

Michiel Luchtman

European cooperation between financial  
supervisory authorities, tax authorities and  
judicial authorities



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ISBN 978-90-5095-862-2  
D/2008/7849/104  
NUR 827

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[www.intersentia.com](http://www.intersentia.com)

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## PREFACE AND ACKNOWLEDGEMENTS

Although the European Economic Community focused initially on economic cooperation and integration, the EEC/EC - and later the EU - has gradually set itself more and more goals. Criminal law too has become a subject of European policy and legislative initiatives. This policy has been shaped in the programmes of Tampere and later The Hague. Mutual recognition has become the dominant principle of cooperation in Europe, including police and judicial cooperation in the pre-trial stage. The European Evidence Warrant is intended in due course to replace the current EU rules on judicial cooperation in the collection of evidence.

An aspect that has scarcely received any attention from European policymakers and researchers<sup>1</sup> is the relationship between police and judicial cooperation in the collection of evidence and its administrative counterpart, namely mutual assistance in administrative matters. This is surprising because the European Member States had a relatively wide discretion (known as a 'margin of appreciation') in choosing between criminal and administrative enforcement (or civil enforcement) of EC law and still do have such discretion in many areas. In many Member States a major role in enforcing EC law is played not only by the police, the public prosecution service and the criminal courts but also by the administrative authorities. Often the ties between the administrative and judicial authorities are close. Many criminal cases would not come to light if they were not notified by the administrative authorities to the public prosecution service. Conversely, the administrative authorities may need to have a 'big stick' in reserve in the form of their own powers to impose a (punitive) sanction or to refer matters for criminal prosecution.

The discretion which the Member States have in choosing the manner of enforcing EC law also has indirect consequences for transnational cooperation. The dividing lines between administrative and criminal enforcement and hence the dividing lines between administrative and criminal assistance in the different European Member States do not run in parallel. Far from it, indeed. The distinction that exists in the EU

1 One important exception is the 2002 study by Vervaele and Klip (eds.).

between administrative and criminal cooperation therefore merits further study. For the time being, however, administrative and criminal assistance are treated as independent systems and continue to evolve in different forums (at present the first and third pillars). There is a real risk of gaps or, at the other extreme, overlaps between administrative and judicial assistance. Such gaps or overlaps not only impair the effectiveness of European enforcement cooperation as a whole but also affect the legal position of the citizen concerned in the transnational exchange of evidence.

The central subject of this book is the relationship between mutual assistance in administrative matters and mutual assistance in criminal matters. As such it adapts and updates my PhD thesis, the Dutch text of which was defended at the University of Utrecht in April 2007.<sup>2</sup> That thesis contained not only an analysis of the international and European rules on mutual assistance in administrative matters and mutual assistance in criminal matters but also a comparative study of the nature and organisation of national law enforcement in three States. The criminal and administrative enforcement of tax law (direct taxes) and conduct-of-business supervision in the financial markets in the Netherlands, Germany and Switzerland were used as case studies. Special attention was paid to banking secrecy. The thesis identified to what extent mutual assistance in administrative matters and mutual assistance in criminal matters, as distinguishable concepts of cooperation, were in keeping with the nature and organisation of tax, financial and criminal enforcement in the three countries concerned. The analyses and descriptions required for this purpose have not been translated in full in this book. Choices had to be made in order to keep this project manageable. This is why chapters 3 and 4 of this book set out the main findings of this comparative work, but do not contain the underlying analyses of the three national legal systems themselves. The other chapters of my thesis have been updated, partly to take account of the conclusion of the Treaty of Lisbon. Changes until early May 2008 have been incorporated in the text.

At the end of this foreword I should like to express my thanks to those who have made the PhD and this project possible. I should like to single out for special mention my PhD supervisors Professor J.A.E. Vervaele and Professor P.J. Baauw for their invaluable advice and informed criticism. This translation was made possible thanks to a research grant which I received from Utrecht Law School and a generous contribution from the Utrecht Foundation for the Advancement of Criminal Law Research (BeSOU). Thanks are also due to Peter Kell for undertaking this difficult translation in a specialised field with much skill and diligence and to Wieneke Matthijsse of the Willem Pompe Institute for Criminal Law and Criminology for preparing the layout. I should also like to thank Themis van Helvoort, also of the

2 M.J.J.P. Luchtman, *Grensoverschrijdende sfeercumulatie - Over de handhavingssamenwerking tussen financiële toezichthouders, fiscale autoriteiten en justitiële autoriteiten in EU-verband*, Nijmegen: Wolf Legal Publishers 2007, internet: <[igitur-archive.library.uu.nl/dissertations/2007-0420-200406/UUindex.html](http://igitur-archive.library.uu.nl/dissertations/2007-0420-200406/UUindex.html)>.

Willem Pompe Institute, for her assistance in preparing the lists of literature and case law. Finally, I take the opportunity to thank my publisher Intersentia for its willingness to publish this book.

Utrecht, 13 May 2008

Michiel Luchtman

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## ABBREVIATIONS

AB	Administratiefrechtelijke Beslissingen (NL)
ABRvS	Afdeling bestuursrechtspraak Raad van State (NL)
Abs.	Absatz
AFM	Autoriteit Financiële Markten [ <i>Netherlands Authority for the Financial Markets</i> ] (NL)
AMF	Autorité des marchés financiers (F)
AO	Abgabenordnung 1977 (DE)
AP	Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters
ASA	Archiv für Schweizerisches Abgabenrecht (CH)
ASB (St.)	Anweisungen für das Straf- und Bußgeldverfahren (Steuer) (DE)
Awb	Algemene wet bestuursrecht [ <i>General Administrative Law Act</i> ] (NL)
AWR	Algemene wet inzake rijksbelastingen [ <i>States Taxes Act</i> ] (NL)
BAFin	Bundesanstalt für Finanzdienstleistungsaufsicht (DE)
BankG	Bundesgesetz über die Banken und Sparkassen (Bankengesetz) (CH)
BBl	Bundesblatt (CH)
BEHG	Bundesgesetz über den Börsen- und Effektenhandel (CH)
BFH	Bundesfinanzhof (DE)
BFHE	Entscheidungen des Bundesfinanzhofes (DE)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (CH)
BGHSt	Entscheidungen des Bundesgerichtshofes in Strafsachen (DE)
BNB	Beslissingen in belastingzaken/Nederlandse belastingrechtspraak (NL)
BStBl	Bundessteuerblatt (DE)
BStP	Bundesstrafrechtspflegegesetz (CH)
BSU	Abteilung Besondere Steueruntersuchungen EStV (CH)
BuStra	Bußgeld- und Strafsachenstelle (DE)
BV	Bundesverfassung [ <i>Swiss Constitution</i> ] (CH)
BVerfG	Bundesverfassungsgericht (DE)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (DE)

## Abbreviations

CBb	College van Beroep voor het bedrijfsleven (NL)
CESR	Committee of European Securities Regulators
CH	Confoederatio Helvetica [ <i>Swiss Confederation/ Switzerland</i> ]
CH-StPO	Schweizerische Strafprozessordnung (CH)
CISA	Convention implementing the Schengen Agreement
COB	Commission de Operation de Bourse (F)
COE	Council of Europe
CONSOB	Commissione Nazionale per le Società e la Borsa (I)
DBG	Bundesgesetz über die direkte Bundessteuer (CH)
DE	Bundesrepublik Deutschland [ <i>Germany</i> ]
DPFD	Data Protection Framework Decision
EAW	European Arrest Warrant
EBK	Eidgenössische Bankenkommission [ <i>Swiss Federal Banking Commission SFBC</i> ] (CH)
EC	European Community
ECD	Economische Controle Dienst [ <i>Economic Investigation Service</i> ] (NL)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECMACM	European Convention on Mutual Assistance in Criminal Matters 1959
ECOFIN	Economic and Financial Affairs Council
EComHR	European Commission of Human Rights
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
EG-AHiG	EG-Amtshilfegesetz (DE)
EJN	European Judicial Network
EPC	European Political Cooperation
ERV	European Convention on Mutual Assistance in Criminal Matters
ESC	European Securities Committee
ESTG	Einkommensteuergesetz (DE)
ESTV	Eidgenössische Steuerverwaltung (CH)
ETS	European Treaty Series
EU	European Union
Europol	Einkommensteuergesetz (DE)
EUSD	European Union Savings Directive
F	France [ <i>French republic</i> ]
FBCD	First Banking Coordination Directive
FEC	Financieel Expertise Centrum [ <i>Financial Expertise Centre</i> ] (NL)
FED	Fiscaal Weekblad FED (NL)
FGO	Finanzgerichtsordnung (DE)
FIM	Financial Integration Monitor
FinDAG	Finanzdienstleistungsaufsichtsgesetz (DE)
FINMA	Eidgenössische Finanzmarktaufsicht (CH)
FINMAG	Finanzmarktaufsichtsgesetz (CH)

FIOD	Fiscale Inlichtingen- en Opsporingsdienst [ <i>Fiscal Intelligence and Investigation Service</i> ] (NL)
FSAP	Financial Services Action Plan
FSC	Financial Services Committee
GG	Grundgesetz für die Bundesrepublik Deutschland [ <i>Basic Law</i> ] (DE)
HR	Hoge Raad der Nederlanden [ <i>Dutch Supreme Court</i> ] (NL)
I	Italia [ <i>Italian republic</i> ]
ICT	Intra-Community transactions
IRG	Gesetz über die Internationale Rechtshilfe in Strafsachen (DE)
IRS	(Wegleitung zur) Internationale(n) Rechtshilfe in Strafsachen (CH)
IRSG	Bundesgesetz über internationale Rechtshilfe in Strafsachen (CH)
IRSV	Verordnung über internationale Rechtshilfe in Strafsachen(CH)
ISD	Investment Services Directive
JHA	Justice and Home Affairs
JOR	Jurisprudentie Ondernemingsrecht (NL)
KWG	Kreditwesengesetz (DE)
LJN	Landelijk Jurisprudentie Nummer (NL)
MACM	Mutual assistance in criminal matters
MAD	Market Abuse Directive
MiFID	Markets in Financial Instruments Directive
MLA	Mutual legal assistance
NJ	Nederlandse Jurisprudentie (NL)
NJW	Neue juristische Wochenschrift (DE)
NL	Nederland [ <i>The Netherlands</i> ]
OECD	Organisation for Economic Co-operation and Development
OJ EU	Official Journal of the European Union
OWiG	Ordnungswidrigkeitengesetz (DE)
PNR	Passenger Name Records
PPS	Public Prosecution Service
Rawb	Rechtspraak algemene wet bestuursrecht (NL)
RiStBV	Richtlinien für das Strafverfahren und das Bußgeldverfahren
RiVAST	Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten
SAA	Schengen Assoziierungsabkommen
SBCD	Second Banking Coordination Directive
SEC	Securities and Exchange Commission (USA)
SPD	Sozialdemokratische Partei Deutschlands (DE)
Stb	Staatsblad (NL)
Stcrt	Staatscourant (NL)
StGB	Strafgesetzbuch [ <i>penal code</i> ] (DE/CH)
StHG	Steuerharmonisierungsgesetz (CH)
StPO	Strafprozeßordnung (DE/CH)
StR	Steuer Revue/Revue fiscale (CH)
Sv	Wetboek van Strafvordering [ <i>Code of Criminal Procedure</i> ] (NL)
SWIFT	Society for Worldwide Interbank Financial Telecommunication

Abbreviations

TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Trb	Tractatenblad (NL)
UNTS	United Nations Treaty Series
VAT	Value Added Tax
Vifb	Voorschrift informatie fiscus/banken [ <i>Tax Authorities/Banks Information Regulation</i> ] (NL)
VIV	Voorschrift informatieverstrekking 1993 [ <i>Fiscal Information Provision Regulations</i> ] (NL)
VstG	Bundesgesetz über die Verrechnungssteuer/ Verrechnungssteuergesetz (CH)
VStR	Bundesgesetz über das Verwaltungsstrafrecht (CH)
VwVfG	Verwaltungsverfahrensgesetz (DE)
VwVG	Verwaltungsgerichtsordnung (DE)
WED	Wet op de Economische Delicten [ <i>Economic Offences Act</i> ] (NL)
Wft	Wet op het financieel toezicht [ <i>Financial Supervision Act</i> ] (NL)
WIB	Wet internationale bijstandsverlening bij de heffing van belastingen [ <i>Act on the Provision of International Assistance in the Levy of Taxation</i> ] (NL)
WpHG	Wertpapierhandelsgesetz (DE)
ZBStG	Bundesgesetz zum Zinsbesteuerungsabkommen mit der Europäischen Gemeinschaft (CH)
ZH-StG	Steuergesetz of the canton Zürich (CH)
ZH-StJVG	Straf- und Justizvollzugsgesetz of the canton Zürich (CH)
ZH-StPO	Strafprozessordnung of the canton Zürich (CH)