COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 14 September 2010 CDCJ (2010) 29

[cdcj/cdcj et documents et instruments juridiques/documents CDCJ/CDCJ(2010)29E] ***English only***

EUROPEAN COMMITTEE ON LEGAL CO-OPERATION
(CDCJ)

« COUNCIL OF EUROPE'S INSTRUMENTS ON MUTUAL ASSISTANCE IN ADMINISTRATIVE MATTERS: TECHNIQUES, SHORTCOMINGS AND POSSIBLE IMPROVEMENTS »

Report prepared by the
« Istituto Di Ricerche Sulla Pubblica Amministrazione (IRPA) »

Document prepared by the CDCJ Secretariat
Directorate General of Human Rights and Legal Affairs

TABLE OF CONTENTS

I R P A

ISTITUTO DI RICERCHE
SULLA PUBBLICA AMMINISTRAZIONE

COUNCIL OF EUROPE INSTRUMENTS ON MUTUAL ASSISTANCE IN ADMINISTRATIVE MATTERS: TECHNIQUES, SHORTCOMINGS AND POSSIBLE IMPROVEMENTS

REPORT PREPARED BY THE
ISTITUTO DI RICERCHE SULLA PUBBLICA AMMINISTRAZIONE (IRPA)

COUNCIL OF EUROPE INSTRUMENTS ON MUTUAL ASSISTANCE IN ADMINISTRATIVE MATTERS: TECHNIQUES, SHORTCOMINGS AND POSSIBLE IMPROVEMENTS[1]

Introduction

In an ever more globalized world, an increasing number of social and economic phenomena relevant to public authorities are assuming an a-territorial and ultra-national dimension, thus escaping effective control of the States. In order to foster and to mainstream interstate cooperation, a set of arrangements were developed at the ultra-national level over time. In general terms, cooperation may concretely be accomplished either on a bilateral or on a multilateral basis, the latter growing at a faster pace in recent times. Moreover, it may be put in place by way of mere practice or on the ground of binding rules. In the second case, binding rules are traditionally laid down in the context of international conventions, which may be, in turn, stipulated autonomously by interested States or under the aegis of international organizations or supranational regimes, among which, as far as Europe in concerned, the United Nations (UN), the Council of Europe (CoE), the Organization for Economic Co-operation and Development (OECD), the (former second pillar of the) European Union (EU). More recently, binding rules are ever more frequently being established in the context of trans-national agreements, stipulated among national institutions or administrations per subject matter or type of legal entities (e.g. neighboring local authorities), normally within the framework of wider international instruments. Lastly, binding rules may sometimes be set out even by means of normative acts, as it has insofar happened within the (former first pillar) of the EU. Interstate cooperation may then be concentrated on relatively general fields (like criminal, civil and commercial, tax, administrative matters) or on much more specific ones (like financial supervision, prevention of terrorism financing, suppression of slavery, etc.), and it may involve on the part of national bodies the exercise of many different activities, including service of documents, exchanging information, carrying out enquiries, obtaining evidence, executing decisions, etc.

This report will focus on the international instruments drawn up under the aegis of the CoE regarding mutual assistance among judicial and administrative authorities on administrative matters generally considered. To this aim, it will thoroughly go through the European Convention on the Service Abroad of Documents relating to Administrative Matters (CETS No. 94) and the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (CETS No. 100). In this context, a set of problematic issues arise as to the scope of application of the conventions, their implications in terms of legal obligations falling upon national administrations, their effective implementation at the national level. In the meanwhile, a sizeable legislation is being adopted even within the EU legal order regarding mutual assistance among national administrations. Three sets of questions may therefore be raised as to the topic at issue. Firstly, what matters are covered by the conventions, and what kind of mutual assistance can be requested by/to State parties? To what extent are national authorities entitled to refuse mutual assistance to one another? Moreover, how many States signed and ratified the conventions? How have the conventions been implemented and what results have they accomplished at the national level? Lastly, what are the main shortcomings, if any, occurring in the field of mutual assistance in administrative matters? What effect do they bring about? In order to answer these questions, the report will take into account, besides the conventions and all related official documentation (as to their signature, ratification, declarations, communications), the parallel legislation in force within the EU as well as any legal material as to the concrete implementation of the conventions at the national level. To this end, a detailed questionnaire was posted, upon authorization and with the aid of the Secretariat of the Council of Europe, to ad hoc authorities of each State parties to the conventions.

[1] This report is the result a collective effort of the IRPA associates, under the coordination of Edoardo Chiti and Marco Pacini. The final draft was drawn up by Susanna Screpanti (as to the section on the EU law) and Marco Pacini.

INTERNATIONAL INSTRUMENTS ON INTERSTATE COOPERATION

The conventions on mutual assistance in administrative matters fall into the wider group of multilateral international instruments on interstate cooperation. Among those instruments, appropriate distinctions may and should be drawn according to several criteria. Notably i) the nature and the aims of interstate cooperation, whether simply mutual assistance (when one State party gives assistance to others in the latter's exclusive national interest) rather than cooperation *stricto sensu* (when State parties cooperate among themselves each in its own national interest), co-ordination (when State parties coordinate among themselves in the pursuit of a trans-national common interest), co-administration; ii) the nature of the cooperating authorities, whether judicial (either prosecuting or adjudicating) or administrative, and, within the latter, whether investigative or other; iii) the nature of the activities for which cooperation is sought, whether repressive (when an infringement is to be punished, either criminal or administrative), contentious (when a controversy is to be settled) or not contentious; iv) the subject matter for cooperation, whether criminal, civil and commercial, administrative, fiscal or other; v) the object and the width of cooperation, whether of a general character of referred to specific procedural acts.

A first set of international instruments focus on legal cooperation in criminal matters. In this context, four groups of obligations might be enucleated. Firstly, a general obligation of mutual assistance is provided for among judicial authorities of State parties as to all type of judicial acts to be adopted within criminal proceedings referring to nearly all type of crimes (CETS No. 30, supplemented by CETS No. 99). Secondly, mutual assistance is provided for among judicial authorities as to specific acts, such as extradition (CETS No. 24, supplemented by CETS No. 86 and by CETS No. 98), transfer of sentenced persons (CETS No. 112, supplemented by CETS No. 167), execution of criminal sentences (CETS No. 70). Thirdly, beyond mere mutual assistance, a higher degree of coordination is envisaged among judicial authorities as to specific crimes, such as money laundering (CETS No. 141 replaced by CETS No. 198), financing of terrorism (CETS No. 198), trafficking in human beings (CETS No. 197), torture and other inhuman treatment (CETS No. 126, supplemented by CETS No. 151 and no 152). Fourthly, coordination is even provided for among administrative authorities, notably investigative authorities, in preventing and investigating those serious crimes.

A second set of international instruments relate to legal cooperation in civil or commercial matters. Firstly, a general obligation of mutual assistance is provided for among judicial authorities of different State parties in obtaining information on their law and procedure in civil and commercial fields as well as on their judicial organization (CETS No. 62, supplemented by CETS No. 97, extending the obligations to criminal matters). Secondly, beyond mutual assistance, cooperation is provided for among judicial or administrative authorities in specific more specific matters, such as registration of wills (CETS No. 77), recognition and enforcement of decisions concerning custody of children and on restoration of custody of children (CETS No. 105), recognition and enforcement of decisions concerning contact orders (CETS No. 192).

A third set of international instruments focuses on legal cooperation in administrative and fiscal matters. Firstly, it is here that, as we will see in greater details, a general obligation of mutual assistance is provided for among administrative and judicial authorities as to service abroad of documents (CETS No. 94) as well as to comply with requests for communicating information, conducting enquiries and obtaining evidence in administrative matters (CETS No. 100). Secondly, a higher degree of mutual assistance is also envisaged among administrative authorities (expressly listed in an annex to the convention) as to a wide range of administrative activities (including exchange of information, tax examinations, recovery of tax claims, measures of conservancy, service of documents) in tax matters (CETS No. 127). Thirdly, beyond mere mutual assistance, a higher degree of co-ordination is requested among judicial and administrative authorities in more specific matters, such as deprivation of the right to drive a motor vehicle (CETS No. 88) and control of the acquisition and possession of firearms by individuals (CETS No. 101). Fourthly, a variable degree of coordination is fostered among border territorial administrative authorities as to any possible public activity falling into their scope of action (CETS No. 106, supplemented by CETS No. 159).

In the light of the foregoing, some remarks may be made as to the conceptual position of conventions CETS No. 94 and CETS No. 100 in the context of CoE conventions on interstate cooperation. In the first place, they are of residual application in two respects. On the one side, though reference is made to the notion of "administrative matters", the conventions seemingly find application to all matters other than criminal, civil or commercial. On the other side, even within the sphere of administrative matters, the conventions find application only where and insofar as other conventions do not. Clearly, these matter-related notions are basically conventional in character, as legal cooperation in criminal, civil or commercial matters well may involve administrative rather than merely judicial functions, while, on the contrary, administrative matters may involve activities conceptually falling within the criminal sphere (such as proceedings for punishing administrative offences). Secondly, the conventions take into account and regulate separately activities which are homogeneous in character (service on the one hand, exchanging information, conducting enquiries, obtaining evidence on the other). Thirdly, on the contrary, the conventions bring together and regulate unitarily activities which are different in character (judicial and administrative activities). Fourthly, the conventions limit themselves to set up a system of mutual assistance which is basic in character.

COE INSTRUMENTS ON MUTUAL ASSISTANCE IN ADMINISTRATIVE MATTERS

a. Scope of application of the conventions

As to the scope of application, the conventions apply to administrative matters as a whole, though with some exceptions, the States parties being entitled to include or exclude specific matters.

In general terms, the conventions apply to all "administrative matters" (Article 1(1), CETS No. 94; Article 1(1), CETS No. 100), but not to fiscal and criminal matters (Article 1(2), CETS No. 94; Article 1(2), CETS No. 100). Nonetheless, State parties may modify the scope of application of the conventions, either by excluding specific administrative matters (Article 1(3), CETS No. 94; Article 1(3), CETS No. 100), or by including specific fiscal matters or «any proceedings in respect of offences the punishment of which does not fall within the jurisdiction of its judicial authorities» (Article 1(2), CETS No. 94; Article 1(2), CETS No. 100). At any rate, «[a]ny other Contracting State may claim reciprocity», this meaning that any declaration in the sense of broadening or narrowing the scope of the conventions would take effect in respect of other State parties only should the latter accept the same modification. Lastly, the conventions shall not affect existing or future international agreements and practices or other arrangements between State parties which relate to the subject matters of the conventions themselves (Article 16, CETS No. 94, Article 12, CETS No. 100), to the effect that the conventions may be automatically derogated from by any different arrangements, either already in force or still to be drawn up, written or unwritten, bearing on the same subject-matters as those of the conventions.

The scope of application of the conventions presents some main features. Firstly, it is connected with an international autonomous and common notion of "administrative matters". What is included into that notion is to be determined in general terms according to the conventions, and not case by case according to legal definitions adopted within the legal orders of the State parties. State parties are, thus, deprived of the power to determine one-sidedly the breadth of their duty to mutual assistance. Secondly, the very notion of "administrative matters" appears to be highly indefinite in nature. In order to circumscribe the sphere of action, therefore, the conventions seem to resort to a twofold criterion. On the hand, the scope of application is carved out from the outside, by the international common notions of criminal and fiscal matters. On the other hand, it should be determined from the inside, trying to identify the common core of "administrative matters". In this context, many different approaches have been employed in different legal regimes over time, more importantly based on the public nature of the persons or of the activities (functions) concerned, of which probably no one can be said to have definitively settled down. Thirdly, the scope of application is to some extent open to modification by the State parties, either by means of declarations to the conventions themselves or by recurring to different "arrangements".

These features reflect the balance among many concurrent or conflicting factors involved in mutual assistance. The leading interest pursued by the conventions is undoubtedly to extend the system of mutual assistance among States beyond the criminal matters and, later, the fiscal ones, to encompass all matters where public authorities or public functions are more or less directly involved. This being the general intent of the conventions, many connected issues have to be tackled concurrently. Firstly, it was necessary to take into account the existing regulatory differences among State parties, in two senses. On the one hand, the boundaries of the so-called administrative sector may profoundly vary from State to State, to the effect that subject matters which are administrative in certain States are civil or commercial in others. On the other hand, the rules governing specific subjects or procedures falling within the administrative sectors may significantly change from State to State, with the consequences that the same matters are subject to common/private law in one State, to public law/authoritative powers in others. Secondly, it is necessary to take into account the regulatory differences among national legal orders in matters included in the administrative sectors, mainly depending on the relevance and the nature of the interests at stake. Thirdly, the drafters of the conventions had both to make safe previous commitments that State parties might have taken regarding specific subject matters and to give them the opportunity to take on new and more specific commitments, either on a bilateral or a multilateral basis, on specific subject matters.

As a result, an innumerable and much variegated group of public activities may fall within the scope of application of the conventions. These activities could conventionally be classified according to many different criteria, such as whether the public activity for which mutual assistance is sought i) affects private parties or other public administrations or bodies; ii) affects people who are citizens of, or reside or carry out their economic or professional activity in, the requesting or the requested State or third States; iii) is judicial or purely administrative or contentious in nature; iv) is aimed at producing positive or negative effects in respect to its addressees, so as to widen or narrow their legal sphere of action; v) implies the mere exercise of private activities or involves the use of authoritative powers on the part of public authorities; vi) impinges upon mere expectations, protected interests, fundamental rights. However, unlike what holds valid in the fiscal and criminal sectors, which comprise a set of relatively homogeneous public actions, each of the activities potentially included into the sphere of action of the conventions may require different and differently incisive means for intervention, with the consequence that, on the one hand, the general system for mutual assistance outlined in the conventions may result in being levelled down, while on the other, it still risks of proving ineffective in some matters and too intrusive in others.

b. Object: from service of documents to obtaining evidence and beyond

As to the object of mutual assistance, the conventions refer to any type of public activity, including some specific activities, the State parties being entitled to refuse compliance in particular cases.

In general terms, the conventions as a whole refer to «mutual assistance [...] whenever a request for assistance in received» (Article 1(1), CETS No. 100), after which they spell out some more specific activities for which request for assistance may be received, notably i) «service of documents» (Article 1(1), CETS No. 94), ii) «requests for information on law, regulations and customs» (Article 13, CETS No. 100), iii) «requests for factual information and for documents» (Article 14, CETS No. 100), iv) «requests for enquiries» (Article 15, CETS No. 100), v) «obtaining evidence» in the context of «judicial functions in administrative matters» (Article 19, CETS No. 100). Theoretically, this implies that a wide range of public activities might be the object of mutual assistance, of which the aforementioned more specific activities constitute an expression, that the drafters might have decided to enucleate, even in two different conventions, in order to regulate them better or in more details. As a consequence, mutual assistance could hypothetically be requested for some very important purposes: for communicating information (e.g. to communicate to a national of State A the start of proceedings in State B), for allowing and favouring participation (e.g. to transmit to public authorities of State B written observations of nationals of State A), for adopting precautionary or provisional measures, even for carrying out executive activities[2].

[2] This being the overall tenor of the conventions, mutual assistance could be hypothetically requested, for example, in a case of illicit cash transfer across the borders, for serving the formal communication of the charges levelled against

Nonetheless, each State party is entitled to refuse to comply with requests for assistance from abroad if it considers i) that the matter to which the request relates «is not an administrative matter» in the sense of the conventions; ii) that «compliance with the request might interfere with the sovereignty, security, public policy or other essential interests of that State» (Article 14(1)(a)(b), CETS No. 94; Article 7(1)(a)(b), CETS No. 100); iii) 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» (Article 7(1)(c), CETS No. 100); iv) that the addressee of the service cannot be found at the address indicated by the requesting authority and his whereabouts cannot be easily determined (Article 14(1)(c), CETS No. 94). In other words, mutual assistance may be refused if, according to the autonomous and unreviewable evaluation of the central authorities of the requested States, the requests fall outside the scope of application of the conventions, may hamper the essential interests of the requested States, may prejudice the fundamental rights of the residents of the latter, or may not be easily complied with.

The abovementioned provisions thus represent the result of an unavoidable compromise between many different needs involved in mutual assistance, including those i) of the requesting States to obtain assistance, ii) of the requested States to protect their essential interests against the risk of their misuse abroad, iii) of the involved private persons against the possibility that information concerning them be used in proceedings adversely affecting them without being appropriately heard. Beyond the interests of the parties, moreover, there seems to lie the concurring purposes, sought by the drafters of the conventions, both to persuade the States to bind themselves to the conventions and to give them enough discretion as to control the information flow in such a wide and variegated field as that of “administrative matters”. According to the provisions being studied, however, the reasons for protection seem to outweigh those of mutual assistance. As a matter of fact, the decisions whether to accept or refuse requests for mutual assistance i) are taken autonomously and one-sidedly by central authorities, ii) involve an unlimited margin of appreciation on the part of the latter, iii) are not subject to any kind of review, either at the judicial or the political level.

This situation might entail some relevant consequences. First of all, leaving to the States the final interpretation of what is meant by “administrative matters” (thus falling within the scope of application of the conventions) may imply a disordered and not homogeneous implementation of the latter, wherein each State could absolve itself from the duty to give assistance simply by qualifying a matter as not administrative. Moreover, conferring upon State parties such a wide discretion in deciding what might interfere with their essential interests (and could therefore justify a refusal to requests for mutual assistance) may give way to a sort of bottom-oriented “practical reciprocity”, whereby each State might refuse, on the ground of interfering with essential interests, to comply with requests of the kind that the requesting State had previously rejected, thus reducing mutual assistance to a very narrow playing field. On the same line, giving State parties the opportunity to refuse to comply with requests for assistance on the ground of a risk of prejudicing fundamental rights could lead to the paradoxical situation that those rights are more protected when proceedings are carried out in the requesting State than in the requested one, where the private person involved reside. To sum up on this point, even if these criteria are conducive to a more attractiveness and flexibility of the overall system of mutual assistance, they are nonetheless suitable to frustrate its effectiveness.

c. Central authorities: organization and competences

The conventions require the designation of ad hoc authorities within the State parties in charge of dealing with requests for mutual cooperation in administrative matters, leaving State parties the

---

the author, collecting and transmitting information on the latter’s account, carrying out searches at the author’s home with a view to discovering the money, effecting seizures on the money thus discovered, and, finally, once the administrative offence is punished by the competent authorities of the requesting State, transferring the money to the latter in order to ensure the effective payment of the fine imposed.

opportunity either to split them up into receiving and forwarding authorities, to support them with subsidiary authorities delegated for specific matters or tasks or to replicate them in each federate State.

As to the institutional framework, States are under the obligation to designate at least one central authority. Nonetheless, they are entitled, i) to «designate other authorities having the same functions as the central authority and [to] determine their territorial competence», in which case, however, «the requesting authority [has in all cases] the right to address itself directly to the central authority»; ii) to «designate a forwarding authority to centralise requests [for service or assistance] from its own authorities and transmit them to the competent central authority abroad». With specific regard to federal States, moreover, they are free to designate more than one central authority and more than one forwarding authority (Article 2(1-3), CETS No. 94; Article 2(1-3), CETS No. 100). The system for mutual assistance outlined by the conventions, therefore, appears to be informed by the principle of a "moderate centralisation", according to which a) mutual assistance is centralised from a variety of dispersed and heterogeneous administrations to well-identified ad hoc authorities, but b) there may exist many ad hoc (subsidiary, forwarding) authorities in charge of specific tasks or responsible for particular territorial areas, provided that c) there exists at least and no more than one central authority at the (federate) State level. In other words, centralisation, far from leading to concentration in one single authority, may coexhist with differentiation and delegation.

As to the organisational structure, «the aforementioned authorities must be either a ministerial department or another official body» (Article 2(4), CETS No. 94; Article 2(4), CETS No. 100). As to this provision, three main remarks may be made. Firstly, ad hoc authorities must be embedded within the public sphere. This might be justified by the fact, on the one hand, that the object of mutual assistance and the mutual assistance itself amount to public functions (meaning activities carried out in the general interest), on the other hand, that those public functions may impinge upon private rights and interests and should, therefore, be subject to the general law regulating public functions. Secondly, ad hoc authorities need not be afforded any special degree of autonomy or independence. This may due to, on the one hand, to the assumption that mutual assistance does not imply the fulfilment of task typically conferred upon independent authorities (such as rule-making or adjudication); on the other hand, to the need not to overburden the requirements set out by the conventions, thus easing the signature and ratification. Thirdly, no recommendation is formulated in the conventions as to the preferable location of the authorities within the public sphere.

As to the tasks and functions, ad hoc authorities are designated in order to «receive, and take action on, requests for assistance in administrative matters emanating from authorities of other Contracting States» (Article 2(1), CETS No. 100; in similar terms, Article 2(1), CETS No. 94), as well as to «centralise requests for assistance from its authorities and to transmit them to competent central authority abroad» (Article 2(3), CETS No. 94; Article 2(3), CETS No. 100). While receiving and forwarding are relatively well-defined activities, taking action is a much more open-ended concept, possibly bringing together a much variegated group of activities. Some of these activities are expressly envisaged by the conventions, such as i) evaluating the conformity of the requests to the conventions; ii) deciding on the acceptance or the refusal to comply with the requests; iii) if the case may be, translating documents or requests or having them translated. A much wider range of activities, however, may be deemed to be encompassed in the concept of taking action, naturally depending on the sensibleness and willingness of State parties. In this direction, nothing would preclude ad hoc authorities from promoting or adopting any measure improving effectiveness and timeliness in the relations with and among them. In broader terms, therefore, the obligation to take action should be conceived as implying ad hoc authorities to assume the responsibility to make the overall system of mutual assistance work correctly.

In sum, the system of mutual assistance reflects the composition of variegated interests, including, on the one hand, by providing for the designation of ad hoc authorities, the need to relieve requesting authorities «of the task of finding out which authority in the requested State is competent to give effect to the request for assistance», and to «ensure that there is compliance with the law of the requested State by enabling that State to control the requests coming from abroad»; on the other hand, by allowing the

designation of subsidiary and forwarding authorities, along with the replication of central authorities at the federate State level, and by simply demanding that ad hoc authorities be public in nature, the need to respect the constitutional framework (whether federal or not) and to take into account the organisational peculiarities of each State party. Nonetheless, this institutional structure exposes mutual assistance to serious risks. As seen above, while ad hoc authorities are given the power to decide on the acceptance or refusal of requests for assistance, thus exerting an active control over the transnational flow of information and documents, they may be located within ministerial departments, thus being subject to governmental control. This may determine the government reinforcing vis-à-vis other national authorities and mutual assistance shifting from a technical to a political approach, forcing the reasons of trans-national cooperation into the rationale of inter-national negotiation.

d. A common procedure for complying with requests for mutual assistance

The conventions outline a uniform procedure for taking action on requests for mutual assistance, at the same time allowing State parties, though within particular limits, to avail themselves of alternative traditional channels, such as consular officers and diplomatic agents, as well as the post.

As to the procedural streamline, the ad hoc authority of the requested State i) receives requests for mutual assistance from abroad; ii) it evaluates the conformity of the requests with the provisions of the conventions, and, in the negative, «so inform the requesting authority without delay, specifying its objection» (Article 6, CETS No. 100); iii) it evaluates the admissibility of the requests, and, «in case of refusal [so informs] the requesting authority without delay, giving the reasons for its refusal» (Article 7, CETS No. 100); iv) it takes action on the requests, including by, *inter alia*, effecting service of documents upon the interested persons (Article 6(1), CETS No. 94) or providing for inquiries to be carried out (Article 15, CETS No. 100); v) where service of documents is requested, it furnishes, or asks the competent authority to furnish, to the requesting authority a certificate confirming that the request has been complied with (Article 8(1), CETS No. 94); vi) when necessary, it provides for a reply to the requests to be drawn up either by itself or by the national authority competent by subject matter, or even by «a private body or a qualified lawyer» (Article 17, CETS No. 100), and it sends the reply to the requesting authority (Article 10(2), CETS No. 100).

Moreover, mutual assistance appears to be inspired by a set of common principles, such as loyal cooperation, duty to give reason, timeliness, procedural due process. It is in this framework that the conventions establish i) the duty to reply to requests for assistance (Article 4, CETS No. 100); ii) exemption from legalisation, apostille or any equivalent formality (Article 4, CETS No. 94; Article 3, CETS No. 100); iii) the exemption from any costs (Article 13, CETS No. 94; Article 8, CETS No. 100), except when particular method for service is required by the requesting State (Article 13(2), CETS No. 94), or for the sums due to experts or interpreters assisting in the fulfilment of the requests (Article 18 and 21, CETS No. 100); iv) the duty to inform the requesting authority without delay of objections to the requests (Article 6, CETS No. 100) or of the reasons for the refusal to comply with it (Article 7(2), CETS No. 100; in similar terms, Article 14(2), CETS No. 94); v) the obligation for the ad hoc authorities to comply with the requests and to reply as soon as possible, or, if the reply requires a long time to prepare, so «to inform the requesting authority, if possible by indicating at the same time the approximate date on which the reply can be expected (Article 10(1), CETS No. 100; in similar terms, Article 6(3), CETS No. 94); vi) the right of the addressees of documents to be afforded a reasonable time to attend, or to be represented in, the proceedings set up abroad (Article 15, CETS No. 94).

As to the opportunity for State parties to resort to alternative means of service or assistance, a distinction must be drawn between the case where State parties limit themselves to request for service or mutual assistance and the case where they directly affect service of documents, either by consular or diplomatic channel or simply by post. In the first case, each Contracting State is free, without conditions, to use diplomatic or consular channels for the purpose of requesting service of documents (Article 12(1), CETS No. 94) or to forward requests for assistance to the central authority of other States (Article 11, CETS No. 100). In the second case, instead, each State party may restrict the possibility for other States to effect

service directly through the post, or by their consular officers or diplomatic agents of documents, on persons within the territory of other Contracting States, but each State may restrict this opportunity in the event of documents to be served upon its nationals or nationals of a third State or stateless persons. (Article 10 and Article 11, CETS No. 94).

e. Uniform rules on applicable law and language

The conventions lay down uniform rules regarding the law and the language applicable to requests for mutual assistance and to activities for complying with those requests, generally stating that mutual assistance is subject to the language of the requesting State and the law of the requested State, while allowing for derogations in specific circumstances and under specific conditions.

As to the language regime, the requests for assistance should be drawn up in, or accompanied by a translation into, the official language of the requested State, but they may be drawn up even in, or accompanied a translation into, one of official languages of the Council of Europe, unless the requested State states an objection in the specific case; the reply may be given in one of the official languages of the requested State, of the requesting State or of the Council of Europe (Article 9, CETS No. 100). A little more complex regime is envisaged for the case of serving documents abroad. Here, documents to be served should not be translated into the language of the requested State, unless service is refused by the addressee on the ground that he/she cannot understand the language, in which case it is up to the central authority of the requested State either to provide directly, or so to request the central authority of the requesting State, for them to be translated, or accompanied by a translation, into its language; when service is requested according to a particular method and the central authority of the requested State so requires, documents must be translated in, or accompanied by a translation into, the official language of the requested State (Article 7, CETS No. 94).

Under this regime, the conventions seek to strike a delicate balance between different competing language-related interests, particularly, on the one hand, the interest of private persons and public authorities to draw up and/or receive official acts in their own language; on the other hand, the common interest of all subjects involved in any specific matter to ensure an effective, timely and free of charge mutual assistance (which could be jeopardized if any official act is to be translated in the language of each State). Beyond the specific issues relating to mutual assistance more general questions lie as to how best attain an ever closer linguistic integration among State parties, while preserving cultural diversity and protecting linguistic minorities in Europe. In this context, the conventions seem to adhere to a principle of “reversible linguistic neutrality”, according to which any requesting State is free to draw up, and the requested State is obliged to receive, any document and request in either the language of the requesting or of the requested State, unless the selected one is not comprehended.

As to the law regulating procedure, requests for mutual assistance from a requesting State i) may be refused if the central authority of the requested State considers that its domestic law or customs prevent the assistance requested (Article 7(1 b, CETS No. 100); ii) must be complied with according to the form prescribed or permitted by the legislation or customs of the requested State (Article 15, CETS No. 100); iii) may be refused, upon a specific reservation to convention no 100, in so far as the legislation of the requested State on access of the public to administrative records does not permit it to comply (Article 16(2), CETS No. 100). With more specific regard to service of documents, then, service is to be effected either by a method prescribed by the internal law of the requested State or by a particular method requested by the requesting authority, but, the in the latter case, such a method must be compatible with the law of the requested State (Article 6(1), CETS No. 94). In other words, mutual assistance is given upon the limits, within the conditions and according to the procedures envisaged by the requested State, unless the requesting State ask for a specific procedure for effecting the service of documents, which must itself be compatible with the law of the requested State.

As it is apparent from the above, the rules regulating the procedure for mutual assistance are informed to the general criterion of the “requested State law”, though with some mitigations in the field of

service of documents. Such a criterion is inherent with the general system of international mutual assistance. Nevertheless it lends itself to some potential risks. As a matter of fact, each State party might adopt an overly restricting legislation, thus preventing requesting State from obtaining mutual assistance, especially in more sensitive matters such as immigration. This situation may engender two main consequences: on the one hand, it may lead to the concrete scope of application of the conventions becoming too much diversified, with the State parties practically reacting to restrictions adopted by other States by adopting analogous restrictions on their part, as if resorting to a form of "practical reciprocity"; on the other hand, it may drive State parties to treat nationals of requesting State parties unreasonably differently from those of the requested State parties, thus determining a form of discrimination contrary to the spirit and the aim of the conventions. On this point, therefore, State parties should be advised to limit the introduction of restrictions, either in legislation or by way of practice, to mutual assistance to what is deemed as being strictly necessary to protect their own national interests.

f. More specific provisions relating to obtaining evidence in administrative matters

Convention no 100 sets out more specific provisions relating to obtaining evidence in the course of judicial proceedings in administrative matters.

More in details, as to the scope of application, the convention introduces special rules regarding the obtaining of evidence among adjudicatory authorities, still allowing the latter to seek other type of mutual assistance according to the general rules. In general terms, the convention refers to cases where «an administrative tribunal or any other authority exercising judicial functions in administrative matters» is in the need of «evidence in an administrative matter» (Article 19(1), CETS No. 100). As to this point, some remarks may be made. Firstly, it is not clear what is to be included in the notion of "judicial functions", whether only adjudicatory activities or also other type of dispute-settlement procedures, including infringement proceedings. Similar doubts may arise regarding the notion of "administrative tribunals", whether it encompasses also judicial authorities when exercising formally administrative activities. Analogously, it may be disputable whether the notion of "evidence" is to be read in an objective sense, thus comprising the traditional means as documentary evidence, witnesses, etc., or in a functional sense, so as to include any means capable of supporting a decision by the abovementioned tribunals or authorities. Nevertheless, a comprehensive reading of these provisions should suggest that this particular pattern of mutual assistance is intended to facilitate the taking of all type of evidentiary materials capable of supporting a decision of any adjudicatory authority (on administrative matters). Obviously, these provisions do not preclude the possibility for adjudicatory authorities to resort to the general procedure for requesting any other type of mutual assistance, even in the course of judicial proceedings.

As to the object of mutual assistance, instead, the Convention generically refers to obtaining evidence, allowing State parties to refuse compliance in particular cases (Article 19(1), CETS No. 100). As a result, mutual assistance could hypothetically be requested for any means of evidence gathering, even implying the exercise of authoritative or compulsion powers, including enquiries, searches, inspections, acquisition of documents, hearing of witnesses, declaration under oath. On the other hand, mutual assistance can be refused on different grounds, namely i) if, and «to the extent that a procedure for obtaining such evidence may be employed for the case in question» (Article 19(1), CETS No. 100); ii) if the requested evidence «is not intended for use in judicial proceedings, commenced or contemplated» (Article 19(2), CETS No. 100); iii) if, and «to the extent that in the requested State the execution [...] does not fall within the functions of an administrative tribunal or any other authority exercising judicial functions in administrative matters» (Article 19(3), CETS No. 100); iv) insofar as any person concerned «has a right or a privilege or duty to refuse to give evidence» under the law either of the requested State or, upon some conditions, of the requesting State (Article 20(3), CETS No. 100). In other words, mutual assistance in this field may seemingly entail the widest range of evidence-taking actions, but on condition that evidence be taken by adjudicatory authorities in a manner compatible to the law of the requested State and not be used in non-adjudicatory proceedings; accordingly, the convention does not bring about any procedural change within the legal order of the requested State.

Here again, the convention outlines a uniform procedure for taking action on requests for mutual assistance, at the same time allowing State parties, though within particular limits, to avail themselves of alternative channels, namely consular officers and diplomatic agents. As to the procedure, i) an adjudicatory authority requests, by means of a specific letter, the ad hoc authority of another State to obtain evidence; ii) the ad hoc authority of the requested State forwards the request to the competent adjudicatory authorities of its State, and iii) receives answers from the latter which then forwards to requesting adjudicatory authorities (Article 19(1), CETS No. 100). Unlike in the general procedure, therefore, wherein the requests necessarily pass through the central authorities of the interested States, when obtaining evidence is at stake requests for mutual assistance are addressed to the ad hoc authorities of the requested States directly by the requesting adjudicatory authorities. This option is probably grounded on the necessity, underpinned by the general principle of separation of powers, not to subject requests arising from adjudicatory authorities to the more or less indirect governmental control exercised through ad hoc authorities. Like in the general procedure, however, adjudicatory authorities are entitled to «obtain evidence directly through their diplomatic or consular agents, provided there is no objection in the State within whose territory evidence is to be taken» (Article 22, CETS No. 100); which is, in turn, justified by the necessity to allow States to exert a control over, and possibly forbid, the exercise on their territory of further public functions by external agents, especially if bearing on potentially sensitive national matters.

EUROPEAN LEGISLATION ON MUTUAL ASSISTANCE IN ADMINISTRATIVE MATTERS

a. EU law on interstate cooperation

We now examine the parallel EU law on interstate cooperation, with specific reference to mutual assistance in administrative matters. Similarly to the CoE, EU law on mutual assistance in administrative matters falls into the wider group of provisions on interstate cooperation. Among those provisions, appropriate distinctions may and should be drawn according to several criteria. Notably i) the nature and the aims of interstate cooperation, whether simply mutual assistance (when one State party gives assistance to others in the latter's exclusive national interest) rather than cooperation (when State parties cooperate among themselves each in its own national interest), co-ordination (when State parties coordinate among themselves in a trans-national common interest), co-administration; ii) the nature of the cooperating authorities, whether judicial or administrative, and, within the latter, whether investigative or other; iii) the nature of the activities for which cooperation is sought, whether repressive (when an infringement is to be punished, either criminal or administrative), contentious or not contentious; iv) the subject matter for cooperation, whether criminal, civil and commercial, administrative, fiscal or other.

A first set of normative acts focuses on legal cooperation in criminal matters, now having their legal basis in Articles 82 – 86 of the Treaty on the Functioning of the European Union (TFEU). In this context, three groups of obligations might be enucleated. Firstly, a general obligation of mutual assistance is provided for among judicial authorities of State parties as to all type of judicial acts to be adopted within criminal proceedings referring to nearly all types of crimes (Convention of 29 may 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union). Legal cooperation has recently been further enhanced with the setting up of the European Judicial Network in criminal matters (Joint Action 98/428 JHA of 29 June 1998, amended by the Decision 2008/976/JHA of 16 December 2008). Secondly, mutual assistance is provided for among judicial authorities as to specific acts, such as extradition (Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Framework Decisions 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA and 2009/299/JHA), transfer of sentenced persons and recognition and execution of criminal sentences (Framework Decision 2008/909/JHA and 2008/947/JHA of 27 November 2008). Thirdly, beside mere mutual assistance, a strengthened pattern for coordination is envisaged through the setting up of Eurojust, a European judicial cooperation body having legal personality whose main task is to facilitate and improve co-ordination and cooperation among the competent judicial authorities of the UE Member States dealing with serious cross-border and organised crime (Decision 2002/187/JHA of 28 February 2002 setting up of Eurojust with a view of reinforcing the fight against serious

crime, as amended by Decision 2003/659/JHA and by Decision 2008/426/JHA of 16 December 2008; Article 85, TFEU). Fourthly, coordination is even provided for among administrative authorities, notably investigative authorities, in preventing and investigating those serious crimes, through Europol (Europol Convention of 1995, replaced by Decision 2009/371/JHA of 6 April 2009).

A second set of international instruments relates to legal cooperation in civil or commercial matters, now having their legal basis in Article 81 TFUE. Firstly, a general obligation of mutual assistance is provided for among judicial authorities of State parties as to all type of judicial acts to be adopted within civil and commercial proceedings referring to nearly all types of legal issues (Regulation no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – the "the Brussels I Regulation" and Regulation no 743/2002 of 25 April 2002, establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters). Legal cooperation has recently been further enhanced with the setting up of the European Judicial Network in civil matters (Decision 2001/470/EC, establishing a European Judicial Network in civil and commercial matters, amended by Decision no 568/2009/EC of 18 June 2009). Secondly, mutual assistance is provided for among judicial authorities as to specific acts, such as service of documents (Regulation no 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, replaced by the Regulation no 1393/2007 of 13 November 2007) or obtaining evidence abroad (Regulation no 1206/2001 on the cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters). Thirdly, beside mutual assistance, cooperation is provided for among judicial or administrative authorities in more specific matters, notably recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility (Council Regulation no 2201/2003 of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II), repealing Regulation no 1347/2000).

A third set of international instruments focus on legal cooperation in administrative and fiscal matters, now having their legal basis in Article 197 of the TFEU. According to the latter, «effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest», the consequence being a shift from the previous setting, according to which, since administrative cooperation did not fall within the competences of the EU, it required a specific legal basis to be found in the Treaty each time, to the new one, whereby a common legal basis seems to be set once for all for any subject matter of interest. In this context, cooperation in administrative matters has insofar taken shape according to many different patterns, which the European normative acts or the legal doctrine have frequently referred to with notions like co-ordination, co-administration, decentralised administration, European concert of regulators, etc. An exhaustive survey of these patterns would fall outside the scope of this report, which will be limited to a schematic outline of some of the most recurrent ones. Firstly, strengthened obligations of mutual assistance are envisaged among competent authorities of the Member States as to a wide range of administrative activities (including exchange of information, tax examinations, recovery of tax claims, measures of conservancy, service of documents) in tax matters (Directive no 77/799/EEC; Directive no 2010/24/EU; Regulation no 1798/2003, as amended by Regulation no 143/2008; Directive no 112/2006/EC, as amended by Directive no 2008/8/EC). Secondly, besides mere mutual assistance, a higher level of co-ordination is requested among judicial and administrative authorities in more specific matters, such as deprivation of the right to drive a motor vehicle (Directive no 2006/126/EC).

Thirdly, and more importantly, a set of different patterns of enhanced cooperation are set in place among independent regulators in different European administrative systems, wherein three main groups may be discerned. As to the first, for example, a common system was created, in the competition field, of interconnected national competition authorities under the coordination of the European Commission, which is placed in a position of functional prominence over the other components of the «European Competition Network» (Regulation EC no 1/2003, the "Commission Notice on cooperation within the Network of Competition Authorities" and "Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities"). As to the second group, a set of formalized European common systems were set up in crucial fields such as electronic communications (Directive

2009/140/EC) or energy (Directives 2009/73/EC and 2009/72/EC), where national authorities of the Member States network together and with the competent European institutions, and even transnational mixed bodies have been set up, like the Body of European Regulators for Electronic Communications (BEREC) (Regulation no 1211/2009) and the Agency for the Cooperation of Energy Regulators (while the Regulation no 713/2009). As to the third group, examples of even more far-reaching integration among national and European authorities may be found in the European System of Central Banks Eurosystem (ESCB), whose regime is directly enshrined in Articles 127 – 133 of the TFEU, the greenhouse gas emission trading scheme for the cost-effective reduction of such emissions in the Community (Directive 2003/87/EC, as amended by Directive 2004/101/CE), the system for financing of the common agricultural policy (Regulation no 1258/1999) and the common system for the food safety (Regulation no 178/2002).

b. EU law on mutual assistance in administrative matters

As seen before, cooperation in administrative matters within the EU is frequently entrusted to a wide range of formal and informal, procedural or organizational, arrangements aimed at co-ordinating the actions of national administrations as well as at effecting co-administration of national and European administrations and institutions in the most various sectors[3]. By contrast, the EU law does not contemplate a general normative act on mutual assistance in administrative matters comparable to the CoE Conventions no 94 and no 100. As a result, there exists no general obligation of mutual assistance among administrative and judicial authorities to serve documents abroad or to comply with requests for communicating information, conducting enquiries and obtaining evidence in administrative matters on any administrative matter. Nonetheless, specific provisions on mutual assistance are widespread across a set of legal acts regulating specific sectors or subject matters. For the purpose of this report, three most relevant and revelatory sectors will be taken into account, notably i) services in the internal market, ii) customs and agricultural matters, and iii) immigration matters. The analysis will follow the main criteria relied upon in the previous paragraph, with specific regard to the aim, the object and the scope of application of the EU-based systems for mutual assistance, as well as to the organization and competences of the central authorities involved (if any).

i. Aim and scope of application of the EU law

In the service sector, a general legal framework is outlined in the Treaty on the Functioning of the EU aimed at favoring freedom of establishment for providers in other Member States (Article 49 TFEU), as well as the free movement of services between Member States (Article 56 TFEU). It is in this context that a general duty is set out for Member States to give each other mutual assistance in performing public functions relating to the exercise of services in the internal market (artt 28 – 36, Directive no 2006/123/EC), except for a number of activities specifically enucleated, including non-economic services of general interest; financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, electronic communications services and networks, services in the field of transport, including port services, etc.. (Article 2). To this end, a wide range of mutual assistance obligations is envisaged, wherein «certain obligations of mutual assistance should apply to all matters covered by this Directive, including those relating to cases where a provider establishes in another Member State. Other obligations of mutual assistance should apply only in cases of cross border provision of services, where the provision on the freedom to provide services applies. A further set of obligations should apply in all cases of cross-border provision of services, including areas not covered by the provision on the freedom to provide services. Cross-border provision of services should

[3] In all the abovementioned European administrative systems, administrative cooperation has been conceived as a legal mechanism to improve and manage implementation of EU law and policies, alternative to direct implementation (by the Commission) or the indirect rule (through national administrations only). Administrative implementation of EU law and policies has, thus, become essentially a matter of joint action by national, supranational and mixed authorities, i.e. bodies composed of representatives of the two levels of authorities (the classic example is comitology, but European agencies provide a further significant case of composite European administrations). The joint administrative execution of EU law and policies takes place mainly through composite proceedings and structures or administrative networks operating in specific sectors.

include cases where services are provided at a distance and where the recipient travels to the Member State of establishment of the provider in order to receive services» (Recital no 108, Directive 2006/123/EC).

In the customs sectors, a general legal framework is outlined in the Treaty on the Functioning of the EU (Article 33, TFEU), while a detailed set of rules are envisaged in bilateral or multilateral agreements as well as in EU normative acts. In general terms, three main patterns of cooperation may be enucleated, namely i) mutual assistance and cooperation in the field of customs, regulated by the European Customs Code; ii) mutual assistance and cooperation in investigating criminal offences (Convention of 29 may 2000, on Mutual Assistance in Criminal Matters between the Member States of the European Union); iii) mutual assistance and cooperation in investigation, disclosure and prevention of administrative breaches of customs legislation (Regulation no 515/97, 18 December 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, as amended by EC Regulation no 766/2008). Lastly, also in the immigration sector, a general legal framework is envisaged in the Treaty on the Functioning of the EU providing for common rules and procedures on immigration matters, with regard to visas, asylum requests and border controls (Articles 77 – 80 TFEU), commonly referred to as the "Schengen cooperation" and closely connected with cooperation and coordination between police services and judicial authorities of the European member States (Articles 81 – 89 TFEU).

ii. Object of mutual assistance

The object of mutual assistance strongly varies across the different EU regimes at issue.

In the service sector, a general obligation of administrative mutual assistance is envisaged (Article 28), according to which State parties give each other mutual assistance and put in place measures for effective cooperation with one another. A set of more specific subject matters for mutual assistance to be given are then enucleated. Notably, i) a general obligation of mutual assistance is laid down in order to ensure the supervision of providers and the services they provide; ii) an alert mechanism is put in place for an effective and fast exchange of information on service activities or on the good repute of the providers; iii) an obligation to exchange information is envisaged among competent authorities of the Member States, in conformity with their national law, on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud taken by their competent authorities in respect of the provider which are directly relevant to the provider's competence or professional reliability; iv) appropriate measures are to be taken by Member States to facilitate exchange of officials in charge of the implementation of mutual assistance and training of such officials, including language and computer training (for this purpose, the Commission establishes multiannual programmes in order to organise relevant exchanges of officials and training, also availing itself of the Internal Market Information System). Member States are further bound to communicate to the Commission information on cases where other Member States do not fulfil their obligation of mutual assistance, in which case the Commission can take appropriate steps, including proceedings provided for in Article 226 of the Treaty, in order to ensure that the Member States concerned comply with their obligation of mutual assistance. The Commission periodically informs Member States about the functioning of the mutual assistance provisions.

In the customs and agricultural sectors, instead, four main mechanisms of mutual assistance are contemplated, notably, i) assistance on request (Article 4 – 12, Regulation no 515/97); ii) spontaneous assistance, without prior request (Article 13 – 16, Regulation no 515/97); iii) exchange of information with the European Commission and third countries (artt. 17 – 22, Regulation no 515/97); iv) the Customs Information System (CIS), an automated information system aimed at meeting the requirements of the administrative authorities responsible for applying the legislation on customs or agricultural matters, as well as those of the Commission (title V, Regulation no 515/97). Moreover, the new Regulation no 766/2008 reinforces and makes more effective mechanisms of EU cooperation and mutual assistance in preventing, investigating and prosecuting operations that are in breach of customs and agricultural legislation. To that end the Regulation supplements the current case-by-case exchange mechanism for spontaneous assistance, with an automatic and/or structured information exchange mechanism between

Member States and between them and the Commission. In this field, mutual assistance may have the object of findings, certificates, information, documents, certified true copies or other reports requested. Any intelligence obtained by the staff of the requested authority and communicated to the applicant authority in the course of the assistance provided may be invoked as evidence by the competent bodies of the Member States of the applicant authority. Mutual assistance in Customs and Agricultural matters also concerns administrative enquiries, including all controls, checks and other action to discover breaches of the relevant EU legislation according to the national law of the requested States.

In the immigration sector, as seen before, since the abolition of police controls at the internal borders of the EU Member States a number of provisions have been made to improve cross-border police cooperation in the Schengen area, including mutual operational assistance and direct information exchange between law-enforcement agencies; cross-border surveillance; cross-border pursuit of suspects; improved communication links between law-enforcement agencies; information exchange via central law-enforcement authorities; secondment of liaison officers. In this context, with specific reference to mutual assistance, a Visa Information System (VIS) was established, in the context of Schengen cooperation, as a system for the exchange of visa data between Member States (Decision no 2004/512/EC). The VIS is aimed at improving the implementation of the common visa policy, consular cooperation and consultation between the central visa authorities; preventing 'visa shopping'; facilitating the fight against fraud, the checks at external border crossing points and in the territories of the Member States; assisting in the identification of persons that do not meet the requirements for entering, staying or residing in a Member State; facilitating the application of the Dublin II Regulation for determining the Member State that is responsible for the examination of a third-country national's asylum application and for examining said application and contributing to the prevention of threats to the internal security of Member States. Moreover, information contained in the VIS may be necessary for the purposes of preventing and combating terrorism and serious crimes and should therefore be available for consultation by the designated authorities and Europol (Decision 2008/663/JHA).

iii. Central authorities: organization and competences

In some cases, an obligation is set upon Member States to designate ad hoc authorities entrusted with performing the tasks provided for by the different regimes. In the service sector, Member States are under the obligation to designate one or more liaison points to communicate to the other Member States and the Commission, which will publish and regularly update the list of liaison points. In normal circumstances mutual assistance should take place directly between competent authorities operating at national, regional and local level, providing information directly to their counterparts in other countries and, if necessary, carry out factual checks, inspections and investigations. The liaison points designated by Member States should be required to facilitate this process only in the event of difficulties being encountered, for instance if assistance is required to identify the relevant competent authority. In the customs and agriculture sector, instead, no specific obligation is laid down to designate ad hoc authorities, and the relevant functions are entrusted to public authorities competent per subject matter according to national law.

In the immigration sector, Member States must designate competent authorities as well as the central access points through which access takes place and to keep a list of the operating units within the designated authorities that are authorised to access the VIS for the specific purposes of the prevention, detection and investigation of terrorist offences and other serious criminal offences as referred to in Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA of 13 June 2002). It is essential to ensure that the duly empowered staff with a right to access the VIS is limited to those who "have a need to know" and possess appropriate knowledge about data security and data protection rules. Requests for access to the VIS should be made by the operating units within the designated authorities to the central access points. These central access points should then process the requests for access to the VIS following a verification whether all conditions for access are fulfilled. In an exceptional case of urgency the central access points should process the request immediately and carry out the checks only afterwards.

iv. Procedure for complying with requests for mutual assistance

In the service sector, specific procedural provisions are laid down for each type of mutual assistance. Firstly, as to supervision over providers providing services in another Member State, the Member State of establishment i) supplies information on providers established in its territory when requested to do so by another Member State and, in particular, confirmation that a provider is established in its territory and, to its knowledge, is not exercising his activities in an unlawful manner; ii) undertakes the checks, inspections and investigations requested by another Member State and inform the latter of the results and, as the case may be, of the measures taken; iii) informs all other Member States and the Commission of any conduct or specific acts by a provider established in its territory which provides services in other Member States, that, to its knowledge, could cause serious damage to the health or safety of persons or to the environment, the Member State of establishment (Article 29). Specific obligations of mutual assistance are provided for in the event of the temporary movement of a provider to another Member State (Articles 30 and 31). Secondly, as to the alert mechanism for an effective and fast exchange of information on service activities or on the good repute of the providers, where a Member State becomes aware of serious specific acts or circumstances relating to a service activity that could cause serious damage to the health or safety of persons or to the environment, it so informs the Member State of establishment, the other Member States concerned and the Commission (Article 32). Thirdly, where information is requested on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud in respect of providers, i) requests in that sense must be duly substantiated, in particular as regards the reasons for the request for information, while the requested Member State must inform the provider of the information supplied (Article 33).

Moreover, a set of general principles are established regarding mutual assistance, according to which i) requests for information and to carry out any checks, inspections and investigations have to be duly motivated; ii) information exchanged can be used only in respect of the matter for which it was requested; iii) providers established in their territory must supply their competent authorities with all the information necessary for supervising their activities in compliance with their national laws; iv) in the event of difficulty in meeting a request for information or in carrying out checks, inspections or investigations, the Member State in question must rapidly inform the requesting Member State with a view to finding a solution; vi) Member States ensure that registers in which providers have been entered, and which may be consulted by the competent authorities in their territory, may also be consulted, under the same conditions, by the equivalent competent authorities of the other Member States; v) Member States supply the information requested by other Member States or the Commission by electronic means and within the shortest possible period of time. To this end, an electronic system for the exchange of information between Member States is also established (Article 34).

In the customs and agricultural sector, the competent authority of the requested Member State transmits to the requesting authority any information which may enable it to ensure compliance with the provisions of customs or agricultural legislation. More in details, the requested authority i) proceeds, in order to obtain the information sought, as though acting on its own account or at the request of another authority in its own country; ii) supplies the requesting authority with any attestation, document or certified true copy of a document in its possession or obtained which relates to operations covered by customs or agricultural legislation; iii) notifies the addressees of all instruments or decisions which emanate from the administrative authorities and concern the application of customs or agricultural legislation; iv) makes available any information in its possession or obtained, and particularly reports and other documents or certified true copies or extracts thereof, concerning operations detected or planned which constitute, or appear to the applicant authority to constitute, breaches of customs or agricultural legislation; v) carries out, or arranges to have carried out, the appropriate administrative enquiries concerning operations which constitute, or appear to the applicant authority to constitute, breaches of customs or agricultural legislation; vi) conduct administrative enquiries as though acting on its own account or at the request of another authority in its own country; vii) communicates the results of such administrative enquiries to the applicant authority.

More provisions govern the carrying out of enquiries by the requested authority and the storage and analysis of relevant data. As to the first, upon agreement between the applicant authority and the requested authority, officials appointed by the applicant authority may be present at the administrative enquiries. Administrative enquiries shall at all times be carried out by the staff of the requested authority. The applicant authority's staff may not, on their own initiative, assume powers of inspection conferred on officials of the requested authority. However, they shall have access to the same premises and the same documents as the latter, through their intermediary and for the sole purpose of the administrative enquiry being carried out. As to the second issue, the EU Regulation on Customs matters sets up a "European central data directory" to help the competent authorities of the Member States detect consignments of goods, including containers and/or means of transport, that may be in breach of customs and/or agricultural legislation. Furthermore, a Customs Information System (CIS), established for purposes of operational and/or strategic analysis, is connected with the national risk analysis systems. Finally, it creates a Customs Files Identification System (FIDE), a central database allowing to identify the investigation files opened in respect of individual persons or traders in any Member State along with the responsible case officers.

In the immigration sector, a general procedure for mutual assistance is set out, according to which i) the Member State responsible for examining the application transmits any consultation requests together with the application number to the VIS, indicating the Member State(s) to be consulted; ii) the VIS forwards the request to the Member State(s) concerned; iii) after receiving the responses from the competent authorities, the VIS forwards them to the requesting Member State. Special procedures are then envisaged for access to information by asylum authorities and by national border control and judicial authorities. As to the first, asylum authorities are entitled to directly search the VIS with fingerprint data, but solely for the purposes of determining the Member State responsible for the examination of an asylum application and of examining an asylum application. Each application file is stored in the VIS for a maximum of five years, and only the Member State responsible have the right to amend or delete data transmitted to the VIS. As to the second, police, border police, customs and authorities responsible for delivering visas and residence permits have access to the Schengen Information System (SIS), evolved into a second generation System (SIS-II), an informative system made out of national networks (N-SIS) connected to a central system (C-SIS) and supplemented by a network known as Supplementary Information Request at the National Entry (SIRENE) (Regulation no 1987/2006).

c. General characters of the EU law on mutual assistance in administrative matters

In the light of the foregoing, and in comparison with the CoE conventions on the subject, it may be argued that the EU law on mutual assistance displays four main features. First of all, a general preference seemingly emerges in the EU law for more far-reaching and deeply formalized techniques of cooperation, resulting in highly structured specific administrative common systems based on shared procedures and structures in well defined subject matters. As a matter of fact, sectorial cooperation appears to be better conducive to tackle administrative fragmentation in specific areas falling within the jurisdiction of the EU (e.g. Internal market or the Area of freedom, security and justice), where mere mutual assistance consequently seems to be relegated to an ancillary role. Secondly, obligations for mutual assistance envisaged by the EU law seem to be decreasingly wide-ranging and detailed depending on their bearing upon criminal, civil, fiscal or administrative matters. Furthermore, the EU law draws a clear-cut separation between mutual assistance in the course of judicial proceedings or administrative activities. Fourthly, the European normative acts on mutual assistance are in large part legally binding, directly applicable in all Member States, while the related obligations are immediately justiciable either on the national or the European level. In the service sector, e.g., should a Member State fail to comply with requests for mutual assistance, the European Commission would be entitled to start an infringement procedure against that State. Lastly, a central role may be assumed in mutual assistance within the EU by the European institutions, more notably, the Commission. Finally, EU law makes a large use of technological systems to exchange information that enormously facilitate the transnational cooperation and can be used at the same time by judicial and administrative authorities.

ACCESSION, IMPLEMENTATION AND ENFORCEMENT AT THE NATIONAL LEVEL

a. Acceding and implementing the conventions

i. Ratification, execution and implementation patterns

The conventions were signed and ratified by eight of the forty-seven State parties to the Council of Europe. Notably, four State parties signed and ratified both conventions (Belgium, Germany, Luxembourg, Italy); four State parties only the Convention on the service abroad of documents (Austria, Estonia, France, Spain); two State parties only the Convention on obtaining abroad documents (Azerbaijan, Portugal). On the issues, four main remarks may be made. Firstly, most State parties to the conventions are among the first contracting Parties to the Council of Europe (except for Azerbaijan and Estonia). Secondly, most State parties signed the conventions just after the conventions were open for signature or their accession to the Council of Europe (Azerbaijan and Estonia). Thirdly, most of State parties are also parties to most European conventions on mutual assistance in criminal or fiscal matters. Fourthly, most State parties share the French-based legal tradition, where administrative or judicial activities, including service of documents, carrying out enquiries, obtaining evidence or information, are regulated unitarily and in details within procedural laws. Bringing together these different points, it may be argued that the conventions must have been seen as a sort of natural extension of the system of mutual assistance in criminal and fiscal matters, conceptually adherent to the structure of the administrative systems of continental Europe, and especially useful where the State parties did not have a widespread consular network at their disposal.

In the majority of State parties, the conventions were simply ratified, according to their respective constitutional frameworks, with no more specific implementing measures being adopted. As a result, the conventions may assume different normative qualifications and entail various effects within the national legal orders, notably as to their ranking in the hierarchy of normative acts (whether constitutional, supra-legislative, legislative, other), the applicability of their provisions (whether binding only upon States or also national administration), the relationships with conflicting legal provisions (whether the latter are to be voided or may be merely un-applied). In most general terms, it may be said that the conventions are, expressly or implicitly, recognised as ranking either supra-legislative status (article 9 of the Austrian Constitution; article 155 of the Azerbaijani Constitution; article 123 of the Estonian Constitution; article 55 of the French Constitution; article 25 of the German Constitution; article 117 of the Italian Constitution; article 37 of the Constitution of Luxembourg), while only in one State they seemingly assume mere legislative status (articles 8 and 277 of the Portuguese Constitution). Moreover, in some State parties, reference is made, in national legislation relating to judicial proceedings, to the Convention on service abroad of documents, either in general terms or more specifically. Only in few State parties, instead, more specific implementing measures were adopted. Lastly, in federal States the conventions recall similar constitutional provisions regulating cooperation in administrative matters among national administrations of federate States (article 22 of the Austrian Constitution; articles 91b and 91c of the German Constitution).

As a result, it may by argued that three main legal effects come into place. As to the first, State parties are bound, at the international level, to legally and practically give effect to the conventions. As to the second, ad hoc authorities are under the obligation, at the transnational level, to take action on, or to comply with, requests from central authorities of other State parties. As to the third, competent national authorities are in turn obliged, on the one side, to cooperate with ad hoc authorities as to requests for mutual assistance coming from abroad, and on the other side, to resort to ad hoc authorities for requesting mutual assistance abroad. While the first two effects directly stem from the conventions being signed and ratified by State parties, the third one mainly originates from national legislation, in two ways. In general terms, mutual assistance being a public function, and ad hoc authorities being national public administrations, they should be deemed as being subject to administrative law (or else to the law on public administrations) of each State party. Moreover, as seen before, in some State parties more specific obligations are envisaged as to give effect to mutual assistance. Nevertheless, though partly subject to

national administrative law, mutual assistance still affords a low level of legal protection to the interested persons of the requesting State parties. This depends on the fact that no specific legal schemes have yet been arranged for settling disputes among ad hoc authorities of different States, with the rather unpractical result that ad hoc authorities of the requesting States, or even private persons in need of mutual assistance from abroad, should bring an action before a competent court of the requested States.

ii. Restrictions to the scope of application on the conventions

As to the general sphere of action, the scope of application defined by the conventions was accepted by most State parties (Azerbaijan, Belgium, France, Portugal, Spain). Nonetheless, in some cases, more matters were included, notably of two groups. The first group referred to «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 » (Germany, Italy, Luxembourg). Sometimes, specific proceedings were even precisely determined to which the conventions apply, like «proceedings for fines under the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*) » (Germany). Elsewhere, instead, while including these types of proceedings, some specific subject matters were excluded, notably fiscal matters (Germany, Luxembourg). The second group of matters to be included, but only with regard to service abroad of documents, referred to fiscal (Austria, Estonia), or even criminal matters (Austria). On the other hand, some matters were excluded from the scope of application, as the ones relating «to foreign trade (exchanges of goods and services, financial transactions and payments) or to prohibitions and restrictions on trans-frontier exchanges of goods» (Italy, Germany).

On this point, two main remarks can be made. On the one hand, confirming the applicability of the conventions to all "administrative matters" without more specific remarks is bound to widen the field of action of at least some of the mutual assistance techniques previously put in place in other sectors, so as to fill the gap left open between criminal and fiscal matters on the one side and civil and commercial matters on the other. Along the same reasoning, widening the scope of application of the conventions reflects the desire of some State parties to shift the limits of their obligations under the conventions so as to embrace typologies of proceedings which are contiguous to criminal proceedings, but which could not be subject to mutual assistance in criminal matters for the fact of not falling within the jurisdiction of judicial authorities. On the other hand, narrowing the scope of application of the conventions might be justified by the will of some State parties to avoid subjecting themselves to the obligation to give assistance in some more sensible matters, relating to which it may be deemed to be preferable either to refrain or abstain for co-operating, or to cooperate case by case on a voluntary or merely political basis, or even to cooperate in the context of other existing bi-lateral or multi-lateral international instruments to which they are actual or prospective parties (such as the European convention on mutual cooperation in fiscal matters, which was opened for signature long later).

As to the scope of application of specific provisions, the opportunity to resort to alternative means of mutual assistance (such as consular officers or diplomatic agents, or the post) was accepted by most State parties (Azerbaijan, Estonia, France, Portugal, Spain). In some States, specific restrictions or derogations were introduced by declaration relating to three main areas. First of all, service by consular officers or diplomatic agents of the requesting State was forbidden in one case (Belgium), allowed only for such documents to be served upon the nationals of the requesting States in other cases (Austria, Germany, Spain). Moreover, service by post was forbidden in one case (Germany), permitted in one case on the basis of reciprocity except for well-defined types of documents relating to expropriation, military service, refugees, arms and weapons, police regulations of aliens (Austria). Lastly, obtaining of evidence in the requested State's territory through diplomatic or consular agents of the requesting State is somewhere forbidden (Germany), elsewhere permitted on condition that i) no measure of coercion is exercised, and ii) the request only concerns nationals of the requesting State (Belgium, Italy, Luxembourg).

The diverse approach adopted by State parties reflects the different weight given by the latter to the multiple and conflicting interests at stake. On the one hand, as we have already seen, the opportunity for State parties to have recourse to alternative means for mutual assistance is oriented at different purposes,

among which to exploit at the maximum level, and in any case not to penalize, existing and potentially more effective or less expensive means of mutual assistance, as well as to leave public administrations or private parties free to choose among different options. On the other hand, the derogations and limitations imposed by some State parties, naturally implying a higher centralisation upon central authorities, seem to be grounded on different reasons. A first reason might be the intent to avoid unnecessary duplications and to rationalise the overall internal system for mutual assistance. Evidence of this is given by the fact that limitations are lifted where existing means may prove more effective (e.g. when service is effected by consular officers upon nationals of their States). A second reason could be found in the willingness of State parties to retain a certain degree of control over assistance-related information and data flowing across their boundaries, especially in more sensible matters. A third reason has probably much to do with the will of the State parties to monopolize in their hands the exercise of public functions within their national territories, especially where measures of coercion are possibly involved. At any rate, these diverging approaches does not appear anyhow to curtail the effectiveness of the system.

b. Central authorities: organization and competences

i. Single/multiple central authority organizational patterns

As to the institutional framework, in most States only one central authority was designated (Azerbaijan, Belgium, France, Italy, Luxembourg, Spain). In federal States, on the contrary, one central authority for each federate State was designated (Austria, Germany), while in one case, one central authority was designated even for the federal State, dealing with matters of national interests, as those concerning refugees, arms and weapons, or police regulations on aliens (Austria). In no cases, instead, neither subsidiary nor forwarding authorities were designated. As to the organisational structure, in most States central authorities were placed within ministerial departments, most frequently within the Ministry of Foreign Affairs (Belgium, France, Italy, Luxembourg, Spain), within the Ministry of Justice (Azerbaijan, Estonia, Portugal), in at least two cases within the Ministry of the Interior (Austria, as to the central authority for the federal State, the federate German State of Bavaria). As to the competences and correlated powers, most States limited themselves to designate their respective central authorities. Other States, on the contrary, have conferred upon the authorities specific powers or drawn up specific procedures in order to discharge their duties.

Clearly, the institutional arrangement of central authorities was seemingly outlined according to two main guidelines. As to the first, the choice between one or more central authorities mirrors the constitutional framework of State parties regarding the allocation of competences among national public entities, notably between federal States and their respective federate States. In the case of Germany, however, where no central authorities were designated at the federal State level, it is not clear what authority may be competent upon requests for mutual assistance in administrative matters falling within the competences of the federal State. As to the second guideline, the organisational structure of central authorities appears to be reasonably justified by the functional expertise of each of the public entities where central authorities were located. In more detailed terms, the Ministry of Foreign Affairs was probably chosen for its experience in external relations and its connections with consular and diplomatic networks; the Ministry of Justice, for the knowledge of the overall judicial sector, including administrative justice, and its privileged relationships with judges and prosecutors; the Ministry of Interiors, for the traditional competences in national administrative affairs, especially in the public security and public order fields, and its far-reaching links with territorial and local administrations. It is rather striking, however, that in no case it was decided better to exploit the added-value of each public administrations, e.g. by adding subsidiary or forwarding authorities.

SHORTCOMINGS AND POSSIBLE SOLUTIONS

a. Main shortcomings in mutual assistance

Signature and ratification of the conventions has been affected by many shortcomings, mainly pertaining to three main issues. First of all, the conventions have been signed and ratified by a very low number of States in comparison with other conventions drawn up within the Council of Europe, especially in the field of mutual assistance, like the European Convention on mutual assistance in criminal matters (47 States), the European Convention on extradition (47 States), the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (37 States). Moreover, even where the conventions were signed and ratified by State parties, they have not been much relied upon by national administrations, as to both service abroad (in 2009, no requests from/to Estonia; 50 requests from/to Italy; 36 requests from/to Spain; 257 requests from/to France), and obtaining evidence abroad (no requests from/to Italy), the requests mainly relating to road traffic offences, sometimes to commercial issues (Spain). A noteworthy exception in represented by the federate German State of Bavaria (in 2009, about 18.000 requests for service and about 5.000 requests for obtaining information), most probably depending of the fact that service and obtaining information to Germany can only be sought through central authorities.. Lastly, even where the conventions were utilised, they did not prove to be as effective as expected, on three main grounds. In many cases, mutual assistance was denied on the reason that it would have run counter to the interests of the requested State parties; when afforded, mutual assistance was frequently unsatisfactory, due to the information given to requesting authorities being incomplete or not translated in one of the official languages of the Coe, or compliance with requests to take action on specific matters being ineffective and not to the point, often without any reasonable justification; when satisfactory, mutual assistance took quite a long time to be provided.

The abovementioned shortcomings may originate from different reasons. Starting with the last of those shortcomings, mutual assistance might have proved quite ineffective for a set of concurring factors, mainly relating to the relationships among central authorities of different State parties and among central authorities and competent administrations of each State party. As to first type of relationships, central authorities might be overstepping their almost unlimited margin of appreciation in autonomously determining what falls outside the notion of administrative matters or what runs counter to the essential interests of the State, thus refusing mutual assistance. As to the second type of relationships, central authorities might be encountering some degree of difficulty in dialoguing with national administrations for different reasons. In general terms, being a public function, mutual assistance is not dispensed from all types of inefficiencies typically striking administrations and the public sector in most State parties. These basilar inefficiencies may, then, be worsened by the incapacity of central authorities to ensure compliance with requests for mutual assistance by national authorities, which may, in turn, depend on different factors, like central authorities not being sufficiently acquainted of the administrative system of their respective States, or not being afforded with enough powers or resources for making themselves obeyed by national administrations[4]. The system of mutual assistance may further be weakened by a lower degree of institutional sensitiveness commonly exhibited by national administrations towards legitimate claims or demands coming from abroad, so that, comprehensibly even if not justifiably, national administrations are keen to finish up with national files before starting with non national. More generally, the system of mutual assistance might suffer from the lack of effective remedies, either at the national or international level, against infringements of the obligation to give mutual assistance, capable of ensuring compliance with requests from abroad as well as to redress potential damages originating therefrom.

[4] On this point, great influence is played by the institutional location as well as the organizational structure of central authorities. As a matter of fact, the Ministry of Foreign Affairs is much more keen on international or trans-national relations; the Ministry of Justice on matters relating to judicial proceedings; the Ministry of the Interiors with matters relating to public order. But no one normally possesses in-depth cognizance of the national administrative system as a whole.

Moving to the second shortcoming, mutual assistance might have been not much relied upon by national administrations for different reasons. In the first place, the abovementioned inefficiencies may have played a non secondary role in taking national administrations away from activating their central authorities. The distance might be sizeably strengthened by the fact that central authorities are frequently unknown to potentially interested national administrations, which apparently depends on governments limiting themselves to officially designated central authorities, without taking any more specific measure capable of streamlining relationships with national administrations (unlike what happens, e.g., in Germany and in Austria, where the Internet sites of governmental institutions frequently provide information on the system of mutual assistance and on related central authorities). Moreover, some national administrations might possibly feel rather reluctant to submit their activities to a sort of indirect discretionary governmental control over their activities, possibly leading to a denial of mutual assistance for substantially political reasons. It may, then, be added that, similarly to what emphasised above, national administrations may display a lower degree of sensitiveness towards legitimate claims or demands located abroad, thus renouncing to ask for mutual assistance (e.g. by requesting that enquiries be carried out in the State of a person demanding recognition of a certificate) where it is not strictly necessary or mandatory according to the law. Lastly, and this is probably the main reason for central authorities being bypassed, mutual assistance is being ever more superseded by a steadily increasing number of transnational cooperation mechanisms set out, at the European or at the international level, that involve the development of networks among national authorities competent per subject matter or the creation of ad hoc bodies aimed at promoting and regulating cooperation.

Moving to the third shortcoming, the conventions were signed by such a low number of States probably owing to the following reasons. First of all, the abovementioned factors that have discouraged national authorities from having recourse to central authorities may also lie at the basis of the limited success of the conventions. After all, why committing to an international system of mutual assistance if it appears of little or problematic use? But beyond this practical observation, there probably lies a more profound consideration as to the overall expediency of the system of mutual assistance designed in the conventions. As we have seen in the previous paragraphs, the scope of application of the conventions is very wide and rather indefinite. Therefore, it may include subject matters which might be of particular relevance for governments. It is true that the conventions allow State parties either to exclude some matters from the scope of application or to refuse assistance if need be to protect the essential interests of the State. Yet availing itself to a large extent of those opportunities would seemingly amount for a State to abandon loyal cooperation in international relations. Similarly, the object of the conventions is almost unlimited. As a result, it may encompass the carrying out of such functions that may require long time and high costs.

Additionally, mutual assistance in administrative matters may be perceived as not being of absolute priority, considering that, on the hand, most administrative actions still deploy and produce effects only on nationals and within the jurisdiction of each State and, on the other, that mere administrative matters, unlike criminal, family-related, fiscal and “political matters” generally involve more particular and territory-related interests. In other words, prospective State parties may be feeling rather uncomfortable at the idea of committing themselves to mutual cooperation, possibly involving exchange of confidential information, just to improve the fulfilment of secondary public interests. Compared to mutual assistance in criminal, civil (with regard to family-related issues) and even fiscal matters, therefore, mutual assistance in administrative matters, especially if as wide-ranging but not in-depth as outlined by the conventions, may seem to pursue less imperative targets while imposing more risky obligations. For many States, therefore, the system may appear not to strike a politically acceptable balance between the opposing needs to foster cooperation while preserving national interests[5].

[5] Undoubtedly, mutual assistance implies high costs, in terms of financial and human resources to deploy as well as of demands to national security. Yet, it may also yield high benefits both for the general interest and the protection of private rights. In criminal and fiscal matters, benefits are commonly perceived as outweighing costs of mutual assistance; moreover, public interests and private rights benefited by mutual cooperation often coincide. In administrative matters, instead, the perceived results of weighing costs and benefits of mutual cooperation highly

b. Consequences of the shortcomings

The abovementioned shortcomings are capable of damaging private interests and public policies in two main respects. First of all, they may jeopardize the proper fulfilment of public interests and policies having a trans-national extent. In general terms, prejudices to public interests may originate from different types of failure, such as when i) actions are taken in one State having a bearing on the territory of another State without giving the latter the opportunity to comment or to object (e.g. a close-to-borders power plant being authorized in a State without receiving comment from neighbouring States); ii) the exercise of economic or professional activities by non nationals is authorised in one State without adequate information being collected from the State of nationality as to the fulfilment of the "fit and proper" or other requirements; iii) administrative (not criminal) infringements cannot be pursued, or proceeds of those infringements cannot be seized or confiscated, in one State due to lack of information or intervention by the administrations of other States (e.g. customs violations committed in one State by persons then fled into the territory of other States). In other words, failures may weaken the efficacy of public control over trans-national activities to the advantage of third persons, who could be able to charge the social/economic costs of their activities to other States. Therefore, an ineffective system of mutual assistance in administrative matters might seriously hamper the attainment of public interests, such as public security and public order, and rule of law, in the sense of punishing infringements and reinstating the *status quo ante*, environmental and labour protection (e.g. when pollution produced in one State is offloaded onto the territory or the air of other States), competitiveness of national companies (e.g. when foreign companies are authorized to operate in one State upon less strict conditions). In these cases, the typical "free rider" behaviour may spread, according to which the authors of negative spill-over effects are not held responsible for them.

Secondly, the shortcomings may, at the same time, hamper full enjoyment of private interests, including fundamental rights. In general terms, infringements of private interests may originate from different types of failure, such as when i) proceedings or procedures are started in one State without proper notice being given to potentially affected persons in another State; ii) proceedings or procedures are carried out in one State without appropriate information being collected by the hypothetically involved authorities of another State; iii) final judicial or administrative decisions are taken without an opportunity being given to potentially affected persons in another State to submit their observations; iv) final decisions are executed without previously being served upon affected persons in another State. These failures might entail, where occurring in the course of judicial proceedings on administrative matters, infringements of the right to a fair trial, with specific reference to the right to access to a court (e.g. when final decisions are taken without essential information detained abroad is not taken into account), fairness (e.g. when potentially affected persons are not informed of, or given the opportunity to take part in, the proceedings), decision within a reasonable time (e.g. when delays in requesting/giving mutual assistance may unduly prolong the final decision); where occurring in the course of administrative procedures, infringements of any substantive rights potentially affected by the final decision, most frequently the rights to private and family life and the right to property (e.g. when recognition of professional qualifications is refused by one State without previously contacting the competent administration of the awarding State).

Along the same line, considering that mutual assistance requires taking action on the part of at least two States, failures may be attributable either to the State where the proceedings/procedures are being carried out, for not requesting or delaying request for mutual assistance to potentially competent States; or to the requested State, for not complying, or delaying compliance with requests coming from abroad; or to both. On the contrary, failures may determine the infringement of the private interests of persons being under the jurisdiction either of the State where the proceedings/procedures are being carried out or of the requested State (e.g. where service of the final decision is requested by the competent State but not complied with by the requested State). However, the possibility that failures in mutual assistance infringe

depend on the subject matter at stake. Mutual assistance in pursuing serious trans-national crimes affecting a large amount of persons surely appears more beneficial than in recognising professional qualifications attained abroad.

fundamental rights is hypothetically higher in the case of judicial proceedings on administrative matters than of mere administrative procedures. In fact, as it is well known, the right to a fair trial comes into play whenever a controversy relating to “civil rights and obligations” or “criminal charges” arises, these notions having a substantial meaning and including almost all administrative matters, except for a few. On the contrary, substantive rights, though getting ever more far-reaching in scope, are inexorably bound to the semantic value of the provisions which recognise them. And the same holds valid also for the right to an effective remedy, whose scope of application is strictly connected with those of the substantive rights assumed to be violated. Last but not least, the abovementioned failures might even engender violations of the principle of non discrimination, due to the fact that persons for whom a mutual assistance would unduly not be requested could be deemed to be discriminated against compared to persons for whom similar mutual assistance was not necessary.

In the light of the foregoing, it could be probably argued that international instruments for the protection of human rights, above all the European Convention on Human Rights (ECHR) may find room for concrete application in this context, which would entail the jurisdiction of the European Court of Human Rights (ECtHR). On this topic, four main points could be made. First of all, questions of mutual assistance should be deemed as falling within the jurisdiction of the States, thus involving a general obligation for them to protect the rights potentially affected by failures in cooperation (Article 1 ECHR). This surely holds true for the State of residence or activity of the prospective applicant, be it the State where the proceedings/procedures are carried out or the requested State, while it might be more problematic for the other States. In the latter cases, however, the general principles affirmed by the ECtHR should come into play, according to which, on the one side, «the concept of “jurisdiction” within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory», while on the other, «a State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction» (ECtHR, judgement 8 July 2004, application no 48787/99, Ilaşcu and Others v. Moldova and Russia). According to this interpretation, therefore, both requesting and requested States should be deemed to have jurisdiction, each one for its part, on the cases. Secondly, the obligation to protect human rights possibly interfered with as a consequence of failures in mutual assistance should be considered as coming into play even if the interested State is not party to the conventions in point. In this regard, mention should be made of the settled principle whereby, though the ECHR «does not impose on States the obligation to ratify international conventions», however «it does require them to take all necessary measures of their choosing to secure the individual’s rights guaranteed» (ECtHR, judgement 12 December 2006, application no 35853/04, Bajrami v. Albania).

Thirdly, mutual assistance should be seen as being the object of positive obligations on the part of the States to give each other mutual assistance in administrative matters. As a matter of fact, as widely seen, omitting to request, or refusing to give, mutual assistance should be considered as being tantamount to directly determining an interference with the rights at stake. As a result, an infringement of human rights might be found where competent authorities did not take all appropriate measures so as to gather any relevant information, or hearing affected persons, through the competent authorities of another State (ECtHR, judgement 7 December 2006, application no 31111/04, Hunt v. Ukraine). Fourthly, not all omissions or refusals on the part of competent administrations would necessarily amount to a violation of human rights. On the contrary, according to the settled case-law of the ECtHR, in order to be compatible with the ECHR those behaviours must be provided for by the law, pursue legitimate interests of the State and be reasonably proportionate to those interests. Lastly, the applicability of the ECHR should entail the jurisdiction of the ECtHR, which should be competent, according to the principle of subsidiarity and observing the margin of appreciation of each State party, to verify the respect of the aforementioned criteria, as to evaluate the suitability of the reasons possibly adduced by State parties for not requesting/giving mutual assistance in a specific case. To this end, it would arguable whether a private person willing to bring a case before the ECtHR as a consequence of failures in requesting/giving mutual assistance should be bound to exhaust the domestic remedies reasonably available in the State to which those failures are attributable but where he/she is not resident nor exercises any activities.

c. Possible solutions to the shortcomings

In order to tackle these shortcomings, some measures may be taken at different levels.

In general terms, it may be advisable to take into wider account the differences occurring in mutual assistance requested/given in the course of adjudicatory proceedings on administrative matters and in the course of mere administrative procedures. Even though the distinction between those types of public activities is not always clear-cut, especially in the "lands in between" of infringement proceedings and appeal proceedings, they nevertheless respond to different rationales and may interfere with different type of public/private interests. On the one hand, adjudicatory proceedings unwind in stereotyped manners, are aimed at settling disputes and regularly call into play the right to a fair trial, which applies to the most "administrative matters" possibly involved. On the other hand, mere administrative procedures may assume a variety of different patterns, are normally devoted to implementing public policies and may impinge upon various substantial rights, whose scope of action is relatively narrower. Taking account of these considerable differences, a sharper separation should probably be drawn among these activities, wherein mutual assistance in the course of adjudicatory proceedings could be moulded on the model consolidated in criminal, civil and commercial matters, while mutual assistance in the course of administrative procedures could be shaped on the pattern more recently set up as to fiscal matters. This division may have the double advantage of leaving State parties free to adopt either pattern of mutual assistance independently of one another, and, consequently, of enhancing the effectiveness of both patterns.

Moreover, focusing on mutual assistance requested/given in the course of administrative procedures, it may be advisable to take account of the similarities occurring among the different objects of mutual assistance provided for in the conventions, namely service abroad of documents on the one hand and taking action on the other. As we have explained above, though it presents some peculiarities as to the applicable law and language, service abroad is nothing but a form of mutual assistance, and should therefore be encompassed in the wider group of activities that State parties are bound to exert under the general obligation to take action upon request. For these reasons, a unitary treatment should probably be envisaged for these objects, wherein service abroad of documents could be included (and even regulated in details) among the specific techniques for mutual assistance together with requests for information on law, factual information, and enquiries. This would have the advantage of both simplifying mutual assistance in administrative matters and of rendering it more homogeneous, as was successfully attained, e.g., in the tax field. It might be argued to the contrary that keeping "service abroad" and "taking action" obligations separated would have the advantage of leaving State parties free to choose the degree of their involvement in mutual assistance. But the number of accessions to the conventions seems to suggest that many States look at the conventions as substantially un-detachable, while only a minority of States opted for the sole service abroad obligation, refusing the other. Moreover, an opt-out clause may be introduced with regards to the service abroad obligation so as to allow State parties to better harmonise the extent of their obligations under the conventions.

Moreover, the current system of mutual assistance could be brought forward into a sort of multi-layer system, with obligations of the State parties significantly varying according to the nature and the features of the matters at stake. More in details, at the bottom level mutual assistance would continue to be requested/given by means of central authorities of State parties. The technique currently envisaged should, therefore, be confirmed, after being supplemented by some ameliorative measures that will be gone through below. In fact, they represent the common basis for mutual assistance, to be relied upon where mutual assistance at other level could not concretely be sought. At the middle level, instead, mutual assistance could be requested/given directly among national administrations competent per subject matter, on a case by case basis. This technique would allow to partially overcome the abovementioned shortcomings relating to the inefficiencies in relations among national administrations and central authorities and the reluctance to submit to forms of political control. But it would be clearly influenced by the capacity of interested administrations to sort out and to get in touch with the competent administrations of other States, which should also be willing to cooperate; and it would probably require an

additional legal authorisation for national administrations to exchange information outside the channels drawn by the conventions. At the top level, lastly, mutual assistance would still be requested/given directly among competent administrations, but within the framework of ad hoc agreements concluded among the parties in well determined matters. This last technique, which is closer to those adopted in the international instruments on cross-border and inter-territorial cooperation, would have the advantage of further streamlining the proper functioning of mutual assistance, while surmounting possible objections connected with the need of prior authorisation for cooperating.

Whatever the system of mutual assistance eventually chosen, however, national administrations should be put in the condition to timely have a precise knowledge of the competent administrations of other potentially interested States, in order to promptly seek mutual assistance on the administrative matters at stake, either by directly addressing requests to their counterparts abroad or by availing themselves of the intermediation of their respective central authorities. To this end, a complete and detailed list should be drafted and periodically updated by each State party, collecting information on every public functions and public services carried out within their own States, and organized according to common key concepts, including "subject matter", "competent authority", "nature of the procedure"[6]. This task may be profitably entrusted to the central authorities, which, on the one side, are much closer to national public authorities, and on the other would be in the condition to periodically update it following to any relevant organizational modification. In order to draw up this list, reference could easily be made either to national (primary or secondary) legislation regulating the organization and functions of each administrative authority or to regulatory acts adopted by each administrative authority specifying, for each administrative procedures falling within their competences, responsible offices and final terms. Lastly, a similar list should not be embedded in the normative body of the existing or prospective conventions on the subject, rather it should be kept and managed as one of the main tasks of central authorities, thus avoiding the risk of those lists not being periodically updated nor even agreed upon from the outset.

In this context, the overall role assumed by ad hoc authorities should also be partially reviewed, both under the organisational and the functional point of view. As to the first point, appropriate organizational and procedural measures should be adopted by the State parties in order to facilitate the internal relations among ad hoc authorities and competent administrations. As to this point, ad hoc authorities should be put in the position to dialogue not only with their foreign counterparts but also with competent national authorities. In this context, the conventions leave large discretion to the States as to the number and nature of ad hoc authorities. State parties should consider placing at least one of their ad hoc authorities in those public departments that are best equipped to relate themselves with other national administrations and bodies. Moreover, State parties should consider better regulating the relations among ad hoc authorities and competent administrations, including by attaching request forms to be used by competent administrations requesting assistance abroad. To this end, State parties should take into account the opportunity to expressly extend to relations among ad hoc authorities and competent administrations their general rules on cooperation among national administrations. Under this point of view, it could also prove useful to concentrate in one single authority, or in a small group of connected authorities, the tasks relating to administrative cooperation provided for by all CoE or international instruments, as well as by EU law, still better if coordinated with ad hoc authorities competent for cooperation in criminal, civil or commercial matters.

[6] The idea of including a list of national administrative authorities in an Annex to CETS No. 100 was discussed during the works leading to the drawing up of the conventions but then abandoned, on the argument that « Since the structure of public administration varies considerably from one State to another, it would have been very difficult and indeed, inopportune, to try to determine in the Convention the types of bodies competent to render each other mutual assistance» (point 10, Explanatory Report to CETS No. 100). This does not mean that a similar list should not be handed down by national central authorities, which, on the one side, are much closer to national public authorities, while on the other would be in the condition to periodically update it following to any major organizational modification.

As to the second point, instead, ad hoc authorities should assume a more proactive role in promoting and facilitating mutual assistance in administrative matters, especially in the context of the renovated multi-layered system discussed above, in different respects. Firstly, ad hoc authorities should confirm and, where possible, reinforce their current tasks of intermediating mutual assistance among national authorities. In this context, State parties should take appropriate measures to bring the work of ad hoc authorities nearer to the cognizance and the demands of national administrations (e.g., as already happens in some countries, by giving evidence of the system of mutual assistance either by circulating informative materials among competent authorities or by giving information on institutional websites). Secondly, as suggested above, ad hoc authorities should be engaged in drawing up the list of every public functions and public services carried out within their respective States. Thirdly, the authorities in discourse should give aid to national administrations willing to directly get in contact with competent administrations of other States, e.g. by furnishing them any sort of available and useful information as to their identification, whereabouts, personnel, etc., as well as by establishing fast-track procedures for cooperation. Fourthly, ad hoc authorities should assume the responsibility of promoting the drafting of, and facilitating the accession to, agreements regarding mutual assistance in well defined administrative matters. In order to better perform these functions, then, it would be highly advisable for ad hoc authorities to set out a sort of network among themselves, with a view to enhancing the efficiency of reciprocal exchange of information, as well as to coordinate their actions in order to successfully attain their renewed institutional tasks (similarly to what has been put in place, e.g., in the context of international cooperation in child protection). In this way, ad hoc authorities would shift from being mere executors of national/foreign requests to become the central points and prime movers of mutual assistance, while striking an acceptable balance among the concurring demands to enhance mutual assistance and maintaining a governmental control thereon.

CONCLUSIONS

To sum up, mutual assistance in administrative matters has proven to be a very important tool of legal cooperation in Europe, for at least two main reasons. As to the first, mutual assistance is expedient to ensure a higher capacity to cope with natural, social and economic phenomena transcending national boundaries and involving the interests of multiple States, especially if not members of other regional international organizations or supranational regimes such as the OECD and the EU. Moreover, while coping with those phenomena, mutual assistance is apt to foster, in line with the constant suggestions of the CoE, a closer organizational and functional integration among national authorities competent per subject matters, suitable to attain from an administrative-oriented bottom-up perspective what is frequently much harder to obtain from a politically governed top- down one. As to the second reason, mutual assistant is much aptly conceived, as it represents a common and sufficiently far-reaching legal basis for achieving legal cooperation in Europe, onto which other existing or prospective means of cooperation may easily be inserted, either merely alternative to (such as the post, or consular and diplomatic networks) or superseding (as being more evolved, like the wide set of cooperation arrangements developed within the EU) it. In the light of the foregoing, the system of mutual assistance designed by the conventions appears to be, in itself, much more advanced than what has insofar been accomplished in the EU, where a common legal basis does not clearly exist (except for the to-be- discovered clauses included in the Lisbon Treaty on administrative cooperation).

Despite its appreciable characters, so far mutual assistance in administrative matters has encountered rather remarkable problems of acceptance and implementation by State parties, as well as of reliance on the part of national administrations. This probably depends on the fact that the relevance traditionally recognized by nations States to the principle of sovereignty over internal public matters, including the right to maintain the secrecy over administrative activities and refraining from cooperating in public matters, is apparently still outweighing the aforementioned benefits stemming from mutual assistance. This is also probably due to two principal factors. On the one hand, mutual assistance in administrative matters is deemed to be less urgent than in other matters, above all criminal matters. On the other hand, as seen before, those benefits are negatively counterbalanced by a set of relevant shortcomings, depending on which prospective State parties may adopt for the system of mutual assistance

designed by the conventions as being i) residual in respect to other tools traditionally employed in international relations or more advanced forms of legal cooperation, especially those developed in the EU; ii) not sufficiently flexible to meet the demands of assistance originating in each retailed administrative sector, this implying that the same pattern for mutual assistance may go too far in some subject matters and be insufficient in others; iii) potentially risky for the delicate balances achieved within the States between political institutions and administrations, or between different administrations, where the latter may not be willing to subject their activities to more or less direct governmental control; iv) probably burdened by the same bureaucratic inefficiencies as common administrative action. In other words, mutual assistance in administrative matters seems to be the victim of its very farsightedness: such a wide scope of application requires a too low-levelled common ground of obligations, which renders the overall system less attractive to States and administrations.

In order to tackle these deficiencies, a set of actions could be taken at different levels, according to a proportionality-based approach (even by adopting recommendations addressed to State parties to the conventions or to the CoE), in the following directions: i) mutual assistance in the course of adjudicative proceedings should be treated separately (at least under a theoretical viewpoint) from mutual assistance in administrative procedures; ii) service abroad and taking action obligations should be kept together, as being different objects of the same function; iii) the model of mutual assistance by the intermediation of ad hoc authorities should be supplemented by the two models of mutual assistance among competent authorities and of mutual assistance in the framework of ad hoc agreements; iv) the risk of infringements of human rights originated from failures in mutual assistance should be properly underlined (appropriately stressing that mutual assistance in the course of judicial proceedings may interfere in nearly all cases with the right to a fair trial); v) a list of the public functions performed by national authorities should be drawn up by ad hoc authorities, with a view to facilitating and fostering mutual assistance, especially among competent authorities; vi) the organizational dimension of ad hoc authorities should be thoroughly reviewed, aiming at mainstreaming the relations with national authorities and at enhancing their operative autonomy; vii) the functional dimension of ad hoc authorities is also worth great attention, in order to enhance and improve their proactive role in promoting mutual assistance; viii) a transnational network of ad hoc authorities would also be highly advisable, which could profitably ameliorate the internal relations among themselves and even strengthen their position toward national administrations.

BIBLIOGRAPHY

On the phenomena underpinning the need for an ever closer interstate cooperation, S. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 New York University Journal of International Law and Politics 663 (2005);

In general terms, on mutual assistance in administrative matters, E. Loebenstein, *International Mutual Assistance in Administrative Matters*, in *Österreichische Zeitschrift für öffentliches Recht*, Supplementum 2, Springer-Verlag, Wien-New York, 1972.

On the issues relating to the serving of documents, in a comparative perspective, D. Campbell, *Comparative Law Yearbook of International Business: Serving Process and Obtaining Evidence Abroad*, Wolters Kluwer, 1998.

On the questions concerning the exercise of jurisdiction over cases involving mutual assistances, P. Schlosser, *Jurisdiction and international judicial and administrative co-operation*, in *Recueil des cours / Académie de Droit International de La Haye*, 284 (2000), S. 13 – 428

On mutual assistance between international organizations and states, E. Fromageau, *Assistance in Administrative Matters between International Organizations and States: Towards a Clearer Legal Framework*, available at www.iilj.org.

On mutual assistance in the financial sector R. SANSONETTI, *L'entraide administrative internationale dans la surveillance des marchés financiers: Standards internationaux et réception en droit suisse*, Études suisses de droit bancaire, Schutlhess Verlag, 1998; F. Bellanger, T. Tanquerel (eds.), *L'entraide administrative*, Schulthess Verlag, 2005.

On mutual assistance in the context of the protection of children, W. Duncan, *Administrative and judicial co-operation with regard to the international protection of children*, in W. P. Heere, *International law and The Hague's 750th anniversary*, Springer, 1999.

On mutual assistance in the context of the protection of the environment, J. Sommers, *Verwaltungskooperation am Beispiel administrativer Informationsverfahren im Europäischen Umweltrecht*, Springer, 2003.

On the relationships among central authorities in the context on mutual assistance, S. Corneloup, V. Corneloup, *Les contentieux de la coopération des autorités centrales dans le cadre des conventions de La Haye - Compétence administrative ou judiciaire?*, in Revue *critique de droit international privé*, 89 (2000) 4, S. 641-680.

On the bearing of the European Convention on Human Rights on mutual assistance F. Marchandier, *La contribution de la cour européenne des droits de l'homme à l'efficacité des conventions de la Haye de coopération judiciaire et administrative*, in *Revue critique de droit international privé*, 96(2007), 4, S. 677-715.

On cooperation in administrative matters within the EU, L. B. Auby, J. Dutheil Rochère, *Droit administratif européen*, Bruxelles, Bruylant, 2007; P. Craig, *EU Administrative Law*, Oxford University Press, 2006; E. Schmidt-Aßmann, '*Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*' in *Europarecht*, 1996, 270; E. Schmidt-Aßmann, *Introduction: European Composite Administration (Verwaltungsverbund) and the role of European administrative law*, in O. Jansen and B.

Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia, 2008); E Chiti, C. Franchini, *L'integrazione amministrativa europea*, Bologna, Il Mulino, 2003.

On administrative cooperation through mixed procedures and structures, F. Bignami, S. Cassese (eds), *Il procedimento amministrativo nel diritto europeo*, Milano, Giuffrè, 2004; E. Chiti, *An important part of the EU's institutional machinery. Features, Problems and Perspectives of European Agencies*, in *Common Market Law Review*, 2009, 1395; M. Savino, *I Comitati europei e il procedural supranationalism: il terzo carattere della sopranazionalità europea,* in S. Battini, G. Vesperini (eds), *Lezioni di diritto amministrativo europeo,* Milano, Giuffrè, 2006.

On cooperation in police and immigration matters at the Schengen and EU level, M. Santiago, *Europol and police cooperation in Europe,* Lewiston-Queenston-Lampeter, 2000; A. Moore (ed.), *Police and judicial cooperation in the European Union*, Cambridge, 2004; S. Kabera Karanja, *Transparency and proportionality in the Schengen information system and border control co-operation*, Leiden - Boston, Nijhoff, 2008.

On EU networks in administrative matters, including in customs and agricultural matters, P. Craig, *Shared administration and networks: global and EU perspectives,* in G. Anthony, J-B Auby, J. Morison and T. Zwart (eds), *Values in Global Administrative Law,* Hart Publishing, Oxford, 2010.

On mutual assistance in tax, customs and agricultural matters, J.A.E. Vervaele, A.H. Klip (eds.), European cooperation between tax, customs and judicial authorities: the Netherlands, England and Wales, France and Germany, The Hague-New York, Kluwer Law International, 2002.

I R P A

ISTITUTO DI RICERCHE
SULLA PUBBLICA AMMINISTRAZIONE

COUNCIL OF EUROPE INSTRUMENTS ON MUTUAL ASSISTANCE IN ADMINISTRATIVE MATTERS: TECHNIQUES, SHORTCOMINGS AND POSSIBLE IMPROVEMENTS

QUESTIONNAIRE DISSEMINATED BY THE IRPA & RESPONSES FROM STATE PARTIES

QUESTIONNAIRE DISSEMINATED BY THE IRPA

IRPA

ISTITUTO DI RICERCHE
SULLA PUBBLICA AMMINISTRAZIONE

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

QUESTIONNAIRE ON THE IMPLEMENTATION OF THE EUROPEAN CONVENTION CETS NO. 94 ON THE SERVICE ABROAD OF DOCUMENTS RELATING TO ADMINISTRATIVE MATTERS AND
OF THE EUROPEAN CONVENTION CETS NO. 100 ON THE OBTAINING ABROAD OF INFORMATION AND EVIDENCE IN ADMINISTRATIVE MATTERS

General

The Istituto di Ricerche sulla Pubblica Amministrazione – IRPA is carrying out, on behalf of the Council of Europe, a survey on the measures adopted by State parties with a view to implementing the European Convention CETS no. 94 on the Service Abroad of Documents relating to Administrative Matters and the European Convention CETS no. 100 on the Obtaining Abroad of Information and Evidence in Administrative Matters.

To this end, IRPA is seeking to gather information from authorities purposely set up within State parties as to rules, standards, procedural mechanisms and practices employed in order to abide by the obligations provided for by the aforementioned Conventions. For these reasons, IRPA would be very grateful if you agreed to compile the following questionnaire, and even supplement it with any other useful information that may be at your disposal on the subject matter.

Please return the questionnaire to Istituto di Ricerche sulla Pubblica Amministrazione, via delle Coppelle 35, 00186 Roma – Italy, or to m.pacini@irpa.eu.

Thank you very much in advance for your kind co-operation.

QUESTIONNAIRE

A - Central, subsidiary and forwarding authorities

1. How many central authorities are in place in your country? Are there any subsidiary or forwarding authorities?

2. Where is your authority located and how is it organised? (ministerial department, official body, other)

B - Requests for service of documents (for State parties to CETS no. 94)

3. How many requests for assistance did you receive / send abroad for service of documents?

4. Which were the most recurrent types of documents for which service was requested?

5. Do you have any information as to the number of requests received /sent abroad through diplomatic/consular offices of your country?

C - Requests for factual information, documents, inquiries (for State parties to CETS no. 100)

6. How many requests did you receive / send abroad for information and for documents?

7. How many requests did you receive / send abroad for enquiries?

8. Which were the most recurrent objects and subject matters of the requests for information, documents and inquiries? (e.g. commercial records in order to verify the conditions for granting commercial licenses)

D - Requests for obtaining evidence in administrative proceedings (for State parties to CETS no. 100)

9. How many requests did you receive / send abroad for obtaining evidence in administrative proceedings?

10. Which were the most recurrent objects and subject matters of the requests?

E - Your comments and suggestions

11. Do you think the system of mutual assistance set up by the conventions is effective?

12. What do you think are the main shortcomings at the internal and international level?

13. Do you have any suggestions on how to improve the system at the internal and international level?

RESPONSES

FRANCE

<u>Questionnaire</u>

A – Autorités centrales, subsidiaires et de transmission

1. Combien y a-t-il d'autorités centrales en place dans votre pays ?

   Pour la STCE n° 94, une seule : le ministère des Affaires étrangères et européennes (ci-après désigné MAEE)
   En ce qui concerne la STCE n° 100, la France n'est pas partie contractante

   Y a-t-il des autorités subsidiaires ou de transmission ?

   Il ne semble pas que la France ait désigné « d'autres autorités ayant les mêmes fonctions que l'autorité centrale » ni d' « autorité expéditrice chargée de centraliser les demandes de notification »

2. Où votre autorité se trouve-t-elle et comment est-elle organisée ?

   Un agent du MAEE est chargé du traitement des demandes de notification parvenant de l'étranger (essentiellement Allemagne et Italie). Les nom et adresse du service concerné sont :

   Direction des français à l'étranger et de l'administration consulaire
   Service des conventions, des affaires civiles et de l'entraide judiciaire
   Sous-direction des conventions et de l'entraide judiciaire
   (sigle : FAE/SAEJ/CEJ)
   27 rue de la Convention
   CS 91533
   75732 PARIS CEDEX 15

B – Demandes de notification de documents (pour les États parties à la STCE n° 94)

3. Combien de demandes d'assistance avez-vous reçues/envoyées à l'étranger pour la notification de documents ?

Reçues d'Allemagne	en 2007 : 267,	en 2008 : 193,	en 2009 : 170
Reçues d'Autriche	1,	0,	5
Reçues de Belgique	2,	0,	0
Reçues d'Italie	119,	77,	82

   Par contre, il est impossible de savoir combien de demandes ont été envoyées par les administrations françaises vers l'étranger pour la raison indiquée plus haut : il n'y a pas d'autorité expéditrice chargée de centraliser les demandes.

4. Quelles étaient les catégories les plus récurrentes de documents dont la notification était demandée ?

   Contraventions au code de la route
   Pour l'Allemagne : retrait du droit de conduire
   Pour l'Italie : stationnement dans des zones non autorisées

5. Avez-vous des informations concernant le nombre de demandes reçues/envoyées à l'étranger par les services diplomatiques/consulaires de votre pays ?

   Les demandes sont adressées par diverses autorités étrangères directement à l'autorité centrale française, *i. e.* au MAEE

C – Demandes d'informations sur les faits, de documents et d'enquêtes (pour les États parties à la STCE n° 100)

SANS OBJET

D – Demandes de mesures d'instruction en matière administrative (pour les États parties à la STCE n° 100)

SANS OBJET

E – Vos observations et suggestions

11. Jugez-vous le système d'entraide établi par les conventions efficace ?

    Pour notre part, nous notifions scrupuleusement par lettre recommandée avec accusé de réception tous les documents en provenance de pays ayant ratifié la convention STCE n° 94 et renvoyons aux autorités étrangères requérantes les accusés de réception signés par les destinataires lorsqu'ils ont pu être joints. Lorsque les destinataires n'ont pu être joints, nous indiquons aux autorités étrangères, comme prévu sur le formulaire annexé à la Convention, les raisons de cet échec.

    Mais en ce qui concerne les demandes émanant des autorités françaises, nous ne savons de quelle manière elles sont honorées, dans la mesure où elles ne transitent pas par le MAEE

12. Quels sont, selon vous, les principaux points faibles au niveau national et international ?

    C'est une procédure un peu lourde.

13. Avez-vous des suggestions à formuler concernant les moyens d'améliorer le système au niveau national et international ?

    Aucune

IRPA
ISTITUTO DI RICERCHE
SULLA PUBBLICA AMMINISTRAZIONE

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

QUESTIONNAIRE SUR L'APPLICATION DE LA CONVENTION EUROPÉENNE
STCE N° 94 SUR LA NOTIFICATION À L'ETRANGER DES DOCUMENTS EN MATIÈRE ADMINISTRATIVE
ET DE LA CONVENTION EUROPÉENNE STCE N° 100 SUR L'OBTENTION À L'ETRANGER
D'INFORMATIONS ET DE PREUVES EN MATIÈRE ADMINISTRATIVE

Généralités

L'Istituto di Ricerche sulla Pubblica Amministrazione – IRPA mène, au nom du Conseil de l'Europe, une étude sur les mesures prises par les États parties afin de mettre en œuvre la Convention européenne STCE n° 94 sur la notification à l'étranger des documents en matière administrative et la Convention européenne STCE n° 100 sur l'obtention à l'étranger d'informations et de preuves en matière administrative.

L'IRPA cherche à recueillir auprès des autorités désignées dans chaque État partie, conformément aux dispositions conventionnelles, les informations relatives aux règles, normes, procédures et pratiques employées en vue du respect des obligations prévues par les conventions susmentionnées.

L'IRPA vous serait reconnaissant de bien vouloir remplir le questionnaire ci-après, et de le compléter par tout autre renseignement utile dont vous pourriez disposer à cet égard.

Veuillez renvoyer le questionnaire à l'Istituto di Ricerche sulla Pubblica Amministrazione, via delle Coppelle 35, 00186 Rome – Italie, ou à m.pacini@irpa.eu.

Nous vous remercions vivement par avance de votre aimable coopération.

Questionnaire

A – Autorités centrales, subsidiaires et de transmission

14. Combien y a-t-il d'autorités centrales en place dans votre pays ? Y a-t-il des autorités subsidiaires ou de transmission ?

- Une seule Autorité : la "D.G. Asuntos y Asistencia Consulares" (*Direction Générale des Affaires et de l'Assistance Consulaires).*

- Il n'existe pas d'Autorités subsidiaires.

15. Où votre autorité se trouve-t-elle et comment est-elle organisée ? (service ministériel, organisme officiel, autre)

- "D.G. Asuntos y Asistencia Consulares", du "Ministerio de Asuntos Exteriores y de Cooperación" *(Direction Générale des Affaires et de l'Assistance Consulaires, du Ministère des Affaires Étrangères et de la Coopération)*.

B – Demandes de notification de documents (pour les États parties à la STCE n^{o} 94)

16. Combien de demandes d'assistance avez-vous reçues /envoyées à l'étranger pour la notification de documents ?

- De janvier 2009 à juin 2010 : 36

17. Quelles étaient les catégories les plus récurrentes de documents dont la notification était demandée ?

- Notifications relatives à des affaires commerciales.

18. Avez-vous des informations concernant le nombre de demandes reçues /envoyées à l'étranger par les services diplomatiques/consulaires de votre pays ?

- Les notifications administratives ne suivent pas cette voie.

C – Demandes d'informations sur les faits, de documents et d'enquêtes (pour les États parties à la STCE n° 100)

19. Combien de demandes d'informations et de documents avez-vous reçues /envoyées à l'étranger ?

20. Combien de demandes d'enquêtes avez-vous reçues /envoyées à l'étranger ?

21. Quels étaient les objets et les thèmes les plus récurrents des demandes d'informations, de documents et d'enquêtes ? (par exemple, des registres commerciaux afin de vérifier les conditions d'attribution de licences commerciales)

D – Demandes de mesures d'instruction en matière administrative (pour les États parties à la STCE n° 100)

22. Combien de demandes de mesures d'instruction en matière administrative avez-vous reçues /envoyées à l'étranger ?

23. Quels étaient les objets et les thèmes les plus récurrents des demandes ?

E – Vos observations et suggestions

24. Jugez-vous le système d'entraide établi par les conventions efficace?

Non, en raison du faible nombre de notifications reçues.

25. Quels sont, selon vous, les principaux points faibles au niveau national et international ?

La langue est le problème majeur, car les documents sont établis dans la langue du pays demandeur dans la plupart des cas. De nombreux renvois ont lieu.

26. Avez-vous des suggestions à formuler concernant les moyens d'améliorer le système au niveau national et international ?

Il serait souhaitable que les documents soient accompagnés d'une traduction en espagnol, car de nombreux documents sont établis en langue allemande.

ITALY/ITALIE

IRPA

ISTITUTO DI RICERCHE
SULLA PUBBLICA AMMINISTRAZIONE

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

QUESTIONNAIRE SUR L'APPLICATION DE LA CONVENTION EUROPÉENNE
STCE N° 94 SUR LA NOTIFICATION À L'ETRANGER DES DOCUMENTS EN MATIÈRE ADMINISTRATIVE
ET DE LA CONVENTION EUROPÉENNE STCE N° 100 SUR L'OBTENTION À L'ETRANGER
D'INFORMATIONS ET DE PREUVES EN MATIÈRE ADMINISTRATIVE

Généralités

L'Istituto di Ricerche sulla Pubblica Amministrazione – IRPA mène, au nom du Conseil de l'Europe, une étude sur les mesures prises par les États parties afin de mettre en œuvre la Convention européenne STCE n° 94 sur la notification à l'étranger des documents en matière administrative et la Convention européenne STCE n° 100 sur l'obtention à l'étranger d'informations et de preuves en matière administrative.

L'IRPA cherche à recueillir auprès des autorités désignées dans chaque État partie, conformément aux dispositions conventionnelles, les informations relatives aux règles, normes, procédures et pratiques employées en vue du respect des obligations prévues par les conventions susmentionnées.

L'IRPA vous serait reconnaissant de bien vouloir remplir le questionnaire ci-après, et de le compléter par tout autre renseignement utile dont vous pourriez disposer à cet égard.

Veuillez renvoyer le questionnaire à l'Istituto di Ricerche sulla Pubblica Amministrazione, via delle Coppelle 35, 00186 Rome – Italie, ou à m.pacini@irpa.eu.

Nous vous remercions vivement par avance de votre aimable coopération.

Questionnaire

A – Autorités centrales, subsidiaires et de transmission

1. Combien y a-t-il d'autorités centrales en place dans votre pays ? Y a-t-il des autorités subsidiaires ou de transmission ?

IL N'Y QU' UN'AUTORITE' CENTRALE

2. Où votre autorité se trouve-t-elle et comment est-elle organisée ? (service ministériel, organisme officiel, autre)

L'AUTORITE' EST AUPRES DU MINISTERE DES AFFAIRES ETRANGERES

B – Demandes de notification de documents (pour les États parties à la STCE n^{o} 94)

3. Combien de demandes d'assistance avez-vous reçues /envoyées à l'étranger pour la notification de documents ?

NOUS AVONS RECU ENVIRON 50 DEMANDES D'ASSISTENCE EN 2009 PRINCIPALEMENT DE L'ALLEMAGNE ET DE L'AUTRICHE. BEAUCOUP PLUS DE DEMANDES PARVIENT DE PAYS QUI NE SONT PAS PARTIE A' LA CONVENTION

4. Quelles étaient les catégories les plus récurrentes de documents dont la notification était demandée ?

INFRACTIONS AU CODE DE LA ROUTE

5. Avez-vous des informations concernant le nombre de demandes reçues /envoyées à l'étranger par les services diplomatiques/consulaires de votre pays ?

NOUS N'AVONS PAS DES INFORMATIONS CONCERNANT CE SUJET

C – Demandes d'informations sur les faits, de documents et d'enquêtes (pour les États parties à la STCE n^{o} 100)

6. Combien de demandes d'informations et de documents avez-vous reçues /envoyées à l'étranger ?

AUCUNE

7. Combien de demandes d'enquêtes avez-vous reçues /envoyées à l'étranger ?

AUCUNE

8. Quels étaient les objets et les thèmes les plus récurrents des demandes d'informations, de documents et d'enquêtes ? (par exemple, des registres commerciaux afin de vérifier les conditions d'attribution de licences commerciales)

D – Demandes de mesures d'instruction en matière administrative (pour les États parties à la STCE n^{o} 100)

9. Combien de demandes de mesures d'instruction en matière administrative avez-vous reçues /envoyées à l'étranger ?

AUCUNE

10. Quels étaient les objets et les thèmes les plus récurrents des demandes ?

E – Vos observations et suggestions

11. Jugez-vous le système d'entraide établi par les conventions efficace?

OUI, MAIS EN CONSIDERATION DE L'AMELIORATION DES MOYENES DE COMMUNICATIONS POSTAL, IL SERAIT PREFERABLE ENCOURAGER L'ENVOI DIRECT PAR LA POSTE

12. Quels sont, selon vous, les principaux points faibles au niveau national et international ?

SOUVENT LES FORMULAIRES NE SONT PAS CORRECTEMENT REMPLIS, ET ON A PAS LA POSSIBILITE' DE COMPRENDRE L'OBJET DU DOCUMENT ATTACHE QUI EST DANS LA LANGUE ORIGINELLE

13. Avez-vous des suggestions à formuler concernant les moyens d'améliorer le système au niveau national et international ?

ESTONIA/ESTONIE

Questionnaire on the implementation of the European Convention CETS No. 94 on the service Abroad of Documents relating to Administrative Matters

A – Central, subsidiary and forwarding authorities

1. How many central authorities are in place in your country? Are there any subsidiary or forwarding authorities?

In Estonia we have one central authority – Ministry on Justice and we do not have any more subsidiary or forwarding authorities.

2. Where is your authority located and how is it organized? (Ministerial department, official body, other)
International Judicial Co-operation Unit of the Criminal Law Department in the Ministry of Justice is responsible for the international judicial assistance.

Ministry of Justice of Estonia
Tõnismägi 5A, 15191 Tallinn, Estonia

E-mail address for International Judicial Co-operation Unit - central.authority@just.ee

B – Requests for service of documents (for State parties to CETS no. 94)

3. How many requests for assistance did you receive / send abroad for service of documents?

Non

BAVARIA/*BAVIERE*

1. Im Bundesland Bayern besteht eine zentrale Stelle. In der Bundesrepublik Deutschland wurde in jedem Bundesland eine zentrale Stelle eingerichtet. (insgesamt 16)

2. Die Regierung der Oberpfalz mit Sitz in Regensburg ist eine Mittelbehörde im dreistufigen Behördenaufbau der bayerischen Staatsverwaltung. Sie ist im Aufgabenbereich Amts- und Rechtshilfeverkehr in Verwaltungssachen im Ausland dem Bayerischen Staatsministerium des Inneren unterstellt.

3. In Bayern wurden 2009 ca. 18000 Verwaltungssachen an die jeweiligen Empfänger zugestellt.

4. Bußgeldbescheide bzw. Strafverfügungen wegen Verkehrsübertretungen.

5. Zu Punkt 5 haben wir keine Angaben.

6. Im Jahr 2009 wurden ca. 5000 Auskunftsersuchen an die zuständigen bayerischen Behörden weitergeleitet.

7. Ersuchen um Ermittlungen, vorwiegend Halterermittlungen werden wegen der geringen Anzahl nicht gesondert erfasst.

8. Am häufigsten werden Auskunftsersuchen wegen Kraftfahrzeugen oder Wohnortermittlungen an uns gerichtet.

9./10. Die Leistung Rechtshilfe = Amtshilfe durch Gerichte wird von dem europäischen Abkommen über die Zustellung von Schriftstücken und die Erlangung von Auskünften und Beweisen nicht vorgesehen.

11. Das System funktioniert, wenn die Rahmenbedingungen eingehalten werden.

12. Schlechte Übersetzungen, falsche oder fehlende Zugangsdaten (Kontonummern, IBAN oder SWIFT - Code, Anschriften und Telefonnummern der italienischen Behörde...)erschweren dem Empfänger des Bußgeldbescheides die Zahlung und die Abwicklung.
Für die ersuchte Behörde ist hauptsächlich die äußere Form des Ersuchens problematisch, d.h. fehlende Kopien eines Ersuchens oder mangelhafte Briefköpfe (oft keine genaue Behördenanschrift)erschweren die Bearbeitung zusätzlich.

13. siehe Punkt 12