

ReNEUAL Model Rules on EU Administrative Procedure

Book V – Mutual assistance

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Editorial note and acknowledgements

This publication of the Research Network on EU Administrative Law (ReNEUAL) is the result of a cooperative effort by many people and institutions. ReNEUAL was set up in 2009 upon the initiative of Professors Herwig C.H. Hofmann and Jens-Peter Schneider who coordinate the network together with Professor Jacques Ziller. ReNEUAL has grown to a membership of well over one hundred scholars and practitioners active in the field of EU and comparative public law.

The objectives of ReNEUAL are oriented towards developing an understanding of EU public law as a field which ensures that the constitutional values of the Union are present and complied with in all instances of exercise of public authority. It aims at contributing to a legal framework for implementation of EU law by non-legislative means through a set of accessible, functional and transparent rules which make visible rights and duties of individuals and administrations alike. The Model Rules on EU Administrative Procedure are proof that it is possible to draft an EU regulation of administrative procedures adapted to the sometimes complex realities of implementing EU law by Union bodies and Member States in cooperation.

In order to develop the Model Rules, ReNEUAL established four working groups addressing the main aspects of EU administrative procedure in the EU. These working groups were concerned primarily with executive rule-making (chaired by Deirdre Curtin, Herwig C.H. Hofmann and Joanna Mendes; Book II); single-case decision-making (chaired by Paul Craig, Giacinto della Cananea, Oriol Mir and Jens-Peter Schneider; Book III); public contracts (chaired by Jean-Bernard Auby, Ulrich Stelkens and Jacques Ziller; Book IV); and information management (chaired by Diana-Urania Galetta, Herwig C.H. Hofmann and Jens-Peter Schneider; Books V/VI). The design of these working groups reflected the scope of the ReNEUAL project on Model Rules on EU Administrative Procedure. In order to draft the various books the chairpersons of the working groups established drafting teams. In addition to the chairpersons the following scholars acted as drafting team members: Micaela Lottini (Book VI), Nikolaus Marsch (Book VI), Michael Mirschberger (Book IV), Hanna Schröder (Book IV), Morgane Tidghi (Book VI), Vanessa M. Tünsmeier (Books III, V), Marek Wierzbowski (Book III). Edoardo Chiti, Paul Craig and Carol Harlow actively collaborated in the initial drafting of Book II. Detailed information about the chairpersons and the

additional members of the drafting teams are provided in the respective list following this note and acknowledgements.

A steering committee composed of the chairs and most active members of the working groups undertook the task of management of the project and ensuring the consistency of content and drafting and finally acted as the editorial board of these ReNEUAL Model Rules. It was joined by Professor George Berman (Columbia University, New York) as external member.

The working groups' research and drafting activities benefitted from the insights and critical input in terms of time and expertise by many ReNEUAL members as well as civil servants from the EU institutions and bodies and also other experts from Europe and other parts of the world during presentation at workshops and conferences, and as reactions to earlier publications.

ReNEUAL would like to express its particular gratitude to the support from the European Ombudsman and the European Parliament. In 2011 the European Parliament established a sub-committee to the JURI committee under the presidency of MEP Luigi Berlinguer. The committee heard *inter alia* ReNEUAL steering committee members Paul Craig, Oriol Mir and Jacques Ziller as experts. The EP sub-committee prepared the January 2013 EP resolution requesting the Commission to submit a proposal for an EU Administrative Procedures Act. Following this invitation, the European Commission has undertaken hearings to which ReNEUAL Steering Committee members have contributed.

Since 2011 ReNEUAL has closely cooperated with the European Ombudsman initially with Ombudsman Nikiforos Diamandouros and since 2014 with Ombudsman Emily O'Reilly. Both have publicly supported ReNEUAL's efforts to improve EU administrative procedure law. We are especially grateful for the opportunities they offered to discuss the ReNEUAL project in 2012 and 2014 at conferences in the European Parliament organised by the Ombudsman. We would also like to thank Ian Harden, Secretary General, European Ombudsman's office, for his interest and support of the ReNEUAL project.

ReNEUAL would also like to acknowledge the cooperation with ACA-Europe, an association composed of the Court of Justice of the European Union and the Councils of State or the Supreme administrative jurisdictions of each of the members of the European Union. ACA-Europe's first joint conference with

ReNEUAL was organised in April 2013 at the European Food Safety Authority in Parma, Italy, at which judges from nearly all EU member states of the EU participated and contributed to the discussion of composite decision-making procedures. The meeting had been prepared by a preparatory workshop of members of the French Conseil d'Etat with Herwig Hofmann, under the chairmanship of the vice-President of the Conseil Jean-Marc Sauvé. The second conference in which ACA-Europe cooperated with ReNEUAL was held in Amsterdam (Netherlands) under the Dutch presidency of ACA-Europe with participation of Paul Craig and Jean-Bernard Auby of ReNEUAL, in The Hague in November 2013, in collaboration with the Council of State of the Netherlands.

The European Law Institute (ELI) joined the ReNEUAL project in 2012. In this context, we received many thoughtful comments by members of the ELI Membership Consultative Committee chaired by Marc Clément (Lyon) and Christiaan Timmermans (The Hague) and by participants of two ELI annual general meetings. We would like to thank all individual commentators for contributing their time, energy and knowledge to this joint project as well as ELI for lending its institutional support. A conference organized by the Centre for Judicial Cooperation, Department of Law of the European University Institute in Florence under the directorship of Loïc Azoulai in cooperation with ELI and ReNEUAL in February 2014 allowed for further in-depth discussion. Next to the organisers, we would like to especially thank the participating judges from Member States high jurisdictions.

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Table of Abbreviations

| | |
|---|--|
| APA(s) | Administrative Procedure Act(s) |
| Austrian APA | Allgemeines Verwaltungsverfahrensgesetz 1991 (BGBl. Nr. 51/1991) das zuletzt durch Artikel 1 des Bundesgesetzes vom 31. Juli 2013 (BGBl. I Nr. 161/2013) geändert worden ist |
| CFR | Charter of Fundamental Rights of the European Union [2007] OJ C 303/1 |
| CJEU | Court of Justice of the European Union |
| CJ | Court of Justice |
| CoE | Council of Europe |
| CoE Recommendation | Council of Europe Recommendation of the |
| CM/Rec(2007)7 | Committee of Ministers to member states on good administration CM/Rec(2007)7 |
| Commission Communication on contract awards | Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement directives (2006/C 179/02) |
| DCFR | Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) - Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf . |
| DG | Directorate-General |
| Dutch GALA | Wet van 4 juni 1992 houdende algemene regels van bestuursrecht (Stb. 1992, 315), in werking getreden op 1 juli 1994, laatstelijk gewijzigd bij Wet van 25 juni 2014, in werking getreden op 1 augustus 2014 |

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|----------------------------------|---|
| ECHR | European Convention on Human Rights and Fundamental Freedoms |
| ECJ | European Court of Justice |
| ECSC | European Coal and Steel Community |
| EDPS | European Data Protection Supervisor |
| EO | European Ombudsman |
| EO Code | European Ombudsman – The European Code of Good Administrative Behaviour |
| EP | European Parliament |
| EP Resolution of 15 January 2013 | European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)) |
| EU | European Union |
| EURODAC | European Data Comparison system for the comparison of fingerprints for the effective application of the Dublin Convention established by Council Regulation (EC) No 2725/2000 of 11 December 2000 |
| GALA | General Administrative Law Act |
| GC | General Court of the Court of Justice of the European Union |
| German APA | Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist |
| Italian APA | Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192) |
| MoU | Memorandum of Understanding |
| Polish APA | Ustawa z 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Dziennik Ustaw Nr 30, poz. |

| | |
|-------------|--|
| | 168), tekst jednolity z dnia 30 stycznia 2013 r. (Dziennik Ustaw z 2013 r. poz. 267), zmiana z dnia 10 stycznia 2014 r. (Dziennik Ustaw z 2014 r. poz. 183) |
| RAPEX | Rapid Exchange of Information System |
| RASFF | Rapid Alert System for Food and Feed |
| SIRENE | Supplementary Information Request at the National Entry [Regulation (EC) no 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)] |
| SIS | Schengen Information System |
| Spanish APA | Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013) |
| Swedish APA | Förvaltningslag (1986:223) Utfärdad: 1986-05-07, last amended by Lag (2014:630) om ändring i förvaltningslagen (1986:223) |
| US APA | Administrative Procedure Act of 1946, Pub.L 79-404, §§ 500 – 596, 60 Stat. 237 (1946) |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| TFP | European Civil Service Tribunal of the Court of Justice of the Union |

ReNEUAL Model Rules on EU Administrative Procedures

Book V – Mutual assistance

Structure

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A. Introduction

I. The concept of mutual assistance in the ReNEUAL Model Rules

- (1) This book understands mutual assistance as **a basic form of support between authorities in the exercise of administrative tasks** within the scope of EU law. Mutual assistance consists of a requesting authority requesting administrative support from the requested authority which is located in a different EU jurisdiction. As such mutual assistance rests on a number of central elements which find their expression in Article V-2:
- the requesting authority cannot fulfil one of its tasks by itself,
 - the requested authority from another Member State or the EU is in the position to give the requesting authority what is necessary for it to fulfil its task,
 - the assistance requested can take various forms: the transmission of information, the conduct of an inspection or the service of a document.
- (2) Thereby, as becomes apparent in Article V-1, mutual assistance **applies to requests for assistance between Member State authorities as well as between a Member State and an EU authority**, so long as these requests are within the scope of EU law.

II. Scope of Book V

- (3) The rules of Book V provide a minimum standard for mutual assistance **where EU law triggers a need for the cooperation between two authorities**. Book V of the ReNEUAL model rules establishes mutual assistance between public authorities as a generally applicable default obligation. It is directly applicable to all fields of EU law as long as no more advanced forms of inter-administrative cooperation such as those for information exchange established in Book VI are applicable. While Book VI establishes a framework for information management activities which is supplemented by a basic act for the respective activity the default rules of Book V are not dependent on such a combination.

- (4) The **need for such assistance** primarily arises out of the principle of territorial reach of public authority, which hinders the requesting authority from completing the task itself. Therefore, assistance can either occur horizontally (between two administrative authorities from different Member States) or vertically (between the administrative authority of a Member State and another belonging to the EU). Against this background, Book V covers - in contrast to Books I, II and III - not only mutual assistance between EU authorities but also between authorities from different Member States or between authorities on EU as well as on national level. This comprehensive approach is justified by the fact that the variety of applicable legal rules transforms mutual assistance into an (unnecessarily) complex part of European administrative law.¹ Although theoretically it would thus also have been possible to create two specific sets of minimum standards, one for horizontal and one for vertical assistance, this would have had the disadvantage of further complicating an already complex and little explored area of EU procedural law.
- (5) One of the main advantages of the concept proposed in Book V is its **ability to encompass not only simple forms of exchange of information but also to be applicable to more complex forms of cooperation** such as conducting inspections or the service of documents. In this Book V on mutual assistance is further reaching than Book VI which is confined to information cooperation. In so far as both Books V and VI cover exchange of information they reflect different levels of administrative integration. The conventional forms of mutual assistance covered in Book V represent the lowest degree of informational integration. By contrast, the focus of Book VI is the resolution of some of the challenges created by more integrated structures of information exchange, *inter alia* structured information mechanisms². This approach of Book V enables the creation of minimum standards across different sectors and for different types of administrative actions.
- (6) The strict **distinction** of, on the one hand, **mutual assistance addressed in Book V**, from, on the other hand, **forms of information exchange in Book VI**, prevents the applicability of the rules of Book V to more sophisticated forms of cooperation to which they are (at best) ill-suited. An example for this is the cooperative exchange of information under the Internal Market Information

¹ See paras 11-13 of the introduction.

² See Book VI, Chapter 2.

System (IMI) which functions through the use of pre-defined (and pre-translated) workflows. While the IMI seeks to facilitate what it refers to as ‘mutual assistance’³ it does so by means of a structured information system which poses distinct challenges. A one-size-fits-all rule cannot adequately cover both a system such as the IMI as well the most basic form of assistance which one authority can provide another. By clearly distinguishing the two, this danger is avoided while all forms of information exchange are still covered by the model rules. As a result of this approach, the concept of mutual assistance adopted in Book V does not cover some of the instances EU law refers to as “mutual assistance”,⁴ including the above mentioned mechanism in the IMI. Instead such forms of cooperation fall within the scope of Book VI. This also means that the challenges which are inherent to such more advanced forms of information exchange evolving towards the creation of administrative networks, including *inter alia* rules on coordinated supervision or technical interoperability⁵ are also situated in Book VI.

- (7) The **focus** in Book V **on a more ‘classical’ concept** of mutual assistance **has a number of consequences**. Generally, the assistance rendered is supplementary. It is distinct from a ‘delegation’, by which an authority entrusts another authority with a task, which would otherwise form part of its normal obligations, in its entirety. This supplementary function of mutual assistance affects the grounds on which an authority may refuse a request. Moreover, requests for mutual assistance operate without the safeguards necessary in information networks; hence they should not be used to create such ad-hoc information networks. Nor should requests be excessive so as to not overburden the administrative authorities either of a Member State or of the EU. The principle of proportionality, which applies to requests for and acts of mutual assistance, serves as a safeguard against potentially excessive burdens.

³ Regulation (EU) 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (‘the IMI Regulation’), Recital (2).

⁴ This is also the case for some forms of cooperation which are categorized as mutual assistance in European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) P7_TA(2014)0212, Art 55(1), namely: requests to carry out ‘prior authorization’ and the duty of ‘prompt information on the opening of cases and ensuing developments’.

⁵ See Book VI, para 20 of the explanations.

- (8) Book V has a **narrow scope of applicability** in that its rules apply to mutual assistance in the procedural phase leading up to and preparing administrative action and especially administrative decisions. Book V is not applicable to judicial and enforcement assistance. The latter is generally left to *lex specialis* and not regulated in this book. However, → Article III-18(5) which regulates enforcement assistance for inspections which are conducted within a single case decision-making procedure. Judicial assistance between courts is likewise distinct from administrative mutual assistance and thus not included.
- (9) As a result, informational mutual assistance is the **main focus of this book for several reasons**: First, information is the basis underlying any administrative decision. Without information an administrative authority cannot take any necessary steps. Second, given that administrative authorities are under an obligation to collect all information and facts relevant to a decision in a careful and impartial manner, rules on informational mutual assistance become essential in the indirect implementation of EU law. Third, provisions on the exchange of information constitute a large part of European mutual assistance provisions. It is therefore a good place to start with the creation of common minimum standards for mutual assistance. Fourth and in light of the frequent use of informational mutual assistance just mentioned, it is essential that concerns of protection of individual rights (both procedural and substantive) including data protection rights are not treated as secondary concern in a quest for increasing administrative efficiency. Despite its inter-administrative focus, Book V therefore creates a number of safeguards for the protection of information and personal data, most notably in Articles V-4(3) and V-5.
- (10) The **dividing line between Book III and Book V** is that Book III deals solely with Member State enforcement assistance in the case of EU inspections. The participation of EU authorities in Member State inspections which are of shared interest and joint inspections of different Member States authorities. By contrast, Book V deals with horizontal as well as vertical requests to conduct an inspection for another authority. In these cases the requested Member State authority undertakes the inspection not in its own interest but as a task in addition to its own obligations.

III. Justification for covering mutual assistance in the ReNEUAL Model Rules

- (11) The **inclusion of rules on mutual assistance** within the project is not only useful, but in fact **necessary**. Today, no general piece of legislation exists which provides a clear procedure for cross-border or multi-level mutual assistance. Instead, EU and Member State Authorities rely either on sector-specific rules which exist in a limited number of cases or on respective conventions of the Council of Europe. The obligation to adhere to the principle of sincere cooperation pursuant to Article 4(3) TEU may positively influence the interpretation of sector-specific rules on mutual assistance, but it is not enough to deduce concrete obligations for mutual assistance.
- (12) Mutual assistance constitutes an important part of European administrative law. At present, **diverse concepts of mutual assistance exist** in academic literature as well as in sector-specific EU law. The respective rules in sector-specific law are also quite diverse. Some sector-specific instruments simply establish an obligation to provide mutual assistance by means of a general reference without further specifying the duties subsumed under this concept.⁶ By contrast, the IMI seeks to facilitate the realization of ‘mutual assistance’ obligations (which are not defined further) by means of a structured information mechanism.⁷ It operationalizes Directive 2006/123 which in turn does not clearly define mutual assistance but simply uses the term, apparently on the assumption that its meaning is obvious.⁸ Directive 2006/123 is one of the legislative acts which provide a set of rules which are subsumed under the more general heading of

⁶ By means of a general reference without further specifying the duties subsumed under mutual assistance, see for example the Commission Regulation (EEC) 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) 2913/92 establishing the Community Customs Code [1993] OJ L253/1 last amended by Commission Implementing Regulation (EU) 1099/2013 of 5 November 2013 amending Regulation (EEC) 2454/93 laying down provisions for the implementation of Council Regulation (EEC) 2913/92 establishing the Community Customs Code (enhancement of regular shipping services) [2013] OJ L294/40, Art 856a (6), Art 899(4).

⁷ Regulation (EU) 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (‘the IMI Regulation’), Art 3(1) read in conjunction with Art 5(b).

⁸ Compare Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Recital (107)-(109), Art 28.

'mutual assistance'.⁹ More generally speaking, the same legal phenomenon is sometimes referred to as mutual assistance and sometimes as administrative cooperation, sometimes the former is subsumed under the latter.¹⁰

- (13) This existing **diversity** of approaches **has** not only **created gaps** in protection but **different solutions** have been created **for similar problems**. Nevertheless, some common features, or at least trends, can be observed. Uniform minimum standards would not only benefit administrations, but would also enhance the protection of European citizens.¹¹

⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Chapter VI.

¹⁰ Compare for example Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L364/1 last amended by Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63, Arts 6-8; Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1; Commission Regulation (EC) 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2009] OJ L280/5 last amended by Commission Implementing Regulation (EU) 865/2013 of 9 September 2013 amending Regulation (EC) 1010/2009 as regards administrative arrangements with third countries on catch certificates for marine fisheries products [2013] OJ L241/1, Recital (9), Art 35.

¹¹ Examples for attempts to create such sector-specific minimum standards: Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final, Art 55; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Chapter VI; More detailed, Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1.

B. Model Rules

V-1 Scope and application of Book V

(1) The model rules of Book V directly apply to requests for mutual assistance which are sent from

- (a) an EU authority to a Member State authority,
- (b) a Member State authority to an EU authority, or
- (c) a Member State authority to an authority of another Member State

when the requesting authority is implementing EU Law through administrative action.

(2) An act of mutual assistance may take one of the following forms:

- (a) the transmission of information which is either already in the possession of the requested authority or which is gathered specifically in order to comply with the request for assistance.
- (b) the conduct of an inspection
- (c) the service of documents

(3) The rules formulated in this chapter do not apply when Member States authorities provide information as a party to a proceeding according to Articles III-11 to III-13.

(4) The rules formulated in this chapter do not apply to judicial assistance or enforcement assistance. They are without prejudice to provisions on mutual assistance in criminal matters and leave obligations arising out of the principle of sincere cooperation unaffected.

V-2 General concept of mutual assistance

(1) In order to receive the assistance necessary to fulfil its tasks under EU law, the requesting public authority may ask a Member State or EU public authority (the requested authority) for support, provided it cannot reasonably be expected to execute the necessary task itself.

(2) Any communication shall be in written form and where possible by electronic means. Where provided for in EU law, a communication may be oral in urgent cases, especially by phone, on the condition that it will be confirmed in writing as soon as possible.

(3) Except where otherwise agreed upon between the public authorities involved, requests and follow-up communication shall be conducted by the requesting authority in one of the official languages of the requested authority, or shall be accompanied by a translation in one of those languages. The requested authority shall formulate its response in one of its official languages. If necessary, the requesting authority shall provide a translation into another language. In the case of vertical mutual assistance, any communication must be undertaken in (one of) the official language(s) of the Member State unless otherwise agreed between the EU and Member State authorities involved.

(4) Neither the requesting nor the requested authorities shall use mutual assistance to circumvent obligations or limitations existing under their applicable laws.

(5) In accordance with the principle of sincere cooperation, administrative authorities shall strive for an amicable solution to any dispute arising out of mutual assistance.

V-3 Duties of the requesting authority

(1) A request for assistance shall

- (a) state the provisions which provide the legal basis for the relevant administrative task of the requesting authority
- (b) state the provisions which provide the legal basis for the request itself
- (c) state the purpose of the requested assistance, its intended and desired use as well as reasons why the requesting authority could not conduct the necessary tasks itself. The request shall include relevant facts already known to the requesting authority and shall indicate if a similar request has been made to another Member State.

- (d) contain sufficient information to enable a requested authority to fulfil the request. In case of a request for the service of documents, the relevant documents shall be the original or certified copies thereof, and the request shall indicate the name, address and any other relevant information for identifying the addressee, as well as a short summary of the attached document to be served, its purpose and the period within which it should be served.

(2) Where the request is not to be transmitted through information systems, or not to be sent to a designated contact or liaison point, or due to the sensitive nature of the information to be handled by a specific authority, the request should be sent through suitable ministerial channels. Member States and EU authorities

shall make suitable authorities as easily identifiable to outside authorities as possible.

(3) The requesting authority may, at any time, withdraw the request for assistance which it has sent to the requested authority. The decision to withdraw shall be transmitted to the requested authority immediately. In the case of a request for the service of documents, the originals transmitted to the requested authority shall be returned forthwith. Moreover, a request for the service of documents cannot be withdrawn once such documents have been served to the addressee. The requested authority shall inform the requesting authority immediately if this is the case.

(4) The information transmitted in the course of mutual assistance may only be used for the purposes for which it was exchanged.

(5) Any information, documents, findings, statements, certified true copies collected or information communicated in the course of mutual assistance may be invoked or used as evidence by all authorities of the Member State receiving it on the same basis as similar information or documents obtained within that State. An exception to such use exists where the requested authority has stated otherwise in accordance with EU law. Both the national laws of the requested and the requesting authority may prohibit the use of information as evidence if procedural or defence rights of the person concerned have been violated in the course of collecting the information.

(6) The requested authority may ask the requesting authority to report back to it on the results of the assistance provided. In such cases the requesting authority is under an obligation to send a report.

V-4 Duties of the requested authority

- (1) The requested authority shall
- (a) confirm the receipt of the request for assistance as soon as possible.
 - (b) comply with the request within the shortest possible period of time. Where the requested authority cannot comply with the request, it shall inform the requesting authority thereof and of the reasons for its failure to do so. In case of difficulties in meeting a request, the requested authority shall promptly inform the requesting authority with a view to finding a solution. Where the addressed authority is not the authority competent to comply with the request, it shall forward the request to its competent (national) counterpart and inform the requesting authority thereof.

- (c) inform the requesting authority if it has evidence to suggest that information transmitted is inaccurate, or if it has been transmitted unlawfully.
- (2) In order to comply
- (a) with a request for information, the requested authority shall provide any pertinent information in its possession or obtain the information sought. To obtain the information sought, the requested authority, or the administrative authority to which it has recourse, shall proceed as though acting on its own account or, if the requested authority is a Member State authority, at the request of another authority in its own Member State;
 - (b) with a request for an inspection, the Member State authority shall conduct the inspection requested subject to existing constraints under national law and in accordance with EU law, or transfer the information required where it is already in its possession;
 - (c) with a request for the service of documents, the requested authority shall in accordance with the rules governing the notification of similar instruments in its own Member State, provide the addressee with all of the documents which it has received for the purpose of service.
- (3) The requested authority is obliged to comply with any lawful request for assistance. It shall refuse to provide personal data where the transfer would infringe applicable EU or national data protection law.
- (4) It may refuse to comply in the following cases:
- (a) where the request does not comply with the requirements of Article V-3 (1).
 - (b) to comply with the request would lead to the disclosure of a commercial, industrial or professional secret, or of information the disclosure of which would be contrary to public policy or national security.
 - (c) the requesting authority could have reasonably been expected to fulfil the task itself.
 - (d) to comply would pose a disproportionate administrative burden on the requested authority.
 - (e) the law of the requested authority does not authorise the competent authority to carry out these enquiries or to collect or use that information for the requested authority's own purposes, and the refusal is in accordance with EU law.

V-5 Right of a person concerned to be informed

(1) Where the transfer of data has been requested the person concerned as defined in Article VI-2(7) has a right to be informed by the requested authority of the intended transmission. The requested authority is not obliged to inform the person concerned where this would threaten the purpose for which assistance is sought, and where the decision not to inform such person is proportionate.

(2) Information communicated in any form in the course of mutual assistance shall enjoy the protection extended to similar information under the national law of the receiving Member State and the corresponding provisions applicable to EU authorities.

V-6 Allocation of costs

Member States and EU authorities shall renounce all claims against each other for the reimbursement of costs arising from any mutual assistance acts, except where mutual assistance involves particular problems leading to excessive costs. In such cases the requesting and requested authorities may agree on special reimbursement arrangements. A similar exception may be made, where appropriate, with respect to fees paid to outside actors, such as experts and translators.

C. Explanations

V-1 Scope and application of Book V

Paragraph 1

- (1) Book V creates a **set of minimum rules for mutual assistance** which is applicable between authorities – both horizontally, between authorities belonging to different Member States, as well as vertically, between a Member State and an EU authority. The rules drafted equip administrative authorities with a set of **default rules**. They structure EU mutual assistance proceedings and provide authorities with a greater amount of clarity in their inter-administrative dealings. They apply to requests for mutual assistance which are sent when the requesting authority is implementing EU law through administrative action in the sense of → Article I-4(1)(a)-(c). Book V does not regulate questions of judicial procedures.

Paragraph 2

- (2) Paragraph 2 contains a **non-exhaustive list of forms of mutual assistance**. This does not exclude that other forms of mutual assistance exist. On the contrary, as observed in the introduction to Book V, mutual assistance owes much of its practical importance in the EU law sphere to its inherent flexibility. The obligation to transfer information upon request remains one of the forms of mutual assistance which is most used in the context of European administration. It can be found in a variety of sectors, for instance in the area of feed and food control or consumer protection.¹² The obligation to transfer such information also implies a duty to conduct enquiries as becomes apparent in the field of taxation.¹³ Such considerations are also taken into account in the remainder of Book V, for instance in Article V-4(2)(a). The gathering of information can occur in a number of different ways, notably through investigations, interviews, inspections etc.

¹² Regulation (EC) 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L165/1 last amended by Commission Regulation (EU) 563/2012 of 27 June 2012 amending Annex VII to Regulation (EC) 882/2004 of the European Parliament and of the Council as regards the list of EU reference laboratories [2012] OJ L168/24, Art 36; Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L364/1 last amended by Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63, Art 6. Compare also European convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Arts 13, 14.

¹³ For example Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 8(2); Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1, Art 6(1); Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1, Art 5(1). Compare for feed and food control Regulation (EC) 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L165/1 last amended by Commission Regulation (EU) 563/2012 of 27 June 2012 amending Annex VII to Regulation (EC) 882/2004 of the European Parliament and of the Council as regards the list of EU reference laboratories [2012] OJ L168/24, Art 36(1). For an example outside of the tax-law sector see European convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 15.

- (3) The inherent flexibility of mutual assistance allows for its use not only to request the transfer of information (here which the requested authority will also have to consider whether enquiries are needed) but **also to request the conduct of specific inspections**.¹⁴ The transfer of documents on behalf of another authority constitutes a third form of mutual assistance.¹⁵ It is referred to as “service of documents”.¹⁶

Paragraph 3

- (4) Paragraph 3 draws an **important distinction between Book III and Book V**: Where administrative authorities are themselves parties to a proceeding, for example when a Member State authority is the addressee of a decision by a EU authority within the meaning of → Article III-2(1), they have corresponding duties as a party to the proceeding. Duties described under → Articles III-11 to III-13 do then not fall within the scope of Book V. In addition, reporting duties of a Member State which exist under a duty to inform as defined in → Article VI-2(2) do not fall within the scope of Book V either.

¹⁴ Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 8(3); Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1, Art 6(2); Council Act of 18 December 1997 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on mutual assistance and cooperation between customs administrations [1998] OJ C24/1, Art 12 of the Annex.

¹⁵ For example The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/19, Art 49(e) judicial documents.

¹⁶ Compare Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000 [2007] OJ L324/79 last amendment by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1.

- (5) A point of discussion is the **relationship between supervisory powers of EU authorities**, especially the Commission, with regard to Member States implementing EU law **and obligations under mutual assistance**. Supervisory powers require a specific legal basis in EU law, which the rules on mutual assistance do not provide. Therefore, Book V does not establish a general supervisory power for EU authorities and the drafting team assumes that Book V does not create duties for supervised authorities in relation to the supervisory authority. Supervisory powers will be regulated in sector-specific legislation which will also address the specific duties of the supervised authority in providing information for the purpose of effective supervision.

Paragraph 4

- (6) As was already explained in para 5 of the introduction, Book V focusses on mutual assistance and **does not cover judicial assistance and enforcement assistance**.

V-2 General concept of mutual assistance

Paragraph 1

- (7) The concept of mutual assistance as proposed in these rules **shall not replace action of the administration in charge of a procedure** but shall be only an auxiliary tool. This is inherent in the notion of mutual assistance, which is restricted to those instances when assistance is truly needed. The drafting team chose to use the term 'reasonably be expected' in order to limit the requesting authorities' right to seek assistance. It can be understood in a manner corresponding to a ground of refusal provided in Article 21(2)(g), Joint Council of Europe OECD Convention on Mutual Administrative Assistance in Tax Matters, which allows a requested State Party to refuse a request for assistance "if the applicant State has not pursued all reasonable measures available under its laws or administrative practice, except where recourse to such measures would give rise to disproportionate difficulty".¹⁷ In line with this reasoning, Article V-4(3)(c) allows refusing a request for assistance where the requesting authority could have reasonably been expected to fulfil the task itself.

¹⁷ European Convention on mutual administrative assistance in tax matters [1988] ETS 127 amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters [2010] ETS 208, Art 21(2)(g).

- (8) **Reasons to request assistance** may therefore fall into either **one of these categories**: Legal obstacles render it difficult for the authority to fulfil the task on its own or factual circumstances exist which render the fulfilment of the task difficult. Mutual assistance may also be used for considerations of administrative efficiency. Lastly, any action linked to a request for mutual assistance, or its execution, has to be in compliance with the principles of EU administrative law, especially legality, subsidiarity, proportionality and effectiveness.
- (9) The **principle of proportionality** implies that an authority, when requesting assistance, should ensure that the assistance sought does not cause more work for the assisting authority than what the assistance can reasonably be expected to be worth for the assisted authority. In other words, the request should not be more burdensome than the advantage which can be gained. Also, national administrative authorities have to take care that their national administrative laws on how to proceed with mutual assistance requests may not only render the implementation and application of EU law impossible or disproportionately difficult, but inversely, they ensure equivalence with national mutual assistance requirements and effectiveness with respect to being able to comply with assistance requests.

Paragraph 2

- (10) **Electronic forms of communication** are standard in present-day administration; their use should be encouraged wherever this is possible. Formal structures exist in a variety of fields such as taxation and customs, as well as in alert systems.¹⁸

¹⁸ For example Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 51; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Art 8; Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the

Nonetheless, other forms of communication continue to exist such as written or oral communication.¹⁹ Rules on standard and emergency situations should be designed to fit divergent forms of communication.

Paragraph 3

- (11) Many existing legislative acts address the **question of language** for either the request or its response or both.²⁰ It follows the general concept expressed in the first paragraph of Article V-2, which confers upon the requesting authority the primary responsibility for the fulfillment of its tasks. It can be expected that the necessary efforts of time and expense required for translation will be borne by the administration which will benefit from the acts of assistance of another authority. This proposed solution has two advantages: First, a requesting authority can better judge exactly which information is the most accurate for the purpose of its procedure than the requested authority. Additionally, parties to the procedure will then be able to review the accuracy of the information by also having access to the original document and thereby being able to analyse the accuracy of the translation.
- (12) In relation to the service of document, the **request and the document attached** (to be served to a third party) have to be distinguished from each other. In accordance with the inter-administrative focus of Book V, paragraph 3 mandates only the translation of the request but not of the document itself. This inter-administrative focus is rooted in the concept of mutual assistance while the language requirements concerning the document are an element of the legal relationship between the requesting authority and the addressee of the

accession of the Republic of Croatia [2013] OJ L158/1, Art 9; Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1, Art 21(1).

¹⁹ For example Council Act of 18 December 1997 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on mutual assistance and cooperation between customs administrations [1998] OJ C24/1, Art 9(4) of the Annex.

²⁰ For example European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 9. Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1, Art 22(1); Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States [2009] OJ L93/23, Art 10; Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L364/1 last amended by Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63, Art 12(4).

document. Where sector-specific law regulates the translation of the document itself (or parts thereof) for the protection of the rights of the individual this is of course to be evaluated positively. Regulatory options can mandate the translation of the document before or after its transmission if the addressee complains of not being able to understand the document, potentially with a limited stay of proceedings where necessary.²¹

Paragraph 4

- (13) As becomes apparent in Article V-2 paragraph 4, as well as in Articles V-3(1)(a),(b) and V-2(4), Book V works on the basis of a divided standard of legality, the dividing line being the identity of the acting authority. The **law of the requesting Member State** governs the **permissibility of the request**, while the **law of the requested Member State** governs its **compliance** with a request and **any follow-up** assistance. Moreover, any action undertaken by the relevant authorities must adhere to the general principle of sincere cooperation and other specific conditions laid down by relevant EU law. Where a request is made or complied with by a EU authority, EU law governs the conduct of the respective authority. The decision to designate the national law of the acting authority as applicable law was motivated by the following considerations: First, it is a view which corresponds to a number of EU law provisions on mutual assistance in sectors such as agriculture, customs and tax law,²² although the respective

²¹ Compare European Convention on mutual administrative assistance in tax matters [1988] ETS 127 amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters [2010] ETS 208, Art 17(5); European Convention on the service of documents abroad of documents relating to administrative matters [1977] ETS 94, Art 7.

²² Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1, Recital (14); Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amendment by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 8(4); Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 7(5); Council Regulation (EC) 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of

instruments do not necessarily reflect the wording chosen here. Second, it minimizes the margin of error to a certain degree, as the administrative authority may be expected to be most familiar with its own national laws. The national laws are of course complemented by EU law. The latter comprises not only general principles but also more specific, additional criteria, which in turn depend on the applicable sector-specific law. Such 'additional' criteria can *inter alia* be found in Article 27(3) of Directive 2004/38.²³

Paragraph 5

- (14) The possibility of a Member State to **initiate proceedings** against another Member State which has failed to fulfil its obligations under the treaties in accordance with Article 259 TFEU, or of the Commission to initiate proceedings against a Member State in accordance with Article 258 TFEU, of course remains unaffected by this paragraph.

V-3 Duties of the requesting authority

Paragraph 1

- (15) Article V-3 contains the requesting authority's duties when seeking assistance from another authority. They **serve multiple purposes**: They enhance administrative efficiency, protect the individual and provide greater clarity by structuring mutual assistance across sectors. The formal requirements for a

the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters [1997] OJ L82/1 last amended by Regulation (EC) 766/2008 of the European Parliament and of the Council of 9 July 2008 amending Council Regulation (EC) 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters [2008] OJ L218/48, Art 4(2). Compare in the area of police and judicial cooperation Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1, Arts 13, 14, 26(1).

²³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ 158/77 last amended by Corrigendum to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2007] OJ L204/28.

request which are established by this paragraph²⁴ serve a dual purpose: first, they seek to support the administration and to increase administrative efficiency. By providing the requested authority with all the relevant information, including the intended and desired use of the requested information, it is easier for the requested authority to comply with the request speedily and completely, minimizing risks of a second request for assistance. Moreover, if a request includes a statement of facts, this may limit the amount of data which the requesting authority deems relevant to satisfy the need for information and then transfers.²⁵ By contrast, a duty to duly motivate a request protects the requested authority against an influx of requests for assistance which may be useful for the requesting authority but is not truly needed. Such a duty to motivate one's request already exists in some areas of EU law, for instance in Article 28(3) Directive 2006/123.²⁶ This need to indicate a specific purpose is also in line with data protection law.²⁷ The duty to duly motivate a request is extended by the model rules to cover the reasons for the requesting authority's inability to conduct the task itself. While this is not practiced currently, it seems justified in light of the narrow notion of mutual assistance adopted in the model rules which is reflected in the grounds of refusal in Article V-4(4).

²⁴ In less detail European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 5. Compare European Convention on mutual administrative assistance in tax matters [1988] ETS 127 amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters [2010] ETS 208, Art 18. Formal requirements can be (partly) laid down through the use of a standard form, i.e. European Convention on the service of documents abroad of documents relating to administrative matters [1977] ETS 94, Art 3.

²⁵ Opinion of the European Data Protection Supervisor on the Amended Proposal for a Regulation of the European Parliament and of the Council on mutual administrative assistance for the protection of the financial interests of the European Community against fraud and any other illegal activities [2007] OJ C94/1, Section II.2.

²⁶ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

²⁷ Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L8/1 last amended by Corrigendum to Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2007] OJ L164/35, Art 4(1)(b); Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 last amended by Regulation (EC) 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty [2003] OJ L284/1, Art 6(1)(b).

- (16) As a second aim, some of the obligations seek to **protect the individual**. For instance, the fact that the requesting authority should specify the legal basis for its request for assistance constitutes an innovative rule and is currently not standard practice in EU law in this form. Different EU legal acts often specify in detail which actions may be taken or which information may be transferred for the purposes of the instrument. The duty to specify the legal basis is intended to remind the authorities involved not to go beyond what is provided for in EU law. This notion of a *purpose limitation* can i.e. be found in Article 13 Regulation 1024/2012²⁸ and is also reflected in Article V-3(4). To oblige authorities to provide the relevant legal basis would thus provide a first tier of control by ensuring that all authorities are aware of the origin of their powers to ask for assistance and their limitations. Similarly, the obligation to specify if similar requests have been sent to other Member States is meant to render it more difficult for individual Member States to use mutual assistance to create an ad hoc information network. Such an ad hoc network would lack the safeguards necessary for such a system, which are provided for in Book VI.

Paragraph 2

- (17) Paragraph 2 follows **established practice**.²⁹

Paragraph 3

- (18) The option to withdraw a request ensures that where assistance is either not necessary within the meaning of Article V-2(1) but the requesting authority mistakenly assumed it was, or where it is no longer necessary due to changed circumstances, the requesting authority has the **possibility to withdraw the request**.³⁰

Paragraph 4

- (19) Where information is transmitted between authorities (especially where these are located in different jurisdictions) it is essential to **regulate the way in which this**

²⁸ Regulation (EU) 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

²⁹ For example European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Arts 2, 11; European Convention on the service of documents abroad of documents relating to administrative matters [1977] ETS 94, Art 2.

³⁰ Compare Commission Implementing Regulation (EU) 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, Art 9.

information may be used.³¹ This protects data protection standards which provide that authorities may not use personal data for purposes other than the one for which it was collected.³² For the restriction on the usage of information in information systems, please consult → Article VI-24. Where the applicable law allows for the further use of the information exchanged, including access to information, such more specific norms take precedence over Article V-3(4).

Paragraph 5

- (20) The **use of information** received in the course of mutual assistance as **evidence** by the authorities of the requesting Member State is regulated in a number of EU law provisions.³³ Article V-3(5) creates a **fall-back clause** which allows the use of such information. At the same time it recognizes that the requested authority may prohibit the use of information as evidence in accordance with Union law. One example for such a prohibition is the refusal of the requested authority to consent where sector-specific law requires its consent before information can be used as evidence. An example for the latter is the cooperation of law enforcement authorities in Article 1(4) Council Decision 2006/960.³⁴
- (21) The drafting team did **not** include a **provision** into the model rules on the consequences of sharing information within a mutual **assistance procedure**

³¹ For one example of how this is regulated see European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 16.

³² Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM(2012) 11 final, Art 55(3); compare Opinion of the European Data Protection Supervisor on the proposal for a Council Regulation on administrative cooperation and combating fraud in the field of value added tax (recast) (2010/C 66/01), para 37.

³³ For example Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1, Art 23(6); Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L364/1 last amended by Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63, Art 13(2); Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1, Art 16(5).

³⁴ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89 last amended by Corrigendum to Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2007] OJ L75/26.

which originated from procedures violating rights of defence or other procedural rights of individuals. Not only does this book generally refrain from establishing remedies. Also, the inclusion of such a provision might prove too controversial at this point in time since the consequences of a violation of procedural rights and defence rights vary greatly between the various legal systems of the EU. As a consequence, the inclusion of such a prohibition in the model rules appeared to the drafting team too invasive into national administrative law. Such violations may be remedied differently depending on the respective administrative law framework. Therefore, Article V-3(5) states that Member State laws may prohibit the use of such information as evidence but this approach is not mandatory. This does of course not relieve courts of the obligation to consider whether such evidence must be excluded to avoid the violation of fundamental rights as i.e. formulated in *Steffensen* (2003).³⁵ Moreover, paragraph 5 does not allow authorities to circumvent the general restriction on the subsequent use of information established in paragraph 4.

Paragraph 6

- (22) The **obligation to report back** to the requested authority where this is desired is inspired by rules in the tax law sector.³⁶ It can build an authority's confidence and trust in the administrative authority of another Member State. Of course, this is only the case if the report is indeed useful and not too burdensome on the requesting authority.

V-4 Duties of the requested authority

Paragraph 1

³⁵ Case C-276/01 *Steffensen* [2003] ECR I-3735, para 81 subparagraph (2).

³⁶ Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 16; Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1, Recital (16), Art 14. Compare in the area of police and judicial cooperation Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1, Art 32.

- (23) Corresponding to Article V-3, Article V-4 creates duties for the requested authority, further structuring the mutual assistance procedure. Paragraph 1 sets out the **primary obligation** of the requested authority, which is to **comply with the request**.³⁷ The time-frame in which the requested authority has to confirm receipt of the request has to be interpreted in accordance with the diverging time-frames which exist in sector-specific instruments.³⁸ It should, in any event, occur as soon as possible in a given case.³⁹ The duty to communicate a refusal to comply under Article V-4(3) or V-4(4),⁴⁰ or any difficulties in complying with the request to the requesting authority, is a manifestation of the duty of sincere cooperation. The duty to provide the requesting authority with an update when the requested authority learns that the information it provided was either inaccurate or obtained unlawfully strengthens the protection of personal data and furthers mutual trust among the different administrative authorities.

Paragraph 2

- (24) In the drafting process of the duty to comply with a request for information the question arose how to **limit** in the best possible way **the scope of information to be transmitted**. The drafting team ultimately opted for 'any pertinent

³⁷ Compare European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 4.

³⁸ To define a specific time-limit is not possible in light of the diverging periods opted for in sector-specific EU law, see for example Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 11; Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89 last amended by Corrigendum to Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2007] OJ L75/26, Art 4.

³⁹ European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 10(1).

⁴⁰ Compare European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 7(2); European Convention on mutual administrative assistance in tax matters [1988] ETS 127 amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters [2010] ETS 208, Art 20(2); European Convention on the service of documents abroad of documents relating to administrative matters [1977] ETS 94, Art 14(2). Compare in the area of judicial and police cooperation Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C197/1, Art 4(3) of the Annex.

information' which has to be read in light of restrictions which the different sector-specific laws impose. This means that limitations on the exchange which exist in sector-specific law are of course applicable and relevant legislation should specify as much as possible the type of information which may be transmitted. Where no or little specification is given, 'any pertinent information' has to be judged by the requested authority in light of the information it has been given under V-3(1). As far as the formulation 'as though acting on its own accord' is concerned, similar notions can be found in a variety of instruments, i.e. in Article 8(4) Regulation 389/2012 or Article 6(3) Directive 2011/16.⁴¹

- (25) In connection with the obligation to comply with a request for an inspection, it is important to recall the **dividing line between Book III and Book V** which was explained in paragraph 10 of the introduction to this Book.
- (26) As far as the obligation to comply with a request for the service of documents is concerned, **similar wording can be found in different instruments.**⁴² There are different ways in which this obligation can be given effect, such as notification by postal services or through consular agents. The specific manner of service

⁴¹ Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1; Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1; see also para 13 of the explanations.

⁴² Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 14(1); Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 25; Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1, Art 8(1).

depends on the requirement laid down in national and/ or sector-specific law. The duty upon Member State authorities to serve documents when requested by EU authorities is based on Article 297(2) TFEU.

Paragraphs 3 and 4

- (27) Paragraphs 3 and 4 are an important element in the overall structure of Book V. They mandate that lawful requests for assistance have to be complied with unless a **ground for refusal** exempts the authority from this obligation. In order to protect personal data, the drafting team opted for a list of grounds of refusal divided between a mandatory ground of refusal in paragraph 3 and a number of voluntary grounds of refusal in paragraph 4.
- (28) In paragraph 3 the decision to include a **possible infringement of national data protection law** as a mandatory ground of refusal is necessary as long as large parts of data protection law are regulated on the national level. At present national data protection laws remain the focal point of national data protection implementing Directive 95/46⁴³ (currently under review), also in the implementation of EU law.
- (29) Paragraph 4 lists **voluntary grounds of refusal** listed. Grounds of refusal in paragraph 4 are without prejudice to the obligations arising out of the principle of sincere cooperation and may of course be made mandatory in a specific EU legal act.
- (30) Paragraph 4's first ground of refusal is a **formal** one. It allows authorities to refuse requests where they do not comply with the standards set out in Article V-3(1). This in turn will encourage authorities to adhere to these standards and ensure that their purpose as set out in paragraphs 14 and 15 above is fulfilled.⁴⁴

⁴³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 last amended by Regulation (EC) 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty [2003] OJ L284/1.

⁴⁴ Contrast European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 6; European Convention on the service of documents abroad of documents relating to administrative matters [1977] ETS 94, Art 5 both of which oblige the requested authority to inform the requesting authority of perceived deficits, presumably with a view to remedying them to allow the assistance

- (31) The second ground of refusal exempts the authority from the obligation to assist where this would **violate rules of professional or commercial secrecy, be contrary to public policy or violate national security**. Similar grounds of refusal can be found in a number of instruments in the tax law sector and CoE Conventions.⁴⁵ The refusal to provide information due to national security concerns in the area of vertical mutual assistance also is in line with Article 346(1)(a) TFEU. Except for this exemption which is provided in the treaty, exemptions to the duty to provide vertical, informational mutual assistance have to be understood in a narrow manner. Already in early ECJ case-law, namely two *Commission v Hellenic Republic of Greece* cases in 1988, the court observed that Member States were under an obligation to provide the Commission with information to facilitate the tasks which were given to it under the treaty.⁴⁶
- (32) The third ground of refusal mirrors the concept of mutual assistance explored in Article V-2(1), which is based on the understanding that the **primary responsibility for fulfilling the task rests with the requesting authority**.⁴⁷

action to be taken. Art V-4(3)(a) by contrast is stronger, yet it does not hinder the requesting of resubmitting its request again in compliance with the formal requirements.

⁴⁵ For example Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 54(4); Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amendment by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 25(4); Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1, Art 17(4); European Convention on mutual administrative assistance in tax matters [1988] ETS 127 amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters [2010] ETS 208, Art 21(2)(b),(d); European Convention on the service of documents abroad of documents relating to administrative matters [1977] ETS 94, Art 14(1)(b); European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 7(1)(b).

⁴⁶ Case 240/86 *Commission v Hellenic Republic of Greece* [1988] ECR 1835; Case 272/86 *Commission v Hellenic Republic* [1988] ECR 4875, see especially para 30.

⁴⁷ Compare Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1,

Therefore, when the requesting authority can reasonably be expected to fulfil the task on its own, the requested authority may refuse the request.⁴⁸ However, this ground of refusal may not be used by Member States to attempt to escape their cooperative duties under EU law. To be able to claim this ground of refusal the requested authority must have good reasons to believe that the requesting authority could conduct the task itself without too much difficulty.⁴⁹ Where the Commission cannot fulfil the task itself because of practical hurdles – its administrative resources being significantly smaller than those of the Member States – it could not reasonably be expected to fulfil the task itself. In comparison, this ground will in all likelihood be much harder to use by a Member State authority to refuse a request by EU authorities than a request by other Member State authorities.

- (33) The fourth ground of refusal seeks to **prevent that requests become a disproportionate burden** to the requested authority and hinders it in fulfilling its own obligation.⁵⁰ In this scenario not only does the amount of requests received

Art 17(1); Art 25(1)(a) Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amendment by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 25(1)(a); Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 54(1)(b).

⁴⁸ European Convention on mutual administrative assistance in tax matters [1988] ETS 127 amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters [2010] ETS 208, Art 21(2)(g).

⁴⁹ Compare Revised Explanatory Report to Joint Council OECD Convention on Mutual Administrative Assistance in Tax Matters as amended by the protocol, para 201.

⁵⁰ Compare Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 54(1)(a); Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last

by the requested authority have to be considered, but the relative importance of the respective tasks has to be taken into account as well, especially in view of Article 197(1) TFEU.

- (34) The fifth ground of refusal can be used both for horizontal⁵¹ and vertical requests for assistance. Any refusal will be reviewed under the **principles of equivalence and effectiveness**. A simple refusal to cooperate due to a lack of national law permitting an authority to act, for instance, is contrary to the principle of equivalence.⁵²
- (35) The drafting group discussed but ultimately **excluded further possible grounds** for refusal other than those currently listed in paragraph 4. First, this applies to grounds which were considered not to be suitable for general rules on mutual assistance.⁵³ Second, the drafters propose not to include reciprocity as a ground for refusal. Currently, a number of instruments still provide for a ground of refusal which is linked, in a more or less direct way, to a notion of reciprocity⁵⁴. In view of

amendment by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 25(1)(b).

⁵¹ Compare European Convention on mutual administrative assistance in tax matters [1988] ETS 127 amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters [2010] ETS 208, Art 21(2)(a),(c).

⁵² Contrast European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Art 7(1)(d) “that its domestic law or customs prevent the assistance requested.” See also Explanatory Report to the European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, para 34.

⁵³ For example Regulation (EU) 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency [2011] OJ L326/1, Art 16(5)(b),(c): “(b) judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed; or (c) a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed.

⁵⁴ For example Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 54(3); Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amendment by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain

Article 197(1) TFEU, this might be regarded to be an outdated requirement which should be eliminated from EU law provisions on mutual assistance.

V-5 Right of a person concerned to be informed

Paragraph 1

(36) This article creates a **right to be informed where personal data is about to be transmitted** to another authority, both where the authority is from another Member State and where it is a EU authority. It is currently not standard practice in mutual assistance instruments but it exists in Data Protection law and is an important innovation included in Book V. Existing standards of data protection provide for the data subject to be informed prior to a transmission or no later than before first disclosure of the data to a third party. The exact duties depend on whether the information was directly obtained from the data subject or stems from another source.⁵⁵ Article 18(1) Regulation 1024/2012 provides for a right to be informed without mentioning the point in time when this right is effective.⁵⁶ Article 37(2) Regulation 767/2008 provides for a right of information on the usage of the

regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 25(3); Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1, Art 17(3).

⁵⁵ Compare Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 last amended by Regulation (EC) 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty [2003] OJ L284/1, Arts 10, 11; Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L8/1 last amended by Corrigendum to Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2007] OJ L164/35, Arts 11, 12; Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM(2012) 11 final, Art 14.

⁵⁶ Regulation (EU) 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

information at point of data collection, but this occurs within an information system.⁵⁷

- (37) This being said, the CJ observed in *Sabou* (2013), a case which concerned the implementation of Directive 77/799, that respect for the rights of defence did not require that a taxpayer be notified of a decision to collect information, nor did it require him or her to be heard at the point of inquiry or require him or her to be involved in the stage of information gathering, in particular the examination of witnesses.⁵⁸ The court held that that these actions were still part of the investigatory phase of a procedure and the refusal to inform the person concerned did not negate his or her right to be heard before a decision adversely affecting him or her is taken. The drafting team, similar to the court in *Sabou*, does not view the **right to be informed prior transmission** as a right which is mandated by the rights of defence. However, it **is a procedural right** of an individual natural or legal person concerned. Several reasons speak in favour of establishing this procedural right which include, first, that not every transmission of data will lead to a decision adversely affecting the individual, in the process of which he or she will normally be informed of the transmission of information. Where no decision is reached this should not leave the individual unaware of information related to him or her being transmitted. Second, individuals may have the option to participate in the information gathering in the requested Member State. Such rights can only be effectively used if the individual is made aware of the data transmission in the first place.
- (38) Of course, there may be **instances where a refusal to inform the individual is justified** to protect the underlying purpose of the request for assistance. This need is also recognized in the Directive 95/46.⁵⁹ Such cases were taken into account when drafting the second sentence of paragraph 1 allowing the

⁵⁷ Regulation (EC) 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) [2008] OJ L218/60 last amended by Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1.

⁵⁸ Case C-276/12 *Jiří Sabou v Finanční ředitelství pro hlavní město Prahu* [2013] OJ C367/16, paras 44-46.

⁵⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 last amended by Regulation (EC) 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty [2003] OJ L284/1, Art 13(1).

requested authority to *defer* the individual's right to be informed when two conditions are fulfilled: The duty to inform would threaten the purpose of the request for assistance and the refusal to inform the individual is in line with the principle of proportionality. By contrast, and in line with general data protection law, where these two conditions are no longer fulfilled, the requested authority is under a duty to inform the individual *ex post*. Irrespective of these considerations, that the right to be informed will not apply in the case of a service of documents. This is based on the assumption that in such cases persons concerned are informed by virtue of the documents served.

Paragraph 2

- (39) Paragraph 2 aims at ensuring that **all information which has been exchanged** under the procedure of mutual assistance **shall be protected**,⁶⁰ in compliance with the principles of equivalence and effectiveness (derived from the principle of

⁶⁰ Compare Art VI-28 on confidentiality and Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 55(1); Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1, Art 23(1); Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 last amended by Council Regulation (EC) 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/1, Art 28; Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L364/1 last amended by Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63, Art 13(3); Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89 last amended by Corrigendum to Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2007] OJ L75/26, Art 9; Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amended by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1, Art 28(1).

sincere cooperation under Article 4(3) TEU), in the same way as any other information would be within the Member State. This is not only important for business secrets but also for personal data.

V-6 Allocation of costs

- (40) Article V-6 regulates the financial aspects of mutual assistance. Its starting point is a **complete renunciation of claims** by the authorities involved subject to only **two exceptions**.⁶¹ This is motivated by the need to ensure a smooth functioning of the European administration, both between different Member State authorities and EU and MS authorities. It is inspired by 3 provisions: Article 20(2) Directive 2010/24, Article 26 Regulation 389/2012 and Article 21(2) Directive 2011/16.⁶² The European Convention on Mutual Assistance in Criminal Matters started from a comparable premise already in 1959, the new Commission Proposal for a General Data Protection Regulation in turn prohibits any fee for “any actions taken following a request for mutual assistance”.⁶³ However, since a request or a number of related requests may lead to excessive costs, it was deemed more feasible to provide for a narrow exception to the general prohibition. By contrast, no exception was provided for cases where requests for assistance have been withdrawn by the requesting authority. Such a rule could lead the requesting authority to refuse withdrawing a request even where a specific action is no

⁶¹ Compare European Convention on the obtaining abroad of information and evidence in administrative matters [1978] ETS 100, Arts 8, 18, 21; European Convention on the service of documents abroad of documents relating to administrative matters [1977] ETS 94, Art 13; Compare European Convention on mutual administrative assistance in tax matters [1988] ETS 127 amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters [2010] ETS 208, Art 26.

⁶² Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1; Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004 [2012] OJ L121/1 last amendment by Council Regulation (EU) 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1; Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1.

⁶³ European Convention on mutual assistance in criminal matters [1959] ETS 30, Art 20; Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM(2012) 11 final, Art 55(7).

longer necessary or a particular piece of information no longer needed. Where a requested authority is faced with excessive costs (be it due to the sheer number of “withdrawn requests” or the scope of one request) or where it has to pay external experts, it can still reclaim the costs under Article V-6.

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