearings or in judgments if the competent authority of the Member State supplying the information raises no objection. Use of the information for non-tax purposes, whether of a criminal law or administrative law nature, is therefore excluded, unless permitted by the Member State supplying the information and by its national law. Authorisation is also required for transmission of the information to a third Member State. Finally, a Member State that has more far-reaching restrictions on the duty of

31. Directive 77/799, *OJ* 1977, L 336, as amended by Directive 70/1070 and Directive 92/12.

secrecy in tax matters under its national legislation may refuse to provide assistance on this basis if the applicant country does not also agree to observe these more far-reaching restrictions.

Article 8 regulates the limits to the exchange of information. Assistance is not obligatory if the requested information or enquiries could not be furnished or undertaken by the national authority of the requested State for its own purposes. In addition, the provision of information may be refused if it would involve the disclosure of a commercial, industrial or professional secret. There is also a duty of reciprocity between the Member States. The requesting Member State cannot request information that it would itself be unable to provide.

It is also important that the Directive does not prevent more far-reaching obligations for mutual administrative assistance. It therefore represents a minimum degree of harmonisation.

Finally, it should be noted that an amendment proposal of 1989,[32] which was intended to avoid a situation in which Member States can invoke their administrative practice (banking secrecy for tax purposes) as a ground for not disclosing information) has never been approved.

The Assistance Regulation[33] was adopted in 1992 to regulate administrative cooperation between the Member States by the exchange of information on intra-Community transactions, following the introduction in 1991[34] of the new chargeable event of the intra-Community acquisition (VAT). The Regulation provides for cooperation in respect of the EC ICT problem on the basis of a network of CLOs (central liaison officers). The Directive therefore remains of importance for all turnover taxes not covered by intra-Community transactions.

The Regulation provides for three stages of administrative cooperation: (1) the exchange of listings between the EC ICT points in the Member States in order to establish mismatching (Article 4(2)); (2) the request of supplementary information concerning VAT identification numbers and supplies in the determination of problems (Article 4 (3)), and (3) if the information is insufficient, requests for further information concerning the identity of persons, the place of deliveries and invoice dates, etc. (Article 5). The national provisions governing notification of exchange apply to the latter situation (for example the Dutch International Assistance Act), but the requested authority may refrain from such notification if it would prejudice the investigation of tax evasion (Article 8). In addition, the Assistance Directive is declared applicable in Article 5 situations, as a result of which mixed investigation teams can be operational (Article 6 of the Directive).

32. *OJ* 1988, L 178.
33. Regulation no. 218/92 on cooperation in the field of indirect taxation, *OJ* 1992, L 24.
34. Directive 91/680, *OJ* 1991, 376. As regards enforcement, see J.A.E. Vervaele, *La lutte contre la fraude à la TVA dans l'Union Européenne*, Antwerp-Apeldoorn, 1996.

Unlike the Directive, the Regulation contains no grounds for refusal such as a duty of commercial secrecy, public policy, etc. The only requirement that is made is the principle of reciprocity.

Articles 3 and 9 deserve special attention since they clearly provide for a transition between administrative authorities and judicial authorities. Article 3 provides that the obligation to give assistance does not cover the provision of information or documents obtained by the administrative authorities at the request of a judicial authority. However, if the judicial authority gives its consent, the obligation to provide the information applies. Although Article 3 (3) provides that the Regulation does not affect the application of the rules on mutual assistance in criminal matters, this does not detract from the provisions on transition in Article 9. This provides, after all, that information which is confidential and covered by the obligation of professional secrecy may be used in connection with judicial or administrative proceedings that may involve sanctions, initiated as a result of infringements of tax law. No consent of or notification to the Member State providing the information is therefore necessary for use in tax matters, including the imposition of fines and criminal sanctions. Such consent is therefore necessary only for use for other purposes, i.e. not in connection with tax offences. An example would be prosecution for other offences. Another requirement is that the legislation of the Member State providing the information allows its use for such purposes.

2.2.5 Vertical cooperation in tax and customs matters: the position of the European Commission

In order to provide a clear picture of the enforcement cooperation between the Member States and the European Commission (vertical cooperation), it is necessary to examine two related aspects: first of all, the power of the European Commission to exercise supervision and make administrative enquiries in the Member States (and also in third countries) and, second, the power of the European Commission to acts as requesting authority itself in the context of mutual administrative assistance and, possibly, to participate in the implementation. In practice, both these aspects may be intertwined.

Primary Community law confers on the European Commission administrative supervisory powers and administrative powers of punitive sanction in various fields. These are in particular nuclear energy (Euratom Treaty), coal and steel (ECS Treaty) and European competition (EC Treaty).[35] In the other EC fields the position of the European Commission in relation to enforcement is still insufficiently clear. As guardian of Community law the European Commission has general powers of supervision on the basis of Articles 155 and 145.[36] In the 1970s and 1980s these powers were used to supervise implementa-

35. In the case of Euratom, however, the sanctions are limited to cancellation of certain advantages, the making of a management order and the recovery of nuclear material.
36. J.A.E. Vervaele, 'Administrative sanctioning powers of and in the Community. Towards a system of European administrative sanctions?, in: J.A.E. Vervaele (ed.), *Administrative Law Application and Enforcement of Community Law in the Netherlands,* Deventer-Boston, 1994,

tion and enforcement by the Member States. Its supervision was therefore at second instance. Although visits to enterprises were not excluded, the object was to obtain information about the enforcement efforts of the Member States.

In the 1980s the European Commission obtained powers in various regulations as a supervisor at first instance, although this on-the-spot supervision is exercised in cooperation with and under the direction of the national enforcement bodies. The position of the European Commission as European supervisor has thus been recognised in Community law. A start has been made in many secondary regulations in the fields of agricultural and fisheries policy, phytosanitary policy, the structure funds policy etc. on the creation of a legal framework for the first-line supervisory powers of the European Commission. Sectoral Framework Regulation No. 595/91[37] specifies the powers of supervision for the entire agricultural sector.

A new breakthrough can be found in Regulation No. 2185/96. This is a horizontal regulation on EC income and expenditure.[38] In three specific situations the European Commission (i.e. OLAF) is empowered to exercise administrative supervision autonomously in the Member States and to institute administrative enquiries in relation to individuals and enterprises:

- when there are serious transnational irregularities or irregularities in which economic operators active in various member States may be involved;
- when the situation makes it necessary in a Member State in a special case to strengthen the on-the-spot checks and inspections in order to improve the effectiveness of the protection of the financial interests and thus to guarantee an equal level of protection within the Community;
- when the Member State concerned requests an on-the-spot check or inspection.

The mandate of the Commission covers not only transnational cases of fraud but also serious fraud, and the Commission may carry out inspections in special situations in order to correct any failure of a Member State to enforce the legislation (proactive assimilation principle). Within the context of this mandate OLAF can carry out external inspections (i.e. on its own authority and under the responsibility of the Commission), under which teams can be created consisting of inspectors of the Member State concerned and/or other Member States. For the first time we are therefore confronted in fields of indirect administration with independent enforcement powers that can be exercised by European officials, which are comparable to those provided for in the field of

161-202 and J.A.E. Vervaele, 'Community regulation and operational application of investigative powers, the gathering and use of evidence with regard to the infringement of EC financial interests)', in J.A.E. Vervaele (ed.), *Transnational Enforcement of the Financial Intreresting of the European Union*, Antwerp-Groningen, 1999, pp. 53-91.

37. *OJ* 1997, L 82.
38. Council Regulation No. 2185/96 of 11 November 1996 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, *OJ* 1996, L 292.

competition in Regulation No. 17/62.[39] The Regulation goes much further than the sectoral regulations in the definition of mandate, powers and the legal consequences of the sectoral regulations. For example, Article 7 regulates the powers of the Commission inspectors and hence also the means of collecting evidence. Nonetheless, many aspects are not regulated and are left to the 'rules of procedure laid down by the law of the Member State concerned' (Article 6 (1)). The problem in this connection is that the national rules of procedure in administrative and criminal law are often still not geared to Community situations, let alone operational investigation powers of Commission inspectors.[40] It is fair to say that the Member States still have great difficulty with the idea of autonomous, operational inspections carried out by a supranational enforcement body. Naturally, economic and political interests and/or a desire to conceal their own enforcement failures play a role in this connection. For example the provision in Article 5 that the inspections may be carried out 'where there are reasons to think that irregularities have been committed' is interpreted by some Member States in such a way that there must be a suspicion of a criminal offence, whereas OLAF only has powers of supervision.

Under this Regulation OLAF can therefore make enquiries relating to customs and agricultural duties and EC expenditure autonomously. It is important to stress that the field of VAT is excepted from this power since the Member States have always argued that it concerns a transfer of national funds and not collection of EC income.

Does not this recognition of the European Commission as European supervisor also means that the European Commission is the recognised authority in relation to mutual administrative assistance? In the 1980s administrative cooperation underwent a considerable evolution. In this connection the functions of the European Commission remained limited. The Member States and the specific authorities were obliged to supply information to the European Commission (notification obligations), both generally and in relation to mutual administrative assistance. In a number of cases the European Commission also obtained the power to store information in a central database and to manage this information. An example is the System of Customs Enforcement Network (SCENT) or the tax network VIES. Sometimes the European Commission also obtained a general power of coordination, for example in relation to the intra-Community VAT transactions (ICT) under Regulation No. 218/92.

The situation changed in the 1990s. The powers of the European Commission were expanded and the importance of vertical cooperation strengthened. It should, however, immediately be noted that this change remained confined to the field of customs and agriculture. It is therefore striking that a different approach has once again been adopted

39. The major difference is, however, that in the competition field the object of the powers is the imposition of sanctions by the Commission, which is not the case here since evidence of an infringement should result in the imposition of a national sanction.
40. Nonetheless, Dutch law contains various provisions that could serve as a basis and source of inspiration for this, for example the General Administrative Law Act, the Criminal Code and special legislation such as the EC Comptetition Regulations Enforcement Act, *Government Gazette* (Staatscourant) 1997, 129.

for VAT and direct tax. For example, the European Commission has, under Article 18 (3) of Regulation No. 515/97, acquired the same position as the national enforcement agencies. This replaced Regulation No. 1468/81 and contains a general arrangement for mutual administrative assistance in the field of customs and agriculture. The description of the power is wide-ranging since the import, export and transit of goods can also relate to dangerous waste substances. In brief, this Regulation is not necessarily limited to tax matters in customs cases. Under this Regulation the European Commission acquires the same status as that of the administrative authorities in the Member States, and can therefore itself submit requests as requesting authority for assistance in relation to the exchange of data, administrative enquiries or special surveillance of persons, places, goods (or goods movements) or means of transport. In addition, the European Commission can take part in the transnational enquiries. It follows that the European Commission and OLAF in particular have enforcement instruments available which extend to transnational surveillance (watch), transit under supervision, etc. In addition, the Commission may conduct Community administrative cooperation missions and enquiries in third countries on the basis of Articles 19-22, provided that the necessary legal arrangement has been provided. Such missions may be carried out by the Commission alone or in cooperation with officials of Member States or by national officials alone. The mission is carried out under the control and responsibility of the European Commission itself. This regulation therefore does relate to customs duties and export subsidies for agriculture, but not to the purely tax aspects (VAT, direct taxes). An interesting aspect of this Regulation is that Article 3 expressly provides that the intermediary of a judicial authority is necessary for the performance of a request for mutual administrative assistance. This may mean that the consent of a court is required for a given administrative inquiry, but it may also mean that it has been decided that investigative acts should be carried out, thereby initiating a transition from one category of assistance to another.

Article 3 reads as follows:

> 'Where national authorities decide, in response to a request for administrative assistance or a communication based on this Regulation, to take action involving measures which may be implemented only with the authorisation or at the demand of a judicial authority:
> – any information thus obtained concerning the application of customs and agricultural legislation, or at least
> – that part of the file required to put a stop to a fraudulent practice, shall be communicated as part of the administrative cooperation provided for by this Regulation. However, any such communication must have the prior authorisation of the judicial authority if the necessity of such authorisation derives from national law.'

It is also interesting that the Regulation contains passages dealing expressly with the probative value of the information obtained from mutual administrative assistance. Article 12 provides that the applicant authority may use them as evidence. Article 45 (3) breaks through the obligation of professional secrecy in relation to such information by expressly stating that: 'Paragraphs 1 and 2 shall not preclude the use of information obtained under this Regulation in any legal action or proceedings subsequently initiated in respect of failure to comply with customs or agricultural legislation. The competent

authority which supplied that information shall be notified of such use forthwith.' In short, the requested authority need not grant authorisation for such use. Notification is sufficient.

Naturally, the power of the European Commission remains limited to mutual administrative assistance. The Commission cannot submit a request for mutual assistance in criminal matters since it is not a party to the conventions on mutual assistance in criminal matters and also does not have the power to do so. Nonetheless, two observations should be made in this connection in order to put this in perspective. First of all, the European Commission may request the institution of an administrative enquiry and can participate in it itself. The definition of administrative enquiry does not necessarily coincide with the distinction between supervision and investigation in the Member States, in so far as such a distinction exists at all. The fact that this can result in the European Commission participating in one way or another in an administrative enquiry together with and under the control of the national enforcement borders is evident from the fact that Article 6 of Regulation No. 595/91 provides that the Commission must remain neutral in relation to a number of specific acts of investigation such as searches of premises and the formal questioning of persons under national criminal law, but it does have access to the information obtained in this way. A similar provision is contained in Article 10 of Regulation No. 515/97. Second, the European Commission has a general coordination function. On this basis OLAF coordinates enforcement efforts in the Member States, independently of the distinction between supervision and investigation. This is why experts seconded by the police and judicial authorities in the Member States also work for OLAF. A number of seconded officials come from the Public Prosecution Service or were investigating judges in their Member State. The criminal law expertise and liaison cell at OLAF is not yet a fully elaborated model of 'liaison-magistrates', but there are clear plans in this direction. Even if they do not have operational powers and cannot therefore carry out investigative acts[41] either in the Member States or at the European Commission, their liaison work can clearly be of decisive importance in the gathering of evidence, in the choice of jurisdiction, etc.

Conversely, the European Commission can itself be requested for assistance. Such a request may emanate from administrative or judicial authorities in the Member States and may be for inspection of Commission documents (e.g. reports of fisheries inspectors) or for Commission officials to be heard as witnesses in criminal proceedings. In the Zwartveld judgment[42] the Court of Justice clearly held that the European institutions were obliged to cooperate loyally on the basis of Community allegiance (now Article 10 of the EC Treaty), even if the request emanates from a judicial authority. Article 10 of the EC Treaty takes precedence over the protocol on privileges and immunities of the EC, which is attached to the EC Treaty. If the function of the judicial authority is to

41. They are also separate from the administrative inspection units of OLAF and are a part of the General Policy Unit. This means that they also do not take part in administrative supervision in the Member States.
42. Case C-2/88 Imm., J.J. Zwartveld, Decisions of the Court of Justice of 13 July 1990 and 6 December 1990, ECR I-3365 and ECR I-4405.

monitor the application and observance of Community law in the national legal order, the request can be refused only on legitimate grounds such as protection of the rights of third parties or if the operation and independence of the Communities could be jeopardised. These grounds can be checked by the Court of Justice. The relevant institution should furnish all information to the Court of Justice which is necessary to assess whether the refusal is well-founded.

If the aim of the request of the national judicial authority is on-the-spot enquiries at the European institutions, for example a search of premises or questioning of people suspected of a criminal offence, account should be taken of the specific provisions of the Protocol on privileges and immunities (which forms an integral part of the EC Treaty) and of the Staff regulations (which have been published as a Council Regulation and thus have direct effect). Article 1 of the Protocol provides that: 'The premises and buildings of the Communities shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation. The property and assets of the Communities shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.' In addition, the officials have immunity under Article 12. Article 18 regulates the waiver of this immunity: 'Privileges, immunities and facilities shall be accorded to officials and other servants of the Communities solely in the interests of the Communities. Each institution of the Communities shall be required to waive the immunity accorded to an official or other servants wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Communities.' Finally, Articles 11-19 of the Staff Regulations are relevant. Article 19, in particular, regulates the cooperation with the judicial authorities in the Member States:

> 'An official shall not, without permission from the appointing authority, disclose on any grounds whatever, in any legal proceedings information of which he has knowledge by reason of his duties. Permission shall be refused only where the interests of the Communities so require and such refusal would not entail criminal consequences as far as the official is concerned. An official shall continue to be bound by this obligation after leaving the service. The provisions of the preceding paragraph shall not apply to an official or former official giving evidence before the Court of Justice of the European Communities or before the Disciplinary Board of an institution on a matter concerning a servant or former servant of one of the three European Communities'.

2.3 COOPERATION IN CRIMINAL MATTERS WITHIN THE EUROPEAN UNION

2.3.1 International mutual assistance in criminal matters: a historical survey

Until recently cooperation in criminal matters did not form part of the specific decision-making procedure within the countries of the European Community. Since the establishment of the European Union in the Treaty of Maastricht in 1992, matters have changed radically. The development of international cooperation in criminal matters has been slow to evolve. The first extradition treaties date from the early 19th century. Around 1850 the extradition treaties started to include provisions on mutual assistance in

criminal matters: the hearing of witnesses, the seizure of property and the service of documents. Extradition treaties of this kind remained unchanged until 1950. In addition, treaties designed to combat a particular form of criminal behaviour were concluded in the periods from 1900 to 1914 and from 1920 to 1935: examples are the white slave traffic, counterfeiting and obscene publications. After the Second World War the Council of Europe was the first organisation to conclude a separate convention on mutual legal assistance. Other forms of cooperation followed later.

The Netherlands is one of the countries that has the most complete network of treaties on international cooperation in criminal matters. These have for the most part been concluded in the Council of Europe and the Benelux. Generally speaking, the network now provides for cooperation in respect of all aspects for which foreign assistance is necessary. The defendant, the evidence, information, the criminal proceedings, the judgment and the proceeds of crime may be present in a country other than the one in which the criminal justice authorities need them. Cooperation can take the form of extradition, mutual legal assistance, assistance between police authorities, transfer of criminal proceedings, transfer of the execution of sentence and confiscation. One State provides the assistance which another requires.

The Council of Europe drew up important conventions in the field of cooperation particularly in the 1960s and 1970s. The scope of these conventions has always covered the entire field of criminal law. Documents have been drawn up not in respect of certain criminal offences but for all criminal offences of a given degree of gravity. Those who drew up the cooperation conventions took equal account of the interests of the States concerned and those of the defendant or convicted party and other interested persons. The basic premise of the framers of the conventions was that the package of services to be provided should be as complete as possible. Depending on the circumstances of the case preference should be given by the requesting State to prosecuting the offence itself and requesting assistance or to transferring the prosecution to another country and then providing assistance to the latter. According to this view, the most important consideration is that a State should respond in the most adequate way and not that action should be taken by a given State. The conventions were prepared by experts and plenty of time was allocated for discussion of the proposals. During that period the preparations could be made without political pressure. The Council of Europe had 16 members in 1965 and 41 by 2000. An important role was played by the European Committee on Crime Problems.

Much preparatory work was done in the Benelux. The three countries in this small union had in many cases reached agreement much earlier and had often already drawn up conventions or draft conventions at the moment when the Council of Europe started work. Nonetheless, the influence of the Benelux has gradually declined. Although the 1962 Benelux Treaty on Extradition and Mutual Assistance played an important role in the establishment of the European Extradition Convention of 1957 and the European Convention on mutual assistance in criminal matters of 1959, no initiatives have been undertaken by the Benelux since the 1970s. Although the 1968 Benelux Treaty on the transfer of sentenced persons and the 1974 Benelux Treaty on the transfer of proceedings

in criminal matters have been ratified by the Netherlands, they have not been ratified by either of the other countries and have therefore never entered into force. Nor is there any likelihood that this will ever happen, particularly since the 1972 European Convention on the transfer of proceedings in criminal matters, the 1970 European Convention on the international validity of criminal judgments and the 1983 Convention on the transfer of sentenced persons have entered into force for the Netherlands. In conclusion, it may be said that the role of the Benelux in the construction of the network has been important, but is now a thing of the past. At a practical level (i.e. the implementation of the agreements) cooperation still takes place, but this is not in the nature of the establishment of rules. The Dutch Government has therefore indicated on various occasions that it will not endeavour to breathe new life into the Benelux. In addition to making arrangements for cooperation, the Benelux partners also attempted to unify (or, to use the current terminology, harmonise) the law. The activities of the Benelux Committee for the unification of the law have borne little fruit in terms of acceptance of proposals. One of the few concrete results is Article 207a of the Criminal Code, which provides that perjury before an international Court is an offence. Belgium and Luxembourg have a comparable criminal provision. The provision was originally intended to cover perjury before the Benelux Court of Justice, but was also prompted by the position of the Court of Justice of the European Communities. Even within the small group of countries that constituted the Benelux it was difficult to reach agreement on provisions of substantive law.

The popularity of the conventions concluded within the Council of Europe differs greatly. For example, the conventions on the traditional forms of cooperation, extradition and mutual legal assistance have been generally ratified. This is not the case with the conventions on more recent forms of cooperation: the transfer of proceedings in criminal matters, the transfer of sentenced persons, and the transfer of the power of confiscation. The large countries in particular, for example Germany, France and the United Kingdom, have continued to resist these new forms of cooperation. In consequence, they have less scope for cooperation than a country such as the Netherlands. The large countries implicitly assume that if they are competent to try a criminal offence this automatically excludes the jurisdiction of others. This results in a rather narcissistic attitude: the only way of dealing with a criminal case is, after all, for them to prosecute it. Other countries are necessary only to hand over the suspect or the evidence. The exclusion of alternatives to prosecution by these countries determines the way in which they request and provide mutual assistance in criminal matters. Generally speaking, they view the criminal justice system of other countries as suspect: their own criminal justice system is, after all, the best! A different angle is taken from the perspective of Community law. Article 10 (formerly Article 5) of the EC Treaty obliges all Member States to enforce Community law. This is a joint task, not a purely individual responsibility. This is logical because non-observance of the law is a subject that concerns all Member States. It follows that there should be cooperation in enforcement and that criteria should be established for this purpose.

Some separate observations should be made about England and Wales. Since its criminal procedure is based on the common law system, England and Wales have long shunned

multilateral conventions on cooperation in criminal matters. Although it is a member of the Council of Europe, it did not even participate in the conclusion of the European Extradition Convention or the European Convention on mutual assistance in criminal matters. In the case of extradition, it declined to participate since it did not wish to accept the notion that countries could refuse to extradite their own nationals. Furthermore, the extradition arrangements were of less importance to England and Wales since jurisdiction was traditionally based exclusively on the principle of territoriality and its courts did not claim jurisdiction beyond the country's borders. As Britain is also an island, this reduced the likelihood that suspects would be present outside England and Wales. The UK's objections to mutual assistance in criminal matters were due mainly to the common law system. This provides little scope for written evidence. Since the continental tradition in which the written testimony of witnesses included in the court file can be used as evidence in criminal proceedings was alien to the English system, such evidence could not be used in proceedings in England. As regards the seizure of documents and evidence, a chain of custody is required under common law. This means that it must be possible to show from minute to minute which authority has possession of the document. Such a system is unworkable for countries with a continental tradition. Since the 1990s, however, England and Wales have played an active part in the evolution of international cooperation in criminal matters.

In the 1970s various attempts were made to confer powers in the field of criminal law on the European Communities. The Member States were extremely divided about this. Indeed, on one occasion the Netherlands even exercised its veto to block a proposal by the French President Giscard d'Estaing to create an 'espace judiciaire'. It has always been the express wish of the Member States that the criminal law should remain a matter for the Member States themselves. It should, incidentally, be noted that the objections appeared to be directed more against the power of the Commission in the area of substantive criminal law than against cooperation as such.

In the 1980s and 1990s the cooperation became much more intense. The possibilities for expanding the conventions of the Council of Europe had become more limited. First, because the forms of cooperation had already been 'covered'. And, second, because the sharp increase in the number of members of the Council of Europe meant that it had become increasingly difficult to reach agreement. This problem was compounded by the accession of the countries of the former East Bloc, since their legal systems had evolved entirely differently and had not yet been adapted to the *acquis* of the Council of Europe. At the initiative of Germany and France, the Schengen Agreement and the Convention applying the Schengen Agreement were concluded with the Benelux countries in 1985 and 1990. Later almost all the other Member States of the European Union acceded to these agreements. It was decided in the Treaty of Amsterdam that the Schengen acquis should be incorporated into the structure of the Community and the Union. The Convention applying the Schengen Agreement is intended to elaborate the conventions of the Council of Europe on cooperation. It abolishes various obstacles and reduces the number of grounds for refusal. In addition, it introduces mutual assistance between police forces as a form of cooperation. The Schengen Agreement is the first treaty in which this form of cooperation is regulated in detail. Mention should also be made of the developments

in the field of European Political Cooperation (EPC) and of the Third Pillar in the Treaties of Maastricht and Amsterdam (see 2.3.5). Within the context of EPC, criminal law became for the first time a subject of cooperation between the countries of the European Community. It should, however, be noted that none of the six conventions concluded in this context has yet entered into force.[43] However, some conventions have provisionally been applied in relations with a limited number of countries.

In addition, the United Nations too still plays a role as a treaty legislator. Although it has not proved possible in the United Nations to conclude general conventions on cooperation in criminal matters since the organisation is simply too large to reach agreement on very wide-ranging fields of law, there are model conventions which the member States can use as an example for bilateral or regional conventions. The importance of the United Nations in the field of cooperation in criminal matters lies mainly in the combating of drug trafficking. The UN Narcotics Convention of 1988 has been ratified by a very large number of countries.[44] Article 7 of this Convention contains a number of provisions which ensure that it is a virtually complete convention on mutual legal assistance in respect of drug trafficking.

It is important to have an understanding of the different organisations that produce conventions on cooperation in criminal law matters. It may be noted that a degree of competition sometimes exists between these organisations. A theme which leads to the conclusion of a convention within the Council of Europe may in some cases also prompt the conclusion of a convention within the European Union or the United Nations. This has consequences not only for practical cooperation within the smaller organisation but also for the formulation of the legislation. The relationship between the different conventions is also important since the EU countries have also often ratified conventions of the Council of Europe or the United Nations. This inevitably leads to the question of which convention takes precedence in the event of an inconsistency.

All these forms of cooperation could and can be used for the criminal law enforcement of Community law. It is important to recognise that Member States are obliged under Article 10 (formerly Article 5) of the EC Treaty to enforce Community law. If this necessitates cooperation between the Member States, they should cooperate together. Community law does not impose direct requirements on how this cooperation in criminal matters is effectuated, nor does it stipulate that the Member States should cooperate in a given way.

43. An overview of conventions containing provisions regulating mutual assistance in criminal matters can be found in A.H.J. Swart and A.H. Klip, *International Criminal Law in the Netherlands*, Freiburg im Breisgau 1997, Appendix II.
44. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna 20 December 1988, *Treaty Series of the Kingdom of the Netherlands* 1989, 97.

Finally, some observations should be made about the difference in attitude of States depending on whether they are providing or requesting legal assistance.[45] Continental countries generally apply their own law both when requesting and when providing legal assistance (see Klip 1994, chapters 4 and 8, and Klip 1997, pp. 453-459). This means that problems and frictions are bound to arise when such States have to cooperate with one another. This is why the position of each of the four countries in this survey as applicant and requested State must be examined and assessed separately.

2.3.2 Mutual assistance in criminal matters as a concept

Judicial and police assistance

Unlike, say, extradition, the terms judicial and police assistance are not defined in Dutch legislation. A definition of extradition is given in Article 1 of the Extradition Act because it is a comparatively straightforward concept and it is relatively immaterial which authority gives or requests legal assistance. However, it has already been observed that mutual assistance in criminal matters is organically structured. The classification has been made precisely on the basis of who is requesting or providing legal assistance and the requested actions play a less important role in relation to the classification.

Mutual assistance could be defined as the assistance that States give each other in investigating and prosecuting criminal offences. A distinction is subsequently made between judicial assistance and police assistance. It is important to note that these definitions are not legally binding. The distinction is not always clearly made in treaties. Furthermore, confusion arises because States often themselves determine which authorities they will regard as judicial authorities and which as police authorities. Practice can therefore vary.

As regards police assistance, the Benelux Treaty of 1962 was – until the Convention applying the Schengen Agreement – the only agreement that included a provision regulating legal assistance between police agencies. Article 39 of the Convention applying the Schengen Agreement even gives a definition of police cooperation, namely 'assist each other for the purposes of preventing and detecting criminal offences, in so far as national law does not stipulate that the request is to be made to the legal authorities...'. Administrative authorities can therefore come under this term only if they can be regarded as police within the meaning of Article 39.

The EU Convention on mutual assistance in criminal matters abandons the sharp dividing line between judicial and police assistance. The importance of the definition is therefore limited. Like the Netherlands, most countries have decided that where coercive

45. See Klip, *Buitenlandse getuigen in strafzaken* (Witnesses Abroad in Criminal Matters) 1994, chapters 4 and 8. And 'Obtaining Evidence from Witnesses Abroad: Comparative Examples of Attitudes and Responses of States in Mutual Legal Assistance in Criminal Matters', Nijboer/Reijntjes, *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence*, 1997, pp. 453-459.

measures must be applied or people's rights infringed a judicial authority should usually be charged with implementation or with making a request.

In criminal matters

All conventions contain a provision, either in the title or in one of the articles, defining their scope in terms of such as 'this convention is applicable to mutual assistance in proceedings in respect of criminal matters in the requesting State'. None of the conventions contains a definition of the term criminal matters. This is regulated in practice without resulting in legal action. Three criteria could be relevant here. First of all, the requesting State determines whether the request concerns a criminal matter according to its legal definition. Second, the requested State does the same. And, third, reference may be made to the term criminal charge in Article 6 (1) of the European Convention on Human Rights for an autonomous interpretation of what does or does not come within the ambit of the criminal law.

Legal assistance on request

Traditionally, legal assistance could be provided only after one State had made a request to another State. This was a result of the concept of sovereignty. Three important rules result from this:

- a State may not obtain legal assistance in another State without making a request;
- a State to whom a request for legal assistance is addressed has the freedom to refuse it;
- a State which grants a request carries it out itself.

These rules still apply in the majority of legal assistance contacts, but no longer have absolute validity. For example, the EU Convention on mutual assistance makes provision for the possibility of a State supplying information of its own volition (Article 7).[46] No request is necessary for this purpose. The direct consultation of computer systems such as the Schengen Information System can also be described as legal assistance without a request. Each national police service has access to this system without first having to make a request.

Until recently the independent performance of investigative acts in a foreign State was considered absolutely unacceptable. Here too a change has slowly occurred. More and more frequently it is now accepted that police officers are active abroad. A distinction should be made in this connection between de jure and de facto consent to perform activities abroad. Of importance in this connection are the Convention applying the Schengen Agreement (Articles 40 and 41) and the EU Convention on mutual assistance. In addition, international law allows ad hoc consent to be given. It is not always clear in this connection whether the police authority which grants a foreign counterpart consent is itself entitled to do so. Here too there may be friction between the legal and the prac-

46. See also 2.3.6.

tical situation. In the later stages of an investigation the public prosecutor and the investigating judge may also travel abroad. They often do this in order to conduct interviews. Under Dutch law trials may not be held abroad (Article 539a of the Code of Criminal Procedure). To this extent the Netherlands differs from other countries such as Germany, which do permit this. Only very seldom are criminal proceedings conducted abroad in their entirety. The Lockerbie trial before a Scottish court in the Netherlands is one such exception.

The possibility of refusing a request has diminished as a result of the increase in the number of conventions. The conventions generally contain an obligation to afford the requested mutual assistance unless the requested State invokes a ground for refusal contained in the Convention. The more recent conventions between the countries of the European Union contain fewer and fewer grounds for refusal, and the pressure to remove them from the existing conventions is increasing.

Horizontal, vertical and diagonal cooperation

Horizontal cooperation means the cooperation that takes place between States. Under international law States are equal and operate at the same level. It follows from this that a requested State can therefore refuse a request. Another definition of horizontal cooperation also exists. Under this second definition the criterion is whether the authorities that cooperate are of the same level: a request from one police force to another or from one judge to another.

A characteristic of vertical cooperation is the existence of a hierarchical relationship. The organisation that is higher in the hierarchy (the European Commission, the Yugoslavia Tribunal, the International Criminal Court) can impose an obligation to provide certain assistance. The scope for refusing such a request is then very limited. In addition, there is in practice often one-way traffic. The State affords assistance to the higher organisation, but receives nothing in return. Since the Zwartveld judgments of the Court of Justice in 1990 this situation has ended in the context of the European Community.[47] Since then it has been clear that the Commission must supply documents and information to the Member States if the latter are enforcing Community law.

Diagonal cooperation is characterised by the fact that it concerns cooperation between authorities which do not have the same powers. Cross-border cooperation between a supervisory authority on the one hand and an investigative authority on the other is, by definition, diagonal. In some cases the situation is more complicated because certain authorities in Member States have both regulatory powers and investigative powers. The diagonal nature therefore depends on the powers which they exercise. Complications may arise because one of the authorities has a *sui generis* status. For example, the definition of cooperation between a Dutch public prosecutor on the one hand and a

47. Case C-2/88 Imm., J.J. Zwartveld, Decisions of the Court of Justice of 13 July 1990 and 6 December 1990, ECR I-3365 and ECR I-4405.

foreign notification centre for unusual financial transactions depends to a large extent on the latter's powers. Recognition of the diagonal aspect is of particular importance since it is almost invariably the result of the absence of a common arrangement for mutual assistance. One authority is, for example, tied to a criminal law structure and the other may make use only of an administrative procedure.

2.3.3 The 1959 European mutual assistance convention and the protocol

This state of affairs means that the European Convention on mutual assistance in criminal matters of 1959 and the Protocol of 1978 are still of decisive importance for the EU Member States. The four States included in this survey are party to the 1959 European Convention and the 1978 Protocol. The Protocol removes the ground for refusal in respect of tax offences. This is important because traditionally the grounds for refusal exist precisely when the offences have a political, tax, military or customs law aspect. Germany has made a reservation to the Protocol to the 1959 European Convention. This reservation reads as follows:

> 'In accordance with Chapter IV, Article 8 (2), the Federal Republic of Germany avails itself of the following reservations: Regarding Article 2 of the Additional Protocol, the Federal Republic of Germany, in accordance with Article 8 (2) (a), reserves the right to make the execution of letters rogatory of any kind in proceedings concerning contraventions of regulations governing international transfer of capital and payments, and the execution of letters rogatory for search and seizure of property in respect of other fiscal offences, dependant on the condition that the offence motivating the letters rogatory is punishable under German law as well, or would be so punishable after analogous conversion of the facts.'
> (*Treaty Series of the Kingdom of the Netherlands* 1994, 43).

The United Kingdom has made reservations to the effect that it does not accept Chapters II and III of the Protocol.[48] France and the Netherlands have not given notice of any reservations or declarations in respect of the Protocol.

2.3.4 Schengen and the Convention applying the Schengen Agreement

Article 50 of the Convention applying the Schengen Agreement provides a basis for the provision of mutual assistance as regards infringements of their rules of law with respect to excise duty, value added tax and customs duties. The relationship between the Protocol to the European Convention on Mutual Assistance and the Convention applying the Schengen Agreement is not clear. The United Kingdom is not a party to the Schengen Agreement and also does not become so through the Schengen Protocol to the Treaty of Amsterdam.

48. Chapters II and III relate to the exchange of information about judicial verdicts.

2.3.5 Third Pillar cooperation

Since 1992 there has been the power under the Treaty of Maastricht to cooperate in the fields of justice and home affairs. Article K.3, paragraph 2, provides that the European Union should do this by means of three legal instruments: the common position, common action and convention. The Treaty of Amsterdam has four instruments: the common position, decision, framework decision, and convention. The cooperation as such has not changed as a result.

The following conventions have now been drawn up within the EU:

- Convention on simplified extradition procedure between the Member States of the European Union, Brussels, 10 March 1995, *Treaty Series of the Kingdom of the Netherlands* 1995, 110;
- Convention on the establishment of a European Police Office, Brussels, 26 July 1995, *Treaty Series of the Kingdom of the Netherlands* 1995, 282;
- Convention on the use of information technology for customs purposes, Brussels 26 July 1995, *Treaty Series of the Kingdom of the Netherlands* 1995, 287;
- Agreement on provisional application between certain Member States of the European Union of the Convention on the use of information technology for customs purposes, Brussels 26 July 1995, *Treaty Series of the Kingdom of the Netherlands* 1995, 288;
- Convention on the protection of the European Communities' financial interests, Brussels 26 July 1995, *Treaty Series of the Kingdom of the Netherlands* 1995, 289;
- Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office, Brussels 24 July 1996, *Treaty Series of the Kingdom of the Netherlands* 1996, 265;
- Convention relating to extradition between the Member States of the European Union, Dublin 27 September 1996, *Treaty Series of the Kingdom of the Netherlands* 1996, 304;
- Protocol to the Convention on the protection of the European Communities' financial interests, Dublin 27 September 1996, *Treaty Series of the Kingdom of the Netherlands* 1996, 330;
- Protocol on the interpretation, by way of preliminary rulings by the Court of Justice of the European Communities of the Convention on the use of information technology for customs purposes, Brussels 29 November 1996, *Treaty Series of the Kingdom of the Netherlands* 1997, 39;
- Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, Brussels 29 November 1996, *Treaty Series of the Kingdom of the Netherlands* 1997, 40;
- Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Brussels 26 May 1997, *Treaty Series of the Kingdom of the Netherlands* 1997, 249;

- Second Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, Brussels 19 June 1997, *Treaty Series of the Kingdom of the Netherlands* 1997, 251;
- there are also a number of other agreements in the process of preparation (mutual assistance in criminal matters for the countries of the EU, see section 2.3.6.4).

Some other conventions are currently being drawn up. With the exception of the Europol Convention, most of the conventions listed above have entered into force only recently. It is therefore still to early to draw any conclusions about the value of these conventions.

In addition, there are a number of European or partnership and cooperation conventions with third countries that also contain provisions on cooperation in combating fraud, as well as bilateral and multilateral conventions on customs cooperation. An example of this is the agreement between the EC and Uzbekistan of 21 June 1996, *Treaty Series of the Kingdom of the Netherlands* 1996, 290. Article 65 regulates cooperation in the customs field. Article 69 deals with illegal activities in the economic field and article 70 with money-laundering. The provisions are of great importance. In the case of cooperation with third countries in combating fraud it is necessary to rely on the regular cooperation treaties since the European Union conventions are not open to non-EU countries.

The agreements concluded within the context of the Third Pillar are distinct from those of the Council of Europe. Unlike the conventions of the Council of Europe the emphasis is not on establishing a complete network of forms of mutual assistance, but on facilitating extradition and mutual legal assistance. A new feature is the establishment of Europol, which represents an important step forward in police cooperation. This form of legal assistance is important for other reasons too. In the case of the traditional forms of legal assistance (extradition and mutual assistance) a clear distinction was always made between the requesting State and the requested State. In case of new structural forms of cooperation, this distinction is always difficult to make. Europol and cooperating police teams of multinational composition are examples of this. In addition, it should be noted that thematic conventions are being drawn up. These are concerned with combating a given form of crime, for example EC fraud or corruption, and contain provisions on cooperation. Another element is that the conventions under the Third Pillar allow much scope for retaining national rights: prohibition of extradition of own citizens; impossibility of legal entities being held criminally liable. As a result, the general picture is that the Third Pillar acquis has more of an ad hoc political character than the acquis of the Council of Europe.[49] These conventions are therefore more instrumental and give precedence to the interests of the States in combating crime. The absence of any attention

49. See Gert Vermeulen, *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulpruimte voor de Lid-Staten?* (Mutual assistance in criminal matters in the European Union: towards a fully fledged own legal assistance area for the Member States?), dissertation, Ghent 1999.

to the role of cooperation in the interests of the suspect/convicted person is also a clear departure from the practices of the conventions of the Council of Europe.

Another development relevant to cooperation between the Member States can be identified. Whereas the words harmonisation or approximation of substantive criminal law are employed (Article 29 of the Treaty of Amsterdam), the harmonisation relates to procedural regulations. It is striking in this connection that they are based on an unproved theory, namely that approximation of substantive provisions is necessary in order to improve the cooperation. In addition, conventions on cooperation in criminal matters are presented as administrative agreements. An example of this is the Convention on Customs Cooperation.

In addition, it is striking that Third Pillar cooperation is evidently not considered by the Member States to be exclusive. Besides a Convention there are also Regulations that deal with cooperation for the protection of the Communities' financial interests. The relationship between cooperation in administrative matters and cooperation in criminal matters is not a theme of the criminal law conventions. There is no longer any perceptible distinction between the two forms of cooperation, particularly as regards customs agreements. The Customs Information System (CIS) is used on the same basis for the Community law aspects of goods transport under Article 30 (formerly Article 36) and Article 296 (formerly Article 223) of the EC Treaty and for combating illegal drug trafficking. Article 6 of the Convention on Extradition of 27 September 1996 has largely removed the ground of refusal based on the tax or customs nature of the offence. In addition, the grounds of refusal on account of Customs offences have been removed in Article 6 of the Second Protocol in respect of fraud, active and passive corruption and money-laundering as referred to in the above-mentioned fraud conventions. The combating of fraud plays a reasonably prominent role since it requires an agreement and two protocols. Customs cooperation is regulated in a separate agreement. The Naples II Convention also regulates cooperation in tax matters. The other Third Pillar conventions do not contain a word about combating fraud.[50]

2.3.6 Treaty cooperation along the dividing line between criminal law and other areas of law

After discussion of the historic evolution and most important instruments of mutual assistance, it is important to deal specifically with the 'bandwidth' of mutual assistance in criminal matters. Does this allow cooperation only for criminal law in the strict sense, namely ordinary criminal law and special criminal law (in so far as there are no specific grounds for refusal, for example in the tax field)? Or can cooperation also be used for other forms of punitive enforcement? Particular reference may be made here to punitive enforcement by administrative authorities, whether or not pursuant to the rules of the law of criminal procedure. In addition, there is the question of whether a role is established

50. Fraud is one of the offences in respect of which Europol could in due course be declared competent, pursuant to Article 2 of the Convention.

for non-judicial authorities as requesting or requested party in the context of mutual assistance.

This problem is analysed by reference to the existing instruments, but attention is also paid to a number of recent instruments or proposals for reform which greatly extend the bandwidth for mutual assistance.

The Benelux Agreement on cooperation between administrative and judicial authorities

Although, strictly speaking, this 1969 agreement falls outside the ambit of this study, it is nonetheless worth mentioning. It is of a unique nature since it regulates both assistance in administrative matters and assistance in criminal matters. It applies only between the countries of the Benelux, but is an interesting subject of study for other countries. The treaty regulates the mandatory probative value of documents, permits, official reports and so forth. Official reports of authorities of one country must be treated by the other countries as having the same value as their own documents. Articles 2, 7 and 21-24 of the Treaty regulate the relationship between the administrative law procedure and the criminal law procedure. See also the Joint Explanatory Memorandum on this Treaty (*Treaty Series of the Kingdom of the Netherlands* 1969, 124).

The European Convention on mutual assistance in criminal matters and the Additional Protocol

The European Convention on mutual assistance in criminal matters of 1959 makes no mention of distinctions between forms of assistance. At that time countries were reluctant to provide assistance other than in connection with offences. Article 1 merely states that the assistance must relate to 'offences the punishment of which falls within the jurisdiction of the judicial authorities'. To this extent the definition is unambiguous. The Explanatory Report also indicates that the use of the words 'judicial authorities' is intended to underline the distinction with administrative authorities.[51] Assistance may also be granted in respect of minor offences which are disposed of by an administrative procedure (e.g. the German *Ordnungswidrigkeiten*), in so far as appeal is possible to the criminal courts. The Netherlands has indicated in a declaration under Article 24 of the Convention that it interprets the term as meaning the members of the *rechterlijke macht* (i.e. the judiciary and the prosecutors). Other countries apply their own definitions, which may or may not have been formally announced by means of a declaration under the Convention.

Article 2 of the Mutual Assistance Convention provides for the possibility of refusing a request on the ground that it concerns a fiscal offence. It is important to note that this concerns an optional (i.e. non-mandatory) ground of refusal. A State need not therefore make use of it. It may be assumed that customs offences are covered by the term 'fiscal offence' in this respect. This can also be inferred from the wording of Article 2 (2) of the

51. Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters, ETS 30, Council of Europe, Strasbourg 1969.

Protocol to the European Mutual Assistance Convention. In fact, the Protocol contains only a minor relaxation of the fiscal offence refusal ground. A request may not be refused purely on the ground that it concerns a fiscal offence. This is stated in rather stronger terms in the 1979 Agreement of Wittem between the Netherlands and Germany, which supplements the European Mutual Assistance Convention bilaterally. Article III of the Agreement reads: 'If the request relates to an offence which is regarded by the requested State as a breach of statutory regulations concerning duties, taxes, customs and foreign exchange, the assistance may be refused only if the requested State is of the opinion that granting the request might be prejudicial to its public policy or other essential interests'. The conventions contain no provision on the use of information obtained through mutual assistance for purposes other than that for which it was provided. Despite the many possibilities for gathering evidence abroad, the use of the evidence is scarcely regulated in the cooperation conventions. The conventions on mutual assistance do, however, contain limitations designed to ensure that the requested State implements the request in a given way (with a view to use of the information in the applicant State). Only the European Convention on the Transfer of Proceedings in Criminal Matters contains more far-reaching provisions on this subject.

Convention applying the Schengen Agreement

The Convention applying the Schengen Agreement draws a distinction between police cooperation (Articles 39-47) and mutual assistance in criminal matters (Articles 48-53), which is based on the question of whether it concerns requests that are not reserved to the judicial authorities and no means of coercion needs to be used for the purposes of implementation. Police cooperation of this kind may take place under the Convention 'for the purposes of preventing and detecting criminal offences'. The term criminal defence is not defined. Unlike Articles 40 and 41, which deal with forms of cross-border cooperation, no indication is given as to what police forces are covered by the reference to general police cooperation in Article 39.

What is important is that Article 39, paragraph 2, of the Schengen Convention imposes a restriction governing the use in evidence of written information obtained through police cooperation. Under this provision it may be used as evidence only with the agreement of the relevant legal authorities of the requested State.

Article 50 of the Schengen Convention provides that the European Mutual Assistance Convention may also be used by judicial authorities between the Schengen countries 'as regards infringements of the rules of law with respect to excise duty, value added tax and customs duties'. The Convention does not stipulate who or which authority decides whether this is the case. As regards customs regulations the definition contained in Article 2 of Naples I applies, as does Article 2 of Regulation No. 1468/81.

Article 50, paragraph 2, limits the application of the ground of refusal in respect of requests based on evasion of excise duties. An important provision is paragraph 3, which allows evidence to be used for purposes other than those referred to in the request provided that the prior assent of the requested State has been obtained. This therefore makes it possible for information obtained through criminal law procedures to be used

in other proceedings. On the other hand, it says nothing about the question of whether authorities are compelled to choose one procedure or another. Paragraph 5 of Article 50 is important in respect of administrative fines (e.g. *Ordnungswidrigkeiten* and offences under the Dutch Traffic Regulations (Administrative Enforcement Act). The European Mutual Assistance Convention may also be used for this purpose.

The Schengen Convention therefore makes a distinction in relation to the use of the ordinary judicial assistance procedure according to the authority involved, namely whether it concerns a police authority or a judicial authority.

EU Convention on Mutual Assistance in Criminal Matters[52]

This Convention supplements the European Mutual Assistance Convention, the related Additional Protocol, the Schengen Convention and the Benelux Mutual Assistance Treaty. Article 2 sets out the circumstances in which mutual assistance is to be afforded: 'Mutual assistance shall also be afforded in proceedings brought by 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 particular in criminal matters'.

A further definition of 'criminal investigation' is given in Article 3 for the purpose of the provisions on the surveillance of telecommunications (Articles 15-20). A criminal investigation is deemed to mean 'an investigation that follows the commission of a specific criminal offence in order to identify and arrest, charge, prosecute or try the persons responsible'. The basic premise is that surveillance of telecommunications may not be proactive, i.e. it may not take place before a criminal offence is committed.

The Convention takes account of situations in which the police or customs authorities are empowered in one country and the judicial authorities in another country. For example, Article 6 (5) provides that requests as referred to in Articles 12 and 14 (which concern controlled deliveries and covert investigation) may be made where a judicial or central authority is competent in one Member State and a police or customs authority in the requested State. The Convention provides for this diagonal legal assistance only where the requesting authority is the judicial authority. The Convention does not therefore purport to confer a power to address requests to foreign judicial authorities and foreign police or customs authorities.

The draft Convention is not very precise in distinguishing between judicial and police assistance and does not indicate exactly who is competent to make requests. For example, reference is made to administrative authorities (Article 2), the central authority (Article 6), the police or customs authority (Article 6), the competent authority (Article 5), the receiving authority (Article 7), the sending authority (Article 7) and the Member

52. See the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000, *Treaty Series of the Kingdom of the Netherlands* 2000, 96. As regards the negotiations and history of this Convention, see Gert Vermeulen, *op. cit.*

State (Article 10). Under Article 21 each State will be included in the above. In consequence, the power may differ according to the type of assistance concerned and from Member State to Member State. Needless to say, this is hardly conducive to clarity. The Convention contains no provisions on the use as evidence of the assistance obtained. Nor does it include any rules governing the distinction between criminal law and administrative law assistance.

The Convention contains a few innovations and creates new forms of mutual assistance. For example, it includes a basic provision to the effect that requests must be implemented in accordance with the formalities indicated in the request (Article 4). This will be conducive to the use of the evidence obtained in this way. For the first time a Mutual Assistance Convention provides for an exchange of information and the initiative of the State providing the information (Article 7). Such a provision is useful because a Member State can hardly request information if it does not know of its existence. Another new feature of the Convention is an arrangement for interrogation by video conference (Article 10) and by telephone conference (Article 11).

An important provision for operational cooperation between teams of judicial and administrative composition is the establishment of joint investigation teams, as regulated in Article 13. Such teams consist of officials of two or more countries. In addition, judicial, police and customs authorities form part of them. Paragraph 1 also allows 'officials of international organisations or authorities' to be involved in them. Examples would be the staff of Europol and OLAF. Joint investigation teams can be established for the benefit of 'criminal investigations' as defined in Article 3. They are intended in particular for serious criminal offences which resulted in difficult and expensive investigations extending over a number of Member States.

Article 14 includes covert investigation as a form of mutual assistance for the first time. This involves 'criminal investigations carried out by officials who operate under a false or fictitious identity'. The article covers both implementation of covert investigation on request and permission for covert investigation after a request for consent. It is one of the few provisions in respect of which reservations are allowed.

The terms of the assistance in surveillance of telecommunication are new. Article 16 also provides for the more classical form of request for surveillance of telecommunication. Article 17 concerns surveillance of telecommunication networks which operate in the territory of the Member State. The Member States must ensure that they are directly accessible to the other Member States. Finally, Article 18 provides for surveillance of telecommunication without technical assistance of the Member State in whose territory the persons to be surveyed are active.[53]

53. As regards surveillance of telecommunication and the practical and legal problems that arise in this connection, see Gert Vermeulen, *op. cit.*

Mutual customs assistance 1967 (Naples I)

The subject of this Convention is assistance 'to ensure the correct levy of customs duties and other taxes levied in respect of imports and exports, and to prevent, investigate and combat criminal offences in respect of customs legislation'. Article 1, paragraph 1, states that assistance should be provided through the intermediary of customs administrations'. Paragraph 2 allows for the possibility that authorities other than the customs administrations may be entitled to exercise certain powers covered by the Convention.

Article 2 defines the term 'customs legislation'. Articles 3 et seq. set out the different forms of cooperation. Few if any impediments to the use of the Convention for the purpose of criminal investigations relating to customs offences can be inferred from Articles 9 and 10: the investigating authorities must be given the opportunity to liaise directly with one another.

In the context of prosecution and trial, members of the customs administrations may be called by the judicial authorities as witnesses or experts in criminal proceedings (Article 12). Article 14 confers a right for customs officials who also have powers of investigation to be present when official acts of investigation are conducted in another country.

Article 15 confers a power on customs administrations to use as evidence information they have obtained. The power conferred by this article does not therefore extend to use by persons other than customs administrations. Article 20 is an elaboration of the principle that assistance is provided only for the purposes of the Convention. Other persons may be supplied with the information only with the consent of the provider. It is also noteworthy that the Convention contains a reciprocity provision (Article 21). Assistance may be requested only in cases in which the State would itself also provide assistance.

Mutual customs assistance 1997 (Naples II)

The EU Convention on mutual assistance and cooperation between customs administrations of 18 December 1997 will in due course replace the 1967 Convention. According to the definition of the scope given in Article 1 of the Convention, the cooperation between the Member States takes place through their customs administrations. They cooperate 'with a view to:

- preventing and detecting infringements of national customs provisions, and
- prosecuting and punishing infringements of Community and national customs provisions'.

Paragraph 2 of Article 1 deals with the relationship with mutual assistance in criminal matters, albeit in a rather ambiguous manner. It is stated that the Convention does not affect the provisions applicable regarding mutual assistance in criminal matters between judicial authorities. This is a provision comparable to Article 51 of Regulation 515/97, which provides that the Regulation 'shall not affect the application in the Member States of rules on criminal procedure'. This is all very well, but what does it actually mean? Does mutual assistance in criminal matters take precedence or is it in fact a 'something

for everyone' provision? Article 3 stipulates that the Convention covers mutual assistance and cooperation in the framework of criminal investigations. Paragraph 2 of Article 3 provides that if a criminal investigation is performed by a judicial authority, this authority will determine whether requests are submitted on the basis of the provisions concerning mutual assistance in criminal matters or on the basis of the Convention. According to the Explanatory Report on the Convention the choice depends 'on the particular circumstances of any given case and on the principles of criminal procedure of the applicant Member State'.[54] Customs authorities which are not judicial authorities do not have this possibility. They are therefore reliant solely on the Customs Convention. Article 4 defines various terms including 'national customs provisions' and 'Community customs provisions'.

Paragraph 3 of Article 10 creates the possibility for officials of one country to obtain information possessed by the offices of the other country. It may make copies of such documentation. Article 11 regulates requests for surveillance. This is a kind of intermediary concept between suspicion and the exercise of control powers. Another country may be requested to 'keep a special watch or arrange for a special watch to be kept on persons where there are serious grounds for believing that they have infringed Community or national customs provisions'. Article 14 regulates the use as evidence of information obtained pursuant to Articles 10, 11 and 12. This may be used without additional consent. This is an important provision since use as evidence is expressly restricted to information obtained in accordance with specific articles. This raises the question, for example, of whether the confidentiality which may be imposed under Article 27 can frustrate use in accordance with the previous articles, since the provisions on use are formulated for the most part unconditionally.

Articles 15, 16 and 17 regulate provision of spontaneous assistance. Of particular importance is the relationship with Article 18, which provides that information obtained in this way may be used as evidence. Cross-border activities are also possible in the event of certain offences listed in paragraph 4 of Article 20. This paragraph also stipulates that requests should be submitted to judicial authorities 'where this is necessary under the national law of the Member States'. The question is which national system takes precedence, i.e. that of the requested State or the applicant State.

A provision that is to some extent concealed in paragraph 7 of Article 19 allows information to be used as evidence by the competent authorities of the State in which the information was obtained pursuant to Articles 20-24. However, the use by the applicant State must evidently be in accordance with the national legislation of the State in which the information was obtained. Articles 20 and 21 are modelled on the Articles 40 and 41 of the Convention applying the Schengen Agreement. Unlike the Schengen Convention, there is a possibility of hot pursuit at sea. It is important that in the case of both forms of cross-border cooperation the officials concerned are required to be available to give evidence as witnesses.

54. Explanatory Report, section 3.2, on Article 3, see *OJ* 1998, C 189/4.

The controlled delivery regulated in Article 22 can result in forms of diagonal cooperation since the type of service designated to carry out investigation and prosecution will not be the same in all Member States. A new provision is the arrangement for covert investigations (Article 23) and for joint special investigation teams (Article 24). This arrangement appears to imply that the team can operate only within a single country. Article 24 provides, for example, that the team is headed by an officer from the Member State in which the team's activities take place. It also specifies the law by which the participating officers are to be bound.

Article 25 contains an obligation to respect the Data Protection Convention of the Council of Europe of 1981. It may be wondered whether this provision is not, strictly speaking, superfluous since the Member States that are parties to the Data Protection Convention are already bound by it. Rules are also included governing correction and compensation for citizens.

2.4 Transition between types of cooperation in the case of transnational cooperation

The analysis of the supranational rules governing administrative and judicial cooperation clearly shows how both systems have developed independently of one another in varying contexts. In consequence, overlaps and cross-links between the two systems have not been included in the rules. In addition, the current expansion of the scope of the provisions on both mutual administrative assistance and mutual assistance in criminal matters means that there are complex legal rules which largely overlap and raise questions both about the practicability of the instruments and about the legal safeguards. Furthermore, the cooperation is no longer limited to the horizontal level (between States), but has now extended to cooperation with authorities of the European Union.

As a transition to the country reports and as an example of the problems that arise, the following case in which the Dutch Supreme Court recently gave judgment can serve as a good example.[55]

A number of businesses imported quality beef into the Community, but avoided high customs duties by describing the product as slaughterhouse waste. Thermotraffic, a shipping agent involved in the operation in Rotterdam, had also mentioned slaughterhouse waste on bills of lading supplied to Portugal. In the course of a criminal investigation in Portugal and Germany the Portuguese Public Prosecution Service was interested in the bills of lading issued by Thermotraffic, since it suspected that they had been falsified and used illegally.

The Portuguese Public Prosecution Service did not invoke the instruments of mutual assistance in criminal matters, but instead addressed a request to the European Commission in the context of administrative customs cooperation (under the then Regulation 1468/81). Subsequently, the European Commission requested the Netherlands through

55. Supreme Court, 28 March 2000, NJ 2000, 483.

the CIC (Customs Information Centre) to carry out an administrative investigation at Thermotraffic in order to recover the bills of lading.

During the administrative investigation carried out by the Fiscal Intelligence and Investigation Department (FIOD) under its powers of supervision in the Customs Act, the bills of lading were discovered and indeed found to mention slaughterhouse waste. As this constituted a suspected infringement of Article 225 of the Criminal Code, the bills of lading were seized by the judicial authorities. Thermotraffic was then prosecuted in the Netherlands and convicted on appeal. Appeal was lodged in cassation.

The Advocate General at the Supreme Court gave the following opinion:

> 'It must be admitted that the request of the Commission can hardly be interpreted otherwise than as a request to ascertain whether the bills of lading had been falsified and if so on whose instructions. I therefore find it hard to comprehend the evident opinion of the Court of Appeal that the investigation carried out by the officials of the Fiscal Intelligence and Investigation Department as a result of the request in the books and records of the suspect was not of a criminal law of nature. In so far as the appeal complains about this, it is in my view unfounded. However, this need not result in cassation since the Court of Appeal rightly rejected the defence. Although the relevant letter of the Commission states that foreign investigation services have instituted investigations into the fraudulent importation of beef and waste, the letter does not mean that the information is requested in order to serve as evidence in the context of a prosecution by authorities of another State on account of a criminal offence. Nor does it request the seizure of documents. The defence submission that the request should have been dealt with under the Conventions regulating the obligation to provide mutual international assistance in criminal matters and that Article 552n, paragraph 1, opening words and (c) of the Code of Criminal Procedure should have been applied is for this reason incorrect.'

The Supreme Court reasons as follows in relation to this ground of appeal:

> 'Against the background of what is stated above from the request for investigation (by the Commission), the ruling given by the Court of Appeal regarding the non-criminal law nature of the investigation carried out in the Netherlands is incomprehensible, without further explanation. In view of the following, this need not result in cassation. The concept of international mutual assistance in criminal matters presupposes that one State performs acts for the benefit of another State the result of which can be used in criminal proceedings in the other State. This is not the case here. It concerns the use of results of an investigation instituted in the Netherlands at the request of the European Commission following a criminal investigation carried out in other States. This does not alter the fact that the results of such a request should be communicated to the European Commission.'

This case shows in any event that there is no clear definition of the terms mutual administrative assistance and mutual assistance in criminal matters and that it is also not clear for what purpose they may be used. Furthermore, it is evident that legal protection in the event of transnational enforcement is very much defined according to national law.

The next chapter will examine how and to what extent cooperation in administrative and criminal matters between judicial and administrative authorities is regulated in the Netherlands, Germany, France and England and Wales.