Utrecht Law Review
published by igitur

EU influence on law enforcement and international cooperation in the field of insider dealing[1]

Michiel J.J.P. Luchtman[2]

1. Introduction

In the European Community, the practical implementation and legal enforcement of many Community matters is in the hands of the Member States. The nature and organization of this enforcement is primarily their own business. National discretion is not unlimited, however. The Court of Justice, for example, already held some time ago that EC law is to be enforced by effective, proportionate and dissuasive sanctions.[3] National discretion may also be limited through legislative intervention. A striking example is the Market Abuse Directive, which not only provides substantive rules in the field of insider dealing and market manipulation, but also lays down express requirements as to (the nature of the) responsible national authorities, their powers and their relationship with other national institutions (among which the judicial authorities), their professional duty of confidentiality and their possibilities for transnational cooperation.[4]

In this contribution, I aim to describe the influence of the Market Abuse Directive on the organization of administrative and criminal law enforcement and, particularly, how this impacts on transnational cooperation. On a national level, administrative law enforcement (financial supervision) and criminal law enforcement are often closely related. How this relationship is given shape exactly, differs from one country to another. This may have an impact on transnational cooperation. Whereas in transnational cases requests for *mutual administrative assistance* are necessary for administrative law purposes, for criminal law enforcement purposes requests for *mutual assistance in criminal matters* (or *judicial assistance*) are needed. Does this distinction between mutual administrative assistance and mutual assistance in criminal matters pay due respect to differences in national law enforcement in the field of insider dealing?

There is ample reason for exploring this question, now that the European Court of Justice has recently recognized the competence of the Community (*i.e.* first pillar) to prescribe, subject to certain conditions, criminal sanctions as mandatory for violations of Community law.[5] Even more so than before, this has granted the EC the power to interfere in national law enforcement,

1 With thanks to the Centre for Enforcement and European Law (CEEL) of the Utrecht School of Law and Corinne van den Berg for making the English translation possible. The author further wishes to thank Professor Sacha Prechal and Professor John Vervaele for their comments on an earlier version of this article. This article will also be published in Dutch in *SEW Tijdschrift voor Europees en economisch recht*.

2 Lecturer in Criminal Law/Ph.D. candidate at Utrecht University, School of Law, Willem Pompe Institute for Criminal Law and Criminology, Janskerkhof 16, 3512 BM Utrecht, the Netherlands, (contact: m.luchtman@law.uu.nl).

3 Case 68/88, *Commission/Greece*, [1989] *ECR* 2965, subsequently repeated many times, cf. joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi a.o.*, [2005] *ECR* I-3565.

4 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJ* 2003 L 96/16.

5 Case C-176/03, *Commission/Council*, [2005] *ECR* I-7879.

including criminal law enforcement. What is more, it should not be ruled out that it will make use of this power in practice.[6] Of course, this will have consequences for the relationship between the administrative on the one hand and the Public Prosecution Service and the criminal courts on the other. In turn, this will have an effect on international cooperation.
I will start this contribution with an introduction on the institutional structure of the Union and the relevant provisions of the Market Abuse Directive (Section 2). The Directive includes provisions concerning both the organization of financial supervision and international cooperation. Like in many areas of Community policy, the Directive's starting point is that the practical implementation and enforcement of the rules it lays down are entrusted to the Member States. However, on some points, this Directive goes further than others in prescribing the tasks and powers of the national authorities in putting the Directive into practice. The question is how this affects national relations between administrative law enforcement and criminal law enforcement and thereby how it also affects international cooperation. In Sections 3 and 4, I will therefore discuss how two Member States, the Netherlands and Germany, have further substantiated this Community framework. In Section 5 an analysis will subsequently be given of the current possibilities for international cooperation. There I will mainly discuss the question of the extent to which the present arrangements, especially those under the Market Abuse Directive, offer scope for national discretion. In Section 6, I will briefly explore some alternatives for current interstate practice. Different solutions to the encountered problem are possible. Some will argue in favour of strict partitions between administrative and judicial assistance in order to prevent the circumvention of legal safeguards, such as the *nemo tenetur* principle; others (including the author of this contribution), however, oppose to such partitions. An additional issue that arises here is whether and, if so, to what extent harmonization of national laws is necessary for improving transnational cooperation. In this respect, I will also discuss the possible consequences of Case C-176/03 for the topic in hand. I will conclude with some final remarks in Section 7.

2. International and Community requirements for supervision and cooperation

2.1. The institutional structure of the European Union

The European Union is structured in accordance with the well-known pillar model. It consists of three pillars, whereby the first pillar is made up of the former EC (and Euratom and the ECCS) and the third pillar concerns justice and police cooperation. The desire to retain national sovereignty in the field of criminal law appears to be the *raison d'être* of the third pillar, where decision-making is carried out in accordance with different procedures than under the first pillar. Within the pillar structure the precise role and position of the Community in relation to national criminal law has long been controversial.[7] The Court's judgment in Case C-176/03 mentioned above gives rise to a host of new questions. These questions also concern the relationship between the criminal justice system and the administrative authorities, in this case: the supervisory authority. For example, it is doubtful whether – once the Community has made use of its criminal law powers – the Member States may still make use of administrative punitive means

6 The Commission has already indicated that the possibility of mandatorily prescribed criminal law enforcement is being researched in several fields. So far, the Market Abuse Directive is not being considered in this context; COM(2005) 583 final/2.

7 See extensively on this Martin Wasmeier and Nadine Thwaites, 'The "battle of the pillars": does the European Community have the power to approximate national criminal laws?', 2004 *E.L.Rev*, no. 29, pp. 613-635.

of sanctioning.[8] Many Member States provide for such sanctions which are sometimes applied complementarily and sometimes parallel to criminal law enforcement measures. In *Nunes & De Mattos* the Court recognized the competence of the Member States to apply criminal law means of enforcement in addition to the penalties prescribed by Community law,[9] but is this also true the other way around? How does this relate to the *ultimum remedium* character of criminal law? This question as yet remains unanswered.

What does not seem controversial after the Court's judgment, however, is that issues concerning criminal law cooperation are still third pillar matters (cf. Article 34 TEU).[10] Mutual assistance in criminal matters began to develop within Europe with the (Council of Europe's) 1959 European Convention on Mutual Assistance in Criminal Matters.[11] To this Convention numerous bilateral and multilateral additions were subsequently made. This trend continued within the EU, among other things through the EU Convention on Mutual Assistance in Criminal Matters.[12] Some of these treaties also paid attention to differences in the organization of law enforcement in the various countries. Especially on the insistence of Germany, the scope of mutual assistance was extended to include what are known as *Ordnungswidrigkeiten*, *i.e.* punitive monetary sanctions that are imposed by an administrative body, but with the possibility of legal recourse to a criminal court.[13]

In addition to the development of mutual assistance in criminal matters, first through the Council of Europe and after that also in the third pillar, transnational cooperation in the field of administrative law also gradually began to receive attention within the EU. As we have seen in the introduction, this type of cooperation is known as mutual assistance in administrative matters. In the Market Abuse Directive this has been elaborated in Article 16.[14] Mutual assistance in administrative matters is therefore a first pillar affair. There are many differences between mutual assistance in criminal matters and mutual assistance in administrative matters. A common feature, however, is that they enable cooperation for criminal law and administrative law enforcement purposes respectively. Such cooperation may entail the exchange of information upon request (but increasingly also includes spontaneous or automated data exchanges) and where necessary the collection of information by carrying out acts of investigation.[15] The distinguishing criterion between 'administrative assistance' on the one hand and 'judicial assistance' on the other is largely organic, which is to say that it is linked to the *status* of the

8 Cf. among others G.J.M. Corstens, 'Criminal law in the first pillar', 2003 *European Journal of Crime, Criminal Law and Criminal Justice*, no. 1, pp. 131-144; idem, 2005 *Nederlands Juristenblad*, no. 45; Rolf Ortlep and Rob Widdershoven, 'Europa en de strafrechtelijke handhaving van milieurecht', in: Chris Backes et al. (eds.), *Lex Dura Sed Lex – opstellen over de handhaving van omgevingsrecht*, Deventer 2005.

9 Case C-186/98, *Nunes & de Matos*, [1999] *ECR* I-4883.

10 Cf. M.J. Borgers, 'Harmonisatie van het strafrecht in de context van de Eerste Pijler', 2006 *Delikt en Delinkwent*, no. 7, pp. 76-99.

11 30 European Treaty Series.

12 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *OJ* 2000 C 197, and the Protocol established by the Council in accordance with Art. 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *OJ* 2001 C 326.

13 Cf. Art. 3 (1) of the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000, *OJ* 2000 C 197.

14 Not only the Market Abuse Directive is relevant. Numerous other agreements have made the financial sector for the main part subject to European rules. See *e.g.* the Council of Europe Convention on insider trading of 20 April 1989 which also deals with mutual assistance. European Treaty Series 130, including the Protocol to this Convention, ETS 133. A special feature of this Treaty is that it also includes provisions concerning cooperation in the field of criminal law. For this contribution, however, the Treaty is less relevant, as Community agreements have priority over it (Art. 16bis). Further, the Memorandum of Understanding which was prepared in the framework of the Committee of European Securities Regulators (CESR) which regulates cooperation between EU regulators more generally should of course be pointed out. The Memorandum can be found through http://www.cesr-eu.org/ (site last visited on 10 February 2006). There is also a multilateral Memorandum of Understanding of the International Organization of Securities Commissions (IOSCO): http://www.iosco.org/ (site last visited on 10 February 2006). However, I will focus on Art. 16 of the Directive which is by far the most important provision.

15 See extensively on the similarities and differences between administrative assistance and judicial assistance J. Vervaele et al. (eds), *European Cooperation between Tax, Customs and Judicial Authorities*, The Hague/London/New York 2002.

authorities involved. If these are 'administrative' authorities, they make use of mutual assistance in administrative matters; if they are 'judicial' authorities, they use mutual assistance in criminal matters.[16] It is possible, however, that assistance in administrative matters is used to cooperate for the purpose of punitive sanctions, provided that these sanctions are imposed by administrative authorities.

In the field of transnational enforcement cooperation, two separate platforms therefore exist within the European Union framework which both deal with the same or at least with closely connected topics. The question that may be asked in this context is whether the distinction between 'administrative assistance' and 'judicial assistance', and especially the development of these instruments in separate platforms, does in fact do justice to the differences in law enforcement which may appear within the EU Member States. As will emerge below, financial supervision and criminal law enforcement are often closely interwoven at the national level. At the international level, however, they have been separated. Does the pillar structure of the Union in this way not effectively contribute towards the development in different directions of 'judicial assistance' and 'administrative assistance'? Would the opposite not make more sense, *i.e.* the mutual coordination of administrative assistance and judicial assistance? Such coordination currently hardly takes place at all.[17] It could however be a suitable tool to do more justice to the system of indirect enforcement of Community law by the Member States and the accompanying differences in the choice for either criminal or administrative sanctions. In order to be able to substantiate this further it is necessary first to discuss the question of how supervision and criminal law enforcement interfere with each other. For this reason, a brief overview will be given below of the Community requirements in these matters and of the manner in which these have been implemented in two EU Member States.

2.2. The Market Abuse Directive

The Market Abuse Directive has a solid basis in Community policy.[18] It is the follow-up to Council Directive 89/592/EEC which was adopted in 1989.[19] The European Commission made the regulation of the financial sector a topic for its consideration in the context of the creation of the internal market. The European Commission's Financial Services Action Plan of May 1999 therefore set out strategic objectives to create an integrated EU capital market by April 2004 (a single EU financial services market, by open and secure retail markets, state-of-the-art prudential rules and supervision).

More so than its predecessor and more so than is usual in other areas of Community law the Market Abuse Directive provides requirements for the duties and powers of the responsible authorities. 'If the European Union is to develop integrated financial markets, there needs to be convergence (rather than divergence) in the methods of implementation and enforcement in Member States. Different sets of responsibilities and powers of national administrative authorities hinder the establishment of a fully integrated market and add to market confusion. To address this, the Directive proposes that Member States designate a single regulatory and supervisory authority [Article 11, ML] with a common minimum set of responsibilities [Article 12 - 15, ML].

16 Vervaele et al., *supra* note 15, p. 284.

17 On the contrary, those instruments that do recognize a possible overlap between administrative assistance and judicial assistance usually provide that the rules concerning administrative assistance are without prejudice to the rules concerning judicial assistance. This mainly seems to indicate that all options should be kept open; cf. Vervaele et al., *supra* note 15, p. 264.

18 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht* (Ph.D. thesis at Tilburg University, the Netherlands), Nijmegen 2004, pp. 162 *et seq.*; see also Peter Nobel, *Schweizerisches Finanzmarktrecht – Einführung und Überblick*, Bern 2004, pp. 259 *et seq.*

19 Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, *OJ* 1989 L 334/30.

Given the increasing number of cross-border activities, European legislation will need to ensure that regulatory and supervisory authorities work effectively together to prevent, detect, *investigate and prosecute* market abuse [italics added, ML]. For this purpose they need to be able to rely on the assistance of each other and to receive relevant information from each other in good time [Article 16, ML].'[20]

A certain degree of harmonization is therefore needed to enable effective supervision, which is in fact expressly defined as including the investigation and prosecution of market abuse. Nevertheless, the Directive does not go so far as to prescribe the type of sanctions which Member States should provide.[21] Article 14 provides that: 'Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with.' This means that the final choice between criminal law enforcement and administrative law enforcement is still left to the Member States. This has major consequences for cross-border cooperation.

Article 16 only lays down a duty to cooperate for the competent authorities referred to in Article 11 – *i.e. administrative* authorities. These authorities have to cooperate in the fulfilment of their duties. It would seem logical that this obligation also applies in case they wish to impose administrative sanctions which may have a punitive character as referred to in Article 6 ECHR. For the fulfilment of such requests and also of their other tasks under the Directive they have to make use of the powers referred to in Article 12. These powers also include the possibility to require existing telephone and existing data traffic records and to request the freezing and/or sequestration of assets (Article 12 (2) (d) and (g)). That is remarkable. In many countries these are powers of the prosecution. For this reason, Article 12 (1) provides that these powers may also be exercised in cooperation with the judicial authorities.[22] That is up to the Member States to decide.[23] Article 16 (1) does however require that these powers are either directly or indirectly (*i.e.* after the involvement of the judicial authorities) exercised for the purpose of transnational cooperation.[24] In that case, cooperation takes place through multiple channels. The administrative authority that receives the request may in turn apply to the judicial authorities to collect the information and provide it to the requested authority so that the latter may provide it to the requesting authority. The whole procedure appears to be rather laborious and moreover not very transparent.

Article 16 does not regulate direct cooperation with judicial authorities. Judicial authorities are not 'competent authorities'. This means that they cannot request administrative assistance even if the violation of a provision of the Directive for which assistance is sought is dealt with administratively in the requested state.[25] However, what is permitted is that an administrative authority forwards the information to a judicial authority. Article 16 (2), fourth paragraph, of the Directive expressly provides for this possibility. It states that: '*Without prejudice to the obliga-*

20 COM(2001) 281 final, pp. 4-5.

21 See thereon also Kristen, *supra* note 18, pp. 205 *et seq.*

22 See thereon J.A.E. Vervaele, 'De Europese dimensie van het (economisch en financieel) strafrecht', in: Van Russen Groen et al. (eds.), *Iets bijzonders – Liber amicorum prof. jhr. Mr. M. Wladimiroff*, The Hague 2002, pp. 219-242.

23 Art. 12 does not make clear whether the powers it refers to should be available for *all* the offences described in the Directive (Arts. 2-5) or merely for the most serious ones. This, too, is therefore in principle left to the Member States to decide.

24 After all, Art. 16 (1) states that: 'Competent authorities shall cooperate with each other whenever necessary for the purpose of carrying out their duties, *making use of their powers whether set out in this Directive* [cf. Art. 12 (2). Italics added ML] or in national law. Competent authorities shall render assistance to competent authorities of other Member States. In particular, they shall exchange information and cooperate in investigation activities.'

25 The Council of Europe Convention, *supra* note 14, does offer this possibility.

tions to which they are subject in judicial proceedings under criminal law, the competent authorities which receive information pursuant to paragraph 1 may use it only for the exercise of their functions within the scope of this Directive and in the context of administrative or judicial proceedings specifically related to the exercise of those functions [italics added, ML].' In such cases, the additional consent of the providing state is not required.

To sum up, therefore, we have seen that the Market Abuse Directive on the one hand does influence national law enforcement, but on the other hand also leaves quite a bit of room for the Member States on a number of crucial points. For this contribution it is especially relevant that: a/ information may be exchanged by supervisory authorities for punitive purposes (Article 14 in conjunction with Article 16), b/ that in this process powers may be exercised – either in cooperation with judicial authorities or not – which by their nature may be criminal procedural powers (Article 16 (1) in conjunction with Article 12 (2)) and c/ that information may be forwarded to the judicial authorities without prior consent if national law provides for this possibility (Article 16 (2), fourth paragraph). In addition, we have also found that the Member States are (still?) free to choose between criminal law enforcement and administrative law enforcement (Article 11) and that direct contact between judicial authorities and administrative authorities is not allowed (Article 11 in conjunction with Article 16 (1) following an *argumentum a contrario*).[26]

The question is whether the Directive in this way does justice to differences in the organization of law enforcement in the different Member States. For this reason it is interesting to examine how the obligations contained in the Directive have been transposed exactly. This question is dealt with below, where I will successively discuss the Netherlands and Germany.

3. The Netherlands

3.1. The organization of supervision and investigation

The Market Abuse Directive has recently been implemented in the Act on the Supervision of the Securities Trade 1995 [*Wet toezicht effectenverkeer* 1995 (*Wte*)].[27] If we examine this Act it is striking to note that violations of almost all provisions that are an implementation of the Directive may be enforced by both the Dutch competent authority under Article 11 of the Directive, *i.e.* the Netherlands Authority for the Financial Markets (*AFM*), and by the Public Prosecution Service (*Openbaar Ministerie*/*OM*).[28] The organization of Dutch supervision is characterized by greatly parallel punitive powers of the Public Prosecution Service and the Netherlands Authority for the Financial Markets.[29]

The *AFM* expressly does not have any criminal procedural powers. The legislator considered that this would conflict with the Authority's special position *vis-à-vis* the market, but also *vis-à-vis* politics.[30] Criminal law enforcement is exclusively entrusted to the Public Prosecution Service

26 Further below, I will discuss a number of (possible) explanations for this impossibility.

27 Market Abuse Act [*Wet Marktmisbruik*], *Staatsblad* 2005, 346. The Act entered into force on 1 October 2005.

28 This is not to everyone's liking, by the way. Some argue in favour of transferring in particular the more complex offences to criminal law in order to prevent undermining the legal protection of the parties involved; cf. G.J.M. Corstens, 'Bestuurlijke boeten in de vierde tranche Awb', 2000 *Nederlands Juristenblad*, no. 24, pp. 1185-1190 and L.F.M. Verhey and N. Verheij, 'De macht van de marktmeesters – Markttoezicht in constitutioneel perspectief', 2005 *Handelingen NJV*, no. I, pp. 289- 292. Others by contrast argue in favour of the primacy of administrative enforcement; cf. M.I. Jap-A-Joe Blagrove, *Beursfraude effectief aangepakt* (Ph.D. thesis at Maastricht University, the Netherlands), Nijmegen 2003. A.R. Hartmann, 'Strafrechtelijke handhaving van de financiële wetgeving: houden of weggeven?', 2004 *Nederlands Juristenblad*, pp. 1070-1073 goes even further than this.

29 The *AFM* is not the only financial regulator. There is also *De Nederlandsche Bank (DNB)* which is in charge of the prudential supervision of financial institutions. The *AFM* is responsible for regulating conduct. At the end of 2001 a far-reaching reform of the supervisory structure was started which eventually led to the proposal for the Financial Supervision Act [*Wet op het financieel toezicht*], *Kamerstukken II* 2005-2006, 29 708.

30 See thereon M.J.J.P. Luchtman, *Geheimhouding en verschoning in het effectenrecht*, Amsterdam 2002.

which is assisted by a special investigative service that is part of the tax revenue service (*i.e.* the *FIOD-ECD*) which has special criminal procedural powers (among which the power of seizure) based on the Economic Offences Act [*Wet economische delicten/WED*].[31] The *AFM* can, however, impose punitive sanctions within the meaning of Article 6 ECHR. This is done in the shape of (among other things) administrative fines (*bestuurlijke boetes*).[32] This type of sanction may be defined as a punitive monetary sanction which is imposed by an administrative authority against which legal recourse may be had through administrative law channels. There is no recourse to the criminal courts and the guarantees of the Dutch Code of Criminal Procedure cannot be invoked. The minimum guarantees under Article 6 ECHR must, however, apply, as the sanctions involved are after all punitive.[33]

The Netherlands thus has a two-track trajectory whereby the same offences can be dealt with by two different types of authorities which have different powers at their disposal. These authorities are increasingly cooperating. This is necessary if only to prevent problems in connection with the *ne bis in idem* principle.[34] In the past, cooperation was not always as smooth as it should have been. For a long time, the *AFM* did not have to report offences as this was thought to conflict with its sensitive position *vis-à-vis* the entities placed under its supervision. After all, the provision of sensitive financial information to third parties, including the Public Prosecution Service, might easily lead to commotion or even panic on the financial markets, if this information is not handled with utmost care. This has led to clashes between the supervisory authority and the Public Prosecution Service in the past,[35] but this now seems set to change. It no longer seems to be commonly held that the *AFM* has an absolute duty of secrecy *vis-à-vis* the Public Prosecution Service.[36] Indeed, mutual cooperation is needed now that the Netherlands has opted in favour of the collaboration model in the implementation of Article 12 (2) of the Market Abuse Directive.[37] The *AFM* itself is not authorized to perform seizures or to require data traffic records. For this, it has to apply to the Public Prosecution Service, given that the powers in question are criminal procedural powers under Dutch law.

---

31 The Economic Offences Act applies in addition to the general rules of the Criminal Code and the Code of Criminal Procedure. The Economic Offences Act among other things extends the criminal law concept of suspicion; see Dutch Supreme Court, HR 9 March 1993, *NJ* 1993, p. 633.

32 What is known as naming and shaming is also considered a punitive sanction.

33 It is typical (and in my opinion – unfortunate) that in the Netherlands the right to remain silent under criminal procedural law as laid down in Art. 29 of the Code of Criminal Procedure and the right to remain silent in the administrative fine procedure have been regulated differently; see on this, among others, G. Knigge, 'De verkalking voorbij: over de verhouding van het strafrecht tot het bestuursrecht', 2000 *RM Themis*, pp. 83-96; O.J.D.M.L. Jansen, *Het handhavingstoezicht* (Ph.D. thesis at the Universiteit van Amsterdam, the Netherlands), 1999, pp. 104-105; A.R. Hartmann, *Bewijs in het bestuursstrafrecht* (Ph.D. thesis at the University of Rotterdam, the Netherlands), Deventer 1998, pp. 87 *et seq.*; L. Stevens, *Het nemo-teneturbeginsel in strafzaken: van zwijgrecht naar containerbegrip* (Ph.D. thesis at Tilburg University, the Netherlands), Nijmegen 2005, pp. 128-130.

34 Cf. Art. 48j of the Securities Transactions (Supervision) Act 1995, which contains what is called the *una via* provision; see on *una via* L.J.J. Rogier, *Strafsancties, administratieve sancties en het una via-beginsel* (Ph.D. thesis at the University of Rotterdam, the Netherlands), Arnhem 1992 and also A.H. Klip and H.G. van der Wilt, 'The Netherlands, Non bis in idem', 2002 *International Review of Penal Law*, pp.1091-1137.

35 See on this Luchtman, *supra* note 30.

36 The *AFM* is *competent* to report offences or provide information (cf. Art. 161 Code of Criminal Procedure). This is increasingly considered part of its tasks. That this is a competence rather than a duty may be concluded from the fact that the general criminal procedural law duty to report and cooperate under Art. 162 of the Code of Criminal Procedure does not apply to the *AFM*. The *AFM* has not been designated as such in the 'Decree of 31 March 1987 providing for the adoption of an order in council for the implementation of Art. 162 (4) of the Code of Criminal Procedure', as lastly amended by *Staatsblad* 2005, 690. The examining magistrate or the court may, however, oblige the *AFM* to cooperate; in that case the *AFM* might be entitled to a limited right of nondisclosure. This is connected with Case 110/84, *Hillegom/Hillenius*, [1985] *ECR* 3947. See also *Kamerstukken II* 2001-2002, 28 122, no. 2, p. 12; *Kamerstukken II*, 2003-2004, 29 708, no. 3, pp. 52-55; *Handelingen II* 2005, p. 83-4983; Luchtman, *supra* note 30, p. 140.

37 See the Dutch *traveaux préparatoires* with respect to the Act implementing the Market Abuse Directive; *Kamerstukken II*, 2004-2005, 29 827, no. 3, pp. 17-18.

3.2. National rules for cross-border cooperation

What does the above imply for international cooperation? First of all, that in international dealings the *AFM* – as the requesting party – has to make use of administrative assistance (*wederzijdse administratieve bijstand*), whereas the Public Prosecution Service makes use of judicial assistance (*wederzijdse strafrechtelijke rechtshulp*). The *AFM* cannot make requests for judicial assistance, because administrative fine procedures do not qualify as 'proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings *before a court having jurisdiction in particular in criminal matters* [italics added, ML]', as referred to in Article 3 (1) of the EU Convention on Mutual Assistance in Criminal Matters. The *AFM* does not have any responsibilities in the field of preliminary investigations either, which would enable it to request judicial assistance in that capacity.[38]

Where the Dutch administrative fine is concerned, therefore, a request for administrative assistance has to be made. However, neither Dutch legislation, nor the Market Abuse Directive are very clear concerning foreign variants of punitive sanctions in cases where the Netherlands is the requested party. Pursuant to Dutch law, there seems to be no bar against requests for administrative assistance by foreign authorities with punitive tasks. Of course this does raise questions as to the guaranteeing of the *nemo tenetur* principle transnationally.[39] As of what point is the person involved – when present in the Netherlands – entitled to this right? Who is entitled to it? What is the scope of such a right? To what extent can it be invoked when a request for administrative assistance, besides a punitive purpose, also serves a non-punitive purpose?[40] Dutch law, especially the rules for the implementation of the agreements concerning cooperation (Articles 45b and 29-36 of the 1995 Supervision Act),[41] is silent on this point. In my view the situation seems to be that the right to remain silent that a person would have in the Netherlands (Article 48e of the 1995 Act) can also be relied on when the *AFM* carries out a request for administrative assistance that serves a punitive purpose. This does not, however, answer all of the questions just raised.

Although direct contact with the foreign judicial authorities is thus not possible, there are still indirect possibilities for cooperation. It is possible that the *AFM* asks the foreign authority for its permission to forward the information to the Dutch Public Prosecution Service (Article 33 (2) of the 1995 Act). In turn, the *AFM* may grant a foreign authority permission to forward the information to a foreign Public Prosecution Service. In the latter case, Article 33 (3) of the 1995 Act lays down strict additional requirements which serve to prevent that the provisions concerning judicial cooperation in criminal matters are circumvented. Permission may not be given, for example, if the information in question cannot be obtained by means of mutual judicial assistance.[42] This is remarkable, as Article 16 of the Market Abuse Directive does not lay down such

---

38 Some countries, like for instance Switzerland, are prepared to provide judicial assistance to administrative authorities that operate at that stage and that can request the Public Prosecution Service to start a criminal investigation; cf. the Swiss Bundesgericht, Bundesgerichtentscheid/*BGE* 109 Ib 47 (with regard to the US *SEC*), *BGE* 118 Ib 457 and 121 II 153 (with regard to the French *CFB*) and Bundesgericht of 28 April 1997, no. 1A.361/1996 (with regard to the Italian *CONSOB*). The Dutch *AFM* does not in any case have these tasks.

39 On this principle under Dutch law see Stevens, *supra* note 33.

40 Cf. ECtHR in *J.B.* v. *Switzerland*, 3 May 2001, appl.no. 31827/96, Reports 2001-III.

41 The 1995 Act on the Supervision of the Securities Trade in Arts. 33-39 also includes provisions to implement international and Community obligations to cooperate. These are partly intended to implement the Investment Services Directive (Directive 93/22/EC) which has recently been replaced by Directive 2004/39/EC of 21 April 2004, *OJ* 2004 L 145/1.

42 An English translation of the 1995 Act can be found on: http://www.afm.nl/english.htm (site last visited on 9 February 2006). 'Section 33 (…) 3. If a foreign agency as referred to in Subsection (1) requests the person who has supplied the data or information pursuant to Subsection (1) for permission to use the said data or information for a purpose other than the one for which it was supplied, the request may be granted

strict requirements. It is further remarkable because in the Dutch situation internally the importance of consultation between the Public Prosecution Service and the *AFM* is increasingly recognized. This approach apparently does not extend to the transnational level. The question is, however, whether foreign supervisory authorities that receive information from the *AFM* should pay much heed to this restriction. Above, I have stated that no permission is required for forwarding information to judicial authorities (Article 16 (2) of the Directive). In other states – especially Germany – this requirement does therefore (rightly, in my view) not apply.

4. Germany

4.1. The organization of supervision and investigation

Like in the Netherlands,[43] supervision in Germany has also been radically reformed recently. Germany has opted for what is called *Allfinanzaufsicht* with one supervisory authority for the entire financial sector. This supervisory authority is the *Bundesanstalt für Finanzdienstleistungsaufsicht* or *BAFin*. Its powers have been laid down in the *Finanzdienstleistungsaufsichtsgesetz* (*FINDAG*) of 22 April 2002 and in sectoral supervision Acts, among which the federal Securities Act, the *Wertpapierhandelsgesetz* (*WpHG*).[44] This latter Act is also the implementation of the Market Abuse Directive.[45] The *BAFin* is the competent authority under the Market Abuse Directive. It does not only have executive duties, but may also perform controls and in case of violations may impose penalties. In the latter event, the relationship with criminal law becomes relevant.

As opposed to the Netherlands, Germany did not opt for parallel powers for the *BAFin* and the German Public Prosecution Service, the *Staatsanwaltschaft*. The responsibility for dealing with violations of the Directive rests upon either the *BAFin* or the Public Prosecution Service. A number of offences may be handled by the *BAFin* itself as *Ordnungswidrigkeiten* (see above).[46] Based on the *Ordnungswidrigkeitengesetz* (*OWiG*) the *BAFin* (according to Article 40 *WpHG*) may deal with violations of the Securities Act equally applying (a considerable number of) criminal procedural law powers and procedures. Based on the same Act, it also has the power to perform seizures after prior judicial authorization (Article 46 *OWiG*).[47] Unlike in the Netherlands, therefore, a procedural link exists with the law of criminal procedure, which also has consequences for international cooperation (see below).

---

solely: (a) if the intended use does not conflict with Subsections (1) or (2); or (b) if the said foreign agency could obtain, in a manner other than that provided for by this Act, the data or information for that other purpose from the Netherlands in conformity with the relevant procedures; and (c) after consultation with Our Minister of Justice, if the request referred to in the opening lines relates to a criminal investigation.'

43 *Supra* note 29.

44 For the English translation see www.bafin.de.

45 This took place via the 'Gesetz zur Verbesserung des Anlegerschutzes – Anlegerschutzverbesserungsgesetz – AnSVG' of 28 Oktober 2004, published in Bundesgesetzblatt I 2004 Nr 56, p. 2630. The *traveaux préparatoires* are published in Bundesrat Drucksache 341/04 of 30 April 2004.

46 Which offences these are may be found in Arts. 38 and 39 *WpHG*. In Germany it is a criminal offence to acquire (*Erwerben*) or dispose of (*Eräußern*) financial instruments to which inside information relates, regardless of who committed the offence (Art. 38 (10) no. 1 *WpHG*). This is different in the case of disclosing (*Weitergeben*) inside information to other persons and inducing (*Verleiten*) others on the basis of inside information to make transactions. These actions are only criminal offences when performed by primary insiders (Art. 38 (1) no. 2a – d *WpHG*). Only then, they fall within the competence of the Public Prosecution Service. In the case of secondary insiders the actions in question are *Ordnungswidrigkeiten*, for which the *BAFin* is competent. This distinction is to do with the lesser degree of injustice (*geringere Unrechtsgehalt*) of the latter actions; Bundesrat Drucksache 341/04, p. 78.

47 Bundesrat Drucksache 341/04, p. 57. Based on the *Ordnungswidrigkeitenrecht* investigative methods directed at telecommunications are not possible (cf. Art. 12 (2) (d) of the Directive). Based on Art. 16b *WpHG* the *BAFin* nevertheless does have this power.

Not all offences are dealt with by the *BAFin* itself. For the investigation and prosecution of certain offences the Public Prosecution Service is the responsible authority.[48] In that case the rules of criminal law and criminal procedural law apply.[49] In such cases the role of the *BAFin* changes as well: it then has a statutory *duty* to report suspected violations (Article 4 (5) *WpHG*).[50] The Public Prosecution Service in turn has a duty to start an investigation (Article 152 (2) *Strafprozessordnung*/*StPO*). Here, therefore, there is no such thing as a 'position of trust *vis-à-vis* entities under supervision'. This has given rise to the reproach that the supervisory authority has allowed itself to become a vehicle for the prosecution. Administrative *Massenfahndung* by means of duties to inform (Article 9 *WpHG*) and report to (Article 10 *WpHG*) the *BAFin* in this way leads to the criminal law *Verwertung von Zufallsfunden*.[51] This duty to report and provide support may in fact be partly explained by the absence of special investigative services which do exist in the Netherlands. Moreover, Germany uses a rather reactive[52] concept of suspicion to mark the beginning of criminal proceedings (*Anfangsverdacht*; Article 152 *StPo*). This inherently leads to the conclusion that the role of the administrative authorities as the provider of leads to the judicial authorities becomes correspondingly more important.[53] Presumably for the same reason – although this was already the case before the adoption of the Market Abuse Directive – the *BAFin* may require that financial institutions retain existing data traffic records (Article16b *WpHG*).

If the *BAFin* transfers a case to the Public Prosecution Service this does not necessarily mean that its own task has come to an end. It is possible that the *BAFin* carries out further investigations using its powers under the Securities Act, for example for the purpose of taking administrative measures or to carry out a foreign request for administrative assistance.[54] Parallel investigations by the Public Prosecution Service and the *BAFin* in the same case are therefore quite possible. Here too, like in the Netherlands, this raises the question of the guaranteeing of the *nemo tenetur* principle. Persons who risk incriminating themselves are then entitled to a right of nondisclosure (*Zeugnisverweigerungsrecht*; Article 4 (9) *WpHG* in conjunction with Article 383 of the German Code of Civil Procedure (*ZPO*)).

4.2. National rules for cross-border cooperation

What does the above mean for international cooperation via mutual administrative assistance (*Amtshilfe*) and/or judicial assistance (*Rechtshilfe*)? This has been laid down in Article 7 *WpHG*. It provides that the *BAFin* is to cooperate with other competent authorities in the supervision (*Überwachung*) of financial instruments and markets. Again it emerges here that direct contact with the foreign justice authorities is not an option. Nevertheless, it is also true in Germany that

48 *Supra* note 46.

49 To the extent that these offences overlap with offences for which the *BAFin* is responsible under the Securities Act in combination with the *Ordnungswidrigkeitengesetz,* the Public Prosecution Service may take over the prosecution of the *Ordnungswidrigkeit* by virtue of the *Prinzip der Vorrang des Strafverfahrens*; cf. Arts. 35, 40-42 *OWiG*.

50 For other offences it is *competent* to report them or to disclose confidential information; see Art. 8 (1) *WpHG*. The Public Prosecution Service in turn is obliged to inform the *BAFin* of certain offences; cf. Art. 40a *WpHG*.

51 See thereon *in extenso* Michael Nietsch, *Internationales Insiderrecht* (Ph.D. thesis at the University of Darmstadt, Germany), Berlin 2004; Schäfer, § 16 WpHG, nr 3, in: Schäfer (ed.), *Wertpapierhandelsgesetz – Kommentar*, Stuttgart/Berlin/Köln 1999, § 16 *WpHG*, no. 3; Dreyling, § 16 *WpHG*, nos. 8-11, in: Assmann et al. (eds.), *Wertpapierhandelsgesetz: Kommentar*, Köln 2003; J.W. Habetha, 'Verwaltungsrechtliche Rasterfahndung mit strafrechtlichen Konsequenzen?', 1996 *Wertpapier Mitteilungen*/*WM*, pp. 2133-2140; Kai Müller, 'Insiderrechtliche Mitwirkungs-pflichten der Kreditinstitute im Lichte des nemo-tenetur-Grundsatzes', 2001 *Wistra*, no. 5, pp. 167-171.

52 By this I mean to indicate that the judicial authorities only become active once a reasonable suspicion has arisen that an offence has already been committed. See for the Netherlands *supra* note 31: especially for economic crimes a broader concept is used.

53 *BAFin* employees may also be involved in the investigation as experts: Art. 40a *WpHG*.

54 Art. 4 (5) *WpHG*; see also Bundesrat Drucksache 341/04, pp. 58-59. In the latter case, Germany is by the way free to refuse to execute the request based on Art. 16 (2) of the Market Abuse Directive.

mutual administrative assistance is quite relevant for criminal law enforcement. As we have just seen, for example, the *BAFin*, much more so than is the case in the Netherlands, operates in the preliminary stages of criminal investigations. It also makes requests for administrative assistance for the fulfilment of these tasks.

A further question is whether the *BAFin* may use administrative assistance in the investigation and prosecution of *Ordnungswidrigkeiten.* Above, we have seen that in situations like these it is in any case possible to make a request for judicial assistance.[55] Article 16 in conjunction with Article 14 of the Market Abuse Directive would, in my opinion, not prohibit this, which means that the *BAFin* in such cases could choose between administrative assistance and judicial assistance. Here, however, German law itself imposes certain limits:[56] Article 1 (2) of the Mutual Judicial Assistance in Criminal Matters Act (*Gesetz über die internationale Rechtshilfe in Strafsachen*/*IRG*) provides that a 'criminal matter' as referred to in this Act (*strafrechtliche Angelegenheit*) can also be an *Ordnungswidrigkeit* or a comparable foreign sanction. This is commonly understood to imply that in the case of *Ordnungswidrigkeiten* the criminal law trajectory – *i.e.* judicial assistance – *must* be followed.[57] This could also be inferred from Article 7 (6) *WpHG*.[58]

If the *BAFin* should be the requested party, the reverse is true. For administrative punitive sanctions against which appeal is possible to a court which also has jurisdiction in criminal matters, the rules concerning judicial cooperation in criminal matters are applicable. It further seems to follow from this internal German legislative system that in the execution of requests for administrative assistance only the powers of investigation under administrative law (especially Article 4 *WpHG*) may be used for the execution of the request. The powers based on the *Ordnungswidrigkeitensgesetz* are not to be used.[59] The question is whether this is compatible with Article 16 (1) of the Directive where it provides that: 'Competent authorities shall cooperate with each other whenever necessary for the purpose of carrying out their duties, *making use of their powers whether set out in this Directive or in national law* [italics added, ML].' In short, when you have the powers, you have to use them. This, however, gives rise to many questions, not the least of which is the possible risk of evasion of the guarantees provided for in case of judicial assistance under criminal law, such as for example the double criminality requirement in case of certain coercive measures. It is as yet unclear how this situation is to be assessed.

The relevance of Article 16 of the Market Abuse Directive for administrative law enforcement and criminal law enforcement also becomes clear from Article 7 (2) and (4) *WpHG*, which lay down the German requirements for forwarding information.[60] These are considerably more

55 *Supra* note 13.

56 One may wonder how these restrictions fit in with the declaration that Germany made to the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters; *infra* note 72.

57 Cf. Schomburg and Lagodny, p. 220, in: Albin Eser et al. (eds), *The individual as subject of international cooperation in criminal matters*, Baden-Baden 2002; G. Dannecker, 'Der Schutz der Beteiligten beim internationalen Auskunftverkehr in Steuerstrafsachen', 1990 *StVj*, pp. 124-145. One may wonder, however, whether this rule, which in itself is quite clear, is actually workable in practice. In case of suspected insider dealing it is not necessarily clear from the start whether prosecution will follow. And even where this is clear, it is moreover possible to opt for a two-track approach by imposing both a fine and a reparatory penalty (for example, halting trade). Which road should be taken in case of such cumulative goals?

58 In translation, this subsection provides that: 'The above shall be without prejudice to provisions on international assistance in criminal matters.' Concerning the lack of clarity as to the precise meaning of this, see *supra* note 17.

59 Conversely, only criminal procedural law powers could be used in the execution of requests for judicial assistance.

60 Cf. the following translation of Art. 7 (2) WpHG, which is relevant when Germany is the requested state (Art. 7 (4) applies when Germany is the requesting state): 'When communicating information, the Supervisory Authority is obliged to instruct the recipient that, *without prejudice to his prosecutorial obligations* [italics added, ML], the communicated information, including personal data, is to be used only to fulfil supervisory duties in accordance with sentence 1 and in the context of administrative and judicial proceedings relating thereto. The Supervisory Authority may allow representatives of foreign authorities within the meaning of subsection (1) sentence 1 to participate in its investigations.'

flexible than the Dutch requirements. Unlike in the Netherlands, no permission from the providing authority is required. This is fully in line with internal law enforcement. It implies recognition of the fact that the supervisory authority and the Public Prosecution Service are reliant upon each other. Such a lenient approach does mean, however, that a request for administrative assistance may at the same time *also* serve criminal law purposes.[61] The information may be forwarded to the judicial authorities straight away. This makes parallel investigation possible. Especially when the enforcement of the law depends upon cooperation between the Public Prosecution Service and the supervisory authority this to me appears to be a dangerous situation. There is a very real risk that the requested authority is unable to form a clear picture of what exactly it is providing assistance for. On the one hand, it is obliged to provide assistance, but on the other hand – as far as criminal law enforcement is concerned – it cannot impose any conditions as to what the information supplied may be used for (see *supra* Section 2).

5. Problems encountered in cooperation

The above description has first of all shown that the administrative authorities and the judicial authorities rely on each other to a considerable extent. The exercise of supervision, including the exchange of information, is essential for effective law enforcement. The administrative authority (*i.e.* the supervisory authority) plays an important role in this. This is not only true for the stage of practical implementation of the law and preventive supervision, but also for the stage at which it is concluded that certain rules have been violated (repressive enforcement). Here the following possible courses of action have been distinguished:

a. the administrative authority may be obliged or competent to report violations to the Public Prosecution Service, and/or
b. the administrative authority may be charged with the further investigation of possible violations (repressive enforcement), either in the framework of criminal proceedings as an investigative service under the direction of the Public Prosecution Service[62] or as an alternative for the Public Prosecution Service in criminal proceedings,[63] or independently in a different procedure under administrative law which might possibly be directed at the imposition of a punitive sanction, and/or
c. the administrative authority is charged with the decision following the investigation (imposition of a sanction), either in the framework of a criminal investigation, or in a different procedure which might or might not be directed at the imposition of a punitive sanction.

Whichever of these options is chosen, what catches the eye every time is the close relationship between the Public Prosecution Service and the supervisory authority. What is more, the supervisory authority and the Public Prosecution Service may both operate simultaneously in one and the same investigation. Prosecution without the involvement of the supervisory authority therefore seems difficult to imagine.

---

61 The word 'also' is of the essence here. If a purely criminal law objective were at stake, then there would be a case of *détournement de pouvoir*. Supervision (*Überwachung*) as required in Art. 7 (1) *WpHG* would then be lacking.

62 I have not yet come across this option in financial supervision. It would not be compatible with the independent status of many regulators. It is, however, a common phenomenon in the enforcement of tax law.

63 This option does not exist either in the countries that were examined here. It has however been suggested as a possible alternative for overly extensive possibilities for administrative punitive sanctioning; cf. Corstens, and Verheij and Verhey, *supra* note 28. So far, this option has been rejected. Incorporating the regulator into the criminal procedure would also result in the applicability of criminal law control principles. Under fiscal law, however, this option already exists for some time, both in the Netherlands (Art. 80 of the State Taxes Act [*Algemene wet inzake rijksbelastingen*/*AWR*] and in Germany (Art. 386 *AO*).

And yet, this relationship is not quite extended to the transnational level, which is a second important conclusion that may be drawn from the above. National Member States are still left a considerable amount of discretion in the precise organization of their law enforcement. This has immediate consequences for international cooperation. The sanctioning of the various provisions as described in the Directive and transposed into national law offers many examples of this. For example, one might think of the national provisions transposing Article 2 of the Market Abuse Directive for which the Public Prosecution Service and the *AFM* are both responsible in the Netherlands, but for which only the Public Prosecution Service is responsible in Germany. Direct cooperation between the *AFM* and the German Public Prosecution Service is, however, not a possibility, even though this could certainly serve the underlying objectives of the Directive, namely 'to ensure the integrity of European financial markets, to establish and implement common standards against market abuse throughout Europe, and to enhance investor confidence in these markets'.[64] Contact can only be made indirectly, namely through the involvement of the Dutch Public Prosecution Service or the *BAFin*. In that case, the forwarding of information is either subject to extremely strict requirements (the Netherlands) or to almost no requirements at all.

In short, it looks as if the current distinction between administrative assistance and judicial assistance fails to do justice to the differences that exist in the structuring and organization of law enforcement within Europe which are a direct result of the discretion which the Member States have in giving shape to national law enforcement. Even the Market Abuse Directive, although it interferes in national enforcement structures more than is usual, cannot alter this to any structural degree. Would it not make sense to tackle this problem and if so, how?

In my view, the best way to solve the problem would be to completely eliminate the partitions between administrative assistance and judicial assistance. In this way, all the authorities that are responsible for guarding the objectives of the Directive – put briefly: to protect the integrity of the financial sector – would be able to approach each other directly, which would considerably increase the transparency of inter-state data traffic and thereby also its supervision.[65] In that case, the *AFM* would also be able to request data from the German Public Prosecution Service and possibly even to ask it to carry out investigations. Still, this is a highly controversial option. Opponents may point out a number of objections.

First of all it can be argued that direct contact is incompatible with the supervisory authority's position of trust *vis-à-vis* the entities placed under its supervision and its independent status.[66] Where the judicial authorities in criminal proceedings only incidentally deal with financial institutions, the supervisory authority relies on a good relationship with the institutions placed under its supervision in order to be able to fulfil its functions properly. This argument fails to convince, as the legislator actually quite often takes mutual coordination and cooperation between the judicial authorities and the administrative authorities as its starting point. It is moreover increasingly required that the supervisory authority where necessary takes corrective measures or even imposes penalties.[67] Clarity concerning the use of information would therefore appear to be more relevant for friendly relations between the supervisory authority and the regulated entities than shielding information from the judicial authorities, even in cases where

64 COM(2001) 281 final, p. 2

65 This is not considering the position of the stock markets which at times also have supervisory powers.

66 Cf. A. Althaus, *Amtshilfe und Vor-Ort-Kontrolle* (Ph.D. thesis at the University of Berne) Berne 1997, pp. 119-120; R. Roth, 'Art. 38 BEHG – Amtshilfe', in: Hertig Gérard et al. (eds.), *Kommentar zum Bundesgesetz über die Börsen und den Effektenhandel* (loosleaf), Zürich 2000.

67 Art. 14 of the Market Abuse Directive is in fact a perfect example of this.

abuses could sully the sector's image.[68] It is therefore only right that the 'trust argument' is slowly being abandoned, also in the Netherlands.[69] The responsibility for the integrity of the financial markets is in the hands of multiple institutions which have to rely on close cooperation. Especially in situations where the administrative authorities themselves have punitive tasks, invoking the 'position of trust' would appear to be somewhat incongruous. Cooperation would in my opinion not endanger the independent status of the supervisory authority either, as long as such cooperation takes place on the basis of equality.

A second possible argument against eliminating the distinction between administrative assistance and judicial assistance could be a difference in the seriousness of the underlying offence. The idea behind this is that this distinction expresses the *ultmimum remedium* aspect of criminal law: for more serious offences a request for judicial assistance should be used, while for less serious offences and non-punitive purposes administrative assistance would be indicated. In that case the administrative methods of investigation are used. At the same time, less heavily reinforced means of legal recourse would suffice.[70] According to this line of reasoning, judicial assistance should be used for the more complex investigations where serious charges are usually levelled against the persons involved. This would offer more scope for operation, but stricter requirements would at the same time apply in respect of legal recourse. Therefore, cooperation in criminal matters should be restricted to cooperation between judicial authorities and cannot include supervisory authorities.

However, this line of reasoning ignores the fact that the current system also fails to fulfil its conditions. It presupposes consensus concerning the seriousness of the underlying facts and how worthy of punishment these are, whereas such consensus is as yet lacking in the EU Member States.[71] The above discussion of Dutch and German law alone amply illustrates this. On the contrary, the current division between administrative assistance and judicial assistance rather seems to be the result of random history and a number of parallel developments which were not coordinated. The extension of the scope of application of judicial assistance to the *Ordnungswidrigkeiten* serves as an example of this.[72] Administrative assistance and judicial assistance have developed along separate lines, especially after the Treaty of Amsterdam. Coordination between the first and third pillar of the EU barely took place, even though there was ample reason for it given the coherence and overlap of the underlying subject matter.[73]

A third, much-heard argument is that the circumvention of criminal procedural law guarantees has to be prevented. In this, reference is often made to the condition of double criminality in mutual judicial assistance and the more extensive procedures for legal recourse that apply in the execution of requests for judicial assistance. For this reason, administrative assistance should be

---

68 Cf. Luchtman, *supra* note 30; M.J.J.P. Luchtman et al., *Informatie-uitwisseling in het kader van het Financieel Expertisecentrum*, Utrecht 2002.

69 This is different however for prudential supervision. The utmost discretion is required from the Dutch prudential supervisor, *De Nederlandsche Bank (DNB)*.

70 Such legal protection would still have to fulfil the requirements of Art. 6 ECHR, however. I will discuss this aspect later.

71 This might however be about to change, especially after the judgment in Case C-176/03, *supra* note 5, where in ground 80 the Court held that the *ultimum remedium* nature of criminal law is the prime consideration.

72 Germany attempted also to let cooperation in connection with *Ordnungswidrigkeiten* take place through administrative assistance. To this end, it made the following declaration to the 1978 Council of Europe European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, 100 *European Treaty Series*: 'The Convention shall apply for purposes of requests addressed to the Federal Republic of Germany to any proceedings in respect of offences the punishment of which does not fall within the jurisdiction of the judicial authorities at the time of the request for assistance. In the Federal Republic of Germany such proceedings include proceedings for fines under the Administrative Offences Act (Gesetz über Ordnungswidrigkeiten) as published on 2 January 1975 (…) and last amended by Art. 4 of the law of 5 October 1978 (…).'

73 Not all of the problems noted above may be blamed on a lack of coordination between the first and the third pillar, however. Also in administrative assistance, which is unequivocally first pillar material, the implications of punitive administrative sanctioning are insufficiently recognized in transnational cooperation. This is affecting among other things the transnational protection of the *nemo tenetur* principle.

strictly separated from judicial assistance. I also doubt the tenability of this position. It is true that legal recourse against criminal law means of coercion, such as searches, is often more substantial than in investigations of an administrative law character. Administrative law demands for information for example are not always considered as acts against which separate legal recourse should be possible. However, this often becomes different in a transnational context. A number of countries, notwithstanding their domestic law, do provide for legal recourse against decisions to grant administrative assistance.[74] On the other hand, the quality of legal recourse in the case of judicial assistance should not be overestimated. The inter-state rule of non-inquiry for example causes legal recourse to be potentially less effective. In addition, the precise nature and form of individual legal protection may differ per country, which may, when these countries are involved in mutual cooperation, give rise to a situation where a person has either two options for legal recourse or none at all. This phenomenon is sometimes referred to as 'the crack in the system of international cooperation in criminal matters' (in Dutch: *systeembreuk*).[75] Furthermore, in the third pillar the abolition of national *exequatur* procedures in judicial assistance is currently favoured. Mutual recognition is the motto. The proposal for a Framework Decision concerning a European Evidence Warrant which in time is to replace mutual judicial assistance within the EU is a good example of this.[76] Grounds for refusal and the condition of double criminality will be restricted as much as possible in the new system. This will also lower the level of legal protection in judicial assistance.[77]

It is however the fourth and last argument which will be discussed here that I consider to be the most convincing. This argument concerns what is termed the 'silver platter issue': would the elimination of the distinction not cause authorities more frequently to request the application of powers that they do not have themselves by means of a request for assistance and thereby get the requested information presented to them on a silver platter as it were? Not only might the respective powers of the cooperating authorities differ considerably per country, but the effects of this can only be reinforced when it is furthermore authorities with a different status that cooperate. Especially when – as is so often the case – the use of powers is requested that interfere with fundamental rights I consider it undesirable that the authorities themselves are able by means of mutual cooperation to expand their powers at will. This is a choice that has to be made by the legislator, not by the executive.[78]

In my view it is especially this dilemma that should be dealt with.[79] The question is whether the individual EU Member States are capable of this. It would make more sense to raise this problem to a higher, supranational level. The EU/EC – *i.e.* the first *and* the third pillar together – provide a highly suitable platform for this, especially now that the creation of a European justice area is propagated for the entire European Union (Article 2 TEU) and criminal law powers of the EC

74 The Netherlands is actually a striking example of this as it expressly provides for legal protection against decisions to grant assistance in mutual administrative assistance in tax matters. Oddly, a different approach is applied in administrative assistance in financial matters.

75 A. Orie, 'De verdachte tussen wal en schip òf de systeem-breuk in de kleine rechtshulp', in: E. André de la Porte et al. (eds.), *Bij deze stand van zaken – Bundel opstellen aangeboden aan A.L. Melai*, 1983, pp. 351-361; see also A. Klip, *Criminal law in the European Union* (inaugural lecture at the University of Maastricht), 2005, p. 64; A.A.H. van Hoek and M.J.J.P. Luchtman, Transnational cooperation in criminal matters and the safeguarding of human rights, 2005 *Utrecht Law Review*, no. 2, pp. 1-39.

76 Proposal of 14 November 2003 for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, COM(2003) 688 final.

77 See thereon Van Hoek and Luchtman, *supra* note 75.

78 For the sake of convenience, I qualify the Public Prosecution Service as part of the executive here. In some countries, however, the Public Prosecution Service is part of the judiciary.

79 It has to be said, however, that the Market Abuse Directive acknowledges this problem more than other Community legislation, given that Art. 12 of the Directive defines minimum powers which the regulators – either in cooperation with the judicial authorities or not – must have. To that extent, this reduces the risk of abuses. However, my problem with this is that this approach does nothing to promote transparent cooperation. I have already touched upon this in the discussion of Art. 12 in Section 2.2 above.

have been recognized in the first pillar. A pillar-transcending approach of transnational cooperation in the supervision and investigation of violations of the Market Abuse Directive would appear logical. It would be useful here to indicate the outlines of an alternative model, without, however, pretending to be exhaustive. This will be the subject of the next section.

6. Alternatives for the current model

6.1. Possible main features of a new system

As has been stated above, the dilemma under discussion here is that on the one hand, major differences between the Member States may interfere with transnational cooperation, but that on the other hand where such cooperation is nevertheless permitted these differences may easily cause a loss of legal protection. These difficulties cannot be solved by individual states. A coordinated approach is needed, as is a certain amount of harmonization of the rules on cooperation.[80] This fact in my view compels the EU to formulate rules at European level which may deviate from the national legal order to *the extent* to which this is necessary for transnational cooperation. As this concerns matters which do not only come under the first pillar, but also under the third pillar, it would make sense to handle them in the same way and in a coordinated manner within both pillars.

What would the main features of such a system be? As I have stated, I favour a system in which the national status of an authority (*i.e.* 'judicial' or 'administrative') is not decisive for its possibilities for cooperation in a cross-border context. National differences in law enforcement are after all intrinsic to the model of indirect enforcement that has been chosen within the EU. Even more so than in the case of cooperation between authorities with similar status, it is important in the case of authorities with different status that the requested authority is able to assess for itself what exactly it is granting assistance for. Therefore, direct communication between 'administrative' and 'judicial' authorities should be made possible; the organic criterion should be abolished. This increases the transparency of the cooperation and in this way counters improper use or even abuse. Types of indirect cooperation whereby cooperation takes place via another competent authority and is difficult to supervise must be prevented. For this reason also the problem must be handled in a coordinated manner from the first and third pillar jointly.

All this is not to say that the requested authority for the execution of such requests should be given new powers or powers that deviate from the internal enforcement of law. On the contrary, the main rule should still be that the requested authority applies its own powers and procedures, also when assisting foreign countries (*locus regit actum*). For the individual, and especially for those who are not involved in the proceedings on the merits in the requesting state, this increases the accessibility and foresee-ability of government action and prevents the requested authority from handling requests that are alien to its own task. This authority should however not distinguish between *punitive administrative law* and *criminal law* procedures. After all, due to the case law of the ECtHR there is sufficient clarity concerning the interpretation of the concept of 'punitive sanction'. If therefore for the facts under investigation a criminal procedural law power to perform searches is available in state A, this should also be applied for the purpose of punitive administrative means of sanctioning in state B. Conversely, administrative powers in state B will

80 The precise meaning of the term 'harmonization' is still being debated. I use this term in the meaning given to it by Tadić, in: A. Klip and H. van der Wilt (eds.), *Harmonisation and harmonising measures in criminal law*, Amsterdam 2002. It does not mean unification or approximation (meaning the elimination of differences between two or more legal orders), but coordination (increasing the inner consistency of two or more legal orders), in this case by legislative intervention and supervision by the ECJ, with a view to international cooperation.

also have to be applied – with due observance of the *nemo tenetur* principle – following a request from a judicial authority in state A. In such cases, the obligation of professional secrecy under Article 13 and the rule of speciality under Article 16 of the Market Abuse Directive provide further guarantees against improper use.[81] They guarantee that the powers can only be used to serve the objectives for which the Market Abuse Directive was created.

These things however require the coordination and harmonization of a number of preconditions for the benefit of this cooperation. Simply being a party to the ECHR does not suffice for the purpose of such harmonization. The point is to recognize that national systems may in themselves be completely compatible with the Convention, but because of a wide margin of appreciation may differ to such an extent that cooperation may still go against the Convention or may reduce or even cancel the effect of Conventional guarantees.[82] For this reason, there will have to be agreement concerning for example the question as of what point criminal procedural powers may be used in transnational cases[83] and which authority may authorize their use or may apply them. Other questions as well, such as the question of guaranteeing the *nemo tenetur* principle,[84] the question of the use of the information supplied[85] and the question of legal remedies[86] should be tackled and answered at European level. Limited harmonization of national law is needed in order to tackle the problems that nowadays already exist, but even gain weight after the removal of the partitions between administrative and judicial assistance. Although the requested authority would thus in principle make use of its own powers, in given cases substitute supranational rules instead of national rules would apply. For the purpose of interpretation of these supranational rules judicial control by the European Court of Justice would seem indicated.

Again, we are not talking about the complete harmonization of national administrative and criminal procedural law as a goal in itself, but about the partial harmonization of rules that apply in cases of transnational cooperation. The underlying idea is that where on the one hand it is accepted that the practical implementation and enforcement of much of European law is carried out by the Member States, we also on the other hand need facilities which in cases of transnational cooperation are able to do justice to national differences and national autonomy, but that

---

81 Corresponding provisions should in fact also be included in the third pillar instruments; see below.

82 *Supra* note 75.

83 Essentially, this concerns a transnationally defined concept of 'a reasonable suspicion.' In many countries the concept of a reasonable suspicion is considered an elaboration of the proportionality principle; cf. for Germany L. Schulz, *Normiertes Misstrauen: der Verdacht im Strafverfahren* (Habil. Frankfurt am Main), Frankfurt am Main 2001; J. Corts and H. Hege, 'Die Funktion des Tatverdachts im Strafverfahren, nos. 1 and 2', 1976 *JA/Juristische Arbeitsblätter: für Ausbildung und Examen*, pp. 303-308 and pp. 379-386. In the Netherlands, this is currently being discussed; cf. the proposals from the research project *Strafvordering 2001*, M.S. Groenhuijsen and G. Knigge (eds.), *Dwangmiddelen en rechtsmiddelen – Derde interimrapport onderzoeksproject Strafvordering 2001*, Deventer 2002, and the response by the Dutch Minister of Justice; *Kamerstukken II* 2003-2004, 29 271, no. 1, pp. 13 *et seq.*

84 Attention will also have to be paid to a transnational right to remain silent. Which persons are entitled to such a right? Do they only have this right if they are suspects or also if they are heard in a different capacity, for instance as a third party or witness? As of what point is one entitled to a right to remain silent? What is the scope of this right? Does it also apply in case a request has both punitive and non-punitive purposes?

85 Mutual agreement and clarity concerning the use of the information that has been provided are essential. Some powers for instance are so far-reaching that they are only permitted for limited purposes. Often such powers are secret by nature, which means that the person involved does not know about the measure taken. This makes the person involved into the mere 'object' of the investigation. In many countries, this has led to additional safeguards with respect to the goals for which such information may consequently be used. The question is how this principle of strict speciality is to be ensured in a transnational context.
Similar questions may be asked in respect of the application of administrative powers of investigation which rely on the active cooperation of the person concerned. In many legal orders, such powers are permitted, as they are coupled with detailed regulations concerning the (purpose-bound and confidential) use of the information (cf. Arts. 13 and 16 (2) of the Market Abuse Directive). Again, the question is how this principle of strict secrecy and speciality is to be ensured in a transnational context. Attention should be paid especially to the extent to which judicial authorities are bound by such a transnational official duty of confidentiality.

86 Think of the following questions: against which acts should legal recourse be provided at the least? Should such recourse take place before or after? Should it take place in the requested or in the requesting state? What authority – for example, a court – should offer this protection? What are the rights of the persons concerned to participate in the proceedings or to appeal against decisions? What persons are entitled to legal recourse? See hereon also Van Hoek and Luchtman, *supra* note 75.

at the same time iron out the major differences in order to prevent a loss of transnational legal protection. I do not aim to provide complete answers to these questions. I consider it much more important that these questions are asked now and that this takes place in a coordinated fashion, whereby it is also recognized at European level that there is a considerable overlap between cooperation under the first pillar and cooperation under the third pillar.

6.2. Other options

Assuming a desire to solve the problems outlined above, other options could also be defended. I will briefly mention two here. First, it could be argued that the EC should use the legislative competence in the field of criminal law which it has accepted for itself in Case C-176/03 (also) to smooth down the irregularities described above. The problem of cooperation would thereby indirectly lose relevance, as from then on cooperation could take place through judicial channels. Faltering international cooperation could be cited as an argument in favour of (mandatory) criminal law enforcement, especially if in the near future cooperation is to take place on the basis of the European Evidence Warrant.

It is to be hoped, however, that the Community will use its newly acquired power judiciously. Intervening in the nature and organization of national law enforcement may have far-reaching consequences. After all, there is a reason that the Court applies quite strict requirements to the conditions for criminal law sanctioning: 'However, the last-mentioned finding [that, as a general rule, neither criminal law nor the rules of criminal procedure falls within the Community's competence, ML] does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an *essential* measure for combating *serious* environmental offences, from taking measures which relate to the criminal law of the Member States which it considers *necessary* in order to ensure that the rules which it lays down on environmental protection are *fully effective* [italics added, ML].'[87] In short, for the enforcement of the legal interest involved (in this case, the integrity of the European financial markets instead of the environment) enforcement through criminal law has to be the best possible option.[88] Only then will legislative interference be indicated. This is clearly a further elaboration of the *ultimum remedium* notion by the Court.

In its explanation to the proposed Market Abuse Directive the European Commission indicates why a certain degree of harmonization of law enforcement is preferred: 'In principle it is unacceptable in an integrated financial market for wrongful conduct to incur a heavy penalty in one country, a light one in another and no penalty in a third. However, full harmonization of penal sanctions is not provided for in the EC Treaty. Nevertheless, it is both desirable and consistent with Community law for the Directive to set a general obligation for Member States to impose and determine sanctions to be imposed for infringement of measures pursuant to the Directive in a way that is sufficient to promote compliance with its requirements.'[89] Insofar as this passage suggests that criminal law harmonization is a panacea for the problems noted, but that the EC at the time lacked the necessary power, this to me would appear to convey the wrong message. It is difficult to see why punitive administrative sanctions could not suffice here.

87 ECJ 13 September 2005, C-176/03, § 48, *supra* note 5. It yet remains to be seen how fully the Court will review the implementation of these criteria by the European legislator; cf. Borgers, *supra* note 10.

88 This would require the existence of a certain empirical basis for that choice; cf. Corstens 2005, *supra* note 8.

89 COM(2001) 281 final, p. 5.

For this reason, criminal law enforcement which is mandatorily prescribed by the EC should be rejected, *to the extent that* such legislative intervention would be the result of a desire to promote transnational cooperation. For this purpose, such intervention would go too far, given that it also covers internal law enforcement. Moreover, it would not solve all the problems encountered. Even in the case of such a legislative operation, administrative supervision and with it administrative assistance will remain important factors. The problems outlined above will not be erased by opting in favour of criminal law enforcement: information that was provided during the supervisory stage may later prove relevant during the investigation or vice versa; the Public Prosecution Service may be in need of the expertise of the supervisory authority, etcetera. All these consequences have to be thought out before criminal law enforcement is opted for.
A second solution could be to reinforce the partitions between administrative assistance and judicial assistance.[90] By tightening the provisions concerning speciality and secrecy separate channels could be created which would also make it more difficult to circumvent legal guarantees. However, this argument also ignores the difference in law enforcement between countries. At the very least in that case all forms of administrative sanctioning, including the Dutch administrative fine, would have to be transferred to the realm of judicial assistance. But even then we would find that the administrative and the judicial authorities simply cannot do without one another. It does seem inefficient to separate punishment-orientated cooperation from other forms of cooperation at the transnational level if at the national level cooperation between judicial authorities and administrative authorities is in fact required.

7. Final remarks

Above I have discussed the growing influence of the European Union on the shape taken by national law enforcement and the consequences this has for cooperation at European level, using the Market Abuse Directive to illustrate the point. Criminal law enforcement prescribed by the EC has become possible after Case C-176/03. It cannot be ruled out that in time it will indeed be stipulated that rules provided in the Market Abuse Directive must be criminally enforced by the Member States.
However, the debate which has – rightly – begun to rage concerning EC powers in the field of criminal law, threatens to elbow aside another important topic. In my view, more attention than is currently the case should be focused on the nature and manner of transnational cooperation in enforcement matters. This topic from the point of view of the creation of an integrated stock market (and also for other Community areas) would seem to me to be at least equally important. Both topics touch upon each other. Future discussions concerning the use and need for Union-wide criminal law enforcement may be influenced by the possibilities for transnational cooperation, especially in a system of indirect enforcement, in which the Member States are (for the time being?)[91] limited to operating within the confines of their own borders. Opting in favour of criminal law enforcement implies that mutual judicial assistance, and in the future possibly also

90 Cf. Swart, p. 457, and Lagodny, p. 738, in Albin Eser et al. (eds), *supra* note 57. These authors by contrast consider the speciality principle an important guarantee; see hereon also J.J.E. Schutte, 'Administrative cooperation', in: M. Delmas-Marty (ed.), *What kind of criminal policy for Europe?*, The Hague/London/Boston 1993, pp. 191-204; J.M. Sjöcrona, 'Communautaire administratieve samenwerking bij EG-fraude: immuun voor mensenrechten', in: J.W. van der Hulst (ed.), *Administratieve bijstand in de EG*, Deventer 1995, pp. 71-88.

91 Some financial Directives offer the possibility of cross-border intervention by regulators; cf. Art. 57 of Council Directive 2004/39/EC of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, *OJ* L 2004 145/1.

the European Evidence Warrant (EEW), is gaining importance at the expense of mutual administrative assistance.

Criminal law enforcement, however, is not the miracle drug to cure all ills, especially not when it comes to international cooperation. Even in case of Union-wide criminal law enforcement mutual administrative assistance remains relevant for criminal law enforcement. After all, supervision – and, as a consequence, administrative assistance – is an indispensable part of the enforcement chain. Consequently, the problem will remain that the cooperating authorities, either directly or indirectly,[92] retain the option to choose between judicial assistance and administrative assistance. Differences in the scope of application, grounds for refusal, restriction to purpose, legal recourse, etc., in themselves may justify a choice in favour of either the one approach (*e.g.* judicial assistance) or the other (*e.g.* administrative assistance) and therefore affect the transparency of inter-state data traffic. The differences between cooperation in administrative matters and cooperation in criminal matters are even set to increase with the arrival of the European Evidence Warrant, which is based on completely different starting points than mutual administrative assistance. For this reason, coordination between the first and the third pillar is essential.

I consider it remarkable, therefore, how little attention is paid to this issue, of which I am convinced that it impedes the realization of the integrated financial market in respect of enforcement and which may – partly – be viewed as an alternative for a possible mandatory criminal law enforcement, prescribed by the EC. In my opinion, the efforts of the Union in its entirety (*i.e.* the first and the third pillar taken together) should at this point in time primarily be focused on facilitating cooperation between the Member States, whereby the pillar structure is where necessary disregarded and whereby differences in enforcement and organization between the Member States concerned are taken into account. Transparency and limited recognition of mutual differences, but with (restrictive and coordinated) legislative intervention in both the first and the third pillar are key concepts in this. Separate platforms do not contribute to this; quite the contrary, in fact.

92 By the latter I mean the involvement of other authorities. Given the close cooperation at national level between the regulator and the Public Prosecution Service this seems an obvious solution and something that is to a certain extent even expected of these authorities.