

## The 1988 Convention on Mutual Administrative Assistance in Tax Matters (as amended by the 2010 Protocol) as a source of inspiration for mutual assistance between data protection authorities

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### 1. Scope of investigative measures provided for

- exchange of any information that is foreseeably relevant for the enforcement of domestic laws (Article 4), either on request (Article 5) or provided spontaneously (Article 7)
- simultaneous examinations/investigations (Article 8) (i.e. parallel investigations, each in their own territory), with a view to exchanging any relevant information they so obtain
- possibility to request to and (if authorized) be present during relevant examinations/investigations abroad (Article 9)
- taking of measures in view of the recovery of claims upon request of the requesting state, as if it were the claims of the requested state itself (Article 11)
- taking of measures of conservancy, even where claims are contested or are not yet the subject of an instrument permitting enforcement (Article 12)
- service of documents upon an addressee in the requested state, including where relating to judicial decisions (Article 17)

### 2. Scope/character of proceedings: administrative

The scope of assistance is administrative, i.e. similar to enforcement cooperation between DPA's.

The demarcation between administrative MA and MLA in criminal matters is very clearly made in Article 1. According to the explanatory memorandum, administrative MA comprises “all mutual assistance activities [...] which can be carried out by the public authorities, including the judicial authorities, and which are not covered by criminal law. Action by judicial bodies carried out pursuant to criminal law and intended to punish criminal offences [...] does not therefore fall within the scope of application of the present instrument. Any information or assistance which judicial bodies may need in order to judge and punish criminal offences [...] must therefore be obtained under the conventions for mutual assistance in criminal matters.”

The convention covers (see explanatory memorandum)

- action by administrative enforcement authorities, including in view of prosecution before an administrative authority and the imposition of administrative penalties
- action by judicial bodies to assist the competent administrative authorities in carrying out the above tasks
- preparation of criminal proceedings to be initiated before the judicial bodies. However, once criminal proceedings have begun, the Convention no longer applies, in order to avoid conflict with the applicable instruments relating to MLA in criminal matters; relating to the latter scenario, the explanatory memorandum to the original 1988 Convention even clarified that information thus administratively obtained, could not be used as evidence before a criminal court, unless the requested state/authority would authorize such use (since some states require additional safeguards to be

applied in the collection of evidence for use in criminal matters). This is a very principled approach, truly faithful to the purpose limitation principle.

### 3. Sharing of personal data

The Convention (in Article 22) extensively deals with secrecy and confidentiality, including but not exclusively concerning personal data. A future international instrument relating to administrative MA between DPA's may certainly draw inspiration from it.

The key provisions of Article 22 are the following:

- at least equivalent secrecy/confidentiality as under the domestic law of the recipient authority: any information obtained must be treated as secret and protected in the same manner as information obtained under the domestic law of the recipient country/authority
- compliance with possible additional data protection safeguards required by the supplying authority: in addition, the recipient state/authority will, where deemed necessary by the supplying state/authority to ensure the necessary level of *protection of personal data*, also comply with any safeguards specified by the supplying state/authority as required under its domestic law. Paragraph 216 of the explanatory memorandum specifies in this respect:

*“Such safeguards, as specified by the Supplying Party, may for example relate to individual access, independent oversight or redress. The specification of the safeguards may not be necessary if the supplying Party is satisfied that the receiving Party ensures the necessary level of data protection with respect to the data being supplied. In any case, these safeguards should not go beyond what is needed to ensure data protection”*

- limited disclosure: disclosure is limited to persons or authorities (including courts and administrative or supervisory bodies) concerned with [...] enforcement or prosecution in respect of, or the determination of appeals in relation to [data protection breaches], or the oversight of the above
- strict use limitations/purpose limitation:
  - only the persons or authorities mentioned above may use the information and then only for such purposes
  - they may, notwithstanding, disclose it in public court proceedings or in judicial decisions relating to [data protection breaches]
  - use for other purposes, if altogether allowed under the law of the recipient state/authority, require prior authorization by the supplying state/authority
  - also onward transfer will require such prior authorization

### 4. Applicable law

Interplay between convention law and the domestic laws of cooperating states. See also below, under 6.

### 5. Method of implementation

- subject to ratification, acceptance or approval (Article 28)
- implementation (Article 24): quite flexible, as outlined in Article 24.1: “The Parties shall communicate with each other for the implementation of this Convention through their respective competent

authorities. The competent authorities may communicate directly for this purpose and may authorize subordinate authorities to act on their behalf. The competent authorities of two or more Parties may mutually agree on the mode of application of the Convention among themselves”

## **6. Other substantive and relevant aspects**

Several relevant locus law limitations, such as (list limited to what seems possibly relevant in a data protection context):

- the rights and safeguards secured to persons by the laws or administrative practice of the requested state may not be affected
- no obligation for the requested state to carry out measures at variance with its own laws or administrative practice or the laws or administrative practice of the requesting state
- no obligation for the requested state to carry out measures which would be contrary to public policy (*ordre public*)
- no obligation for the requested state to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the requested state or its administrative practice;
- no obligation for the requested state to supply information which would disclose any trade, business, industrial, commercial or professional secret, or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*)
- no obligation for the requested state to provide administrative assistance if the requesting 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