Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?

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1 Introduction

By joining the European Community, the Member States have committed themselves to cooperating in the creation and implementation of common policy, as expressed in Article 5 EEC Treaty. This also means that the Member States must make every effort to ensure compliance with Community law and impose penalties in case of infringement.[1] In regulations, this is often confirmed by such statements as 'the Member States are to take all necessary legislative and administrative measures to ensure compliance with Community rules'.

The enforcement of Community law is and remains the competency of the Member States. With the exception of Article 87(2)a, concerning competition law,[2] the EEC Treaty[3] does not explicitly provide either administrative or criminal powers of supervision, control or sanctioning at Community level. The extent to which and the manner in which interpretation and consequences are given to the enforcement of Community law are determined by the legislative, executive and judicial powers in the Member States. This means that the Community is dependent, not just for implementation but also for supervision, control and sanctioning, on the national administrative and enforcement structures.

1. J.A.E. Vervaele, Fraud against the Community. The need for European fraud legislation. Deventer 1992.
2. G. Olmi, La sanction des infractions au droit communautaire, in: Droit Communautaire et droit pénal, Milan 1981, 167; C. Harding, The use of fines as a sanction in EEC competition law, CMLRev. 1986, 71; G. Dannecker and J. Fischer-Fritsch, Das EG-Kartellrecht in der Bussgeld-praxis, Köln 1989 and C. Harding, European Community investigations and sanctions, Leicester 1993.
3. The ECSC and Euratom Treaty are not treated here. Regarding these treaties, see C. Harding, *op. cit.* and H.G. Sevenster, Criminal law and EC law, CMLRev. 1992, p. 29-70.

Nevertheless, the fact that the duty of enforcement lies primarily with the Member States does not mean that the Community bears no responsibility whatsoever for ensuring compliance with Community law. The *Council*, as the legislative body, does have *decision-making or normative powers* to realize the objectives of the EEC Treaty and in conformity with the provisions thereof (Article 145). That the Council may fix norms for the enforcement of Community law is not disputed. However, whether this means that the Council can lay down Community sanctions to be imposed by the Commission, or can prescribe norms for numerous aspects of national enforcement, is fully under discussion. A definite task has also been reserved for the *European Commission* in the enforcement of Community law. In a number of specific territories the Commission derives independent decision-making powers from the Treaty.[4] In addition, Articles 145 and 155 EEC Treaty grant the *European Commission implementing and supervisory powers.* The Commission's implementing power is a delegated decision-making or normative power.[5] The Commission has always held the view – which is not shared by all Member States – that this power does not just include the authority to lay down specific or supplementary conditions for granting aid or levying sums, but also the power to make rules for the controls *and* penalties needed for an effective and uniform implementation of the measures concerned. The supervisory power means that the Commission monitors compliance with Community law. This implies the scrutiny and monitoring of the measures taken by the Member States with regard to implementation, application and enforcement. There is no general rule in Community law for the European Commission's supervisory power, also called *internal control*.[6] Those control powers are established by secondary legislation per general sector (own resources, agricultural expenditure, structural funds) and are therefore quite diverse.[7] For some market regulations, they are specifically determined (*e.g.*, olive oil, wine and tobacco). Broadly speaking, the supervisory power has two aspects: on the one hand, the European Commission lays down control and reporting duties for

4. This is particularly the case in the area of competition law and customs.
5. The Council has delegated far-reaching normative powers to the Commission particularly in the area of agriculture and fisheries. The exercise of these powers is often subject to conditions, such as consulting a 'Management Committee', which consists of representatives from the Member States and is chaired by the Commission.
6. Furthermore, the Financial Controller of the Community exercises financial control on the basis of the Financial Regulation (OJ 1977, L 356). In addition, the Treaty has provided for a system of *external control*, which is carried out by the European Parliament and the Court of Auditors. See J.A.E. Vervaele, *op. cit.*
7. See J.A.E. Vervaele, *op. cit.*

the Member States; on the other, the European Commission has independent control powers at its disposal (to conduct administrative investigations and carry out on-site checks itself). It is clear that the Commission considers sanctioning powers a logical continuation of its control tasks.

The question of (administrative) sanctioning powers for the Community is thus two-fold: do the normative powers of the Council also involve providing for sanctions under Community law? – do the European Commission's normative and supervisory powers also involve providing for sanctions under Community law? An answer in the affirmative would imply questions regarding the legal consequences (legal protection) and limits of authority, partly in the light of the political and legal sovereignty of the Member States. Answering these questions requires first and foremost a closer analysis of the sanctioning powers[8] in the EEC Treaty.

2 Sanctioning Powers in the EEC Treaty

2.1 Division of Sanctioning Powers

There is only one place in the EEC Treaty where sanctioning powers on the Community level are explicitly mentioned,[9] namely the periodical penalty payments and fines provided in Article 87(2)(a) EEC Treaty to induce compliance with Community competition law.[10] Although AG Capotorti in the *Amsterdam Bulb* case[11] held the view that these Community sanctions impose limitations on the adoption of penal sanctions by the Member States, in the *Wilhelm* case the Court decided that 'the possibility of concurrent sanctions need not mean that the

8. In this article we shall not discuss in detail the control powers of the Commission. For this discussion, see J.A.E. Vervaele, Procédures communautaires: enquêtes et mise en oeuvre des sanctions, in M. Delmas-Marty, Quelle politique pénale pour l'Europe?, Paris 1993, p. 215-236.
9. G. Grasso, Comunità Europee e diritto penale. I rapporti tra l'ordinamento comunitario e i sistemi penali degli state membri, Milan 1989; K. Tiedemann, La protection pénale des intérèts financiers de la Communauté, in La protection juridique des intérèts financiers de la Communauté, Commission Européenne, Luxembourg 1990, 141-160; K. Tiedemann, Reform des Sanktionswesen auf dem Gebiete des Agrarmarktes der Europäischen Wirtschaftsgemeinschaft, in Festschrift für Pfeiffer, Köln 1988, p. 101.
10. See Articles 15-16 of Regulation 17 of 6 February 1962, OJ 1962, L 204, since then repeatedly amended.
11. Conclusion of AG Capotorti in Case 50/76 *Amsterdam Bulb* [1977] ECR 0137.

possibility of two parallel proceedings pursuing different ends is unacceptable'.[12] This has already resulted in problems concerning the relationship between Community and national sanctioning. It is regrettable that the Community has never carried out Article 87(2)(e), which enables the relationships to be established between Community and domestic rules.

Does the mere fact that only in Article 87(2)(a) EEC Treaty mention has been made of sanctioning powers mean that the EEC Treaty contains no legal grounds for sanctions in other areas, for example, Common Agricultural Policy? In the last few years, there have been political and legal debates over this question on both the Community and the national level. Treaty interpretation is used particularly in debates over the relationship between sanctioning powers and Articles 87(2) and 172 EEC Treaty[13] and over the power to harmonize enforcement on the basis of Articles 100 and 100A EEC Treaty. Discussions on political sovereignty, the extent of democracy in the Community and legal protection also play a role. It appears that the battle will not be decided in the near future. That the views differ so strongly is in no small measure due to the lack of a clear analysis of sanctioning powers in and through the Community. For these reasons, it helps to draw a number of distinctions which have not always been done full justice in the literature. Sanctioning involves a number of legal decision-making moments with diverse legal consequences, based on the separation of powers. First of all, a legal basis must be created for the exercise of the concrete sanctioning power (legislative aspect); then the sanction must be imposed (judiciary aspect); finally, the imposed sanction must be carried out (executive aspect).[14] In the Community, three forms of sanctioning breaches of Community law can be distinguished (see diagram (administrative) sanctioning powers in the Community). The starting point here is that the Community only

12. Case 14/68 *Walt Wilhelm et al. v. Bundeskartellambt* [1969] ECR 0001. See also the conclusion of AG VerLoren van Themaat in Case 117/83 *Könecke* [1984] ECR 3314, ground 4.2, which states that this is not an application of the principle *ne bis in idem*, but of the (Community) proportionality principle.
13. Article 172 EEC Treaty: 'Regulations made by the Council pursuant to the provisions of this Treaty may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations.'
14. In administrative sanctioning, the sanction is in the first instance imposed by the government. Even though the government body in this case is not the judiciary in a formal sense, it does carry out a judicial task.

has at its disposal the powers granted to it by Treaty, although one must bear in mind that the EEC Treaty is an enabling Treaty.[15]

The first form of sanctions for infringements of Community law consists of the special legal basis included in the EEC Treaty itself for *Community sanctions*, *i.e.* the imposition of sanctions by the Community (in this case by order of the European Commission) which can be appealed at the Court of Justice. However, the sanction is executed by the competent authorities of the Member State. The periodical penalty payments and fines provided for in Article 87(2)(a) are the prime example because they are explicitly mentioned in the EEC Treaty.[16] But this is not the only example of Community sanctions. There is, after all, no need of a specific reference in the Treaty to empower the European Commission to impose Community sanctions. A sufficient legal basis in the Treaty, on which grounds Community sanctions can be created in secondary Community legislation, is in conformity with Community law. In this context we can cite Article 79(3) EEC Treaty, containing rules for fair competition in transport, which stipulates:

> '3. The Council may in particular lay down the provisions needed to enable the institutions of the Community to secure compliance with the rule laid down in paragraph 1 and to ensure that users benefit from it to the full.'

For the implementation of Community transport policy, Regulations 11/60,[17] 1017/68,[18] and 4056/86[19] all grant the European Commission the power to order that sanctions (fines and periodical penalty payments) be imposed on

15. Certain Treaty articles have an open formulation. Moreover, the Treaty itself contains a special article for the expansion of powers, Article 235 EEC Treaty: 'If action by the Community should prove necessary to attain in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'
16. These fines and periodical penalty payments also cannot be imposed by the Member States solely on the basis of Community law. The Member States can provide for a parallel sanctioning system in their domestic law. See Case 14/68 *Walt Wilhelm et al. v. Bundeskartellambt* [1969] ECR 0001 and Case C-67/91 *DGDC v. AEBP*, conclusion of AG Jacobs, unpublished.
17. Regulation 11/60, concerning the abolishment of discrimination in freight charges and transport conditions, OJ C 1121/60.
18. Regulation 1017/68, concerning application of competition law in the area of rail, road and canal transport, OJ 1968, L 175.
19. Regulation 4056/86 to lay down the manner in which Articles 85 and 86 of the Treaty are to be applied in transport by sea, OJ 1986, L 378/4.

violators, which can be appealed before the Court of Justice.[20] It must therefore be concluded that the EEC Treaty leaves open the possibility to create specific sanctions on the basis of generally formulated legal grounds. The question is now whether this means that independent Community sanctioning powers can also be provided in Community agricultural, fisheries or customs policy. Regarding Common Agricultural (and fisheries) Policy, Article 40(2-3) does stipulate:

> '2. In order to attain the objectives set out in Article 39 a common organization of agricultural markets shall be established (...).
> 3. The common organization established in accordance with paragraph 2 may include all measures required to attain the objectives set out in Article 39 (...).'

Article 40(2-3) is on the one hand less concrete than Article 79(3), particularly in that there is no explicit reference to compliance. On the other hand, the phrase 'all measures required' points to a broad formulation, which does not necessarily preclude sanctioning. Up to now, no Community rules have been made with independent Community sanctions in the area of agriculture or fisheries. A recent proposal for a new control regulation in the fisheries sector, however, contains types of sanctions that could be termed independent Community sanctions.[21]

A second form of sanctioning Community law infringements consists of the generally formulated legal basis available in the EEC Treaty which grants the *Community* the power, in the secondary legislation, *to prescribe sanctions for the Member States (Community sanctioning provisions).* These sanctions are to be imposed and executed by the Member States. The above-cited provision of Article 40, section 2(3), particularly 'all measures required', has also been used several times for this purpose. But the prescription by the Community of sanctions for the Member States is not limited to areas of Community policy. Articles 100, 100 A and 235 (in combination or apart) can also be used to achieve harmonization of enforcement, including sanctioning, by the Member States. The prescription of sanctions by the Community and the harmonization by the Community of national sanctions interpenetrate. The Court of Justice has also clearly stated that all arguments deriving from Article 87(2)(a) and Article 172 EEC Treaty, often used in the literature, are irrelevant in this connection. Article 172 EEC Treaty does not confer any sanctioning powers, but grants the Court of Justice full

20. The Commission has not made use of this power in practice. This is related to the fact that Community transport policy has never got off the ground.
21. See *infra* paragraph 3.4.1.

jurisdiction over the sanctions included in all regulations, which presumes the existence of such a sanctioning power. Article 172 only applies to Community sanctions, therefore sanctions imposed by the Community, in this case the European Commission, itself.[22]

How do Community sanctioning provisions relate to the general enforcement duty of the Member States, as formulated in Article 5 EEC Treaty? The fact that in a certain regulation a certain sanction is prescribed, which is to be imposed by the Member States, does not relieve the Member States of the duty to take all control and sanctioning measures to ensure effective compliance with Community law. In the case *Commission v. Germany*,[23] Germany held that the Member States are only obligated under two conditions to use national sanctions for the purpose of ensuring compliance with Community law. In the first place, Germany stated, this duty only exists when the Community law involved does not itself provide a sanction. In the second place, the possibility to use national means of compulsion must be clearly provided for in a Community rule in which this purpose is laid down. Germany based this argument on the principle of legal certainty and the principle of uniform application of Community law. However, both AG Jacobs and the Court found that Article 5 EEC Treaty and the applicable Regulation obligate the Member States to take all measures to ensure effective compliance. The sanction provided for in the Community rules is not an exhaustive regulation. The appeal to the legality and legal certainty principles was also rejected, since the Member States not only have the power, but also the duty to provide supplementary national sanctioning measures.

A third form of sanctioning infringements of Community law, used in the majority of cases, derives from the fact that the EEC Treaty provides no legal basis whatsoever. Sometimes in the applicable directive or regulation, a general statement is aimed at the Member States, in particular urging them 'to take all appropriate measures (administrative or criminal)'. In those situations the general

22. Opinion of AG F.G. Jacobs in Case C-240/90, *Germany v. Commission* [1992] ECR I-5383, ground 14: '(...) The sanctions at issue in the present proceedings are to be imposed by national authorities, pursuant to provisions in Commission regulations, and not imposed directly by the Commission. Since Article 172 of the Treaty is not concerned with such a case, it is not relevant, for the purpose of deciding whether the Commission is able to adopt such provisions, that Article 172 refers only to regulations made by the Council, and not to regulations made by the Commission.'
23. Case C-217/88 *EC Commission v. the Federal Republic of Germany* [1989] ECR I-2879.

rule applies that enforcement, including the punishment of infringements of Community law, is a power and a duty of the Member States. On the basis of Article 5 EEC Treaty and the interpretation given it by the Court of Justice, they are to provide penalties in their national justice systems which are effective, proportional and dissuasive, and they are to make sure that infringements of Community law are penalized under substantive and procedural conditions analogous to those applicable to similar and equally serious infringements of national law.[24] This is a question of *national sanctions,* partly for compliance with Community law, which are influenced by Community law.[25] To the extent increasing demands are made by Court case law on national sanctions, these sanctions are becoming more and more harmonized and thus comparable to the second form of sanctioning (Community sanctioning provisions). AG van Gerven in his conclusion in the *M.H. Marschall II* case,[26] even goes so far as to state that the Court has interpreted the sanctioning duty contained in Article 5 EEC Treaty so unconditionally and precisely for the Member States on the basis of general principles of Community law (see the above requirements) that the sanctioning duty contained in Article 6 of the Equal Treatment Directive 76/207 should be given direct effect. This means that an individual can invoke it before the national court or that the court can officially invoke it in order to render inapplicable national rules that do not meet those quality requirements. Very many directives and regulations contain sanctioning duties, which may or may not be specific, that could acquire direct effect in this manner.

24. Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1908; Case 68/88 *Commission of the European Communities v. the Hellenic Republic* [1989] ECR 2965.
25. M. Zuleeg, Der Beitrag des Strafrechts zur Europäischen Integration, JZ 1992, 761.
26. Case C-271/91 *M.H. Marschall v. Southampton and South West Hampshire Area Health Authority*, conclusions of AG W. van Gerven, unpublished. At the time this article was written the Court had not yet reached a decision.

(Administrative) Sanctioning Powers in the Community

Legislative (legal basis)	Judicial (imposition of sanction + appeal)	Executive (execution of sanction)
Specific power under the EEC Treaty to impose sanctions	Commission appeal: Court of Justice	competent authorities in Member State
Specific power under the EEC Treaty to prescribe sanctions	administrative body in Member State. appeal before an administrative tribunal	competent authorities in Member State
	criminal court in Member State. appeal procedure	
No specific power Article 5 EEC Treaty; Community cooperation	administrative organ in Member State. appeal before an administrative tribunal	competent authorities in Member State
	criminal court in Member State. appeal procedure	

Now that we have distinguished three forms of sanctioning, it is necessary to define them with regard to legal character and legal consequences. We shall discuss, respectively, sanctioning under criminal and administrative law.

2.2 *The Community and Powers under Criminal Law*

The starting point is that the Community does not have any independent criminal powers at its disposal. There is no Community criminal (procedural) law either with regard to detection and judicial investigation or in the area of penalties. For this reason, Community penalties cannot be criminal penalties. Therefore, Article 15(4) of the Competition Regulation 17/62[27] stipulates that orders to impose fines are not of a criminal nature. On the basis of Article 172 EEC Treaty such penalties, imposed by the Commission as the Community's executive body, can be appealed in court, *i.e.*, the Court of Justice.

This, however, does not mean that national criminal (procedural) law is immune to the effect of Community law.[28] In the first instance, the effect of Community law precludes criminal enforcement of conflicting national provisions (negative integration). Secondly, it is accepted practice that in instruments of secondary Community law (directives, regulations), the Member States are obligated to punish breaches of the relevant rule and to provide appropriate penalties to further compliance with that rule (positive integration.) This derives from the normative power of the Community, in the framework of Community policy, and from its powers of harmonization. This will entail a closer definition of the content or certain aspects of the Member States' enforcement duty.[29] A question arises as to whether it can be prescribed in directives and regulations that the Member States must make violations punishable and that rules can be prescribed for the type of penalty, the amount of the penalty, the working *ratione materiae, ratione loci,* the procedural aspects and the application modalities (limitation, dismissal, etc.). How differently the Member States among one another and the Community institutions feel about this matter is apparent from the results of the discussions in the ad-hoc Working Group 'Community Law and Criminal Law' in the framework of European Political Cooperation.[30] For a number of Member States, the harmonization of criminal provisions by way of secondary Community law was

27. OJ 1962, L 204/62.
28. Case 82/71 *SAIL* [1972] ECR 0119; Case 238/84 *H. Röser* [1985] ECR 0795.
29. C.W.A. Timmermans, La sanction des infractions au droit communautaire, in FIDE II, La Sanction des infractions au droit communautaire, Lisbon 1992, p. 45-55.
30. Under chairmanship of the Netherlands, the ad-hoc working group, a sub-group of 'cooperation judiciaire' under EPC, prepared a report for the Council of Ministers of Justice of the EEC (November 91). The report is published in the special issue 'Europees strafrecht in intergouvernementeel en communautaire perspectief', Panopticon 1992, p. 560.

strictly out of the question. Opinions also vary greatly in the sphere of legal doctrine. The prevailing view denies any power to prescribe criminal penalties,[31] while a minority view sees no legal problem at all.[32]

The question is whether an analysis of the case law of the Court of Justice can give a point of departure for further legislation. The starting point in Court of Justice case law is that criminal law is not immune to Community law. Community law supersedes national law and has an effect on the national legal order. This is also the case for criminal law. Criminal provisions that are not compatible with Community law must give way, and criminal law has a role to play in the enforcement of Community law.[33] In other words, criminal law and the law of criminal procedure are the power of the Member States, but Community law sets limitations on that power.[34] This, however, does not mean that the Community would have the authority to prescribe criminal penalties or rules concerning those penalties for the Member States.[35] The decisions of the Court in this area are interpreted differently, even by those directly involved. AG Tesauro concludes from the Court's case law[36] that the Community does not have the right to prescribe criminal sanctions. In my opinion, this view is unfounded. In any event, in the case law referred to it is only stated that criminal (procedural) law is *in principle* the competency of the Member State.[37] This does not mean the Com-

31. See, *e.g.*, M. Bigay, L'application des règlements communautaires en droit pénal français, Revue trimestrielle de droit européen, 1971, p. 54: 'Aucune disposition du traité de Rome ne prévoit l'obligation pour les États membres de sanctionner pénalement les règlements communautaires, qui sont donc, en principe, dépourvus de sanction pénale tant qu'un texte interne n'est pas intervenu à cet effet.'
32. H.G. Sevenster, *op. cit.* p. 29-70 and G. Grasso, *op. cit.*
33. J.A.E. Vervaele, *op. cit.* and H.G. Sevenster, *op. cit.*, p. 29.
34. Case 203/80 *Casati* [1981] ECR 2595.
35. This concerns criminal sanctions in the regulation of the social-economic order. The debate is limited here to non-custodial criminal sanctions.
36. Case 1/78 [1978] ECR 2151, ground 36; Case 186/87 [1989] ECR 0195, ground 19; Case 203 *Casati* [1981] ECR 2595.
37. In that connection, Case 1/78 *IAEA* [1979] ECR 2151, ground 31 is often cited: 'There is no dispute with regard to the provisions of the draft convention relating to criminal prrosecution and extradition; it is quite clear that the articles in question relate to matters falling within the jurisdiction of the States.' C.W.A. Timmermans, *op. cit.*, p. 54 correctly states that the fact that the Court in this case decided that the duties in the Draft-Agreement of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports with regard to police measures, criminal provisions, extradition and mutual assictance come under the powers of the Member States does not mean that the Community can have no right of initiative in this area. See also Case 186/87 *I.W. Cowan v. Trésor Public* [1989] ECR 0195. For the effect, see A. Barav, L'incidence du droit communautaire sur le pouvoir répressif national, in Écrit

munity can be granted no authority whatsoever to set requirements for the exercise of that national competency. This is also apparently the opinion of AG Jacobs who in Case C-240/90 emphatically states: 'Certainly, then, Community law in its present state does not confer on the Commission (or on the Court of First Instance or the Court of Justice) the function of a criminal tribunal. It should be noted however that that would not in itself preclude the Community from exercising, for example, powers to harmonize the criminal laws of the Member States, if that were necessary to attain one of the objectives of the Community.'[38] This is directly in conflict with the opinions of certain Member States. Denmark, for instance, observes in the *Hansen* case:[39]

> 'The imposition of penalties is, and must remain, a matter for national law because policy in the field of criminal law has not been the subject of international cooperation except sporadically and each country thus retains its own traditions with regard to the severity of penalties and the discretion of the courts. The Danish Government considers that a country's policy in the field of criminal law is bound up with its national culture, and it is therefore crucial for the evolution of society as a whole that the possibility for Member States to pursue an independent policy in that area should not be completely nullified.'

The judgments of the Court of Justice thus give no definite answer as to whether or not secondary Community law can prescribe criminal sanctions to be imposed by the Member States. We can only conclude that Community law has an undeniable effect on national criminal penalties which serve in part to further compliance with Community law, and that the quality requirements developed by the Court in this area on the basis of Article 5 EEC Treaty (*supra*) fully apply. However, it should be mentioned in this regard that the Court has recognized certain fundamental principles of criminal (procedural) law as general principles of Community law which must be respected in the exercise of the criminal enforcement of Community law.[40]

mémoratif à H.J. Constantinesco, Berlin 1983.

38. Opinion of AG Jacobs in Case C-240/90 *Germany v. the Commission* [1992] ECR I-5383, ground 12.
39. Case C-326/88 *Hansen & Sφn* [1990] ECR 2911.
40. I have in mind particularly the legality principle and not the retroactive effect of criminal provisions. See, *e.g.*, Case 63/83 *K. Kirk* [1984] ECR 2689.

To the present day – as far as the EEC Treaty is concerned[41] – there is no prevailing Community law that prescribes criminal penalties. There are many rules for fixing norms (*norma agendi/prohibendi*), or determining the conditions with which the penalty must comply.[42] Certain authors,[43] however, refer to far-reaching sanctioning provisions in the fisheries sector. But in my opinion, these do not (yet) represent the strict prescription of criminal penalties. Article 11 *quater* (1) of Regulation 2241/87,[44] containing certain control measures for the fisheries sector, does stipulate that *criminal or administrative measures* should be taken against the captain of a ship, which in accordance with the relevant provisions of domestic law can result in the actual loss by those responsible of the economic benefit obtained through the violation. Paragraph 2 also provides a system for transfer of proceedings. Nowhere is it stipulated, however, that this is a prescription of the compulsory transfer of *criminal* proceedings. Depending on the applicable national laws – and those remain the prerogative of the Member State – the transfer of proceedings will in reality be the transfer of criminal proceedings.[45] On the legislative plane there have been several attempts to prescribe the use of criminal law in secondary community law. However, this always comes up against resistance from a number of Member States, which results in the formulation being made neutral (appropriate measures, all legislative and administrative measures). A striking example of this is the money laundering directive. Article 2 of the original proposal[46] contained a provision for criminal penalties. Many Member States were opposed to this Community obligation and held the view that they were only bound by international duties[47] to provide for

41. For example, Article 27 of the Statute of the Court of Justice, which is part of primary Community law, prescribes the use of domestic criminal law.
42. See, *e.g.*, Regulation 2262/84 of 17 July 1984 concerning olive oil, OJ 1984, L 208/11.
43. C.W.A. Timmermans, *op. cit.*, p. 45.
44. OJ 1987, L 207/1.
45. In this sense, I do not agree with C.W.A. Timmermans, *op. cit.*, p. 42, who states that: '(...) le régime des sanctions dans le secteur de la pêche (...) montre notamment que le législateur communautaire s'estime compétent pour arrêter au besoin une réglementation contenant non seulement la définition des infractions, mais aussi des critères minima pour l'importance et l'imposition des sanctions répressives, voire un régime de transfert des poursuites *pénales*' (author's italics).
46. Proposal for a Council directive to prevent use of the financial system for money laundering, COM (90) 106 def., OJ 1990, C 106/6, Article 2: 'Member States shall ensure that money laundering of proceeds from any serious crime is treated as a criminal offence according to their national legislation.'
47. The UN Convention adopted in Vienna in 1988 against the smuggling of drugs and psychotropic substances and the Council of Europe Convention adopted in Strasbourg in 1990 concerning money laundering, detection, seizure and confiscation of the revenues from criminal activities.

criminal penalties. As a result, in the approved directive Article 2 only requires that money laundering be prohibited and Article 12 speaks of appropriate measures and penalties. A Declaration has been added to the directive in which the Representatives of the Member States commit themselves to take all requisite measures for the introduction of criminal legislation in this area. However, this Declaration is not of a Community nature, since it was approved, in order to fulfil international commitments, in the framework of the intergovernmental European Political Cooperation.

It appears from the above discussion that there is no uniform standpoint on Community powers in the area of criminal law. Nevertheless, the EEC Treaty does contain rules on common policy areas and harmonization (Articles 100 and 100A),[48] which, whether or not in combination with the open authority provision in Article 235, do not preclude criminal law. If we read these articles in combination with the new Article 209a of the Treaty on European Union,[49] legal perspectives then appear to exist for the integration of criminal penalties in the social-economic area, which some authors consider the definite end of sovereign criminal law. Much, however, seems to indicate that the time is not yet ripe politically to make actual use of the available possibilities for legal harmonization. This is one of the reasons[50] that there is an increasing interest in administrative sanctions, also in the Community.

48. B. Langeheine, Rechtsangleichung unter Article 100a EWGV – Harmonisierung vs. nationale Schutzinteressen, Europarecht 1988, p. 235.
49. Article 209 A of the Treaty on European Union reads as follows: 'Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests. Without prejudice to other provisions of this Treaty, Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organize, with the help of the Commission, close and regular cooperation between the competent departments of their administrations.'
50. In addition there is a noticeable shift in the Member States towards more administrative sanctioning, partly for reasons of decriminalization and partly for reasons of effectiveness. Because of the osmosis between criminal and administrative sanctions, an administrative law has been created with punitive characteristics.

2.3 *Administrative Sanctioning Powers of the Community*

2.3.1 The Power of the Community to Prescribe Sanctions

Here, too, we could treat *in extenso* the three sanctioning forms: Community sanctions,[51] Community prescriptions for sanctions and national sanctions.[52] To keep this article within bounds we shall concentrate on the most controversial and current form of sanctioning, the prescription of sanctions by the Community to be imposed by the Member States. Whoever thinks that only the effect of Community law on domestic criminal (procedural) law has stirred up feelings is mistaken. As the Community tries to increase the effectiveness of compliance with Community law and in particular to protect Community financial interests (combat fraud against the Community), the Member States try with might and main to call a halt to the increasing influence of the European Commission on domestic law enforcement.

Whether or not the Community has the power via secondary Community legislation to compel the Member States to impose certain administrative sanctions is debatable. Nevertheless, since the eighties this has already been done here and there by the European Commission in the framework of its delegated normative power for fisheries and agriculture.[53] The administrative sanctions prescribed therein are restitution of unjustly acquired amounts, forfeiture of deposit, quota reduction, etc. In prescribing these sanctions, much use is made of the phrase 'all measures required' from Article 40 paragraph 2(3) EEC Treaty.

Besides the debates over the sanctioning powers of the Community, a second point of controversy is whether the Commission in the framework of its power to develop implementation modalities in secondary Community legislation can independently – without special delegation from the Council – prescribe administrative sanctions for the Member States. Article 145(3) EEC Treaty stipulates that the Council delegates the implementation of its rules to the Commission. It is emphasized in Article 155 that the Commission exercises the

51. See *supra* on the independent sanctioning powers of the Commission.
52. The quality requirements of Article 5 EEC apply here, which has had an effect on the Wet algemeen bestuursrecht (Act containing the general provisions for administrative law).
53. This is sometimes generally phrased (Regulation 2241/87, OJ 1987, L 306), sometimes conditions are attached to the sanctions (Regulation 2262/84, OJ 1984, L 208), or specific sanctions are prescribed (Regulation 1279/90, OJ 1990, L 126).

powers conferred upon it by the Council for implementing the rules it lays down. In short, the Council outlines the main features of Common Agricultural Policy according to the procedure from Article 43 EEC Treaty and sets rules for implementing the basic regulations or delegates the power of implementation, on the basis of Article 145(3), to the Commission. In a procedural Decision,[54] the Council clearly stipulates that the essential elements of the powers which it delegates to the Commission are to be laid down by the Council itself. The question is thus whether sanctioning measures are to be considered 'essential elements' or rather 'implementing provisions'. Only in the latter case can the Commission prescribe sanctions independently without explicit delegation. The Commission has always taken the position that the power it is granted by the Council in all its rules to lay down the relevant implementing provisions does not just comprise the power to establish supplementary or specific conditions for aid or the levying of a sum, but also the power to determine the rules for the controls and sanctions necessary for an effective and uniform implementation of those measures. The fact that the European Commission in the past has not always made use of that power in all areas does not mean it has given up those powers.[55] The latter would in any case only be possible on the basis of an amendment to the Treaty. The Court has indeed always defined the concept 'implementing provision' in a broad sense.[56] Recently it confirmed[57] that the prescription of administrative sanctions does not come under the essential elements.

Despite the fact that the European Commission had made use of the powers confirmed by the Court, there was still dissatisfaction within the European Commission over the unsystematic manner in which secondary legislation in the

54. Council Decision of 13 July 1977 to lay down the conditions applicable to the exercise of the implementing powers delegated to the Commission, OJ 1977, L 197.
55. If Community sanctioning measures are lacking, the Member States have the right and the duty to take any measures necessary to provide for effective enforcement. See Case 804/79 *Commission v. the United Kingdom II* [1981] ECR 1045 and Case 269/80 *Thymen* [1981] ECR 3079 of the European Court of Justice.
56. Case 121/83 *Zuckerfabrik* [1984] ECR 2039: '(...) the Council to adopt the general rules for the implementation of that article, whilst the adoption of the detailed rules for its implementation is a matter for the Commission. That provision must be understood as meaning that, in the exercise of its powers, the Commission is authorized to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council.' See also *Ditta Fratelli Pardini* [1980] ECR 2103.
57. Case C-240/90. For discussion see paragraph 3.2.

past was provided with Community control and sanctioning powers. In order to make the secondary legislation concerning Common Agricultural Policy more homogeneous in the area of control and sanctions, in October 1988 a Working Group[58] was established by the European Commission. The task of the Working Group was to conduct a comparative study of the directives and regulations in the various market sectors with a view to developing a coherent system for a systematic approach to controls and sanctions. In its comparative analysis, the Working Group distinguished 11 'families'. Mention was made of sanctions, or penalties, only when the obligation consisted of more than simple repayment of an unjustly acquired sum with interest. The Working Group developed a number of general principles in the area of control[59] and penalties. Concerning penalties, the Working Group was of the opinion that one could not allow protection of the Community's financial interests to depend solely on law enforcement by the Member States. The big differences between the enforcement systems of the Member States, with regard to both the nature (administrative or criminal) and the amount of the penalty, result in frustration of the enforcement of Community law. European integration requires not just Community norms, but also a certain minimum standard for compliance with those norms. Harmonization of national enforcement in the Member States is one possibility, but is in practice a difficult process.[60] For this reason it is advisable to provide for administrative sanctions in the secondary legislation itself. To ensure that they have a preventive and deterrent effect, the sanctions must be able to completely remove any economic advantage. However, according to the Working Group, the introduction of Community administrative sanctions in secondary Community legislation does not mean that Member States cannot adopt tougher administrative or criminal penalties in their domestic legislation. Community administrative sanctions should be considered minimum sanctions.

This comparative study has enabled the European Commission to develop a system for building controls and sanctions into its regulations. Events have led

58. The Working Group was established by DG XX (Financial Control), assisted by representatives from DG VI (Agriculture), DG XIV (Fisheries), the Legal Service and UCLAF (Unité de Coordination de la lutte anti-fraude).
59. See J.A.E. Vervaele, *op. cit.*
60. The harmonization of national enforcement provisions on the basis of Article 100 or 100A EEC Treaty is not just technically very difficult, but is also very sensitive politically. *Cf.* the report of the ad-hoc group Community law and criminal law, European Political Cooperation, presented at the Council of Ministers of Justice, November 1991, *op. cit.*

to the development of a horizontal enabling regulation for control and sanctioning.[61] Before discussing this, however, some attention should be given to the case law of the Court of Justice on administrative sanctioning powers. This will give an idea of the forms of sanctions that are prescribed and the functions they fulfil in the concrete market sectors.

2.3.2 Court of Justice: Sanctioning à la Carte Communautaire?

The lack of attention to Member State compliance with Community law and to Community control and sanctioning powers when the EEC Treaty was drawn up is one of the reasons that there is still no outline for a coherent common enforcement policy. Nonetheless, the Community is often confronted with failing enforcement in the Member States. In view of the increasing need in the Community to prescribe more coercive sanctioning rules and in view of the standpoint of a number of Member States on this issue, it is obvious that the Court of Justice has repeatedly had to make decisions on the legal grounds of certain penalties and on the claims to authority by the Community and its institutions. The sector-oriented approach of secondary Community law – and the accompanying fragmentation – is strongly felt in the case law, which has more the character of jurisprudential patchwork than jurisprudential policy.

A basic starting point in the administration of justice by the Court is that sanctions – criminal or otherwise – can only be imposed if there is a clear and unambiguous legal basis for doing so.[62] This applies to the three sanctioning forms sketched above, that is, independent Community sanctions, Community-prescribed sanctions for the Member States and national sanctions to ensure compliance with Community law.[63] Precisely the legal ground on which the sanctioning power is based and its legal consequences have often been the subject of proceedings at the Court. Here we shall concentrate on a number of forms of

61. Proposed Council Regulation on controls and sanctions in the area of Common agricultural and fisheries policy, COM (90) 126 final, OJ 1990, C 137; amended by COM (891) 378 final of 25 October 1991, OJ 13 November 1991, C 294/17.
62. Case 117/83 *Könecke* [1984] ECR 3291, ground 11; Case 172/89 *Vandermoortele* [1990] ECR 4677.
63. Regarding the latter, it is unclear whether the Community principle of legality (lex certa/non-retroactivity) also applies to domestic administrative sanctions. For the applicability of the Community principle of legality in criminal law, see Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969 and Case 63/83 *K. Kirk* [1984] ECR 2689.

sanctions that are often prescribed in Community rules for the Member States and that illustrate how Community law and domestic law interact.

Requirement and Forfeiture of Deposit or Cautio

The Court of Justice has repeatedly had to make judgments concerning *cautio*. In Common Agricultural Policy, access to a favourable rule is made dependent on a deposit. This is the case, for example, for export and export subsidies (export refunds) and for Community storage of goods by private individuals. The deposit is forfeited if the conditions of the subsidy are not fulfilled. As early as the *Internationale Handelsgesellschaft* case,[64] the Court recognized the authority of the Community to prescribe this administrative sanction. Also in the *Köster* case[65] the question arose as to whether Articles 1 and 7 of Regulation 102/64, to the extent they apply to export certificates for grain and the deposit required to obtain a certificate, were applicable. The Köster company was penalized with forfeiture for failure to export within the time limit. The Court states first that the requirement of a deposit is a necessary and appropriate means to enable the competent authorities to conduct the most efficient possible market intervention policy. The Court then states that forfeiture of deposit does not constitute a criminal sanction, which means it is not punitive in nature, since it only guarantees compliance with a voluntarily agreed obligation. Concerning authority, the Court finds that Article 43, paragraph 2(3) is complied with as soon as the Council outlines the main features of a rule in its agricultural regulations. Otherwise, provisions for the implementation of basic regulations can be laid down according to a procedure other than that in Article 43 – either by the Council itself or by the Commission through delegation pursuant to Article 155. The Court finds that the Commission's delegated authority to introduce export certificates also includes the power to require a deposit as a condition for export. In other words, imposition of a *cautio* by the Commission, which is not explicitly laid down, can be considered one of the implementation modalities.

The legal character of the deposit is the main issue in the case *Maizena GmbH versus Balm*.[66] The Court finds that if the deposit loses its character as security

64. Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.
65. Case 25/70 *Köster* [1970] ECR 1161.
66. Case 137/85 [1985] ECR 4587.

and under certain circumstances takes on the legal character of a penalty, it does not mean that this penalty is not an integral part of the deposit rule, much less that it then has a criminal character. This has as a consequence that the general principles of Member State criminal law which are valid in Community law (*in dubio pro reo, nulla poena sine culpa*, etc.) do not apply. In his opinion, AG Mischo also states that this penalty has a *sui generis* character in the context of Community law. In his view, the requirement of a deposit is a specifically administrative phenomenon in the context of Community law and the legal problems must also be solved in this context.[67] Not all instruments of Community law can be automatically brought into line with already existing national legal concepts. However, this does not alter the fact, which the Court confirms, that the requirement of a deposit and its forfeiture must conform to the general principles of due process and the fundamental rights. There is extensive Court case law on this issue.[68] In a number of cases, the Court has found total forfeiture of the deposit disproportionate to the violation committed.[69]

The *Könecke* case involved whether forfeiture of deposit as a result of improper actions could be considered a type of fine, to which the general principles of (criminal) law apply (*in dubio pro reo, nulla poena sine culpa,* the proportionality principle and *ne bis in idem*). The question was in particular whether the national intervention boards had the authority in the private storage of beef to demand restitution of an unlawfully returned deposit or to impose financial sanctions on the enterprises equal to the sum of the refunded deposit, when it was subsequently discovered that not Community beef, but imported Chinese beef had been stored. The Commission had argued that the latter were penalty provisions under private law. The Court however held that the applicable Community law did not

67. *Cf.* also R. Barents, The system of deposits in Community agricultural law, in Efficiency v. proportionality, European Law Review 1985, p. 239 and P. Tiedemann, Das Kautionsrecht der EWG – ein verdecktes Strafrecht?, Neue Juristische Wochenschrift 1983, p. 2727.
68. See in addition to the already-mentioned cases *Internationale Handelsgesellschaft, Köster and Maizena* also Case 265/78 *Ferwerda* [1980] ECR 0617; Case 122/78 *SA Buitoni* [1979] ECR 0677; Case 147/81 *Merkür* [1982] ECR 1389; Case 181/84 *Sugar versus IBAP* [1985] ECR 2889; Case C-155/89 *State of Belgium versus Philipp Brothers* [1990] ECR 3265. See also the contributions of B.P. Vermeulen and A.J.C. de Moor-van Vugt in this collection.
69. Case 122/78 *SA Buitoni* [1979] ECR 0677; Case 147/81 *Merkür Fleisch-Import GmbH* [1982] ECR 1389; Case 181/84 *The Queen, ex parte E.D. and F. Man (Sugar) Ltd.* [1985] ECR 2889.

contain sufficient legal grounds[70] for such penalties, and that it was not the responsibility of domestic law to provide such supplementary penalties since Community law did not allow that kind of policy discretion in a closed Community system. According to the Court, this does not abrogate the duty of the Member States to prosecute the deceitful and fraudulent practices which had led to return of the deposit. In his conclusion, AG VerLoren van Themaat[71] argued 'the nature of the penalty' in a very interesting manner, stating that the forfeiture of deposit was neither a criminal measure nor an administrative fine, which did not mean that failure to comply with the terms of a contract should not be examined against general principles of Community law.

In the recent *Italtrade* case[72] the Court clearly found that while forfeiture of deposit did not have a criminal (punitive) character, it should nonetheless be considered a sanction. In 1977, the Court still held[73] that forfeiture of deposit could not be considered a penalty for the breach of a private obligation.

Recovery/Restitution of Community Aid or Recovery of Community Levies, with or without Interest

Recovery as such is not under discussion in Court case law. Rather, the question is whether and if so, how much, interest may be added. Regulations often specify that the Member States are to take the necessary measures in accordance with their domestic legislative and administrative rules to recover amounts paid out as a result of irregularities or negligence with additional interest. In practice the national implementing and enforcement bodies are charged with this. This means that the national court is competent in case of conflicts and if Community law does not determine otherwise, they are to apply domestic substantive and procedural law.[74] However, this should be done in a manner compatible with the limits set by Community law: without jeopardizing the effectiveness of

70. The formulation of Community law is thus very definitive. The CBB considered that a legal basis did indeed exist for demanding repayment after returning a deposit for import with the purpose of processing for conservation (Regulations 805/68 and 1136/79. See CBB 21 December 1990, No. 40/05/304.
71. Opinion of AG VerLoren van Themaat in Case 117/83 *Könecke* [1984] ECR 3314.
72. Case C-199/90 *Italtrade* [1991] ECR I-5545.
73. Joined Cases 99 and 100/76 *NV Roomboterfabriek* [1977] ECR 0861.
74. Case 130/79 *Express Dairy Foods Limited* [1981] ECR 1887; Joined Cases 119 and 126/79 *Lippische Hauptgenossenschaft e.G.* [1981] ECR 1863.

Community law and without discriminating in favour of similar national claims. The Community has set these limits in order to remove the big differences between the Member States. If the regulation only prescribes restitution and no interest, it is still compatible with Community law for a Member State to follow domestic law and charge interest,[75] again on condition that there is no discrimination with regard to similar non-Community recovery proceedings.

In restitution and recovery the question often arises to what extent these procedures should comply with the general principles of due process or Community legal principles. In the *Deutsche Milchkontor GmbH* case,[76] the issue was whether national rules of evidence, periods of limitation and the nationally defined legal principles of legitimate expectations and legal certainty may stand in the way of recovery. The Court answered in the affirmative, while staying within the previously mentioned limits set by Community law. This means that a legal rule of evidence that makes it practically impossible to recover subsidies paid out in contravention of Community law would be incompatible with Community law, even if there was no discrimination with regard to similar, purely domestic rules.[77] In the *Padovani* case[78] the question was whether the Community principle of legitimate expectations would stand in the way of recovery of levies in a Member State where this principle did not exist under domestic law. The Court decided that in view of the concrete circumstances of the case, the Community principle of legitimate expectations did not apply and thus did not stand in the way of recovery, even though the parties had acted in good faith.

Restitution or recovery proceedings, and particularly the interest, are also tested against the proportionality principle. In the *Plange Kraftfutterwerke* case[79] the Court decided that a total interest of 20% (not on an annual basis) in the recovery of export subsidies was not disproportionate in view of the diverse interest rates in the Member States and the length of time between payment (often in advance) and the recovery claim. Less interest would result in the granting of interest-free

75. Case 54/81 *Firma Wilhelm Fromme* [1983] ECR 1449, ground 8.
76. Cases 205-215/82, [1983] ECR 2633.
77. This can be concluded from Case 199/82 *Spa San Giorgio* [1984] ECR 3595, with an opposite situation, namely the recovery of unlawfully levied Community sums for sanitary inspection duties at the border.
78. Case 210/87 *R. Padovani and Mantovani successors* [1988] ECR 6177.
79. Case 288/85 *Plange Kraftfutterwerke v. Hauptzollambt Hamburg-Jonas* [1986] ECR 0611.

credit. In the same case it is also stated that recovery does not require the commission of fraudulent practices by the parties concerned.

Disallowance from Subsidy or Premium System

Court case law is not exactly unambiguous regarding this administrative sanction. If certain conditions are attached to the granting of a subsidy, and non-compliance results in disallowance from the subsidy system, the question is whether this is a penalty or merely the consequence of not fulfilling the attached conditions.

Article 6(1) of Regulation 337/79 contains a penalty in case winegrowers do not comply with the duty to deliver table wine for distillation. Winegrowers who do not fulfil that condition are disallowed from certain intervention measures (subsidy rule for private storage, preventive distillation and distillation aid) for the following wine harvest year. The Court,[80] in contrast to AG Jacobs, found that this was not a sanction, but a condition under which producers were eligible for certain available intervention measures. In the *Denkavit* case,[81] the Court held that failure to meet the time limits for acquiring monetary compensatory amounts, which in this case had lead to complete loss of the right to those amounts, was to be considered a consequence of not fulfilling the conditions, and could not be considered a sanction.

Contrariwise, in the *Oberhausener Kraftfutterwerk Wilhelm Hoperman GmbH* case,[82] the Court recognized the Commission's power, in the framework of the powers conferred upon it by the Council for administration and control, to set time limits and lay down appropriate sanctions for exceeding those limits, which can go as far as loss of the right to aid (disallowance). AG Tesauro did not qualify the loss of right as a result of exceeding the mandatory time limit as a sanction.

80. Case C-217/88 *Commission versus Germany* [1990] ECR I-2879.
81. Case 266/84 *Denkavit France SARL v. FORMA* [1985] ECR 0149.
82. Case 357/88 *Oberhausener Kraftfutterwerk Wilhelm Hoperman GmbH versus Bundesanstalt für landwirtschaftliche Marktordnung* [1989] ECR I-1669.

Sanctions Sui Generis or Fines in Disguise

In the olive oil sector, stored oil is often sold by open bidding. If the buyer does not collect the oil on time, Articles 9 and 15 of Regulation 2960/77 provide for a storage fee. In Case 71/87,[83] the Court states that this rule is meant to be a sanction, primarily because it not only makes the buyer bear the actual costs of the extra storage, but induces him to honour the time limit by imposing a fixed financial burden which clearly works more like a periodical penalty payment the less the time limit has been exceeded. The Court uses the term periodical penalty payment in the wrong sense here. It is actually a fine.

Case C-172/89,[84] involves the withholding of 1/1000 of the total bid per day of delay for late delivery of goods in the framework of Community food aid. On the basis of Regulation 2200/87 deposits can be required for Community food aid. These can be refunded, reduced or forfeited. The rule is, however, so badly worded that situations arise where all *cautio* is refunded even though delivery conditions have not been met, which leaves the Commission as its sole instrument – per analogy – to apply the reduction to the final account. The Court classifies this reduction as a sanction. In my opinion, it is a fine. However, the Court decided that the sanction was in conflict with the legality principle.

From this survey of case law, it does not appear in any event that the Community, more precisely the European Commission, in no case whatsoever – in the framework of its implementing powers – would have the power to prescribe appropriate measures, including administrative sanctions. Nevertheless, the judgments are sometimes contradictory and hesitant. The Court has answered the question of the sanctioning character of certain rules sparingly, without, however, always drawing all the legal conclusions in terms of general principles of law and legal protection. The question whether or not a sanction is punitive (criminal) in nature – in the sense of Article 6 ECHR – is scrupulously avoided. Therefore, the question is left unanswered as to whether the Community can impose sanctions of a punitive nature and thus go further than the imposition of reparative sanctions such as deposit and restitution, and if so, what the legal consequences would be.

83. Case 71/87 *State of Greece v. Inter-Kom Emboriki kai Biomichaniki Epicheirisis Elaion, Liparon kai Trofimon AE* [1988] ECR 1979.
84. Case C-172/89 *Vandermoortele NV v. EC Commission* [1990] ECR 4677.

On the basis of recent developments in legislation and case law on Community level, we shall try to find an answer to both questions.

3 Recent Developments in Community Legislation and Case Law in the Area of Administrative Sanctioning

3.1 *Proposal for an Enabling Regulation*

It is apparent from the discussion of the Community's administrative sanctioning powers and the analysis of the case law of the Court of Justice that there is a need for more system in these matters. This has not escaped the attention of the European Commission. It was furthermore confronted with increasing pressure from the European Parliament and public opinion to take a more vigorous stand on fighting fraud against the Community. The European Commission invoked its power, confirmed by the Court of Justice, to also lay down those provisions for control and sanctions in the implementation of Council Decisions (Article 145(3) EEC Treaty) which are necessary to ensure an effective and uniform execution of the relevant rules. The Commission took the standpoint that it was legally in a position to give form and content to its sanctioning powers in a systematic manner. To suit the action to the word, it has recently developed a proposal for a regulation[85] for the purpose of clearly defining its powers of control and sanctioning in the implementation of common agricultural and fisheries policy. This regulation is striking, first of all because – and I quote the explanatory memorandum – it is of a declaratory nature. This means that the European Commission considers the powers specified in the regulation already conferred and it thus does not have to wait for approval of the regulation in order to actually exercise those powers.

This proposed regulation (hereafter called Proposal for an Enabling Regulation) in fact consists of enabling legislation for the control and sanctioning powers exercised by the European Commission. The powers it contains are considered standard measures. This means that other measures (controls, sanctions) can be laid down if required for the rule concerned. Standard control measures can include: auditing the books, demanding further information on site, inspection of

85. Proposal for a Council Regulation on controls and penalties in the framework of the common agricultural and fisheries policy, COM (90) 126 final, OJ 1990, C 137; amended by COM (891) 378 final of 25 October 1991, OJ 13 November 1991, C 294/17.

production, taking and checking samples. The market participants, both natural and legal persons, on whom obligations have been imposed by Community law, may not refuse inspection and must make every effort to facilitate access to their premises. It is worth noting that these *Community* control powers, *which are exercised by Community officials or authorized representatives,* are comparable to those in Article 17 of the well-known implementing Regulation 17/62[86] on competition law (Articles 85 *et seq*. EEC Treaty). These explicit control powers, further elaborated and provided with legal protection via the judgments of the European Court of Justice, have apparently served as an example.[87]

Besides control powers, the Regulation also includes a series of provisions on the sanctioning powers of the European Commission. Firstly, Article 4(1) defines the Regulation's field of operation. Penalties are defined as '(...) measures entailing unfavourable financial or economic consequences for an operator who has unjustifiably received a benefit; or for an operator who has failed to fulfil an obligation imposed by legislation; or for an operator who refuses access or otherwise obstructs the conduct of any of the checks (...).' Total or partial *withdrawal* of an unlawfully acquired *benefit*, *recovery* of an unlawfully acquired *amount*, with or without *interest*, and *forfeiture of the deposit* required to apply for a benefit or an advance payment are clearly not considered sanctions and are excluded from the regulation's sphere of operation.[88] Article 4 contains a non-limitative list of financial-economic sanctions, *which can be prescribed by the Commission for the Member States*: the obligation to repay a larger amount than the illegally acquired benefit, possibly with interest *(fine)*; complete *disallowance* from a benefit granted by a Community rule, even if the operator has only received part of that benefit illegally *(disallowance)*; refusal or *withdrawal* of the benefit for a *longer period* than that which the breach concerns if there is evidence that the party involved is unreliable *(suspension or removal)*. These forms of administrative fines remind one of the power to impose fines for breaches of Articles 85 *et seq*. EEC Treaty, although those fines are not imposed by the European Commission but by the Member States themselves. The

86. Regulation No. 17 of 6 February 1962, OJ 1962, L 204, since then repeatedly amended.
87. J.-C. Rivalland, Les entreprises face aux pouvoirs d'enquête de la Commission des Communautés Européennes, Actualités Communautaires, 1991; D. Debruyne, De grenzen van de onderzoeks-bevoegdheden van de Europese Commissie in mededingingszaken. Een juridische benadering, Antwerp 1992 and C. Harding, *op. cit.*
88. There is a marked divergence here, particularly with regard to the forfeiture of deposit, from Court case law which in recent decisions has acknowledged its sanctioning character. See *supra*.

terminology of the Draft Regulation itself is rather slipshod and the European Commission's Legal Service even finds that the sanctions if need be can be imposed by the Commission itself,[89] on the basis of Article 172 EEC Treaty and within the framework of implementing modalities. If this were so, then this would in any case involve Community decisions, against which appeal to the Court of Justice must be open (Article 172 EEC Treaty). This, however, is not explicitly provided for in the Draft Regulation.

It is also evident that besides the control and sanctioning rules, the Regulation contains few elements pertaining to the legal consequences of the exercise of this sanctioning power, in particular regarding legal protection. In the considerations, reference is made to respect for general principles of law, particularly the equal treatment and proportionality principles. However, in the text of the Draft only the *proportionality principle* is mentioned (Article 4(2) para 1).

Finally, it is also significant that in the Draft Regulation, the imposition of a prescribed sanction assumes a subjective element of culpability (negligence or intent), even when the sanction is administrative in nature. At the same time, however, the possibility remains open to impose sanctions even when there is no subjective element present if this is justified by the nature of the infringement. This means that strict liability is one of the possibilities (Article 4(4)). This provision does not offer much legal certainty and proceeds from the *culpability principle* as the general legal principle governing the law of administrative sanctions. This is also not in line with the current case law of the Court of Justice, which has not even considered strict criminal liability to be in conflict with the basic principles of Community law.[90]

Article 5 clearly refers to the contents of Article 5 EEC Treaty, in particular the assimilation principle. This also reaffirms that the sanctions provided by the Draft are only minimal measures supplementing the existing general sanctioning duty under Article 5 EEC Treaty which is subject to quality standards. The explanatory memorandum stipulates that the Member States are to ensure that the national sanctions taken in addition to the sanctions under this proposal are not applied in a manner incompatible with the principle '*ne bis in idem*'. This is also surprising, since the Court of Justice does not recognize the *'ne bis in idem'* principle as

89. ECR (89) D/4447, confidential document.
90. Case C 326/88 *Hansen & Sφn* [1990] ECR 2911.

such in the area of administrative sanctioning. The Court has only stated that in imposing the second sanction, account must be taken of the first sanction (proportional deduction).[91]

The Proposal for an Enabling Regulation was approved in February 1990 by the Committee on Budgetary Control of the European Parliament,[92] on condition that a number of amendments were taken into account.[93] In view of the differences of opinion between certain Member States and the European Commission on the sanctioning powers of the Council and the European Commission, it is not surprising that the Proposal has hit some Member States rather hard. Council discussions were suspended when it became evident that Germany had a case[94] pending at the European Court of Justice directly relating to the contents of the Proposal for an Enabling Regulation.

3.2 *The Court of Justice and Community Sanctioning Powers (Case C-240/90)*

The case involved administrative sanctions in the Commission regulations containing implementing measures in the areas of subsidies for mutton producers and temporary income support for the agrarian sector, in other words, applications of the above-mentioned declaratory Proposal for an Enabling Regulation. In the regulations,[95] there is not only specific provision for *recovery* of the illegally acquired amount *plus a fine*, but also for *disallowance* from the subsidy rule for the period of the following fiscal year. Germany held that the Treaty did not contain any legal basis for *disallowance*, since it has a criminal character, and that *recovery plus a fine* was only possible in the context of a Council Regulation (therefore not by order of the Commission on the basis of delegated or implementing powers).[96] The Commission, on the contrary, held the view that the Community had the power *to prescribe recovery and disallowance* and that

91. Case 14/68 *Walt Wilhelm et al. v. Bundeskartellambt* [1969] ECR 0001.
92. See European Parliament, Report of the Committee on Budgetary Control, Rapporteur P. Price, 8 February 1991, A3-0024/91.
93. COM (91) 378 final, OJ 13 November 1991, C 294/17.
94. Case C-240/90 *FRG v. Commission* [1992] ECR I-5383.
95. Regulation 1260/90 of 11 May 1990, OJ 1990, L 124/15 and Regulation 1279/90 of 15 May 1990, OJ 1990, L 126/20.
96. A salient detail is the fact that in domestic German law this form of disallowance from the subsidy system (Leistungsausschluss-Subventionssperre) is neither a criminal sanction nor an Ordnungswidrigkeit, but a purely administrative measure. See Tiedemann, note to C-240/90, NJW 1993, p. 49.

it could also *provide for* such administrative sanctions within the framework of implementing modalities. The European Commission further acknowledged that explicit delegation from the Council would be required to impose administrative fines.[97]

AG Jacobs announced his conclusion in June 1992. He emphasizes that in its judgments,[98] the Court has left open the possibility to prescribe administrative sanctions in Community law. Even the German government recognizes this power, although it feels that the Community has overstepped its authority in this case. Jacobs thinks that the power to prescribe administrative sanctions is not limited to competition law and that Community law has the right to decide whether these sanctions are criminal or administrative in nature. This means that the Commission in the framework of its implementing powers – and, of course, with respect for the principle of proportionality – can indeed prescribe administrative sanctions with a view to harmonization among the Member States. He also points out that not all dissuasive sanctions are criminal in nature (with reference to the huge fines for unfair competition).[99] In my view, Jacobs' reasoning can be criticized especially on this point. Although Community law can indeed make this distinction, it is nevertheless bound by respect for the fundamental rights which are an integral part of it.[100] The Commission may well have the power to prescribe administrative sanctions, but what if, according to the criteria of the case law from Article 6 of the European Convention on Human Rights, they have a criminal character? Is the Commission still competent to prescribe them under Community Law?[101] Jacobs does not explicitly address this problem, but an affirmative answer can be deduced from ground 12:

> 'Certainly, then, Community law in its present state does not confer on the Commission (or on the Court of First Instance or the Court of Justice) the function of a

97. The question is, however, whether fines in addition to restitution cannot be considered an administrative fine.
98. Case 50/76 *Amsterdam Bulb v. Produktschap voor Siergewassen* [1977] ECR 0137 and Case 68/88 *Commission v. Greece* [1989] ECR 2965.
99. Jacobs also draws a typology of sanctioning that is not at all in line with the prevailing jurisprudence of the ECHR concerning application of Article 6 ECHR.
100. See the contribution of B. Vermeulen, The Issue of Fundamental Rights in the Administrative Application and Enforcement of Community Law.
101. Even if the Commission did have the authority under Community Law to prescribe them, the question would remain as to which system of legal protection the exercise of that authority was subject to on the basis of Article 6 ECHR.

criminal tribunal. It should be noted however that that would not in itself preclude the Community from exercising, for example, powers to harmonize the criminal laws of the Member States, if that were necessary to attain one of the objectives of the Community.'

On 27 October 1992 the Court delivered its judgment in this principle case.[102] The power of the *Community* to prescribe *administrative sanctions* in the framework of Common Agricultural Policy, to be imposed by the Member States on operators who commit fraud, is recognized by the Court. The only precondition set by Article 40(3) on that power is that the sanctions must be necessary to effectively carry out Common Agricultural Policy: 'Il appartient au seul législateur communautaire de déterminer les solutions qui sont les plus adéquates en vue de la réalisation des objectifs de la politique agricole commune' (ground 20). It is also very significant that here the Court clearly recognizes a need for harmonization: 'Il convient d'observer à cet égard que, les demandes de subventions étant trop nombreuses pour être soumises à des contrôles systématiques et complets, un renforcement des contrôles existants est difficilement envisageable. De même, l'application de sanctions nationales ne permettrait pas de garantir l'uniformité des mesures appliquées aux fraudeurs' (ground 21). The Court rejects two important German arguments. Firstly, an argument based on Article 87 EEC Treaty cannot apply, since the present case involves prescription (*prescrire*) and not imposition (*appliquer*) by the Community. Secondly, the Court states, unfortunately without specific grounds, that disallowance is not a criminal sanction but 'un instrument administratif spécifique faisant partie intégrant du régime d'aides et destiné à assurer la bonne gestion financière des fonds publics communautaires' (ground 26). The Court finds that in the pending case it does not have to pass a judgment on the powers of the Community in the area of criminal law, since the disputed sanctions are not criminal sanctions. This position is unfounded and contestable. After all, the question, in line with Article 6 ECHR, is not whether criminal sanctions are involved here, but whether or not the sanctions involved, the fine as well as disallowance,[103] are punitive[104] (are criminal in nature), and whether this has consequences for the granting and exercising of powers in view of the applicable legal protection. By avoiding this crucial question the Court has also failed to resolve the question as to which

102. ECJ 27 October 1992, *Germany versus the European Commission*, C-240/90, unpublished.
103. On this point, Germany, erroneously, had only contested disallowance.
104. See also C. Soulard, Rubrique droit communautaire, Revue de Science Criminelle et de Droit Pénal Comparé, 1993, p. 147.

general principles of law apply.[105] The Court decided, 'la Communauté est compétente pour établir des sanctions qui, comme les exclusions (...), vont au-delà de la simple restitution d'une prestation indûment versée' (ground 29). Disallowance is thus only one of the sanctioning possibilities. From this it may also be concluded that administrative fines and periodical penalty payments cannot simply be excluded from the Community's power to prescribe sanctions for the Member States.

With respect to the *sanctioning power of the European Commission*, the Court holds, in line with its decision in the *Köster* case,[106] that sanctioning provisions are not among the essential elements to be decided by the Council in its delegation, but can be laid down by the Commission as part of its implementing provisions. The conclusion of the Court is also: 'La Commission est compétente pour établir les majorations et les exclusions (...)' (ground 43). This is also open to criticism. It is very debatable whether prescribing punitive administrative sanctions and having them imposed can be considered an extension of implementing powers and do not belong among the essential elements of delegation. This very flexible interpretation of the internal Community principle of legality turns Article 4(1) paragraph 2 EEC Treaty[107] into a mere shell. The fact that the EEC Treaty is an enabling treaty and contains a number of open provisions does not necessarily mean that the conferring of powers can be interpreted in such a way as to deprive an EC provision of all its meaning. This also brings up problems regarding the rule of law, not to mention political legitimacy and sovereignty and the lack of democracy. For sanctions of a punitive, criminal character, adherence may be expected in the legislative, executive and judiciary stages to the stringent demands of constitutional democracy.[108] Questions could at least be asked on

105. Tiedemann states that this conflict with the basic principles of the ECHR and German constitutional law could cost the Court of Justice a German 'Solange III' judgment, *i.e.*, that the German Constitutional Court could decide that basic rights were inadequately protected under Community law and for this reason the German constitution has priority over Community law.
106. Case 25/70 *Köster* [1970] ECR 1161.
107. Article 4(1) paragraph 2 EEC Treaty stipulates that: 'Each institution shall act within the limits of the powers conferred upon it by this Treaty.'
108. See also U. Sieber, Europäische Einigung und Europäisches Strafrecht, Zeitschrift für die gesamte Strafrechtswissenschaft 1991, p. 517.

the Community legislative level in regard to these Community sanctions.[109] It is, by the way, striking that the legality principle, strictly interpreted by the Court of Justice where national imposition of sanctions prescribed in secondary Community law is concerned,[110] is not used by the Court to define the powers under primary Community law to prescribe them.[111]

In conclusion, two more observations. In judging the sanctioning powers of the Commission the Court, in contrast to its formulation on the sanctioning powers of the Community, used a closed formulation, *i.e.* (still) left no opening for other sanctioning forms such as fines and periodical penalty payments. It can be concluded therefrom that the powers of the Commission to autonomously prescribe sanctions in the context of its implementing powers are more restricted than those of the Council.[112] The difference between a Council and a Commission regulation in this area has primarily a political significance, namely as a decision-making process in which the Member States do or do not have the last word. In the Council, the Member States have many opportunities to block administrative sanctioning provisions.

In this judgment, as in its previous judgments, the Court has chosen against the *una via* principle. Cumulation of national and Community sanctions is not a problem. The *'effet utile'* principle and the enforcement deficit are of such great importance that the issue of *ne bis in idem* is not even brought up for discussion. From the viewpoint of legal protection and effective penalties, there is an increasing need for regulation in the field of Community prescription of punitive sanctions, which count as minimum sanctions, and the duties under Article 5.

109. B. Vermeulen, in this collection, has a different opinion; in paragraph 6.2 he holds the view that in relation to the prescription of (punitive) sanctions – if they are not criminal in nature – no requirement needs to be set for a specific assignment in the EEC Treaty at least as far as the areas of agriculture and fisheries are concerned. In that regard, I personally see no difference between the prescription of punitive administrative sanctions and criminal sanctions. Also concerning the Member States' freedom of choice in the enforcement of Community law, the same principles should apply to both sanctions (Vermeulen, in this collection, disagrees. See paragraph 7.2.
110. See Case 117/83 *Könecke* [1984] ECR 3291.
111. See also J. Vogel, Die Kompetenz zur Einführung supranationaler Sanktionen, in G. Dannecker, Die Bekämpfung des Subventionsbetrug im EG-Bereich, ERA, Trier 1993, p. 170.
112. As a matter of fact, it is striking that in the judgments of the Court of Justice as well as the Proposal for an Enabling Regulation, all reference to the concept 'fine' is scrupulously avoided.

3.3 *Proposal for a Regulation on Legal Principles*

While awaiting the judgment in the German case treated above and the reopening of negotiations on the Proposal for an Enabling Regulation by the Council, the Commission has not been sitting idle. In 1991 the European Commission[113] had a study[114] conducted on the administrative sanctioning systems in the Member States and the influence of Community sanctions on domestic sanctions.[115] The purpose was to determine whether the differences in the national administrative sanctioning systems are so great that they stand in the way of Community objectives and call for Community harmonization of administrative sanctions. The conclusion of the summary report is that the administrative sanctioning systems in the Member States differ widely. One group of countries (Germany, Italy, Portugal) have an administrative sanctioning system based on specific enabling legislation. A second group of countries (France, Belgium, Spain, Greece and the Netherlands) do have administrative sanctions, but these are spread criss-cross throughout the special statutes, without any enabling law to determine form and content. Finally, there is a third group of countries (Ireland, England and Denmark) which are not familiar with the phenomenon of administrative sanctions. Moreover, the sanctions in the Member States and the general principles of law which apply to them are widely divergent.

Based on the results of this study, the European Commission has drawn up a Draft Resolution[116] for the purpose of prescribing a number of general legal principles with which the Member States have to comply in imposing Community sanctions. There is even reference to a 'General Section' on administrative sanctioning. The European Commission hopes hereby to counter the criticism that

113. The study was ordered by the Directorate-General for Financial Control (DG XX). The results were contributed by DG IV (Competition), DG VI (Agriculture), the Legal Service and UCLAF (Unité de Coordination de la lutte anti-fraude).
114. At the request of the Council of Ministers of Justice, DG XX and UCLAF are also completing a comparative study on criminal sanctioning in the Member States. DG XXI has had a study done on customs sanctions in the Member States.
115. These studies which, remarkably enough, have almost all been conducted by criminal jurists, will be published by the European Commission in the near future. Up to now, two international reports have been published separately: M. Delmas-Marty and C. Teitgen-Colly, Punir sans juger? De la répression administative au droit administratif pénal, Paris 1992; E. Bacigalupo, Sanciones administrativas. Derecho español y comunitario, Madrid 1991.
116. The draft Proposition de règlement relatif aux principes de fond et de procédure applicables aux sanctions communautaires is not under consideration by the relevant DGs of the European Commission. The proposal has not yet been put before the Council.

it is rather lax regarding legal protection. In drawing up this Proposal, consideration has been given to the legal traditions in the Member States concerning general legal principles, the case law of the Court of Justice in this area and the prevailing Community law.

The Proposal for a Regulation on Legal Principles has a very important but also delicate subject-matter. The main issue is what fundamental principles should apply to imposing sanctions (to ensure compliance with Community law). The Draft proceeds correctly from a three-way division of sanctions: real criminal sanctions, deterrent and reparative administrative sanctions, and a twilight zone of punitive administrative sanctions. The Draft is aimed at this last category, which because of their punitive character should be put on a par with criminal law in regard to legal protection. In this connection, the Explanatory Memorandum also clearly refers to the constitutional case law of certain Member States and to the ECHR.

Article 1 specifies the Proposal's field of operation. As in the Proposal for an Enabling Regulation,[117] reparative sanctions are excluded. Here, too, forfeiture of deposit is considered a reparative sanction. The sanctions explicitly falling under the Regulation are: fines; other patrimonial sanctions (periodical penalty payments, recovery with fines over and above the interest, reduction of aid due to false or incomplete declaration); loss of rights (disallowance from a future benefit, loss of subsidy in case of partially false declaration; withdrawal of a licence due to violation) and special forfeitures. This list is limitative.

In Articles 2 and 3 two important legal principles are prescribed. Article 2 declares the applicability of *nulla poena sine lege* (the legality principle). More favourable rules are applied with retroactive effect. Provisions should be explained strictly and for the benefit of the suspected offender. Texts are to be interpreted in such a way that *fraus legis*[118] is punishable. Article 3 requires use of the guilt principle. Liability requires intent or negligence. The latter should be explicitly stipulated in the legislation. Error in a number of cases precludes liability. Article 4 also provides for exclusion from liability on the grounds of

117. See paragraph 3.1.
118. EC rules are often circumvented in such a way that while actions are correct according to the letter of the law, they are in conflict with the spirit and purpose of the law. 'Fraud à la loi' or 'Rechtsumgehung' in EC law as such is not subject to sanctions in all justice systems.

force majeur and justifiable reasons. The mandatory prescription of the culpability principle is in itself most remarkable. To the present day, the Court of Justice has not recognized culpability as a general sanctioning principle. Culpability through breach of the law or strict liability exists in some Member States even in criminal law, and the Court does not consider that contrary to the general principles of Community law.[119] Yet in this draft, in contrast with the Proposal for an Enabling Regulation, no exception is included to allow strict liability in certain cases.

The legality and culpability principles are the only legal principles prescribed. Why other principles of criminal law (due process) or principles of proper administration (equal treatment, legitimate expectations, due care, etc.) have not been prescribed remains a mystery. Articles 5-15 go on to deal with a whole series of substantive and procedural issues. This has the Proposal limping on both feet: on one side legal protection, on the other the uniform application of Community law. The final impression is that the harmonization aspect, aimed at more *'effet utile'* of Community law, outweighs the need for legal protection.

Articles 5-15 contain provisions on attempt, conspiracy, liability of enterprises and of those acting in the name of an enterprise, breach of control duties, severity of the sanction, concurrence of Community and national sanctions, cumulation of sanctions, limitation and application of Community sanctions by the Member States. First of all, it should be mentioned that many concepts and terms[120] have been taken from criminal (procedural) and not administrative (procedural) law. This is of course no problem for German *Ordnungswidrigkeiten* law, in view of the applicability of the law of criminal procedure, but for many Member States this Regulation means that a path has been cleared right through their dividing line between administrative and criminal law. Secondly, those articles contain provisions. It seems as if the functional culpability and the liability of legal persons from Dutch criminal law must now be mandatorily prescribed everywhere in administrative sanctioning. The *una via* principle doesn't stand a chance here. Cumulation between (punitive) administrative and criminal justice is considered permissible on condition proportional deduction takes place in determining the sanction. Here, in contrast to the Proposal for an Enabling Regulation, not a single reference is included to the *ne bis in idem* principle. Finally, this Draft

119. Case C-326/88 *Hansen & Sφn* [1990] ECR 2897.
120. Reference is made to 'suspect' and 'investigation', 'attempt' etc.

explicitly prohibits permission or dismissal. All discretion is precluded; the obligation to impose sanctions is laid down. The only mitigating factor is that in unspecified special cases the minimum sanction can be lowered.

In short, this proposal is open to criticism. It is ambiguous in purpose and design, contains too many criminal concepts and prescribes a number of unacceptable harmonization rules. It is in the interest of us all to have proper legal protection and compliance with general principles of law in the application and enforcement of Community law. But this proposal falls far too short of that goal. On the other hand, this proposal is much too much aimed at instrumental harmonization.

Treatment of this Commission Proposal is not proceeding without a hitch. After the judgment in Case C-240/90, an internal Working Group at the European Commission was charged with integrating the Proposal for an Enabling Regulation and the Proposal for a Legal Principles Regulation. In view of the internal differences and diverging objectives, this promises to be a difficult task. The discussions in the Council on this integrated enabling regulation, limited to agriculture and fisheries, are due to resume in the autumn of 1993.

3.4 New Administrative Sanctions in the Market Sector

The recent proposals for horizontal regulations could cause one to lose sight of important developments taking place in the specific market sectors (agriculture and fisheries) with respect to sanctions. These reforms are giving more form and content to the control and sanctioning powers of the Community.

3.4.1 Integrated Control for Fisheries

At the end of 1992, the fisheries policy of ten years' standing concerning conservation and management came to an end. After a critical evaluation[121] of the quota policy and the technical measures, the Commission introduced proposals in the Council for a new basic regulation[122] and a regulation to institute control

121. Report on the revision of the Common Fisheries Policy, SEC (91) 2288 final, 18 December 1991; Report on the monitoring aspects of the Common Fisheries Policy, SEC (92) 394 final, 18 March 1992.
122. Regulation 3760/92, OJ 1992, L 389/1.

rules for Common Fisheries Policy.[123] In the explanatory memorandum of the control regulation, reference is made to *integrated control* and to incorporating a system of uniform, gradually increasing and deterrent sanctions into national legislation and harmonizing the sanctions in the various Member States. Article 32(1-3) gives this concrete form with unprecedented concrete provisions:

> '1. Where the competent authorities in a Member State find that the rules are not being complied with, for instance after monitoring or inspection carried out pursuant to this Regulation, they shall initiate administrative or criminal proceedings against the natural or legal person responsible.
>
> 2. Such proceedings initiated by the competent authorities of the Member State must be liable, in accordance with the relevant provisions of national legislation, to lead to a penalty which shall result in deterrent financial and/or economic consequences for the parties concerned as well as the elimination of any financial profit from the infringement.
>
> 3. Without prejudice to national law. the Member States shall take all necessary measures to arrive at the result referred to in paragraph 2, which may be, depending on the gravity of the offence: fines; seizure of prohibited fishing gear and catches; sequestration of the vessel; temporary immobilization of the vessel; suspension of the licence; withdrawal of the licence.'

That the Regulation, in addition to harmonization, also envisages integrated law enforcement is evident from the fact that granting aid is made contingent upon compliance with national and Community rules on fisheries policy. Articles 35 and 36 stipulate, respectively, that the Member States and the Commission have the authority to stop, suspend, reduce or withdraw national and/or Community aid when the rules have not been complied with. Article 29 determines that the Commission can restrict the number of days at sea for certain categories of vessels. In the explanatory memorandum, the Commission reserves the right, in the event a Community licensing system is instituted for fisheries, to introduce rules for the suspension or withdrawal of those licences in case of infringement. These Draft-Regulation provisions are surprising. First, the institution of a Community licensing system is under consideration; what is more, there would be *sui generis* forms of independent Community sanctions. Up to now, aside from in the territory of competition law and transport, the Community has had no independent Community sanctioning powers. In agriculture and fisheries there has only been the prescription of administrative sanctions to be imposed by the

123. COM (92) 392 final, 30 September 1992, to amend Regulation 2241/87, OJ 1987, L 207/1.

Member States. The surreptitious manner in which *sui generis* forms of independent administrative sanctions are being provided here can be condemned from the standpoint of legislative transparency and political legitimacy. The Council discussions on this subject, however, are proceeding with much difficulty and the final results of the political negotiations remain to be seen.

3.4.2 Integrated Control for Agriculture

Through the reform of Common Agricultural Policy (MacSharry plan), the existing rules for supporting the market are being redirected towards more direct income support for the producers. Hitherto, the management and control of aid has in principle been the competence of the Member States which, in view of the heterogeneous structure of the various market regulations, have applied strongly divergent rules for compliance. The Community maintains this basic principle, but the Council in Regulation 3508/92[124] has laid down a harmonized system of control.[125] In the Commission's implementing Regulation 3887/92,[126] the explanatory memorandum emphasizes that effective sanctions must be laid down to combat fraud. Besides Article 14, which requires the recipient of a subsidy to repay the subsidy with interest if it was acquired illegally, Articles 9-12 in particular contain far-reaching provisions for punitive sanctions. Article 9 contains provisions for requesting subsidies based on 'surface area'. If the surface area declared exceeds the actual area, administrative reductions are applied. If the declared area exceeds the actual area by 2 to 10%, the amount to be reduced is twice that of the excess; if it is exceeded by 10 to 20%, there is an extra reduction of 30% of the excess; if it is exceeded by more than 20%, the right to a subsidy is lost. If in addition a false declaration has been made, in which the

124. Regulation 3508/92 of 27 November 1992 establishing an integrated system of management and control for certain Community subsidy rules, OJ 1992, L 355/1.
125. Some striking amendments from the European Parliament do not appear in the final text. Rapporteur T. Wynn, Draft Report of the Committee on Budgetary Control, DOC-NE/PR/211/211849 of 8 September 1992, would have preferred to include two considerations: to ensure effective control, the national laws should be harmonized and the Commission should propose an appropriate legal basis for this; they should be geared to the (control) reforms in the Structural Funds.
126. Regulation 3887/92 of 23 December 1992 containing provisions to implement the integrated management and control system for certain Community subsidy rules, OJ 1992, L 391.

farmer has acted intentionally or with gross negligence,[127] he is disallowed from the subsidy for at least the rest of the current calender year. For intentional falsification, disallowance for the next calendar year is mandatory, not only from the same subsidy rule but also from all subsidy rules governed by Regulation 3508/92, and for a surface area equal to that for which the request was denied. Article 10 provides similar reductions for 'animal' subsidy requests. Article 11 clearly states that these sanctions are without prejudice to additional sanctions on the national level. Furthermore, the Community is to decide what circumstances can be designated by the national authorities as *force majeur*. These administrative sanctions are also contained in the implementing regulation for the beef sector.[128]

These administrative sanctions, which comprise recovery, sharp reductions and disallowance, are an outstanding application of the horizontal Proposal for an Enabling Regulation. Regarding the reductions, there is a question as to whether these are not a veiled form of administrative fines, prescribed in a mathematical way that leaves absolutely no more room for policy discretion on the national level except through application of the partly Community-determined escape clauses of *force majeur* and legitimate expectations.

It is remarkable that these sanctions, which go much further than those prescribed in, for example, Regulation 2264/84 on olive oil,[129] have nevertheless been approved by the Council without much discussion, while the discussions on the horizontal Proposal for an Enabling Regulation are still proceeding with difficulty.

4 Conclusion

The Community has slowly but surely given form and content to Community sanctioning powers, also beyond the territory of competition law. To the present day, the legal actions of individuals and/or Member States at the Court of Justice

127. The article formally recognizes the principle of legitimate expectation as grounds for justification. Article 9 (2) paragraph 4: 'These reductions shall not be applied if the farmer can show that his determination of the area was accurately based on information recognized by the competent authority'.
128. Regulation 3888/92, OJ 1992, L 391.
129. Regulation 2262/84 of 17 June 1984 containing special measures for the olive oil sector, OJ 1984, L 208/11.

have only resulted in confirmation of the sanctioning powers, which consist primarily of Community prescription of sanctions for the Member States. Nevertheless, it cannot be said that the judgments of the Court of Justice have presented a clear picture of either the legal character or the limits of those sanctioning powers.

Roughly speaking, there are three steps in the development of these sanctioning powers. In the first stage, prescriptions for sanctions appeared in regulations in an unsystematic manner and in very diverse forms. After division into 'families' and development of the horizontal enabling regulation, this came to an end and in the last few years the Commission has clearly been conducting a systematic policy, which has also resulted in the German case before the Court. Recently a third step was taken, namely the incorporation of Community sanctioning provisions into a system of integrated control. Sanctions have thus become the final effective link in the chain of enforcement.

This evolution has occurred gradually and is today still limited to agriculture and fisheries. In itself this is surprising. Customs law is completely governed by the Community,[130] but customs sanctions have remained a national competency. This is in contrast with the fact that many infringements are violations of import and export rules which per definition occur on the external frontiers of the Community and are thus not dependent on the Member States. Nonetheless, in the area of customs, as opposed to agriculture and fisheries, up to now no use has been made of Community sanctioning provisions. However, everything points to the fact that behind closed doors much thought is being given to possible harmonization of customs sanctioning law. Whether these developments will also spread to policy areas where the Community does not have exclusive authority is an open question. It is nevertheless clear that the Community is also using its powers of harmonization to this end. The directives on insider trading[131] and money laundering[132] are a definite step in that direction. Therefore, the possibility cannot be ruled out that in the future, once the European Environmental Agency has been established, Community environmental rules will also contain sanctions.

130. Regulation 2913/92 of 12 October 1992, Community Customs Code, OJ 1992, L 302.
131. Directive to coordinate provisions on insider-trading, OJ 1989, L 334.
132. Directive 10 June 1991, OJ 1991, L 166/77.

This evolution poses problems. Because of the *sui generis* character of Community sanctions, it seems as though Community sanctioning powers (with the exception of imprisonment) are unlimited. From the standpoint of the rule of law, this is totally unacceptable. Secondly, this has left a lack of clarity as to the limits of legal protection. When do the principles of Article 6 ECHR apply? The increase in administrative enforcement in the Member States, partly under the influence of the Community, is also leading to the considerable expansion of administrative cooperation (possibilities) in monitoring and determining sanctions. Mutual assistance between administrative agencies is preferable to time-consuming international legal assistance in criminal matters.[133] Here, too, questions arise – qua operation as well as legal protection – concerning gearing administrative investigation to the imposition of punitive sanctions under administrative or criminal law.

Expanding European integration has led to increased interpenetration of the national and Community components of the Community legal order. This also affects enforcement. Although we cannot yet speak of a Community legal order with regard to sanctioning, it is still clear that in sanctioning the national and Community components interact. In that context it is necessary to let go of the dogmatic distinction between criminal sanctions and punitive administrative sanctions and look at the nature and the legal consequences of the sanctioning powers. After all, it is high time to re-examine the relationship between constitutional democracy and the sanctioning under public law in the Community legal order and ascertain whether and in what way the constitutional democratic model, which is the ideological basis of the state's *ius puniende*, can be guaranteed on the European federal level. Any further amendment of the Treaty requires legislative work in this connection. In anticipation, one can only hope that the Court of Justice will not keep avoiding the real legal problems.

133. See also The Internal Market after 1992. Meeting the challenge. Report to the EEC Commission by the High Level Group on the Operation of the Internal Market (Sutherland Report); The operation of the Communitu's Internal Market after 1992, follow-up to the Sutherland Report, SEC (92) 2277 final, and Reinforcing the effectiveness of the internal market, COM (93) 256 final.