Working Paper Series

Working Paper Number 03

First Presented at the CLaSF Workshop on April 25 2003

Oswald Jansen, GJ Wiarda Institute, Law Faculty, University of Utrecht*

The Systems of International Cooperation in Administrative and Criminal Matters in Relation to Regulation EC 1/2003

Introduction

The new Regulation EC 1/2003 gives national competition authorities the possibility to apply EC competition law. This means that not only the European Commission but also National Competition Authorities have the right to apply EC competition law. They are empowered to impose fines, periodic penalty payments or any other penalty provided for in their national law (Article 5). The new Regulation will create a web of authorities competent to apply European competition law. These authorities are obliged to cooperate closely. Article 11 specifies the requirements of the principle of close cooperation (Article 10 EC) for European competition law purposes. This article aims to enable the Commission and the national competition authorities to function as a network with the exchange of information and documents. Within this network the flow of information can be both vertical (between the Commission and a National Competition Authority) and horizontal (between National Competition Authorities). To a certain extent there will be a free flow of information within this network. Competition authorities have the power to provide one another with and to use in evidence any matter of fact or law, including confidential information (Article 12, first paragraph). National competition authorities may even use the information exchanged within the network (network information) for the purpose of applying Articles 81 and 82 EC or for the parallel application of national competition law (Article 12, second paragraph). As far as imposing sanctions on natural persons is involved, the free flow of competition law information is restricted however (Article 12, third paragraph).

The national systems to enforce European competition rules can be designed as a criminal law system, an administrative law system or both. The new Regulation provides an instrument to exchange information to be used by the receiving authority as evidence in both administrative and criminal proceedings. If the information is not already available, it can be obtained by using both administrative law and criminal law powers. The European Commission as well as national competition authorities can request another national competition authority to exercise powers to obtain the information which the requesting

---

* A version of this paper appears in Gerhard Dannecker and Oswald Jansen (ed.), *Competition Law Sanctioning in the European Union. The EU-Law Influence on the National Law System of Sanctions in the European Area*, Kluwer Law International, 2004

authority needs (Article 22). Member States can designate both national administrative and judicial authorities, including courts, as the responsible authority (Article 35). In short, Regulation 1/2003 recognises the wide variation which exists in the public enforcement systems of Member States.[1]

If I am not mistaken, in most cases the provisions of Regulation EC 1/2003 will be sufficient to exchange information. The new regulation does not have any provisions on the powers which Member States should give their competition authorities in order to be able to assist competition authorities from other Member States (Article 22, first paragraph). Powers such as wire-tapping in hard-core cartel cases will only be available in a criminal procedure. Therefore, additional provisions will be needed to make these powers available in a transnational context. I assume that they will only be found in instruments of mutual assistance in criminal matters. In their national legislation most EU Member States will preserve these kinds of powers for criminal investigation.

Article 12 Regulation EC 1/2003

There are some interesting differences between the text of Article 12 that will apply from 1 May 2004 and the version in the Proposal.[2]

The current version:

> 1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
>
> 2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.
>
> 3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:
>
> – the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,
>
> – the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

The former version:

> 1. Notwithstanding any national provision to the contrary, the Commission and the competition authorities of the Member States may provide one another with and use in evidence any matter of fact or of law, including confidential information.
>
> 2. Information provided under paragraph 1 may be used only for the purpose of applying Community competition law. Only financial penalties may be imposed on the basis of information provided.

Two of the most important differences are that the information can also be used for parallel national competition law procedures and the possibility to use this information as evidence in procedures that can lead to custodial sanctions. Both versions provide for the exchange of information for evidence in a criminal procedure. The former version of Article 12 restricted this possibility to financial sanctions only.

---

[1] See consideration 35.

[2] COM (2000) 582 final.

Again, additional provisions may be necessary to enable Member States to exchange information for evidence or to apply certain powers on the request of another Member State in cases where the conditions mentioned in the third paragraph of Article 12 are not met. To give two examples:

(i) Competition authority A based in a Member State where European competition law is enforced on natural persons with a criminal law system and custodial sanctions wants to use as evidence the information exchanged with the European Commission and competition authority B based in a Member State where European competition law is enforced only with an administrative law system without custodial sanctions.

(ii) Competition authority A wants to use as evidence the information exchanged with competition authority B in order to enforce national competition law in another case (see Article 12, second paragraph, second sentence).

These additional provisions should be found in instruments of international cooperation in administrative and criminal matters. I will restrict myself to the description of general European multilateral provisions.

Effective recovery

One of the aims of the new regulation appears to be the effective recovery of the fines imposed.[3] As far as the design of sanctioning powers is involved, the provisions of Regulation 1/2003 are restricted to specific rules on the imposition of sanctions by the European Commission and the general entrustment of sanctioning powers to national competition authorities in order to enforce European competition law. The Regulation does not have any provisions on the recovery of fines and periodic penalty payments.

The private international law possibilities to recover sums of money transnationally, such as the Brussels II convention,[4] do not apply, as debts deriving from fines (as well as periodic penalty payments or astreintes) imposed are debts which arise from an act of a public authority and they are therefore not a civil and commercial matter. In the Judgment of the Court of Justice of 16 December 1980 *Netherlands State v Reinhold Rüffer,* a decision applying the Brussel I convention, the Court stated:

> 'The fact that in recovering those costs the administering agent acts pursuant to a debt which arises from an act of public authority is sufficient for its action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the ambit of the Brussels convention.'[5]

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

As far as financial sanctions imposed by the European Commission are concerned, there is a general provision in Article 256 EC Treaty.[6]

---

[3] Consideration 30: 'In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary….'

[4] Regulation EC 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ, 2001, L12/1.

[5] Case 814/79, [1980] ECR 3087.

[6] See on this Article for example Ingolf Pernice, Vollstreckung gemeinschaftsrechtlicher Zahlungstitel und Grundrechtsschutz, RIW (Recht der internationalen Wirtschaft) 1986, p. 353-357; Hans-Heinrich Rupp, Materielles Prüfungsrecht bei Erteilung der europarechtlichen Vollstreckungsklauseln?, NJW 1986, p. 640-641; M. Ruffert, Kommentar des vertrages über die Europäische Union und des Vertrages zur Gründung der Europäische Gemeinschaft, Luchterhand 2002, p. 2262-2263; Hans van der Groeben, Kommentar zum EU-, EG-Vertrag, Baden-Baden, p. 1142- 1156 (Gudrun

This Article reads:

> Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States, shall be enforceable.
>
> Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice.
>
> When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.
>
> Enforcement may be suspended only by a decision of the Court of Justice. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

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

Article 256 EC Treaty does not apply to the recovery of pecuniary sanctions imposed by national competition authorities enforcing European competition law. This leads us to the question whether Regulation 1/2003 should contain a provision on the recovery of these sanctions. Assumably, the biggest problems could arise from situations where the best placed authority is not the one with the same nationality as the person who has committed the infringement. Provisions are needed if sanctions have to be recovered transnationally. They cannot be found in private international law, nor in the new Regulation, so we have to find them somewhere else. Therefore we will have to analyse international or European instruments in the fields of criminal law and administrative law.

General European Instruments of Mutual Cooperation in Administrative Matters

European instruments of mutual cooperation in administrative matters can be found within organisations such as the OECD, the Council of Europe and the European Union.

OECD

The OECD has published the Recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade.[7] In this recommendation the OECD recognises that with the continuing growth in the internationalisation of business activities the likelihood increases that the interests of more than one Member State will be affected by firms. The unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned. Investigations into anticompetitive practices and resulting proceedings by one Member country may, in certain cases, affect important interests of other Member countries.

Schmidt); Fausto Pocar (ed.), Commentario breve ai Trattati della comunità e dell'unione europea, CEDAM, Milan 2002, p. 256-257 (A. Pietrobon); Rolando Quadri, Riccardo Monaco and Alberto Trabucchi (eds.), Trattato institutivo della comunità economica europea, Giuffrè, Milan 1965, p. 1433-1443 (R. Quadri).

[7] 27 July 1995 - C(95)130/FINAL. This recommendation repeals and replaces the Recommendation of the Council of 21st May 1986, C (86) 44 (final).

Therefore the OECD considers that Member countries should co-operate in the implementation of their respective legislation in order to combat the harmful effects of anticompetitive practices. Closer co-operation between Member countries is needed in order to deal effectively with anticompetitive practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade. The closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a completely voluntary basis, should be encouraged, 'it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning anticompetitive practices, as may arise.'

According to the OECD Council Member countries should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose. They should also allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether this is accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such cooperation or disclosure would be contrary to significant national interests.

A Member country which considers that an investigation or proceeding being conducted by another Member country under its competition laws or that one or more enterprises situated in one or more other Member countries are or have been engaged in anticompetitive practices may request consultation with the other Member country or Member countries. The latter should give full and sympathetic consideration to the request of the other Member country.

> 'The Member country addressed which agrees that enterprises situated in its territory are engaged in anticompetitive practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should take whatever remedial action it considers appropriate, including actions under its legislation on anticompetitive practices or administrative measures, on a voluntary basis and considering its legitimate interests.'

When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries. The Member Country should notify if possible in advance, and, in any event, at a time that would facilitate comments and consultations. The advance notification enables the proceeding Member country, 'while retaining full freedom and ultimate decision,' to take account of such views as the other Member country may wish to express and of such remedial action as the other Member Country may find it feasible to take under its own laws. Where two or more Member countries proceed against an anticompetitive practice in international trade, they will endeavour to coordinate their action as appropriate and practicable.

The Member countries should cooperate in developing or applying mutually satisfactory and beneficial measures. They should supply each other with such relevant information as their legitimate interests permit them to disclose, and should allow 'subject to appropriate safeguards, including those relating to confidentiality,' the disclosure of information to the competent authorities of Member countries by other parties concerned, 'whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such cooperation or disclosure would be contrary to significant national interests.'

A Member country which considers that an investigation or proceeding being conducted by another Member country under its competition laws may affect its important interests

should transmit its views on the matter to or request consultation with the other Member country. 'Without prejudice to the continuation of its action under its competition law and its full freedom of ultimate decision' the addressed Member country should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigations or proceeding. A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in anticompetitive practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the Member countries concerned. Any addressed Member country should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the anticompetitive practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country.

The addressed Member country which agrees that enterprises situated in its territory are engaged in anticompetitive practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on anticompetitive practices or administrative measures 'on a voluntary basis and considering its legitimate interests.'

The appendix to the recommendation contains many guiding principles for exchanges of information and cooperation in investigations and proceedings. Their purpose is to clarify the procedures laid down in the Recommendation. 'It is recognised that implementation of the Recommendation herein is fully subject to the national laws of Member countries, as well as in all cases to the judgment of national authorities that cooperation in a specific matter is consistent with the Member country's national interests. Member countries may wish to consider appropriate legal measures, consistent with their national policies, to give effect to this Recommendation in appropriate cases.'

In short, this recommendation contains many suggestions to cooperate, to notify and to consult, but there is nothing on the recovery of fines. The recommendation only suggests that Member countries should create provisions in their legislation to enable their authorities to undertake the suggested forms of cooperation, notification, consultation and exchange of information.

Council of Europe

The only relevant Council of Europe instruments I could find are the European Convention on the service abroad of documents relating to administrative matters[8] and the European Convention on the obtaining abroad of information and evidence in administrative matters.[9] They have entered into force, but have only been ratified by a few States. Moreover, not all of them are EU Member States, so their relevance within the European Union is limited. I should also discuss the Draft Recommendation of the Committee of Ministers of Member

[8] Council of Europe, Strasbourg, 24 November 1977, European Treaty Series no. 94 (see: http://conventions.coe.int).

[9] Council of Europe, Strasbourg, 15 March 1978 (entry into force 1 January 1983). Ratified by Azerbaijan, Belgium, Germany, Italy, Luxembourg and Portugal.

States on Execution of Administrative and judicial decisions in the field of Administrative Law developed within the Council of Europe Project Group on Administrative Law (CJ-DA).[10]

European Convention on the Service Abroad of Documents Relating to Administrative Matters[11]

The European Convention on the Service Abroad of Documents Relating to Administrative Matters[12] obliges Contracting States to afford each other mutual assistance with regard to the service of documents relating to administrative matters (Article 1, first paragraph). A request for service shall be forwarded to the central authority of the requested State (Article 3). The Central Authority of this State shall effect service by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, unless such a method is incompatible with the law of the requested State. The document may always be served by such a particular method if an addressee accepts it voluntarily (Article 6).

> Article 7
>
> 1. When a foreign document is to be served in accordance with Article 6, paragraph 1, sub-paragraph a and paragraph 2 of the present Convention, it need not be accompanied by a translation.
>
> 2. However, in the event of the service of a document being refused by the addressee on the ground that he cannot understand the language in which it is drawn up, the central authority of the requested State shall arrange to have it translated into the official language, or one of the official languages, of this State. Alternatively, it may ask the requesting authority to have the document either translated into or accompanied by a translation in the official language or one of the official languages of the requested State.
>
> 3. When service of a foreign document is to be effected according to Article 6, paragraph 1, sub-paragraph b, and the central authority of the requested State so requires, the document must be translated or accompanied by a translation into the official language or one of the official languages of the requested State.

Each Contracting State may effect the service of documents directly through the post on a person within the territory of other Contracting States (Article 11, first paragraph).[13] The Central Authority of the requested State to which a request for service is addressed may refuse to comply with the request on the grounds mentioned in Article 14.

> Article 14

---

[10] The German representative withdrew her proposal to develop a draft Convention on administrative aid and legal assistance to enforce writs of execution.

[11] This convention entered into force on 1 November 1982. On 22 July 2003 it was ratified by 8 States: Austria, Belgium, Estonia, France, Germany, Italy, Luxembourg and Spain.

[12] See on this convention for example Robert Walter and Rudolf Thienel, Verwaltungsverfahren, Manz, Wien 2001, pp. 344-359, Göhler, OwiG, Vor § 59, comment nr. 24a; O.J.D.M.L. Jansen, Country analysis – Germany, in: John Vervaele and Andre Klip (ed.), European Cooperation between Tax, Customs and Judicial Authorities, Kluwer Law International, The Hague/ London/ New York 2001, p. 115-180, especially p. 175-179 and Karlheinz Boujong, Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten, C.H. Beck'sche Verlagsbuchhandlung, München 2000, Einleitung, Jellinek, NVwZ 1982, 537.

[13] Each Contracting State has the possibility, though, to object by a declaration in a general manner or partially, either because of the nationality of the addressee or for defined categories of documents, to such service within its territory. Any other Contracting State may claim reciprocity (Article 11, second paragraph. See also the third paragraph of this Article).

1. The central authority of the requested State to which a request for service is addressed may refuse to comply with it:

a if it considers that the matter to which the document to be served relates is not an administrative matter in the sense of Article 1 of this Convention;

b if it considers that compliance would interfere with the sovereignty, security, public policy or other essential interests of that State;

c if the addressee cannot be found at the address indicated by the requesting authority and his whereabouts cannot be easily determined.

2. In the event of refusal, the central authority of the requested State shall promptly inform the requesting authority and state the reasons for such refusal.

When a document is transmitted for service within the territory of another Contracting State the addressee shall be allowed, in the event that such service implies a time-limit effecting him, reasonable time, to be determined by the requesting State, from the moment he has received the document, to attend the proceedings or to be represented or to make representations, as the case may be (Article 15).

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

Another element of an effective system of the transnational service of documents is the rule that the document shall be translated. The convention does not have a general rule that documents should be translated. When the document is served by the central authority of the requested State by a method prescribed by its internal law or by delivery to an addressee who accepts it voluntarily a translation is not needed. In the explanatory report it is stated:

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

I will discuss the applicability of this convention on administrative fines later when describing the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters. Here I would like to add that as far as the service of documents concerned with administrative fines are involved the principle of fair trial embodied in Article 6 ECHR would demand a translation of important parts of the relevant documents into a language that the addressee understands. Although one can imagine that this would only

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

The convention has not been ratified by all the EU Member States. As far as EU Member States are concerned it can only be used by Austria, Belgium, France, Germany, Italy, Luxembourg and Spain. As the convention has a general aim these States can also use it in competition law cases.

The European Convention on the obtaining abroad of information and evidence in administrative matters (15 March 1978)[14]

The European Convention on the obtaining abroad of information and evidence in administrative matters obliges Contracting States to afford each other mutual assistance in administrative matters whenever a request for assistance is received in accordance with the provisions of this Convention (Article 1, first paragraph). The request for assistance and appendices thereto shall be exempt from legislation, apostille or any equivalent formality (Article 3). The designated central authority of the requested State which has received a request for assistance, shall be obliged to take action thereon (Article 4).

Article 7 regulates the possibilities for Contracting States to refuse to comply with a request for assistance:

> 1. The central authority of the requested State to which a request for assistance is addressed may refuse to comply with it if it considers:
>
> a) that the matter to which the request relates is not an administrative matter in the sense of Article 1 of this Convention;
>
> b) that compliance with the request might interfere with the sovereignty, security, public policy or other essential interests of that State;
>
> c) that compliance might prejudice the fundamental rights or essential interests of the person to whom the requested information pertains, or that the request concerns information held in confidence, which may not be disclosed;
>
> d) that its domestic law or customs prevent the assistance requested.
>
> 2. In cases of refusal the central authority of the requested State shall so inform the requesting authority without delay, giving the reasons for its refusal.

Chapter II, Articles 13 to 18, provide rules for requests for information, documents and enquiries. Chapter III, Articles 19 to 22, provide rules for letters of request to obtain evidence.

The Contracting States shall furnish each other with information on their law, regulations and customs in administrative matters whenever a request is made by an authority of the requesting State for an administrative purpose (Article 13), and with factual information in administrative matters which is in their possession, and to issue certified copies, ordinary copies or extracts of administrative documents whenever a request is made by an authority of the requesting State for an administrative purpose (Article 14). When a request is made for administrative purposes by an authority of the requesting State, the Contracting States undertake to comply with it by enquiries or any other procedures according to the form prescribed or permitted by the legislation or customs of the requested State, but without the

[14] This convention entered into force on 1 January 1983. On 22 July 2003 it was ratified by 6 States: Azerbaijan, Belgium, Germany, Italy, Luxembourg and Portugal.

use of compulsory powers (Article 15). Article 16 provides for the possibility to restrict the use of the information or documents:

> 1. Upon a stipulation by the central authority of the requested State the requesting authority may not use the information or documents furnished pursuant to this Convention for purposes other than those specified in its request for assistance.
>
> 2. Any State may, at any time, formulate a reservation to the provisions of paragraph 1 of this Article in so far as its legislation on access of the public to administrative records does not permit it to comply.
>
> 3. The central authority of the requested State may, in respect of each case, refuse to comply with any request emanating from an authority of a State which has formulated such a reservation.

An administrative tribunal or any other authority exercising judicial functions in administrative matters in one of the Contracting States may, in accordance with the provisions of the law of that State, request the designated Central Authority of another Contracting State by letters of request to obtain, through the authority, evidence in an administrative matter to the extent that a procedure for obtaining such evidence may be employed for the case in question in the requested State (Article 19, first paragraph).

This Article continues:

> 2. A letter of request shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.
>
> 3. The execution of the letter of request may be refused to the extent that in the requested State, the execution of the letter does not fall within the functions of an administrative tribunal or any other authority exercising judicial functions in administrative matters.

The authority responsible for the execution of letters of request shall apply its domestic law as to the methods and procedures to be followed and the means of compulsion to be applied (Article 20, first paragraph).

The following paragraphs of this Article are:

> 2. However, deference shall be made to the wish of the requesting authority for the procedure to follow a special form if such form is not incompatible with the law and customs of the requested State, particularly with regard to the notification of the parties concerned of the date and place the enquiry will be carried out.
>
> 3. In the execution of a letter of request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give evidence:
>
> a) under the law of the requested State; or
>
> b) under the law of the requesting State, and the privilege or duty has been specified in the letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

This convention involves another important element of an effective system of the transnational exchange of information and the recovery of public law claims: the exchange of information, documents and requests to carry out enquiries. The convention does not provide for the duty of a Contracting State to use compulsory powers in order to comply with a request to carry out enquiries, however.[15] As long as national law provides for these

[15] The explanatory report states: 'The action which the requested authority may have to take under this article may consist of an enquiry, which by definition means "search for information", or any

powers they can be used, but there is no obligation to do so. This Convention can be used for cases where periodic penalty payments are involved and it has a provision to use it for cases where administrative fines are involved.

The convention has not been ratified by all the EU Member States. As far as EU Member States are concerned it can only be used by Belgium, Germany, Italy, Luxembourg and Portugal. As the convention has a general aim they can also use it in competition law cases.

Administrative criminal law

Article 1, second paragraph of both conventions sets the general rule that the convention shall not apply to tax or criminal matters. There is an interesting exception though: each state may declare that it shall apply to fiscal matters or to any proceedings in respect of offences the punishment of which does not fall within the jurisdiction of its judicial authorities at the time of the request for assistance. As we will see, this clause is complementary to the comparable clause in the convention on mutual assistance in administrative matters.

In the Explanatory Report to the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, it was stated that the expression 'proceedings in respect of offences the punishment of which does not fall within the jurisdiction of its judicial authorities at the time of the request for assistance' denotes the area between administrative and criminal matters, which in certain States is classified as 'administrative criminal law' (such as, for instance, the Ordnungswidrigkeit in German law). The expression just cited, which was borrowed mutatis mutandis from the European Convention on Mutual Assistance in Criminal Matters, was chosen to avoid the risk of creating gaps and also in order to ensure complete compatibility between the two Conventions. It refers not only to proceedings which include, after an administrative phase, a judicial phase, but also to proceedings concerning punishable offences which take place exclusively before administrative authorities.

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

---

other appropriate procedure without, however, using any compulsory powers. The latter term covers any procedures which in some States are not considered as "enquiries" in the traditional sense of the term, for example, visits to the premises, enquiries about moral or social behaviour, certain administrative verifications, etc. For a requested State to be bound to give effect to a request, the procedure to be followed in order to obtain the information must be provided for or at least permissible under its domestic law. Put another way, it is not necessary that the procedure be provided for expressly in its legislation for the case in point. On the other hand, pursuant to paragraph 1. d of Article 7, the requested State may refuse to comply with the request should it be contrary to its domestic law or customs.'

[16] There is also a convention between Austria and Germany on mutual assistance in administrative matters (Vertrag zwischen der Republik Österreich und der Bundesrepublik Deutschland über Amts- und Rechtshilfe in Verwaltungssachen BGBl. 526/1990) with general provisions on assis-

Draft Recommendation on Execution of Administrative and Judicial Decisions[17]

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

There are no provisions on international mutual assistance in the enforcement of administrative decisions. The German representative in the Project Group on administrative law withdrew a proposal to design a draft Convention on administrative aid and legal assistance to enforce writs of execution.[18] Nevertheless, the Draft Recommendation offers a set or rules which can be an example to design a general regulation on the transnational recovery of public law claims.

European Union

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

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

> 'Whereas it is not at present possible to enforce in one Member State a claim for recovery substantiated by a document drawn up by the authorities of another Member State;
>
> Whereas the fact that national provisions relating to recovery are applicable only within national territories is in itself an obstacle to the establishment and functioning of the

---

tance in administrative proceedings as well as in their administrative fining procedures (Verwaltungsstrafverfahren in Austria and Bußgeldverfahren in Germany).

[17] See http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Steering_Committees/CDCJ/Documents/2003/CDCJ%20_2003_%2021%20Addendum%20III%20E-1.pdf

[18] See the Draft meeting report of the Project Group on administrative law within the European Committee on legal cooperation at their 15th meeting (27, 18 and 29 November 2002) to be obtained via www.coe.int/cj-da.

common market; whereas this situation prevents Community rules from being fully and fairly applied, particularly in the area of the common agricultural policy, and facilitates fraudulent operations;

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

(…)

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

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

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

At the request of the applicant authority the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim. In order to obtain this information the requested authority must have the same powers as the powers provided for in the law of the requested Member State to recover similar national claims (Article 4, first paragraph).[19]

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

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

[19] The request will indicate the name, address, and any other relevant information relating to the identification to which the applicant authority normally has access of the person to whom the information to be provided relates and the nature and amount of the claim in respect of which the request is made (Article 4, second paragraph).

At the request of the applicant authority[20] the requested authority can recover claims which are the subject of an instrument permitting their enforcement. This will be done in accordance with the laws, regulations or administrative provisions applying to the recovery of similar domestic claims. For this purpose any claim shall be treated as a claim of the Member State in which the requested authority is situated (Article 6).[21] The applicant authority may not make a request for recovery if the claim is contested,[22] it has applied appropriate recovery procedures available to it and the measures taken will not result in the payment of the claim in full (Article 7, second paragraph).

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

The second paragraph of Article 8 continues:

> Notwithstanding the first paragraph, the instrument permitting enforcement of the claim may, where appropriate and in accordance with the provisions in force in the Member State in which the requested authority is situated, be accepted as, recognised as, supplemented with, or replaced by an instrument authorising enforcement in the territory of that Member State.
>
> Within three months of the date of receipt of the request for recovery, Member States shall endeavour to complete such acceptance, recognition, supplementing or replacement, except in cases where the third subparagraph is applied. They may not be refused if the instrument permitting enforcement is properly drawn up. The requested authority shall inform the applicant authority of the grounds for exceeding the period of three months. If any of these formalities should give rise to contestation in connection with the claim and/or the instrument permitting enforcement issued by the applicant authority, Article 12 shall apply.

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

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

---

[20] The request for recovery shall indicate: (a) the name, address and any other relevant information relating to the identification of the person concerned and/or to the third party holding his or her assets; (b) the name, address and any other relevant information relating to the identification of the applicant authority; (c) a reference to the instrument permitting its enforcement issued in the Member State in which the applicant authority is situated; (d) the nature and the amount of the claim, including the principal, the interest, and any other penalties, fines and costs due indicated in the currencies of the Member States in which both authorities are situated; (e) the date of notification of the instrument to the addressee by the applicant authority and/or by the requested authority; (f) the date from which and the period during which enforcement is possible under the laws in force in the Member State in which the applicant authority is situated; (g) any other relevant information (Article 7, third paragraph). The request for recovery also has to contain a declaration by the applicant authority that the conditions set out in Article 7, second paragraph, have been fulfilled.

[21] Except where Article 12 applies.

[22] Except in cases where the second subparagraph of Article 12 (2) is applied.

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

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

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

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

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

Upon a reasoned request by the applicant authority, the requested authority shall take precautionary measures to ensure recovery of a claim in so far as the laws or regulations in force in the Member State in which it is situated so permit (Article 13, first paragraph).[23]

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

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

[23] In order to give effect to the provisions of the first paragraph, Articles 6, 7 (1), (3) and (5), 8, 11, 12 and 14 shall apply mutatis mutandis (Article 13, second paragraph).

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

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

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

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

Article 18 continues:

2. Member States shall renounce all claims on each other for the refund of costs resulting from mutual assistance which they grant each other pursuant to this Directive.

3. Where recovery poses a specific problem, concerns a very large amount in costs or relates to the fight against organised crime, the applicant and requested authorities may agree reimbursement arrangements specific to the cases in question.

4. The Member State in which the applicant authority is situated shall remain liable to the Member State in which the requested authority is situated for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument issued by the applicant authority are concerned.

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

Summary

In conformity with the OECD recommendation the Competition authorities of most EU Member States can exchange information with other Competition authorities. The European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters

has been ratified by only very few EU Member States (Belgium, Germany, Italy, Luxembourg, and Portugal). Therefore, this Convention can only be used as a tool to exchange information between these States. It can be used if the exchange concerns the preparation of both periodic penalty payments and administrative fines. As we have seen, this Convention can only apply to administrative fines if the proceedings in order to impose them do not fall within the jurisdiction of judicial authorities at the time of the request for assistance and if a Member State declares that it will apply this Convention to these fines. Germany, Italy and Luxembourg have done so. The idea is that as soon as these proceedings fall within the jurisdiction of judicial authorities the instruments of mutual assistance in criminal matters will apply. As we will see, this system fails as many EU Member States have systems where administrative authorities have the power to impose pecuniary sanctions in administrative law, such as periodic penalty payments and administrative fines, and administrative courts instead of criminal courts offer legal protection. Unfortunately, the Convention does not contain the obligation for Member States to use compulsory powers in order to assist another Member State.

From the point of view of legal protection and the safeguarding of the right to defend oneself embedded in Article 6 ECHR, an effective system to service official documents is required. The European Convention on the Service Abroad of Documents Relating to Administrative Matters can only be used between the EU Member States of Austria, Belgium, France, Germany, Italy, Luxembourg and Spain. The provisions of this Convention can be used in proceedings where both periodic penalty payments are involved and administrative fines. For this Convention the same remarks apply as those which I have just made at this point concerning the possibilities of the Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters.

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

In 1978, the explanatory report to the European Convention on the obtaining abroad of information and evidence in administrative matters[24] stated the following:

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

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

---

[24] Council of Europe, Strasbourg, 15 March 1978 (entry into force: 1 January 1983), European Treaty series no. 100 (see http://conventions.coe.int).

General European Instruments of Mutual Cooperation in Criminal Matters

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

Council of Europe

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

The European Convention on mutual assistance in criminal matters (20 April 1959)[25]

The European Convention on mutual assistance in criminal matters only concerns mutual assistance in proceedings in respect of offences the punishment of which falls within the jurisdiction of the judicial authorities of the requesting party. The first additional protocol (1978)[26] widens the scope of the Convention to the service of documents concerning the enforcement of a sentence, the recovery of a fine or the payment of costs of proceedings (Article 3 (a)). The second additional protocol to this Convention[27] broadens the scope of the Convention to mutual assistance in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Party by virtue of being infringements of the rule of law, where the decision may give rise to proceedings before a court having jurisdiction in criminal matters in particular (Article 1, third paragraph). Article 15 of the Convention will be replaced by other provisions on the channels of communication. According to these new provisions requests for mutual assistance, as well as spontaneous information, shall be addressed in writing by the Ministry of Justice of the requesting Party to the Ministry of the requested Party and shall be returned through the same channels. However, they may be forwarded directly between the judicial authorities (new Article 15, first paragraph of the Convention). Requests for mutual assistance concerning the proceedings mentioned in paragraph 3 of Article 1 may also be forwarded directly by the administrative or judicial authorities of the requesting Party to the administrative or judicial authorities of the requested Party and returned through the same channels (new Article 15, third paragraph of the Convention). Parties may at any time define by declaration what they deem to be administrative authorities for the purpose of Article 1, paragraph 3, of the Convention (Article 27). They shall also define what authorities they deem to be judicial authorities (the new Article 24 of the Convention).

These changes to the Convention are all part of the first Chapter of this protocol. The second Chapter contains provisions on subjects such as hearing by video conference (Article 9), hearing by telephone conference (Article 10), the spontaneous exchange of information (Article 11), the restitution of articles to the rightful owners (Article 12), the temporary transfer of detained persons to the requested Party (Article 13), the service by post of procedural documents and judicial decisions to persons in the territory of any other Party (Article 16), cross-border observations, controlled delivery, covert investigations, joint investigation teams, criminal and civil liability regarding officials (Articles 21 and 22), the

---

[25] The convention entered into force on 12 June 1962. By 23 July 2003 this convention had been ratified by 43 States (42 members of the COE and Israel).

[26] The first protocol of 17 March 1978 entered into force on 12 April 1982 and had been ratified by 38 States by 23 July 2003.

[27] This protocol of 8 November 2001 had not entered into force by 23 July 2003. By then it had only been ratified by Albania and Denmark.

protection of witnesses (Article 23), confidentiality (Article 25) and data protection (Article 26).

In short, the European Convention on Mutual Assistance in Criminal Matters does not apply to sanctions imposed by administrative authorities, such as periodic penalty payments and administrative fines. As far as administrative fines are concerned, the second protocol will change this situation. There will be an important restriction though. It is only possible to afford mutual assistance if these administrative fines are to be imposed by a decision which may give rise to proceedings before a court having jurisdiction in criminal matters in particular. Unfortunately, as far as I can see, many systems within the EU will only have the possibility to address a court with jurisdiction in administrative matters.

The second protocol will enable not only judicial authorities to communicate their requests of assistance directly with each other, but also administrative authorities. The provision to service procedural documents and judicial decisions directly to persons who are on the territory of another Party only applies to judicial authorities. As we have seen, the second protocol has not entered into force.

The provisions which this European Convention offers can however be used as a tool in the enforcement of competition law by criminal law sanctioning powers. This means that national competition authorities (or national judicial authorities competent to enforce competition law and designated in conformity with article 35 of EC Regulation 2003/1) which cooperate with other competition authorities with a criminal law sanctioning system to enforce competition law can choose between the tools provided to in Article 12 and the tools provided to in this European Convention.

European Convention on the punishment of road traffic offences (30 November 1964)[28]

The European Convention on the punishment of road traffic offences[29] enables the Contracting State where a person has committed a road traffic offence to request the Contracting State of residence to take proceedings against this person. It also provides for the request to enforce a judgment or decision which is enforceable in the State of the offence[30] after the offender has been given an opportunity to present his defence (Article 1, third paragraph). The road traffic offence in respect of which proceedings or enforcement is requested in accordance with Article 1 must be punishable under the laws of both the State of the offence and the State of residence[31] (Article 2, first paragraph). For the purposes of prosecution or the enforcement of a sentence the law of the State of residence shall be applicable. The only traffic rules[32] to be referred to are the ones in force at the place of the offence (Article 2, second paragraph).

The Convention has provisions on both the proceedings on request in the State of residence (section II, Articles 3-7) and the enforcement in the State of residence (section III, Articles 8-13).

---

[28] This convention entered into force on 18 July 1972. On 23 July 2003 it was ratified by Cyprus, Denmark, France, Romania, and Sweden.

[29] According to Article 24 (a) road traffic offences are the offences listed in the 'Common Schedule of Road Traffic Offences' annexed to the convention.

[30] According to Article 24 (b) 'State of the offence' means the State Party to the convention in whose territory a road traffic offence has been committed.

[31] According to Article 24 (c) 'State of residence' means the State Party to the convention in which the person who has committed a road traffic offence is ordinarily resident.'

[32] According to Article 24 (d) 'Road traffic rules' means any rules covering items 4-7 in annex I to this Convention entitled 'Common Schedule of Road Traffic Offences.'

As far as the provisions on proceedings on request are concerned, the authorities of the State of residence shall be competent to prosecute at the request of the State of the offence for a road traffic offence committed in the territory of that State (Article 3). When the State of the offence has addressed a request for proceedings it may no longer proceed or enforce a decision against the offender. However, it may resume proceedings or enforcement whenever the State of residence has notified the State of the offence that it has not taken action on the request. The State of the offence can also resume proceedings or enforcement whenever it has notified the State of residence of the withdrawal of its request before the opening of the hearing in a court of first instance or before the delivery of an administrative decision in the State of residence (Article 5, second paragraph). The limitation of the time for proceedings shall be suspended in the State of the offence as from the date when the competent authority made application on the request for proceedings. It shall begin to run again from the date of the notifications which I have just mentioned. In the State of residence the time limitation for prosecution shall only begin to run from the date of receiving the request for proceedings (Article 6).[33] Documents drawn up by the judicial and administrative authorities of the State of the offence shall have the same legal force in the State of residence as if they had been drawn up by the authorities of that State, and *vice versa* (Article 7).

As far as enforcement in the State of residence is concerned, the authorities of the State of residence shall be competent to enforce the enforceable judgement[34] or administrative decision[35] at the request of the State of the offence (Article 8). Enforcement in the State of residence shall not take place if the offender has been the subject of a final decision in that State in respect of the same offence, if the time-limit for the penalty has expired according to the law of either State of the offence or the State of residence, or if the offender has benefited under an amnesty or a pardon in either the State of residence or the State of the offence (Article 9, first paragraph). The second paragraph of Article 9 provides for the possibilities to refuse enforcement:

> The State of residence may refuse enforcement:
>
> a. if the competent authorities in that State have decided not to take proceedings, or to drop proceedings already begun, in respect of the same act;
>
> b. if the act for which sentence has been pronounced is also the subject of proceedings in that State;
>
> c. to the extent that that State deems it likely that enforcement would do violence to the fundamentals of its legal system or would be incompatible with the principles governing the applications of its own penal law. In particular if, on account of his age, the offender could not have been sentenced in that State.

The Convention differentiates between the enforcement of a fine and the enforcement of some sanction other than a fine. As far as the latter is involved the State of residence shall substitute the penalty by the penalty prescribed by the law of the State of residence for a like offence if necessary (Article 10).

---

[33] When a complaint from the victim is required for the institution of proceedings in the State of residence, the time-limit within which such complaint shall be lodged will begin to run from the date of receipt of receiving the request for proceedings.

[34] According to Article 24 (e) 'judgment' refers to decisions rendered by a judicial authority, including ordonnances pénales and amendes de composition.

[35] According to Article 24 (f) 'Administrative decision' refers to decisions rendered in some States by administrative authorities empowered to impose the penalties prescribed by law for certain classes of road traffic offences.

This Article continues: Such penalty shall, as far as possible, correspond in nature to that imposed by the decision of which enforcement is requested. It may not exceed the maximum penalty provided for by the legislation of the State of residence; nor may it be longer or more severe than that imposed by the State of the offence. In determining the penalty, the competent authorities of the State of residence may also take into consideration the methods whereby the penalty is customarily enforced in that State.

When a request is made for the enforcement of a fine, the State of residence shall collect payment in accordance with the conditions prescribed by its law up to the maximum sum fixed by such law in respect of a like offence or, failing such a maximum, up to the amount of the fine customarily imposed in the State of residence in respect of the like offence (Article 11). In the case of the non-payment of the fine, the State of residence shall, if requested by the State of the offence, apply such compulsory measures as are prescribed by its own laws. The State of residence shall not apply a compulsory or substitute measure involving imprisonment prescribed by a sentence in the State of offence unless expressly requested to do so by that State (Article 12). The State of the offence may no longer enforce any decision against the offender unless a refusal or an inability to enforce has been notified to it by the State of residence (Article 13).

Article 17 governs the relationship between this convention and the European Convention on Mutual Assistance in Criminal Matters.

It reads as follows:

> The Contracting Parties shall extend the legal assistance they afford one another in criminal matters to measures necessary for the execution of this Convention, including the transmission of writs drawn up by the administrative authorities and service of orders to pay, the latter measure being deemed an enforcement measure.

In the explanatory report it is stated:

> 'The mutual assistance provided for in a general way by the latter Convention is that lent between judicial authorities with a view to the punishment of all kinds of offences. As certain road traffic offences are punished in some States by authorities which other States do not consider judicial authorities, it seems necessary to provide that for the purposes of the Convention, assistance will be granted under any circumstances whatever the authorities concerned. Furthermore, (…) the European Convention on Mutual Assistance does not apply to the enforcement of sentences. It follows that the despatch to the State of residence by the State of the offence of a payment order in respect of a person sentenced to a fine might give rise to difficulties in cases where such an act would be regarded by the State of residence as a measure preparatory to enforcement. It is in order to avoid such contingencies that Article 17 provides that the payment order shall not be deemed an enforcement measure.'

According to Article 14 the requests shall be made in writing and be accompanied by the original or the authentic copy of all statements and documents relating to the offence, by a copy of the applicable legal provisions, and by copies of the offender's record of convictions, statutory provisions relating to the time limitation, writs suspending the time limitation, together with supporting facts. The request for enforcement shall be accompanied by the original or an authentic copy of the decision, which shall be certified enforceable in the manner prescribed by the law of the State of the offence.[36]

---

[36] When the decision for which enforcement is requested supersedes another decision without reproducing the statement of the facts, an authentic copy of the decision containing such statement shall be appended.

Requests shall be sent by the Ministry of Justice in the State of the offence to the Ministry of Justice of the State of residence and the reply shall be sent through the same channels.[37] Any necessary communications shall be exchanged either through the channels I just mentioned or directly between the authorities of the Contracting Parties (Article 15, first and second paragraph).[38]

If the State of residence considers that the information supplied by the State of the offence is inadequate to enable it to apply this convention, it shall request the required additional information. It may fix a time-limit for the receipt of such information (Article 16). The State of residence shall inform the State of the offence without delay of the action taken on a request for proceedings or enforcement and shall send to the latter State a document certifying that the penalty has been enforced and also, in the case of proceedings, an authentic copy of the final decision (Article 18). Evidence and documents transmitted under this convention need not be authenticated (Article 20).

The proceeds of fines shall become the property of the State of residence; it shall have the power to collect, at the request of the State of the offence, the costs of prosecution and trial incurred in that State (Articles 21 and 22).

In short, although this Convention has been ratified by no more than 5 States and it applies to sanctions imposed for road traffic offences, it can offer an example for the design of a general convention on mutual assistance in matters of administrative fines and other kinds of administrative law sanctions, such as periodic penalty payments or astreintes.

As we have seen, the Convention has provisions on the transfer of proceedings and the enforcement of final decisions or judgments.

In order to be able to transfer proceedings, the offence should be comparably punishable in both the requesting State (the State of the offence in this Convention) and the requested State (in this Convention the State of residence). The Convention prevents that the person who has committed the offence will be subject to proceedings in two (or more) States for the same offences at the same time, which is of course an important legal safeguard. There are also provisions on the possibility to resume proceedings in the requesting State. As far as the provisions on applicable law are involved, after the transfer of proceedings the law of the requested State will apply to the prosecution, sanctioning and enforcement of the punishment; the road traffic rules of the requesting State will define the offence to be prosecuted and sanctioned.

For the requested State to be able to enforce a judgement or a decision it is necessary that the decision or judgement is enforceable. In some jurisdictions this will mean that the offender has had the opportunity to challenge the decision or judgment and has not used this possibility, or has used one or more possibilities but without success. These are jurisdictions where the decisions are only enforceable if they are *res judicata*. In other jurisdictions this will mean that the enforceability can change during the process. These jurisdictions have a system where the decision or judgment is directly enforceable, unless the offender has made use of the possibility to challenge that decision and/or its immediate enforceability. This Convention only enables States to execute a judgement or decision at the request of another State if the decision is enforceable and the offender has been given an opportunity to present his defence (Article 1, second paragraph). As is stated in the explanatory report, the relevant expression relates to administrative decisions and to judicial

[37] According to Article 19 there is no translation required unless a Contracting Party reserves the right to require a translation.

[38] In the case of an emergency, the communications may be made through Interpol (Article 15, third paragraph).

decisions rendered by default in so far as they are final. As we have seen, as far as sanctions other than fines are concerned the Convention provides for the substitution of the sanction where necessary. The Convention can be used to mutually assist both judicial authorities and administrative authorities having the power to sanction road traffic offences.

European Convention on the International Validity of Criminal Judgments (28 May 1970)[39]

The European Convention on the International Validity of Criminal Judgments enables one Contracting State to enforce a sanction imposed in another Contracting State. A sanction has been defined as any punishment or other measure expressly imposed on a person, in respect of an offence,[40] in a European criminal judgment,[41] or in an *ordonnance pénale*.[42]

The sanction shall not be enforced by another Contracting State unless the act for which the sanction was imposed would be an offence if committed on its territory and the person on whom the sanction was imposed would be liable to punishment if he had committed the act there (Article 4, first paragraph). Articles 5 and 6 form the core of the system to enable a Contracting State to request another Contracting State to enforce the sanction and the possibilities for another Contracting State to refuse to comply:

> Article 5
>
> The sentencing State may request another Contracting State to enforce the sanction only if one or more of the following conditions are fulfilled: a. if the person sentenced is ordinarily resident in the other State; b. if the enforcement of the sanction in the other State is likely to improve the prospects for the social rehabilitation of the person sentenced; c. if, in the case of a sanction involving deprivation of liberty, the sanction could be enforced following the enforcement of another sanction involving deprivation of liberty which the person sentenced is undergoing or is to undergo in the other State; d. if the other State is the State of origin of the person sentenced and has declared itself willing to accept responsibility for the enforcement of that sanction; e. if it considers that it cannot itself enforce the sanction, even by having recourse to extradition, and that the other State can.
>
> Article 6
>
> Enforcement requested in accordance with the foregoing provisions may not be refused, in whole or in part, save: a. where enforcement would run counter to the fundamental principles of the legal system of the requested State; b. where the requested State considers the offence for which the sentence was passed to be of a

---

[39] The Convention entered into force on 26 July 1974. On 22 July 2003 it had been ratified by 15 States: Austria, Cyprus, Denmark, Estonia, Georgia, Iceland, Lithuania, the Netherlands, Norway, Romania, San Marino, Spain, Sweden, Turkey, and Ukraine. Austria, Cyprus, Estonia, Georgia, Lithuania, Romania, Spain, Ukraine have used the possibility (Appendix 1, paragraph b) to declare that they will refuse enforcement of a sanction for an act which, according to their own law, could have been dealt with only by an administrative authority.

[40] An offence 'comprises, apart from acts dealt with under the criminal law, those dealt with under the legal provisions listed in Appendix II to the present Convention on condition that where these provisions give competence to an administrative authority there must be opportunity for the person concerned to have the case tried by a court.' The list in Appendix II only consists of the French unlawful behaviour sanctioned by a 'contravention de grande voirie', the German unlawful behaviour dealt with according to the procedure laid down in the Gesetz über Ordnungswidrigkeiten and the Italian 'any unlawful behaviour' to which Act No. 317 of 3 March 1967 applies.

[41] Defined as 'any final decision delivered by a criminal court of a Contracting State as a result of criminal proceedings'.

[42] These decisions will be listed in appendix III.

political nature or a purely military one; c. where the requested State considers that there are substantial grounds for believing that the sentence was brought about or aggravated by considerations of race, religion, nationality or political opinion; d. where enforcement would be contrary to the international undertakings of the requested State; e. where the act is already the subject of proceedings in the requested State or where the requested State decides to institute proceedings in respect of the act; f. where the competent authorities in the requested State have decided not to take proceedings or to drop proceedings already begun, in respect of the same act; g. where the act was committed outside the territory of the requesting State; h. where the requested State is unable to enforce the sanction; i. where the request is grounded on Article 5.e and none of the other conditions mentioned in that article is fulfilled; j. where the requested State considers that the requesting State is itself able to enforce the sanction; k. where the age of the person sentenced at the time of the offence was such that he could not have been prosecuted in the requested State; l. where under the law of the requested State the sanction imposed can no longer be enforced because of the lapse of time; m. where and to the extent that the sentence imposes a disqualification.

Articles 8-14 regulate the effects of the transfer of enforcement. The enforcement shall be governed by the law of the requested State and that State alone shall be competent to take all appropriate decisions. The requesting State alone shall have the right to decide on any application for review of sentence. Either State may exercise the right of amnesty or pardon (Article 10). When the sentencing State has requested enforcement it may no longer itself begin the enforcement of a sanction which is the subject of that request (Article 11, first paragraph, first sentence).[43] The competent authorities of the requested State shall discontinue enforcement as soon as they have knowledge of any pardon, amnesty or application for review of sentence or any other decision by reason of which the sanction ceases to be enforceable. The same shall apply to the enforcement of a fine when the person sentenced has paid it to the competent authority in the requesting State. The requesting State shall inform the requested State of any decision or procedural measure taken on its territory that causes the right of enforcement to lapse (Article 12). Articles 15-20 regulate the request for enforcement. Articles 21-30 regulate the way judgments rendered *in absentia* and *ordonnances pénales* are dealt with. Articles 31-38 regulate provisional measures such as the arrest of a sentenced person and the possibility to detain him in custody. Section 5, Articles 37-52 regulate the enforcement of sanctions. General clauses can be found in subsection a (Article 37-42), subsection b (Articles 43-44) contains clauses on the enforcement of sanctions involving deprivation of liberty, subsection c (Articles 45-48), which is of interest to us, contains clauses on the enforcement of fines and confiscations, subsection d (Articles 49-52) on the enforcement of disqualification.

The general rule is that a sanction imposed in the requested state shall not be enforced in the requested State except by a decision of the Court of the requested State. If this sanction is only a fine Member States may empower other authorities to take such decisions if these decisions are susceptible to appeal to a court (Article 37). According to Appendix 1, sub. b, each contracting party may declare that it reserves the right to refuse the enforcement of a sanction for an act which, according to the law of the requested State, could only have

[43] The right of enforcement shall revert to the requesting State: a. if it withdraws its request before the requested State has informed it of an intention to take action on the request; b. if the requested State notifies a refusal to take action on the request; c. if the requested State expressly relinquishes its right of enforcement. Such relinquishment shall only be possible if both the States concerned agree or if enforcement is no longer possible in the requested State. In the latter case, a relinquishment demanded by the requesting State shall be compulsory (Article 11, second paragraph).

been dealt with by an administrative authority. Appendix II contains a list of offences other than offences dealt with under criminal law (Article 62).

The principle of *ne bis in idem* (double jeopardy) has been provided for in Articles 53-55. Together with the provisions on taking other judgments into consideration (Articles 56 and 57), these provisions are part of Part III on the international effects of European criminal judgments. A person in respect of whom a European criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State if he was acquitted, if the sanction imposed has been completely enforced or is being enforced, or if the court convicted the offender without imposing a sanction. This is not possible either if the sanction which has been imposed has been the subject of a pardon or an amnesty or if it can no longer be enforced because of lapse of time (Article 53, first paragraph).

Article 53 continues:

> 2. Nevertheless, a Contracting Party shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of *ne bis in idem* if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, of if the subject of the judgment had himself a public status in that State.
>
> 3. Furthermore, any Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of *ne bis in idem* unless that State has itself requested the proceedings.

If new proceedings are instituted against a person who in another Contracting State has been sentenced for the same act, then any period of deprivation of liberty arising from the sentence enforced shall be deducted from the sanction which may be imposed (Article 54).[44]

In short, the European Convention on the International Validity of Criminal Judgments enables States to enforce final judgments delivered by a criminal court and a few decisions of administrative authorities in respect of an offence, such as the German *Ordnungswidrigkeiten*. Germany has not ratified the convention, however. The act for which the sanction was imposed should be punishable and the offender should be liable in both the requesting and the requested State before it is possible to transfer the enforcement of the sanction for the act for which the sanction was imposed. Article 6 contains a list of possible grounds of refusal to comply with a request to enforce a sanction. After the transfer the law applicable is the law of the requested State. When the sentencing State has requested enforcement it may no longer impose a sanction itself. The convention can not be used to enforce periodic penalty payments. As far as administrative fines are concerned, the convention offers the possibility to transfer enforcement, but the scope of this possibility is very narrow, as only France, Germany and Italy have listed their sanctions in Appendix II and more than half of the Contracting States have declared that they will refuse enforcement of a sanction for an act which under their law could only have been dealt with by an administrative authority.

[44] According to Article 55 it is possible to apply wider domestic provisions relating to the effect of ne bis in idem attached to foreign criminal judgments.

European Convention on the Transfer of Proceedings in Criminal Matters (15 May 1972)[45]

One of the aims of the European Convention on the Transfer of Proceedings in Criminal Matters is to avoid the disadvantages resulting from conflicts of competence. Therefore it is stipulated that any Contracting State shall have competence to prosecute under its own criminal law any offence to which the law of another Contracting State is applicable (Article 2, first paragraph). This competence may be exercised only pursuant to a request for proceedings presented by another Contracting State. Any Contracting State having competence under its own law to prosecute an offence may, for the purposes of applying this Convention, waive or desist from proceedings against a suspected person who is being or will be prosecuted for the same offence by another Contracting State. The requested State shall discontinue proceedings exclusively grounded on Article 2 when to its knowledge the right of punishment is extinguished under the law of the requesting State for a reason other than time limitation (Article 4).

When a person is suspected of having committed an offence under the law of a Contracting State, that State may request another Contracting State to take proceedings. Proceedings may not be taken in the requested State unless the offence in respect of which the proceedings are requested would be an offence if committed in its territory and when, under these circumstances, the offender would also be liable to a sanction under its own law (Article 7, first paragraph).

The Articles 8 and 11 form the core of the system of enabling a Contracting State to request for proceedings and the possibilities for another Contracting State to refuse.

These Articles read as follows:

> Article 8
>
> 1. A Contracting State may request another Contracting State to take proceedings in any one or more of the following cases: a. if the suspected person is ordinarily resident in the requested State; b. if the suspected person is a national of the requested State or if that State is his State of origin; c. if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State; d. if proceedings for the same or other offences are being taken against the suspected person in the requested State; e. if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State; f. if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced; g. if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured; h. if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so; 2. Where the suspected person has been finally sentenced in a Contracting State, that State may request the transfer of proceedings in one or more of the cases referred to in paragraph 1 of this article only if it cannot itself enforce the sentence, even by having recourse to extradition, and if the other

[45] The Convention entered into force on 30 March 1978. On 22 July 2003 it had been ratified by 18 States: Albania, Austria, Cyprus, Czech Republic, Denmark, Estonia, Latvia, Liechtenstein, Lithuania, Netherlands, Norway, Romania, Serbia and Montenegro, Slovakia, Spain, Sweden, Turkey, and Ukraine. Albania, Austria, Liechtenstein, Lithuania, Romania and Spain have used the right (Appendix I, paragraph b) to declare that they will refuse a request for proceedings for an act the sanctions for which, in accordance with its own law, can only be imposed only by an administrative authority.

Contracting State does not accept enforcement of a foreign judgment as a matter of principle or refuses to enforce such sentence.

Article 11

Save as provided for in Article 10 the requested State may not refuse acceptance of the request in whole or in part, except in any one or more of the following cases: a. if it considers that the grounds on which the request is based under Article 8 are not justified; b. if the suspected person is not ordinarily resident in the requested State; c. if the suspected person is not a national of the requested State and was not ordinarily resident in the territory of that State at the time of the offence; d. if it considers that the offence for which proceedings are requested is an offence of a political nature or a purely military or fiscal one; e. if it considers that there are substantial grounds for believing that the request for proceedings was motivated by considerations of race, religion, nationality or political opinion; f. if its own law is already applicable to the offence and if at the time of the receipt of the request proceedings were precluded by lapse of time according to that law; Article 26, paragraph 2, shall not apply in such a case; g. if its competence is exclusively grounded on Article 2 and if at the time of the receipt of the request proceedings would be precluded by lapse of time according to its law, the prolongation of the time-limit by six months under the terms of Article 23 being taken into consideration; h. if the offence was committed outside the territory of the requesting State; i. if proceedings would be contrary to the international undertakings of the requested State; j. if proceedings would be contrary to the fundamental principles of the legal system of the requested State; k. if the requesting State has violated a rule of procedure laid down in this Convention.

The Competent authorities in the requested State shall examine the request for proceedings and shall decide, in accordance with their own law, what action to take thereon. If the requested State has not deposited the declaration stating the conditions under which its domestic law permits the punishment of certain offences by an administrative authority, it has to notify the requesting State (Article 9). Germany has used this possibility for the unlawful behaviour dealt with by the procedure according to the *Gesetz über Ordnungswidrigkeiten* (Appendix III).[46] Articles 13 to 20 further regulate the transfer procedure, Articles 21-26 the effects in the requesting State and the requested State of a request for proceedings. Articles 27-29 contain provisions on provisional measures in the requested State such as the provisional arrest of the suspected person. The important principle of *ne bis in idem* has been secured in Article 35-37.

The core of this principle as it has been incorporated in the Convention is Article 35:

1. A person in respect of whom a final and enforceable criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State: a. if he was acquitted; b. if the sanction imposed: i. has been completely enforced or is being enforced, or ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or iii. can no longer be enforced because of lapse of time; c. if the court convicted the offender without imposing a sanction.

2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of *ne bis in idem* if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, or if the subject of the judgment had himself a public status in that State.

[46] There are other declarations by Italy and France.

3. Furthermore, a Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of *ne bis in idem* unless that State has itself requested the proceedings.

In short, the European Convention on the Transfer of Proceedings in Criminal Matters enables Contracting States to transfer proceedings. The Convention even gives any Contracting State the competence to prosecute any offence to which the law of another Contracting State is applicable. The competence may only be exercised pursuant to a request. This system differs from the system we have seen in the Convention on the punishment of road traffic offences which I discussed previously. The requested State cannot take over the proceedings if the offence involved is not an offence or the offender would not be liable under its own law.

The Convention applies to the German *Ordnungswidrigkeiten,* although Germany has not ratified it, and to the French unlawful behaviour sanctioned by a *contravention de grande voirie* and the Italian unlawful behaviour to which Act No. 317 of 3 March 1967 is applicable. Of the 18 Contracting Parties, 6 have declared that they will refuse a request for proceedings for an act the sanctions for which, in accordance with their own law, can only be imposed by an administrative authority.

European Union

Both the Agreement between the Member States on the Transfer of Proceedings in Criminal Matters (Rome 6 November 1990) and the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences (Brussels 13 November 1991) date from the pre-Maastricht era (E.P.C.: European Political Cooperation) and have not been ratified. Therefore, they never entered into force. Nevertheless, they provide an interesting example for the design of a general Regulation.

Agreement between the Member States on the Transfer of Proceedings in Criminal Matters

The Agreement between the Member States on the Transfer of Proceedings in Criminal Matters should have offered the Member States the possibility to send a request for proceedings to the Member State of which the suspected person is a national, to the Member State where the suspected person is currently present or to the Member State in which the suspected person is ordinarily resident (Article 2). 'Offence' has been defined as an act constituting a criminal offence and as an act constituting an administrative offence or an offence against a regulation, which is punishable by a fine provided that, if the offence falls within the competence of an administrative authority, the person concerned shall have the possibility of bringing the case before a judicial body (Article 1). Each Member State may state in a declaration those offences which it intends to exclude from the scope of the Agreement. The other Member States may apply the rule of reciprocity (Article 1, second paragraph). Only if the act underlying the request for proceedings would be an offence if committed in the requested State, may proceedings be taken in that State (Article 3, first paragraph) (*double criminality*). The requested State shall have the competence to prosecute under its own law the offences in respect of which a request for proceedings has been made (Article 4). Where the requested State has accepted the request, the requesting State shall discontinue proceedings against the person suspected of the offence (Article 7). Any act for the purposes of proceedings or preparatory inquiries, performed in a Member State in accordance with the provisions which are in force there, or any act interrupting or suspending the period of limitation shall have the same force in the other State as if it had been validly performed in that state (Article 8). In the requested State the sanction applicable to the offence shall be that laid down by the law of that State unless that law provides otherwise. Where the competence of the requested State is based solely on Article 4, the sanction incurred in that State may not be more severe than the sanction laid down by the

law of the requesting State (Article 11). The Member States shall communicate between their Ministries of Justice (Article 14).

Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences[47]

The Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences should have offered a Contracting State in the cases and under the conditions provided for in this Convention the possibility to request another Contracting State to enforce a sanction which is enforceable in the latter State. The Convention regards judgements, defined as final decisions of a court imposing a sentence[48] in respect of a criminal offence and the imposition of a pecuniary sanction by an administrative authority for an administrative offence or an offence against regulations, 'provided the individual concerned has had the opportunity to bring the matter before a court' (Article 1).

The Convention makes a distinction between the enforcement of a sentence involving a custodial penalty (Article 3) and the enforcement of a sentence involving a pecuniary penalty or sanction (Article 4). The latter may be requested where the sentenced person is a natural person who is permanently resident in the territory of the administering State[49] or has realizable property or income in its territory. If the sentenced person is a legal person it should have its seat in the territory of the administering State or has realizable property or funds in its territory.

The transfer of the enforcement of a sentence needs the agreement of the sentencing State and the administering State (Article 5).

> The transfer of the enforcement shall be subject to the following conditions: (a) the judgment is final and enforceable; (b) the acts or omissions on account of which the sentence has been imposed constitute one of the offences referred to in Article 1(1)(a) according to the law of the administering State or would constitute such an offence if committed in its territory; (c) under the laws of the sentencing State or the administering State, the enforcement is not barred by time limitations; (d) final judgment against the sentenced person in respect of the same acts has not been delivered in the administering State; (e) when a final judgment against the sentenced person in respect of the same acts has been delivered in a third State, the transfer of enforcement would not run counter to the principle of prohibiting double jeopardy.

The communication on the requests for enforcement shall be between the Ministries of Justice (Article 6), although it is possible under certain conditions to have a particular agreement to communicate between judicial authorities directly. The request shall be accompanied by a certified document containing the judgment, the text of the provisions applied, a statement certifying any period of provisional detention already served or any part of the sentence which, where appropriate, had already been enforced and any other matter of relevance for the enforcement of the sentence, and by documents enabling the requested State to decide whether or not to agree to the transfer of enforcement of the sentence (Article 7).

---

[47] The Convention has been signed by Belgium, Denmark, Germany, Greece, Spain, France, Italy and Luxembourg. No Member State has ratified it. The convention can be found via ue.eu.int/ejn.

[48] Defined as the imposition of a custodial or pecuniary penalty by a court or the imposition of a pecuniary sanction by an administrative authority.

[49] Defined as the State to which enforcement of the sentence has been or may be transferred.

The sentencing State may not proceed with enforcement of the sentence once it has agreed with the administering State to transfer enforcement. Where the enforcement of a sentence involving a pecuniary penalty or sanction is transferred, the right of enforcement of the sentence shall revert to the sentencing state if the administering State has not been able to enforce the pecuniary penalty or sanction and it could not apply a substitutive sanction (Article 17).

Article 8 provides for rules on the determination of the transferred custodial penalty, Article 9 on the determination of the pecuniary penalty or sanction.

Article 9 reads:

> 1. If the transfer of enforcement of a sentence involving a pecuniary penalty or sanction is accepted, the competent authorities of the administering State shall, by means which may include a court or administrative order, convert the penalty or sanction into the currency of the administering State at the rate of exchange obtaining at the time when the decision is taken. However, the amount so determined shall not exceed the maximum amount fixed by that State's law for the same offence. Where a penalty or sanction of a different and more severe nature is permitted for the same offence in the administering State, the competent authorities of this State shall leave the amount of the pecuniary penalty or sanction imposed in the sentencing State unchanged.
>
> 2. The administering State which cannot comply with a request for enforcement on account of the fact that it is related to a legal person, may, by virtue of bilateral agreements, indicate its willingness to recover, in accordance with its provisions on civil procedure in enforcement matters, the amount of the pecuniary penalty or sanction imposed by the sentencing State.

The enforcement of the sentence shall be governed by the law of the administering State. The administering State shall be competent to decide on the procedures for enforcement and to determine all the measures relating thereto. Any part of the penalty or sanction enforced in the sentencing State shall be deducted in full from the sentence to be enforced in the administering State (Article 11). Either Member State concerned may grant an amnesty, pardon or commutation of a penalty or sanction, but only the sentencing State may determine any application for a review of the judgment (Article 13). The administering State shall determinate enforcement of the sentence as soon as it is informed by the sentencing State of any decision or measure as a result of which the sentence ceases to be enforceable (Article 14). Monies obtained from the enforcement of pecuniary penalties or sanctions shall accrue to the administering State unless otherwise agreed upon between that State and the sentencing State (Article 15).

In short, this Convention enables Member States to transfer the enforcement of a judgement or a sanction. It not only applies to final decisions of a court imposing a sentence, but also to the imposition of a pecuniary sanction by an administrative authority for an administrative offence or an offence against regulations, 'provided the individual concerned has had the opportunity to bring the matter before a court.' Unlike many other Conventions which I have discussed here, the restriction is not limited to criminal courts. The possibility to transfer the enforcement is not only restricted to the State of residence but also to the State where the person has realizable property or income.

Schengen Implementation Convention (1990)

Articles 48 et seq. contain supplements to the 1959 European Convention on mutual assistance in criminal matters in relation to the EU Member States involved.

According to Article 49 mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of offences which are punishable in one of the two

Contracting Parties or in both Contracting Parties by virtue of being infringements of the rules of law, where the decision may give rise to proceedings before a criminal court, and in the service of judicial documents relating to the enforcement of a sentence or a preventive measure, the imposition of a fine or the payment of costs for proceedings.[50]

Each contracting party may send procedural documents directly by post to persons who are in the territory of another contracting party (Article 52, first paragraph). If the act on which the request for assistance is based is punishable under the law of both contracting parties by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters, the procedure outlined in paragraph 1 must in principle be used for the forwarding of procedural documents (Article 52, fourth paragraph). Procedural documents may be forwarded via the judicial authorities of the requested contracting party where the addressee's address is unknown or where the requesting contracting party requires a document to be served in person. Where there is reason to believe that the addressee does not understand the language in which the document is written, the document – or at least the important passages thereof – must be translated into (one of) the language(s) of the contracting party in whose territory the addressee is staying. If the authority forwarding the document knows that the addressee only understands some other language, the document – or at least the important passages thereof – must be translated into that other language.

In short, the Schengen Implementation Convention broadens the scope of the European Convention on Mutual Assistance in Criminal Matters to cover mutual assistance in proceedings of an administrative authority imposing a sanction, where the decision may give rise to proceedings before a criminal court. According to the Schengen Implementation Convention it is possible to serve judicial documents that relate to the enforcement of a sentence or the imposition of a fine. These documents can be sent directly to the addressee by post. In the light of Article 6 ECHR, Article 52 of the Schengen Implementation Convention contains important provisions on the translation of (important parts of) these documents.

Agreement on Cooperation in Proceedings for Road Traffic Offences and the Enforcement of Financial Penalties imposed in respect thereof[51]

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

[50] According to subparagraphs b, c, d and f mutual assistance will also be afforded in proceedings for claims for damages arising from wrongful prosecution or conviction, in clemency proceedings, in civil actions which are in conjunction with criminal proceedings, and in respect of measures relating to the deferral of delivery or suspension of enforcement of a sentence or a preventive measure, to conditional release or to a stay or interruption of enforcement of a sentence or a preventive measure.

[51] OJ, 2000, L239/429.

exchange of information between the competent authorities, the service of documents directly on the person suspected of having committed a road traffic offence, and the enforcement of decisions.

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

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

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

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

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

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

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

(e) the amount of the fine or financial penalty imposed is at least Euro 40.'[52]

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

These are:

'(a) the road traffic offence giving rise to the decision is not provided for under the law of the requested Contracting Party;

(b) enforcement of the request runs counter to the principle of *ne bis in idem* pursuant to Articles 54 to 58 of the 1990 Convention;

(c) the financial penalty is statute-barred by limitation under the law of the requested Contracting Party;

(d) the person concerned would have been granted an amnesty or a pardon by the requested Contracting Party if the road traffic offence had been committed on the territory of the requested Contracting Party.'

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

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

According to Article 12 requests for the transfer of the enforcement of a decision and all communications relating thereto shall be made in writing. They may be transmitted through

---

[52] According to the second paragraph of this Article the Contracting Parties may bilaterally alter the scope of the provisions under paragraph 1 (e).

[53] Article 8, fourth paragraph, reads: 'At the time of depositing its instrument of ratification, acceptance or approval, each State may, for reasons of a constitutional order or of equal importance, declare that it intends to derogate from the application of paragraph 1 by making a declaration defining the cases in which the financial penalty to be enforced must be declared enforceable by a judicial decision of the requested Contracting Party before enforcement. This judicial decision shall not, however, concern the contents and the amount of the decision of the requesting Contracting Party which is to be enforced.'

any appropriate channels leaving a written record, including a fax. Documents shall be transmitted directly between the competent authorities of the Contracting Parties.[54]

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

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

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

Convention on mutual assistance in Criminal Matters

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

Article 3 of this Convention states that mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in criminal matters in particular. Mutual assistance shall also be afforded in connection with proceedings which relate to offences or infringement for which a legal person may be held liable in the requesting Member State. The requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless the Convention provides otherwise. If these procedures and formalities are contrary to the fundamental principles of law in the requested Member State, the latter is not obliged to comply. The requested Member State shall execute the request for assistance as soon as possible, taking as full account as possible of the relevant procedural deadlines (Article 4, second paragraph). Article 5 allows Member States to send and serve documents directly by post on persons who are in the

[54] They shall be transmitted via the designated central authorities of the Contracting Party if the contact details of the competent authority 'cannot be inferred from the information' furnished by the vehicle registration authorities.

[55] OJ, 2000, C197/1, Council Act of 29 May 2000.

territory of another Member State.[56] Where there is a reason to believe that the addressee does not understand the language in which the document is drawn up, the document, or at least the important passages thereof, must be translated into (one of) the language(s) of the Member State in the territory in which the addressee is staying. If the authority by which the procedural document was issued knows that the addressee understands only some other language, the document, or at least the important passages thereof, must be translated into that other language (article 5, third paragraph). All procedural documents shall be accompanied by a report stating that the addressee may obtain information from the authority by which the document was issued or from other authorities in that Member State regarding his or her rights and obligations concerning the document. When necessary, this information should also be translated (Article 5, fourth paragraph).[57]

Requests for mutual assistance and spontaneous exchanges of information[58] shall be made in writing or by any means capable of producing a written record under conditions allowing the receiving Member State to establish authenticity. These requests shall be made directly between judicial authorities with territorial competence for initiating and executing them, and shall be returned through the same channels. As far as requests for mutual assistance in relation to proceedings as envisaged in Article 3, first paragraph, are involved, and the competent authority is a judicial authority or a central authority in one Member State and an administrative authority in another, requests may be made and answered directly between these authorities.[59]

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

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

The protocol also limits the possibilities of Member States to refuse cooperation. Member States shall not invoke banking secrecy as a reason to refuse cooperation, and mutual

---

[56] According to the second paragraph procedural documents may be sent via the competent authorities of the requested Member State only if the address of the person for whom the document is intended is unknown or uncertain, if the relevant procedural law of the requesting Member State requires proof of service of the document on the addressee, other than proof that can be obtained by post, or it has not been possible to serve the document by ports, or the requesting Member State has justified reasons for considering that dispatch by post will be ineffective or is inappropriate.

[57] According to its fifth paragraph Article 5 shall not affect the application of Articles 8, 9 and 12 of the European Mutual Assistance Convention and Articles 32, 34 and 35 of the Benelux Treaty.

[58] Article 7 has provisions on the spontaneous exchange of information.

[59] Article 6, paragraph 6. Any Member State may declare when giving the notification of Article 27, second paragraph, that it is not bound by paragraph 6.

assistance cannot be refused only on the ground that it involves a fiscal or political offence in its own law.[60]

In short, as far as it involves Competition law sanctioning the Convention on Mutual Assistance in Criminal Matters is more important for EU Member States with a criminal law system to enforce competition law. Nevertheless, the provisions on administrative law fines are also important for EU Member States with an administrative law system to enforce competition law. As we have seen, it is possible to use the instruments of mutual assistance which this convention offers in proceedings brought by administrative authorities and where the decisions to impose a sanction may give rise to proceedings before a court having jurisdiction in particular in criminal matters. Unlike the European Convention on the International Validity of Criminal Judgments, the Agreement between the Member States on the Transfer of Proceedings in Criminal Matters and the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, but in conformity with the Schengen Implementation Convention, the restriction in the scope of the Convention is related to the competence of criminal courts only.

The proposed Framework decision on the application of the principle of mutual recognition to financial penalties[61]

At the Tampere summit (15, 16 October 1999) the European Council decided that the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the European Union. This principle should also apply to financial penalties imposed by judicial or administrative authorities. In November 2000 the Council adopted a programme of measures to implement the principle of mutual recognition giving priority to the adoption of an instrument applying this principle to financial penalties.[62]

On 10 October 2001 the initiative by the United Kingdom, the French Republic and the Kingdom of Sweden was published[63] and this initiative proposed that the Council of the European Union should adopt a Framework decision on the application of the principle of mutual recognition to financial penalties. Apparently, the last version of this Framework decision should have been determined on 30 April 2003. Unfortunately, it has not yet been published.

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

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

> ‘“Judgement” shall mean a final decision requiring a financial penalty to be paid by a natural or legal person, where the decision was made either by:
>
> (i) a court in respect of a criminal offence; or

[60] According to Article 8, third paragraph, Article 50 of the Schengen Implementation Convention is repealed.

[61] The joint declaration by the ministers and state secretaries meeting in Schengen on 19 June 1990 already stated that the governments of the Contracting Parties will open and continue discussions on the possibilities of reciprocal enforcement of fines (OJ, 2000, L239/60).

[62] OJ, 2001, C12/10.

[63] OJ, 2001, C278/4.

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

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

As far as administrative fines are concerned, this Treaty can only be used to recover them transnationally if they have been imposed to punish administrative offences or offences against certain regulations (*Ordnungswidrigkeiten*), where the decision may give rise to proceedings before a court having jurisdiction in criminal matters in particular.

The proposed Framework decision enables the competent authorities of both the issuing state and the executing state to communicate officially with each other directly. Allegedly, the new version of the Framework decision lists offences which can give rise to recognition and enforcement of decisions imposing financial penalties, if they are punishable in the issuing state. As I have heard this list will resemble the list in the Framework decision on the European Arrest Warrant, and therefore, interestingly enough, it should contain quite a large number of offences which, given their serious character, will more likely be punished with liberty depriving sanctions than with financial penalties. The principle of double criminality would not apply to the listed offences, which would be a consequence of the system of mutual recognition. The competent authorities in the executing State would have to recognise a decision which has been transmitted according to the Framework Decision rules without any formality being required and would have to take all the necessary measures for its execution, unless the competent authority would invoke one of the grounds for not recognising execution provided for in Article 4.

The proposed Article 4 states the following:

1. The competent authority in the Executing State may decide not to enforce the judgement if the certificate provided for in Article 2 is not produced, or the particulars in that certificate are incomplete or manifestly incorrect.

2. The competent authority in the Executing State may also decide not to enforce the judgment if it is established that:

(a) judgement against the sentenced person in respect of the same acts has been delivered

– in the Executing State or

– in another Member State or a third State,

and that judgment has been enforced; or

(b) the judgment is exclusively related to acts which were carried out within the territory of the Executing State or a Member State, other than the Executing or Issuing State, and

– these acts do not constitute an offence within the law of that State; or

– enforcement of the decision is barred by statutory time limitations in that State.

3. Any decision not to enforce a judgement shall be taken and notified as soon as possible, together with the reasons for the decision, to the competent authorities of the Issuing State by any means which leaves a written record.

4. Before deciding not to enforce a judgement, the competent authority in the Executing State shall consult the competent authority in the Issuing State and shall ask it to supply the necessary supplementary information without delay.

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

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

The proposed Article 6:

1. Subject to paragraph 3 and to Article 7, the enforcement of the judgement shall be governed by the law of the Executing State, and its authorities alone shall be competent to decide on the procedures for enforcement and to determine all the measures relating thereto.

2. Any part of the penalty recovered in whatever manner in the Issuing State or in another Member State or a third State, shall be deducted in full from the amount which is to be enforced in the Executing State.

3. A judgement imposed on a legal person shall be enforced even if the Executing State does not recognise the principle of criminal liability of legal persons.

The proposed Framework Decision also has a provision to enable the competent authorities of the executing State to apply alternative custodial sanctions to enforce a judgement imposing a financial penalty.

Where it is not possible to enforce a judgment, either totally or in part, an alternative custodial sanction may be applied by the Executing State if its laws, and those of the Issuing State, so provide in such cases. The length of the custodial sanction shall be determined in accordance with the law of the Executing State, but may not exceed any maximum term stated in the certificate transmitted by the Issuing State (proposed Article 7). The Issuing State may not proceed with the enforcement of a judgement after it has been transmitted to the Executing State to undertake enforcement. The right of enforcement of the judgement, including for the purpose of converting the financial penalty into a custodial sanction, shall revert to the Issuing State upon its being informed by the Executing State of the total or partial non-enforcement of the judgement. Only the Issuing State may grant an amnesty, pardon or commutation of a financial penalty or determine any application for a review of the judgement (proposed Article 8, first paragraph).

Summary

The general instruments of mutual assistance in criminal matters are clearly better developed than the ones which I discussed on mutual assistance in administrative matters.[64] There is obviously a longer tradition in mutual assistance in criminal and civil matters than in administrative matters. The instruments which I discussed on mutual assistance in criminal matters can of course be used to cooperate with the imposition of criminal sanctions to enforce criminal law. Concerning sanctions to be imposed by

[64] Directive 76/308/EEC is of course an important exception to the rule.

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

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

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

Concluding Remarks and a Few Recommendations

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

other administrative sanctions, such as periodic penalty payments,[65] and the free movement of persons, goods and capital is for a long time an already existing reality within the EU, I argue that it is necessary to develop a general instrument as soon as possible. It is my opinion that there are important issues of effective law enforcement within Europe at stake. We could of course think of a system where active officers in every Member State compel offenders or representatives of offenders who are legal persons to pay all debts deriving from these pecuniary sanctions as soon as offences are discovered or later at some moment at the borders of each EU Member State. I think that this system is not very attractive, however.

As far as competition law sanctions imposed by national competition authorities against infringements of European competition rules are involved, a Regulation amending Regulation EC 1/2003 would probably be the best way to introduce the necessary provisions. National competition authorities also need provisions of mutual assistance in proceedings imposing sanctions on infringements of national competition rules. The best way to introduce the necessary provisions is by means of a Directive. This could be a Directive with the same provisions as the amended Regulation EC 1/2003 would have and/or a Directive to amend Directive 76/308. A possibility which should be considered would be the transfer of proceedings to the best placed national competition authority which deals with a European offence where a national offence is involved where a body other than the best placed national competition authority is competent.

The end-result of this regulatory activity should be a system, if possible not only restricted to competition law sanctioning, where it is possible to exchange information, to serve documents, to transfer proceedings and/or to enforce final decisions imposing administrative sanctions. The body of conventions and agreements which I discussed above gives a good impression of the way this system should be designed.

[65] Aster Veldkamp discusses the possibility to enforce in the field of waste shipments in, 'The Shifting Boundaries of European and National Enforcement: a Case-study of the Law Concerning Waste Shipments', J.A.E. Vervaele (ed.), *Compliance and Enforcement of European Community Law*, Kluwer Law International, Boston, 1999, pp. 285-299.