

Summary

Background of the research

National administrative law has traditionally been connected to the principle of territory. According to this principle, an authority is only competent to act on the territory of its own state. For any extraterritorial supervisory activities transnational cooperation is essential. This cooperation can relate to criminal law (mutual judicial assistance) and to administrative law (mutual administrative assistance). This research is limited to mutual administrative assistance.

Within the European legal system, transnational cooperation receives a prominent position. Cooperation is necessary for the effective implementation and enforcement of European law. This cooperation is first of all directed by the principle of loyal cooperation (Article 10 EC), which among other things implies that institutions of the EU and the Member States must vertically and horizontally cooperate to ensure the effective enforcement of European law. The increasing importance of administrative cooperation has been confirmed by the position it has received in the Treaty of Lisbon (still to be ratified). Under the new Treaty, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States in the area of administrative cooperation.

In the provisions of secondary European legislation the cooperation between administrative regulators is given an increasingly prominent position. Important provisions of transnational cooperation are incorporated in the law regarding taxes, customs, financial supervision, food safety and fisheries. All these sectors have extensive provisions on transnational cooperation. These provisions can regulate supervision at the request of an authority of another Member State and cross-border supervision by a Member State on the territory of another Member State. The Services Directive also has extensive cooperation provisions. It forms the immediate reason for this research project.

European influence has brought this subject prominently to the attention of the Member States. Member States need to decide how administrative cooperation needs to be legally implemented so as to ensure that European obligations to cooperate are carried out effectively and in accordance with fundamental legal principles. Although the transposition of the Services Directive forms the immediate reason for this research, the research itself will serve a wider purpose. It describes the European obligations to cooperate in various sectors, as well as the manner in which various Member States have legally implemented these obligations. The results will support a further orientation in this increasingly important legal field and can prove to be an inspiration for the implementation of the Services Directive, whether by means of a general cooperation provision in the Dutch General Administrative Law Act (GALA) or by other means.

Research questions

The central research question is the following: how have the Netherlands and other Member States legally regulated the mutual administrative assistance between supervisory authorities which is necessary for the implementation of European law and which parts thereof are suitable for use in the Netherlands? To provide an answer, the following questions were explored:

- Which obligations to cooperate in supervision are prescribed by the European Union in a number of selected sectors and what is defined under supervision in the relevant European legislation?
- Which conditions and requirements are laid down to provide cooperation, which competences of authorities are prescribed, and how is the legal position of private persons provided for?
- Which national authorities are involved in carrying out the European obligation of cooperation, and which forms of transnational cooperation are legally regulated in the Member States?
- Which conditions and requirements do Member States determine for transnational cooperation, and which competences does national legislation give to national authorities and the authorities of other Member States to carry out this cooperation?
- Which parts of the findings under which requirements are possibly suitable for use in the Netherlands, especially with regard to the Services Directive?

Research Methodology

The most important method used in this research is an analyses of European, Dutch and foreign legal provisions. Both the general legislation and the legislation in various sectors have been taken into consideration in Europe, the Netherlands and four other Member States of the European Union. A quick scan has been made to select the Member States and sectors. As to the Member States, Germany, England and Wales, France and Spain have been selected. As to the sectors, customs, financial supervision, social security, fisheries and food safety have been selected.

Next to the analysis of the legal provisions, the literature on transnational cooperation in Europe and the Member States has been used. This has been especially necessary to study the general provisions on transnational cooperation.

In addition to these methods, questionnaires were sent to representatives from the selected sectors and to experts from the selected Member States, whereby information has been gathered on the organisation and legal regulation of cooperation in other Member States. In the context thereof, informal conversations have taken place with experts from the selected Member States.

Structure of the report

The structure of the report closely follows the research questions. In that way, chapter 2 answers the first two research questions, which concern European law, chapters 3 to 7 answer the third and fourth research questions, which concern the law of the Netherlands and the selected Member States, while chapter 8 answers the final research question and forms the concluding analysis of the report.

In chapter 2 an inventory is made of transnational cooperation for the purpose of supervision in the field of customs, financial supervision, social security, fisheries and food safety. For every sector the organisation of the sector and the relevant legislation is first set out. Subsequently, three other elements are described in detail, the forms of cooperation, the position of Member States, and the position of private parties.

With regard to the forms of cooperation, a general distinction is made between provisions creating a general duty of cooperation, *supervision on request* and *cross-border supervision*. In the case of *supervision on request* an authority carries out enquiries or inspections at the request of an authority from another Member State, which implies the use of inspection powers. A further distinction in the case of supervision on request can be made between an *indirect* request, in which case inspections or enquiries have to be carried out in order to gather the requested information, and a *direct* request, in which case an authority requests that certain specific inspections or enquiries be carried out. In the case of *cross-border supervision* an authority is present to supervise on the territory of another Member State. A further distinction in the case of cross-border supervision can be made between *dependent* and *independent* cross-border supervision. The difference between these two forms concerns the question of who is the leading authority in carrying out the respective inspection or enquiry. In the case of dependent supervision this is the Member State where the inspection or enquiry takes place, and in the case of independent supervision this is the foreign authority. With regard to the position of Member States, attention is given, firstly, to the powers of inspection which authorities have to be able to use in carrying out cross-border inspections or inspections on request, and, secondly, to the conditions and requirements for cooperation. With regard to the position of private parties, brief attention is given to the rules which are provided on the rights and duties of private parties.

Chapters 3 to 7 provide an inventory of national law regarding transnational cooperation in Germany, France, the Netherlands, Spain, and England and Wales are looked at. These chapters describe in which way the various forms of cooperation and the powers of inspection are legally regulated by the Member States.

Chapter 8 brings these results together in an integrated manner and draws a number of general conclusions about the implementation of cooperation provisions. Finally, special attention is given to the transposition of the Services Directive.

Findings and conclusions

1. The European Union regulates the transnational cooperation which is necessary for the supervision and enforcement of European law by regulations and directives. The last few years have seen an increase in these efforts. The two principal forms of cooperation, supervision on request and cross-border supervision, are present in the selected sectors. Supervision on request is prescribed in all selected sectors. *Dependent* cross-border supervision is prescribed in the law of customs, financial services and food safety. *Independent* cross-border supervision is only prescribed in the law of financial supervision and fisheries. In all sectors a *general duty of cooperation* is prescribed.

2. In the legislation of the selected Member States the prescribed cooperation receives only minor attention overall. A general vision of what needs to be implemented in the national legal systems with regard to transnational cooperation between authorities seems to be non-existent.

- a) When cooperation is prescribed in *regulations* few national provisions are present in the legislation of Member States. Probably this has to do with the fact that provisions on cooperation in regulations are generally considered not to need any further elaboration, because regulations are considered to have direct force in the legal systems of the Member States (article 249 EC). However, whether a provision of a regulation can thus be effectively applied by a Member State is not a foregone conclusion. Firstly, not all regulations are so formulated that they can be applied by

the Member State without any further implementation. Further legal implementation is often even prescribed in the regulation. Moreover, the national legal system and its legal principles (such as the principle of legality) will have influence on which parts of a regulation will need further legal implementation.

- b) When cooperation is prescribed in *directives* (in this research in financial services) there are more or less extensive national provisions on cooperation in the Member States. However, it is remarkable that the ways in which these provisions are implemented by the Member States are notably different.

3. The *general obligation of cooperation* is prescribed in the European legislation of all sectors. This obligation is regularly incorporated in national legislation. However, the legal meaning of a general obligation seems to differ between Member States. In the Netherlands no powers of inspection can be derived from a general obligation of cooperation. In the Dutch GALA powers of inspection are linked to the exercise of supervision on a distinctive legal provision and not to the rendering of mutual assistance. This only differs when powers of inspection are expressly linked to the duty of mutual assistance, as in the customs sector in the Netherlands.

4. *Supervision on request* is prescribed in the European legislation of all sectors. In the case of indirect as well as of direct supervision on request, the requested authority is always allowed to choose which measures are the most suitable for fulfilling the request. The requested authorities' powers of inspection are limited to the powers of inspection which they have according to national law. A request for assistance can never be a reason for using powers of inspection which are not accorded to the authority by national law. This is a direct consequence of the principle of institutional autonomy, but it is often expressly stated in regulations or directives in question.

- a) Supervision on request in the financial services sector is regulated in the national law of all the selected Member States. Because cooperation is prescribed by European directives, which must be transposed into national law, an extensive regulation of cooperation in national law is required. However, the manner in which Member States fulfil their duty of transposing these provisions on cooperation differs remarkably. Subjects which are regulated in the examined legislation are the possibility of supervision on request and to provide gathered information to the foreign authority itself, the powers of inspection to fulfil the duty of assistance, and the conditions and requirements to which a request for supervision is subjected by national law.
- b) National legislation that implements provisions in regulations is only found in Germany, and England and Wales in the food safety sector, and in the Netherlands in the customs sector. Unquestionably this has to do with the fact that further national legislation is not deemed necessary when duties of cooperation are prescribed in regulations and supervision is on regulations. Legislation implementing such provisions seems not to be deemed necessary.
- c) Regarding the Netherlands, it is important to consider that the powers of inspection in section 5.2. of the GALA cannot be used for supervising compliance of legislation from another Member State when this legislation is transposed from a European *directive*, because foreign legislation cannot be considered as a 'legal provision' in the sense of article 5:11 of the GALA. Should a Dutch authority be able to supervise, on

request, the compliance with foreign legislation (transposed or not), specific legislative provisions will have to be created. In accordance with this view, the Dutch ‘Financial Supervision Act’ creates specific provisions to make the use of inspection powers possible in such cases.

In the case of *regulations*, a Dutch authority will be able to use the powers of inspection in section 5.2. of the GALA to supervise, on request, compliance with the regulation involved. Regulations are considered to be ‘legal provisions’ in the sense of article 5:11 of the GALA. Further national provisions are in such cases only necessary when a regulation prescribes different powers of inspection than the general powers of inspection for Dutch authorities in section 5.2. of the GALA. In accordance with this view, the Dutch ‘General Customs Act’ creates, in article 1:33, the possibility for customs officers to provide the authorities of other Member States (and the Commission) with information.

5. *Dependent cross-border supervision* is prescribed in the European law on financial services (market abuse directive), customs, and food safety. The provisions in the customs and food safety sectors are substantively identical and provide that officials from the applicant authority ‘shall have access to the same premises and the same documents’ as the requested authority, ‘through their intermediary and for the sole purpose of the administrative enquiry being carried out.’

- a) In most of the selected Member States national provisions on dependent cross-border supervision have been found in the financial supervision sector. As already said, this is not strange, since these provisions need to be transposed from a directive into national law.
- b) Most of the examined Member States have not created legal provisions to implement the obligations in the customs and food safety sectors. Notable exceptions are the Netherlands and Germany. In the Netherlands article 5:15 (3) of the GALA provides that national inspectors – so also those in the sector food safety – are allowed to let themselves be accompanied in the enquiry by a foreign inspector. In the customs sector, where section 5.2. of the GALA is not applicable, an identical provision is found in article 1:23 of the General Customs Act.
- c) Regarding the Netherlands, because the ‘power to accompany’ of a foreign inspector is already regulated in the GALA, the further regulation of this dependent power of inspection in sectoral legislation is generally not necessary. In that case, it is of no importance whether the power is prescribed in a regulation or a directive. When a directive prescribes that a foreign inspector should be able to avail himself of (dependent) powers other than the power to accompany to places, such should be transposed. When these other powers are prescribed in a regulation, it will depend on the precise wording of the regulation whether implementation of these powers is necessary. In view of the wording in the sector food safety and customs, implementation of the power to have access to documents does not seem strictly necessary. Nevertheless, because of the national principle of legality or to put beyond a doubt that foreign inspectors are allowed to use these (dependent) powers of inspection in the Netherlands, it could still be advisable to implement such provisions.

6. *Independent cross-border supervision* is prescribed in Europe in the financial supervision sector by means of directives and in the fisheries sector by means of regulations. In the sector

financial supervision the powers of inspection are not further elaborated. This is remarkable as inspectors must be able to carry out cross-border inspections independently. The fisheries sector has so-called ‘Community inspectors.’ They are specially nominated inspectors from the Member States and are notified to the Commission and included in a list established by the Commission. They are allowed to supervise the waters under the jurisdiction or sovereignty of other Member States and have – according to the relevant regulation – the same powers as those of the fisheries inspectors from the Member State in which the inspection takes place.

- a) In all the examined Member States in the financial supervision sector, with the exception of England and Wales, there are legal provisions regulating the independent cross-border inspections which foreign inspectors must be able to carry out. However, the manner in which foreign inspectors’ powers of inspection are regulated is questionable. The possibility for foreign inspectors to use powers of inspection on the territory of another Member States is either limitedly regulated (Germany) or not at all (Netherlands, France, Spain). However, Spanish and German legislation do attribute their authorities to use powers of inspection in other Member States. Consequently, it is unclear on the basis of which provisions foreign inspectors can use powers of inspection, when these other Member States do not give any powers of inspection to foreign inspectors.
- b) In the fisheries sector Community inspectors are active. They are established by the Commission in a regulation and supervise independently, and ‘shall have the same powers as those of the fisheries inspectors of the Member State in which the inspection takes place.’ Opinions of Member States differ whether this European provision is complete enough to be applied without further legal implementation by the Member States. The wording of the regulation gives ample opportunity to hold that further implementation is not strictly necessary. On the other hand, implementation can have the advantage that it supports the national principle of legality and puts beyond doubt that ‘foreign’ inspectors are allowed to independently use their powers of inspection. All in all, we believe that, although implementation of independent cross-border supervision by the national law in the sector fisheries may not be strictly necessary, there may still be good reasons to do so.
- c) In the Netherlands, when independent cross-border inspections are prescribed in a directive (financial supervision sector), legal provisions must be adopted to make the prescribed independent cross-border inspections possible. This can be achieved by adjusting article 5:11 of the GALA in such a way that foreign inspectors also fall under its definition of an inspector or by creating sufficient provisions in the law of the sector involved.

Consequently, it would be possible to implement the provisions on independent cross-border supervision in the sectoral legislation of the fisheries sector in the Netherlands. However, in the legal system of the GALA this is not necessary. According to Article 5:11 powers of inspection can be used in the Netherlands by inspectors who are designated by a ‘legal provision’ to supervise. Community inspectors are designated by the Commission through a regulation. As regulations are by the GALA considered to be ‘legal provisions’ as well, the designation by the Commission of Community inspectors meets the requirements of Article 5:11 of the GALA. In other words, the Community inspectors are designated inspectors in accordance with Article 5:11 of the

GALA. Consequently, they can avail themselves of the powers of inspection of section 5.2. of the GALA.

7. Of the two distinctive forms of cooperation described in this report, the Services Directive prescribes only supervision on request. Mutual assistance is prescribed when a provider establishes itself in another Member State or when the provider provides services in another Member State. Especially in the latter case, cooperation will be necessary. In that case the competent authority of the Member State of establishment is responsible for the supervision of the activities of a provider in another Member State. This supervision concerns the compliance by the provider with the authorisation requirements of the competent authority of the Member State of establishment. The competent authority where the service is provided participates in this supervision by carrying out, on request or on its own initiative, checks, inspections and investigations necessary for ensuring effective supervision by the Member State of establishment. Therefore, the supervision on request by this Member States regards (also) the compliance by the provider with the demands of the Member State of establishment. Further, the Directive also contains a general duty of cooperation, obligating Member States to give each other mutual assistance and to put in place measures for effective cooperation with one another, in order to ensure the supervision of providers and the services they provide. Regarding the mutual exchange of information, this duty has been elaborated in detail.

Remarkably, the Services Directive does not prescribe any form of cross-border supervision, not even dependent cross-border supervision. According to the Directive, Competent authorities of the Member State of establishment do not need to have the possibility to be present during requested supervision in the Member State where the service is provided. This is most remarkable as the supervision concerns requirements determined by the competent authority of the Member State of establishment. Furthermore, it is this authority which is primarily responsible for the supervision of providers established in its Member State, regardless of whether the provider provides services in another Member State. Thus, the Services Directive clearly takes a lower stance in this subject than the European legislation examined in this report.

In this report inspiration has been sought for transposing the Services Directive in the Netherlands. However, research in other Member States has shown that the implementation of the Directive in all Member States has not yet lead to proposals for legislative measures. Regarding the Netherlands the following points are important in implementing the Services Directive:

- a) The general obligation of cooperation and the various obligations of (the competent authorities of) Member States to exchange information, should be transposed directly in the national law. However, it should be noticed that specific powers of inspection cannot be derived from a general obligation.
- b) If a Dutch competent authority wishes to supervise, on request or on its own initiative, a provider from another Member State, it has to be able to supervise the requirements of the Member State of establishment. Strictly speaking, this means that the Dutch competent authority supervises the compliance of foreign law. According to Article 5:11 of the GALA this is not possible. Foreign legislation is not considered to be a 'legal provision' in the sense of that article. Consequently, Dutch law will have to provide that competent authorities are able to supervise foreign law or use their powers of inspection for the purpose of mutual assistance. The former option has also been implemented in the Financial Supervision Act in the financial supervision sector.

No further legislation is necessary to provide authorities with powers of inspection, as the Directive prescribes that competent authorities act to the extent permitted by the powers vested in them in their Member State. However, a specific provision that creates the possibility to provide foreign authorities with gathered information is necessary. Such a provision is also included in the Financial Supervision Act.

- c) Dependent cross-border supervision by competent authorities of the Member States of establishment in the Member States where the service is provided is not prescribed in the Directive. However, article 5:15 (3) of the GALA does give competent authorities of the Member State of establishment the possibility to accompany Dutch authorities. To this extent, dependent cross-border supervision is possible in the Netherlands.