J.A.E. VERVAELE

24. Community Investigative Procedures and Enforcement of Sanctions

By joining the Community, the Member States have undertaken loyally to collaborate in the elaboration and execution of Community policy as defined in the European Community Treaties. Community loyalty, expressed in Article 5 of the EC Treaty,[1] also implies that the Member States will do everything to insure respect for Community law and, in the appropriate case, sanction violations of it.[2]

The Member States have competence in matters of Community law – which is defined at the European Community level. With the exception of Article 87(a)(2), relative to competition law,[3] the EC Treaty does not provide, at the Community level, any explicit competence for monitoring, control or sanction, either administrative or criminal. The legislators, administrators and judges in the Member States establish the measures and the manner according to which Community law is enforced and the effect it will have. That means that the EC depends upon national structures, for execution and enforcement respectively, not only to carry out the law, but also for monitoring, control, and sanction.

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1 Art. 5 of the EC Treaty:
"Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims.

They shall abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty." (This Article imposes a general obligation on member states to observe the Treaty.)

2 J.A.E. Vervaele, "La lutte contre la fraude communautaire: une mise à l'épreuve de la loyauté communautaire des Etats membres?", *RDPC*, 1991.569.

3 Cf. G. Alm, "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," *Common Market Law Review*, 1986. 71; and G. Dannecker and J. Fischer-Fritsch, *Das EG-Kartellrecht in der Bussgeldpraxis*, Köln, 1989.

M. Delmas-Marty (ed,), What Kind of Criminal Policy for Europe?, 209–247.

The fact that the obligation of implementation rests primarily on the Member States does not mean, however, that the Community has no responsibility for the enforcement of Community law. In the first place, at the Community level there is a system of external control exercised by the European Parliament and the European Court of Auditors. The European Parliament, especially the Commission on Legal Affairs and Citizen's Rights and the Budgetary Control Committee, devotes substantial attention to insuring respect for Community law. The European Commission also submits a yearly report to the Parliament similar to an accounting of the application of Community law. The European Court of Auditors must, pursuant to Article 206 of the EC Treaty, examine the accounts for all Community revenues and expenditures and in so doing pay as much attention to the legality and regularity of the receipts and expenditures as to proper financial management. The Court of Auditors has, moreover, the competence to maintain control of the use of Community resources (subsidies, interventions, etc.), even if they are used by non-Community entities.

Secondly, the European Commission verifies the way in which the Member States follow Community law and fulfill the enforcement obligation according to what one calls the system of internal control. Article 155 of the Treaty expressly provides a general legal foundation:

> With a view to ensuring the functioning and development of the Common Market, the Commission shall:
> - ensure the application of the provisions of this Treaty and of the provisions enacted by the institutions of the Community in pursuance thereof;
> - exercise the competence conferred on it by the Council for the implementation of the rules laid down by the latter.

This last point is spelled out in the third subparagraph of Article 145 of the EC Treaty:

> With a view to ensuring the achievement of the objectives laid down in this Treaty, and under the conditions provided for therein, the Council shall:
> - ensure the co-ordination of the general economic policies of the Member States; and
> - dispose of a power of decision.

In practice, the power of the European Commission in the area of execution, consists of:

a) taking the initiative in establishing rules which must be applied by the Member States by presenting proposed regulations or directives to the Council;
b) thereafter, watching over their application by the Member States (or by the entities designated by the Member States) since they are asked to make reports in a prescribed form on the dates specified; it may also participate in the controls which are effectuated by the Member States;
c) keeping record of all the monies remitted by the Member States, relating to all the activities they undertook and auditing as necessary on a case-by-case basis.

The internal control comprises two aspects: on the one hand, the European Commission prescribes the control duties of the Member States and imposes on them the obligation to render reports, and, on the other hand, the European Commission has its own control competency. Community law contains no general regulation regarding the control competencies of the European Commission. These have increased over the years and they have been inserted in specific sectors of the market. Because of this evolution, the control competencies are not always identical and a discussion of each sector is necessary. Each general sector (own resources, agricultural expenditures, structural funds) encompasses derivative Community legislation on each subject; the control competencies of the European Commission are specifically fulfilled in certain areas of the market (for example, olive oil and viticulture).

In the first part, we will examine in depth the system of internal control. First, we will examine agricultural expenditures because the first control regulation, and the most scrutinized, was formulated for this portion of the EC policy. There will then be an examination of the receipts of the EC, especially the own resources and VAT. The analysis of the system of internal control concludes with expenditures under the structural funds. In the second part we will examine the issue of the sanction competency of the Community.

During the discussion of control and sanction competencies, we will not explicitly deal with the competencies relating to observation of the competition rules (Arts. 85-90). They will be mentioned only in circumstances where specific competencies of control and sanction (fines and periodic penalty payments), which the Commission possesses and which are provided for in the EC Treaty itself, are sources of reference and inspiration for control and sanction competencies in other areas.

I. "INTERNAL AUDIT"[4]

1. FRAUD IN THE EXPENDITURE: COMMON AGRICULTURAL POLICY

1.1. General Regulation

In so far as the control of agricultural expenditures is concerned, beyond the general legal foundation (Arts. 155 & 145 of the EC Treaty), another specific foundation has also been provided in Article 43 of the EC Treaty. The common agricultural policy is financed by the European Guidance and Agricultural Guarantee Fund (FEOGA)[5] and on the basis of advances to the organizations by the Member States. The organizations in the Member States which carry out the common agricultural policy are controlled *a posteriori*. A use of funds not conforming to the common agricultural policy can be for two reasons. It can appear, during the auditing of the accounts, that the Member State did not carry out the common agricultural policy in conformity with Community law. Secondly, frauds can be committed by economic entities ("irregular usage"). This is why a system of internal control of agricultural expenditures is provided for where a responsible party is designated between the Commission and the Member States in order to ensure the common agricultural policy.

In 1970, the first basic regulation established an internal control for the common agricultural policy.[6] Article 8 defines the obligation on the part of the Member States to put it into operation. Paragraph 1 prescribes that the Member States must take necessary measures designed to execute an effective and regular control, to prevent and prosecute irregularities and recover any amounts in issue in the case at hand. It is expressly stated that these measures are taken in conformity with national legislative and administrative provisions. The Member States have the duty to inform the Commission of the measures taken and the progress of administrative and judicial proceedings. Importantly, Article 8, paragraph 2, explicitly fixes the responsibility in cases of non-recuperation of the monies improperly paid:

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[4] This part is an enlarged version of J.A.E. Vervaele, *Fraud against the Community. Need for an European Fraud Legislation*, Deventer, Kluwer, 1992. For French readers: cf. J.A.E. Vervaele, "La Communauté économique européenne face à la fraude communautaire. Vers un "espace pénal communautaire?", *RSC*, 1990. 29, and J.A.E. Vervaele, "La lutte contre la fraude communautaire: une mise à l'épreuve de la loyauté communautaire des Etats membres?", note 2, *supra*, and J.A.E. Vervaele, "La fraude communautaire et le droit pénal européen des affaires," Paris, PUF, 1994.

[5] Translator's Note: The French acronym, FEOGA, is used throughout the text of this book.

[6] Regulation No. 729/70, *OJ*, 1970, L 94/15.

"Absent total recuperation, the financial consequences of irregularities or negligence are assumed by the Community, except when the irregularity or negligence is imputable to an agency or entity of the Member States."

Article 9 deals with the control powers of the Commission. Agents of the Commission have the competence to themselves conduct on-site controls in the Member State in order to verify that the administrative practices conform to Community law or that the accounting of the transactions is up to date and that the conditions linked to the transactions are complied with and controlled. The Commission must, however, give the Member State prior notice of the inspection and the latter must take all necessary measures to make the inspection possible. On the other hand, the Commission can also request that the Member State initiate an administrative investigation. If it complies with this request, a representative of the Commission can participate in the investigation.

During the practical execution of these regulations, the Commission quickly discovered that this internal inspection structure had several loopholes concerning essential aspects of the establishment of an antifraud policy. The collaboration between the Member States and the Commission did not proceed on the same basis. The Member States were very restrictive in furnishing information so that the Commission was insufficiently informed as to the quantity, nature and financial consequences of fraud. In 1972, the Commission had already sent to the Council for approval a much more severe, specific, fraud control regulation.[7] Article 2 of this regulation obligates the Member States to indicate which agencies in authority or national entities are specifically competent in the fight against agricultural fraud. Based on Article 3, the Member States must prepare a tri-monthly status report indicating the irregularities observed in the form of an official administrative or judicial report. These status reports must specifically include: the rules violated, the nature and importance of the expenditure, the common market organization and the product affected, the instances of and the methods used to commit the irregularity, the manner in which and by whom the irregularity was observed, the financial consequences which flow from it, and the chances of recuperation. The tri-monthly reports must also include the progress and results of administrative or judicial proceedings for recuperation, including the reason for the absence or abandonment of prosecution. If the Commission suspects that irregularities have been committed, it may thereafter, based on Article 6, not only request but also compel the Member State to proceed with an administrative investigation[8] in

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[7] Regulation No. 283/72, *OJ*, 1972, L 36/1.

[8] The regulation does not give the Commission the power to start a national judicial proceeding.

which it can participate. In case of a positive result, the Member State is thereafter bound to initiate a formal administrative or judicial proceeding. This 1972 Regulation was not welcomed in all the Member States and the Commission found itself constrained to invoke Article 169[9] against Belgium and Italy[10] in order to encourage these Member States to respect the Regulation.

Beginning in 1973, the European Guidance and Agricultural Guarantee Fund (FEOGA) created an "Extraordinary Inspection Mission" (EAM). This "Special Control Commission", composed of senior officials of the Member States and the Commission, effectuated a five year investigation of fraud in the specific agricultural sectors. On the basis of its recommendations, an important directive[11] became effective in 1977 which requires the Member States to control, *a posteriori*, the commercial documents of businesses which received funds or owed money to the FEOGA. These controls complete the *a priori* controls, thus after the conclusion of the transaction that must be pursued so as to establish, based on an examination of all the pertinent commercial documents, whether the transactions have been effectively conducted in conformity with Community regulations in force. The Directive sets the minimum number of businesses to be audited annually at not less than half the number engaging in transactions of more than 100,000 ecus with FEOGA during the year preceding the audit. (Art. 2, ¶2). The Member State is free to decide the thoroughness and frequency of these inspections but must, however, examine a control representative of the categories of businesses according to their financial importance within the framework of FEOGA (Art. 2, ¶1). Moreover, the Directive invites the Member States to take appropriate legal measures, so that in cases of irregularities observed to the detriment of FEOGA, the national legal provisions relating to seizure of commercial documents could be applied.

January 1, 1990, this Directive, No. 77/435, was replaced by a Regulation which especially augmented the frequency of the controls (Art. 2).[12] After a transitional period of two years, at least half the businesses with transactions of more than 60,000 ecus with FEOGA during the preceding year must be controlled. Business which surpass 200,000 ecus during this

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[9] Article 169 of the EC Treaty states: "If the Commission considers that a Member State has failed to fulfil any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments."

[10] C. Flaesch-Moulin, "La CEE et la lutte contre les fraudes au détriment du budget communautaire", *Cahiers du droit européen*, 1983. 422.

[11] Directive No. 77/435, *OJ*, 1977, L 172/17.

[12] Regulation No. 4045/89, *OJ*, 1989, L 388/18.

period and were not controlled during the preceding period must, in every case, be controlled. In addition, the Member States are bound to present their control programs to the Commission for approval. These programs must mention the number of businesses which will be controlled and their distribution by sector of the market, taking into account the interests thereby implicated. There are, moveover, explicit criteria for management which have been fixed during the establishment of the program. Each Member State must designate, by January 1, 1991, at the latest, a specific agency charged with execution of this regulation. This agency must be organizationally independent of the services or divisions thereof responsible for the distribution of funds or prior controls.

A Regulation was approved by the Agriculture Council on the 12th and 13th of February, 1990, following which thereafter a physical control of at least 5% of the exports eligible for refunds[13] takes place. This 5% requirement is based on the calendar year and includes each sector of production and all customs offices. The Commission announced its intention to write this 5% physical inspection condition into all the agricultural regulations which would thus represent an extension of the intervention and support of production regulations. Additionally, the Commission has formulated its intention not to pay its pro rata share if this percentage is not reached.[14] In other words, the Commission hopes to impose financial and administrative sanctions on the Member States when they do not meet this concrete obligation.

Finally, in 1991, a new, important control regulation came in to effect in order to reinforce the collaboration between the Commission and the Member States in putting Community law into operation.[15] This Regulation eliminates Control Regulation No. 283/72. The obligation of the Member States to furnish the Commission with a status report is enhanced. The requirements relative to status reports, already provided for in Article 2 & 3 of audit Regulation No. 283/72,[16] are repeated and supplemented with regard to the date on which is furnished the first information permitting the suspicion of the existence of an irregularity as well as the source of the information, the Member States and third parties implicated, and the identification of the individuals and corporations involved in the case. (Art.

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[13] Regulation No. 386/90, *OJ*, 1990, L 42/6.

[14] As far as the restrictions on exports are concerned, some directives should have already been approved by the European Commission. They are the response of the European Commission to the special report of 2/90 regarding the management and audit of export refunds, *OJ*, 1990, C 133, p. 58.

[15] Regulation No. 595/91, *OJ*, 1990, L 67/11.

[16] Note 7, *supra*.

3). The report is limited to irregularities involving more than 4,000 ecus unless the Commission expressly requests otherwise. (Art. 12(1)). Article 4 provides for an emergency report, addressed to the other Member States and the European Commission, concerning irregularities found or suspected where there is reason to fear that the effects will rapidly spread or a new fraudulent practice is uncovered.

Within the two months following each trimester, the Member States must also inform the Commission of the proceedings commenced following the communication of irregularities pursuant to Article 3, as well as any significant changes in these proceedings, especially: the amounts recuperated or awaited; confiscatory measures taken by the Member States to insure the repayment of monies improperly disbursed; administrative and judicial proceedings commenced to recoup monies improperly paid and to impose sanctions; the reasons for abandoning restitution or criminal proceedings (Art. 5).

It is expressly stipulated there that the Member States inform the Commission of administrative or judicial decisions relating to the abandonment of these proceedings or essential elements thereof. Moreover, if recuperation is abandoned, the text states: "circumstances permitting, the Commission is to be informed of it before the decision is made." In short, the European Commission thus hopes to have a view of the evolution of administrative and judicial proceedings relative to irregularities and fraud starting from the initiation of proceedings to confiscatory seizures, through the abandonment or termination of the proceeding.

This very thorough reporting obligation nonetheless poses some problems. How can a Member State inform the Commission of the essential elements of decision not to prosecute by the public prosecutor or a settlement made by the customs authorities? Does that mean that the decision must be reasoned and that the reasoning must be communicated? All this is not idle speculation because Article 5(2) expressly says:

> Where a Member State considers that an amount cannot be totally recovered, or cannot be expected to be totally recovered, it shall inform the Commission, in a special notification, of the amount not recovered and the reasons why the amount should, in its view, be borne by the Community or by the Member State. This information must be sufficiently detailed to enable the Commission to decide who shall bear the financial consequences, in accordance with Article 8(2) of Regulation (EEC) No. 729/70.[17]

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[17] Note 6, *supra*.

In other words, the information goes to determine if the irregularities or negligence are the fault of the agencies or entities of the Member States and if the financial consequences are ultimately charged to them.

Article 6 deals with the investigative competencies of the Euro-inspectors. When the Commission determines that irregularities have been committed in one or several Member States, it informs the Member State(s) concerned which promptly proceed with an investigation in which the agents the Commission can participate. The concept of the "inquiry" is defined (Art. 6(1)) as "any inspection, verification or action carried out by officials of the national administration with a view to establishing whether there has been an irregularity, with the exception of action carried out at the request or under the direct authority of a court." However, the management of the investigation remains permanently in the hands of the agents of the Member State. The Community agents cannot exercise on their own initiative the control powers attributable to the national agents, although they have access to the same locations and documents as the national agents. On the other hand, this regulation responds to the often heard criticism that the Member States must financially support their antifraud efforts and that, as a consequence, some active Member States are prejudiced financially. To deal with this, Article 7 provides that each Member State may retain 20% of the amounts recuperated on behalf of FEOGA. Moreover, from now on, the European Commission also pays the expenses of legal proceedings if they are initiated on its request by the competent authorities of a Member State to recover unauthorized payments, even if the proceedings are not successful.

1.2. Regulation of the Sector Markets

Alongside the general control regulations in matters of agricultural expenditures within the framework of the FEOGA, there are also specific inspection rules for sectors of the market.

One of the first sectors in which Community control inspections occurred was the Community fishing policy. In 1982, a systematic control system[18] was established, which provided the opportunity to create, as it was said *sub silentio,*[19] a Community control agency for fishing matters, which was to scrutinize national practices with regard to monitoring and investigation. *"Sub silentio"* because in the control regulation, there is no mention of a Community inspection agency, but of "Commission officials" who can take part in the national administrative investigation. The regulation is vague as to their duties and competencies. The Euro-inspectors can intervene only after prior notice; they do not have the right to control individuals or to take

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[18] Regulation No. 2057/82, *OJ*, 1982, L 220/1.

[19] Regulation No. 2241/87, *OJ*, 1987, L 207/1.

evidence. They accompany the national inspectors who remain responsible throughout. The objectives are formulated in the 18th Report on the work of the Community: 1) to investigate the adaptation of the national inspection procedures at sea and in fishing ports; 2) to participate in administrative investigations of irregularities committed in the Member States which can eventually lead to trial proceedings. The Euro-Inspection, where approximately 20 inspectors now work, was begun in 1983. In Regulation No. 2241/87, which replaced the prior one, Community control over national enforcement is formally addressed in Title IV. Article 12, §§3 & 4(a)state as follows:

> 3. To ensure that Member States comply with this Regulation, the Commission may verify on the spot the implementation thereof, in liaison with the competent national departments.
> 4(a).To that end, officials authorized by the Commission shall be entitled to be present, as deemed necessary by the Commission, at inspections and monitoring carried out by national departments. The Commission shall establish appropriate contacts with Member States with a view, wherever possible, to establishing a mutually acceptable programme of inspection and monitoring. Member States shall cooperate with the Commission in its fulfilment of this task.

The Euro-control appeared a rich source of information for the Commission and developed into an essential element of the execution of the Community fishing policy. Thus, Holland was confronted in 1986 with an extremely critical report regarding the effectiveness of its enforcement.[20] It reflected that the Community had observed a fish surplus (for some types of fish of over 200%) and manipulations in the catch registration reports provided to Brussels as well as in the mandatory termination of the fishing season. Much of the data surfaced during the control inspections of the Euro-inspectors who accompanied the Dutch special inspection service.

The Commission's experience in enforcing the fishing policy was transplanted into other economic sectors and its structure was followed. In this regard, we note that the regulation regarding the Euro-Inspection became more explicit. A recent Council regulation containing general rules relating to controls in the viticultural sector clearly establishes that, given the serious frauds which have occurred in this sector, the intervention of Community officials responsible for viticultural audits must be perceived as an absolute necessity in order to insure that there is a uniform adaptation of the rules and

[20] I cite here the report of Lord O'Hagan made for the Commission on Legal Affairs and Citizen's Rights of the European Parliament, Doc. A2-162/85, 1985-1986.

effectively aid their colleagues in the Member States.[21] It is for these reasons that Title III of the Regulation provides for a Community control structure consisting of a team of specialists from the Community. The auditors' task is to collaborate with the competent agencies in the Member States to see to it that there is uniform adaptation of the viticultural regulations and especially to control compliance with them. The Commission's specialized investigators can participate in inspections initiated by the Member States. The Commission can also request that the Member State begin an inspection in which its specialists can participate. During the execution of their functions, the Commission's specialized auditors have certain rights and competencies which are enumerated: they have access to the premises of viticultural enterprises, to warehouses and transport facilities; they can establish an inventory; they have the right to review the books of account and make copies. They cannot – unlike national officials – take samples and impose confiscatory measures. In effect, the Member State inspectors are always in charge of these inspections.

Under the heading of horizontal collaboration among the Member States, Article 11 specifically provides that the Commission has the competency to coordinate certain control activities outside the borders. It is also important that Article 14 deals specifically with questions of secrecy and evidence. National laws with respect to professional and commercial secrecy are applicable. The data can be used during the investigation and prosecution. Moreover, in applying the directive, the data of other Member States or of Community inspectors has the same value as evidence as that of the Member States themselves. We must note, however, that this is limited to the value of the evidence in the context of the inspection and administrative investigation.

A supplementary step was the elaboration of an enforcement responsibility shared by the Commission and the Member States. In certain market sectors, the European Commission participates in national enforcement. This participation can consist of financial or logistical support or the imposition of an obligation to create an investigative agency for a designated market sector. The Commission did this in the case of the oil sector. It became evident during consideration of the new Regulation[22] that the inspection structure of the Member States concerned did not effectively implement the corresponding Community regulations. The regulation requires the Member States to create a specific and autonomous control agency for this economic sector and the define its tasks. The Commission co-finances its establishment and functioning but the control agency functions under national

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[21] Regulation No. 2048/89, *OJ*, 1989, L 202/32.

[22] Regulation No. 2262/84, *OJ*, 1984 L 208/11.

sovereignty. Article 2 imposes the obligation to apply adequate sanctions in cases of irregularities in production subsidies and Article 3 determines what the minimum sanctions should be. Moreover, Article 4 contains the obligation to revoke authorization for one year of sales in a five year period in circumstances where certain irregularities may have been committed. The Member States have adapted their laws and administrative structures accordingly. Italy has thus established the Agecontrol[23] agency and has provided specific criminal sanctions, which can be imposed independently of administrative sanctions, in cases of fraud affecting community monies from FEOGA. The Commission has also proposed a procedure according to which the competent viticultural investigative agencies would be obligated to cooperate among themselves and with the Commission. The Commission annually holds a meeting with the representatives of the national inspection agencies.

2. FRAUD ON RESOURCES: "OWN" RESOURCES AND VAT

Here again, Community law provides a specific, complementary legal basis in Article 209 of the EC Treaty. The decision to replace the financial contributions of the Member States with the "own" resources of the Community was made on April 20, 1970.[24] The principle is that it is incumbent on the Member States, who to this end must take all necessary measures, to fix and collect all the "own" resources in conformity with their national legislative and administrative provisions. These monies must be put at the disposal of the EC. In other words, the national tax and customs authorities are responsible for effective collection and control. The 1971 Regulation regarding the application of this decision provided for a system of internal controls with, nonetheless, mini-competencies for the Commission.[25] Article 14 straightforwardly prescribes that the Member States proceed with the verifications and investigations relative to the determination and availability of the "own" resources. The Commission can only ask to be involved in these controls or ask that complimentary controls are effectuated by the Member States. The specific control system for the

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[23] Law 898/86, *Gazetta Ufficiale*, Nov. 11, 1987.

[24] Own Resources Decision, *OJ*, 1970, L 94. Cf. also G. Isaac, *Les ressources financières de la Communauté européenne*, Paris, 1989, and D. Strasser, *Les finances de l'Europe*, Paris, 1990.

[25] Regulation No. 2/71, *OJ*, 1971, L 3/1-6. This Regulation has been replaced by Regulation No. 165/74, *OJ*, 1974, L 20/1-3, and Regulation No. 289/77, *OJ*, 1977, L 366/1. By Decision No. 85/275, *OJ*, 1985, L 128, the VAT percentage was raised from 1% to 1.4% of the base rate and by Decision No. 88/376, *OJ*, 1988, L 185/24, supplemented by a tax on GNP.

"own" resources was set up in 1974.[26] This inspection system does not apply to VAT, but only to the traditional "own" resources (customs duties, agricultural and sugar levies). It is expressly stipulated in Article 2 that the controls are effectuated by the national services, entities or authorities. It appears from a number of court decisions that participation by the agents of the Commission in these national audits could be problematical. Thus, a prior agreement between the Member State implicated and the Commission is necessary to fix the modes of participation. Moreover, the EC agents must act according to practices and rules imposed on officials of the Member States and can have contact with the delinquents only through the intermediary of the national officials.

The seminal, 1971 Regulation was replaced in 1977.[27] In the new fundamental Regulation, the enforcement obligations of the Member States and the control competencies of the Commission are again enumerated. Article 4 provides that the Member States must submit to the Commission a list of the agencies or entities responsible for the determination of the "own" resources with specific information as to their status and competencies. The Member State is also obligated to prepare an accounting of the "own" resources, specifically according to the type of resource and to send the Commission a monthly summary of the accounting statement (Art. 3). Each year, the Member States must submit to the Commission a report relating to the determination and control of the "own" resources (Art. 5).

The control powers of the Commission are contained in Article 18. The point of departure remains, and this is nothing other than a confirmation of the validity of the basic 1974 control regulation, that the Member States proceed with the verifications and investigations relating to the determination and availability of the "own" resources. The competency of the Commission remains limited to a binding request addressed to the Member State to effectuate a complementary control in which an agent of the Commission can participate.

As for VAT revenues, it was set forth for the first time in 1977, in a Regulation relating to the VAT system of "own" resources, that the control system provided for in the fundamental 1974 Regulation is equally applicable to audits of VAT receipts. (Art. 12, §2).[28] Article 10 sets out the obligation of the Member States to address annual reports on VAT to the Commission, and Article 12, paragraph 1, permits the Commission to undertake on-site verifications in collaboration with the competent national authorities.

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[26] Regulation No. 165/74, *OJ*, 1974, L 20/1-3.
[27] Regulation No. 2891/77, *OJ*, 1977, L 336/1.
[28] Regulation No. 2892/77, *OJ*, 1977, L 336/8.

In comparison with the regulations regarding frauds in the agricultural expenditures sector, the Commission seems possessed of a more limited competency in so far as control of the "own" resources is concerned. The Commission cannot always investigate on-site in the Member States if the customs duties, the agricultural and sugar levies, and VAT are collected according to the prescribed administrative procedures or if irregularities or frauds are not committed. Moreover, the procedures for notification by the Member States in cases of fraud are far less precise for the "own" resources than in the agricultural sector, to the point that it is difficult to set up a fraud reporting system comparable to the one for FEOGA in agriculture. One of the reasons why the Member States have greater competency in the control of the "own" resources is incontestably that the financial responsibility for the frauds discovered is different. Unlike a fraud on agricultural expenditures, in cases of non-collection to the detriment of internal resources, the Member State is, in principle, responsible and thus is indebted to the EC. *Force majeure* is the only exception. (Regulation No. 2891/77, §2).[29] Article 17 provides:

> 1. Member States shall take all requisite measures to ensure that the amount corresponding to the entitlements established under Articles 1 and 2 are made available to the Commission as specified in this Regulation.
> 2. Member States shall be free from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements solely if, for reasons of *force majeure*, these amounts have not been recollected.

The insolvency of the debtor or the impossibility of collecting the money do not yet constitute, in themselves, a *force majeure*. By contrast, for the agricultural expenditures, there must be an irregularity or negligence which is imputable to an agency or an entity of the Member State before it will be compelled to repay the money to the EC. (Regulation No. 729/70, Art. 8, §2).[30]

The Commission has made various proposals to the Council to eliminate the differences between the control regulations for agricultural expenditures and "own" resources and thus the differences in the controls for fraud on revenues and expenditures. Between 1979 and 1985, not less than six proposals[31] were introduced before the Council which proves the importance the Commission attaches to the necessary reinforcement of its competencies.

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[29] Note 27, *supra*.

[30] Note 6, *supra*.

[31] *OJ*, 1979, C 88/4, and *OJ*, 1982, C 231/15.

After having discarded numerous proposals over the years, in 1989 the Council approved a new Regulation relating to the collection and control of "own" resources.[32] This Regulation, for the first time, accords the Commission the right to conduct on-site verifications (Art. 18, § 3), beyond the already existing possibility of requiring the Member States to effectuate complementary controls. In addition, since January 1, 1990, the Member States have been required to make a biannual report of all cases of fraud and irregularity in amounts exceeding 10,000 ecus and the measures taken to avoid such frauds and irregularities. (Art. 6). In this way, the Commission is in a position to establish a computerized file, comparable to that of FEOGA. It remains constant that the Member States must continue to put all the established "own" resources at the disposition of the Commission, except in cases of *force majeure*. Article 17, §2 nonetheless provides for an attenuation of this principle:

> Moreover, in cases of hard currency, the Member States may not be held to put these sums at the disposition of the Commission when it appears, after a thorough examination of all the data pertinent to the case in question, that it is absolutely impossible to collect for reasons which should not be imputable to them.

As a logical extension, a new regulation relating to collection and control was also implemented for VAT receipts.[33] Article 12, §2 confirms the principle by which the control Regulation of 1974, which describes the competencies and responsibilities of the EC inspectors (see above), applies equally to VAT revenues. Article 11, §1, then describes explicitly what the EC inspectors must scrutinize in connection with the competent authorities of the Member States.

3. FRAUD ON EXPENDITURE: STRUCTURAL FUNDS

The role of the structural funds in the expenditure of the EC has greatly increased in the last several years. Thus, it was decided in 1988 to double in 1993, in real terms, the credits for the structural funds in relationship to the level in 1987. The structural funds are directed toward promoting the development and structural improvement of the underdeveloped regions. The structural funds available are the following: the European Regional Development Fund (ERDF); the European Social Fund (ESF) and the Guidance Section of the European Guidance and Agricultural Guarantee Fund (FEOGA). The principal task of the ERDF consists of subsidizing

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[32] Regulation No. 1552/89, *OJ*, 1989, L 155/1.

[33] Regulation No. 1553/89, *OJ*, 1989, L 155/9.

productive investments to bring up to date or modernize the infrastructure which contributes to the development or the transformation of the affected regions and initiating actions intended to unleash their potential. The ESF's principle mission is to support professional training and to place people in jobs in order to combat long term unemployment and incorporate the youth into the work force. The assistance furnished by the FEOGA's Guidance Section concerns the following (fishing is included in agriculture): reinforce and reorganize the agricultural structure in order to, more particularly, reform the common agricultural policy; guarantee the transformation of agricultural production and the promotion and development of complementary activities for the farmers; insure a reasonable standard of living for farmers and contribute to the social development of the countryside; protect the environment and maintain rural areas, as well as compensate for the consequences resulting from natural obstacles to agriculture.

The growth of regulation and financing in this area also raises the danger of fraud against EC expenditure. However, recent regulations have not provided for a system of internal control parallel to that for agricultural expenditures under the FEOGA Guarantee Section or for "own" resources. Article 5 of Regulation No. 2052/88[34] establishes the sources of the different forms of financing or assistance. The financial control measures are in Article 23 of Regulation No. 4253/88.[35] The Member States are bound, in the first instance, to take the necessary measures of effectuate regular verifications and to prevent and prosecute irregularities. Moreover, the Member States must recoup funds lost due to an abuse or negligence. Except if the Member State and/or the intermediary and/or the promoter produce proof that the abuse or negligence is not imputable to them, the Member State is subsidiarily responsible to reimburse the sums improperly paid. The Member States inform the Commission of measures taken to this end and, in particular, of the progress of administrative and judicial proceedings. In addition, the Commission can request that the Member State conduct a control in which officials of the Commission can participate. Moreover, the officials of the Commission can inspect, on-site, the activities financed by the structural funds after having been previously advised of them by the Member States.

It is probably because the control measures are not as refined as for agricultural expenditure in the Guarantee sector and for revenues ("own"

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[34] Regulation No. 2052/88, *OJ*, 1988, L 185/9.

[35] Regulation No. 4253/88, *OJ*, 1988, L 374/1.

resources) that the Commission has regulated all this in a Code of Conduct[36] on the modalities of the application of Article 23 of Regulation No. 4253/88.[37]

This Code of Conduct states that the duty of communication concerns cases in which the loss to the Community budget exceeds 4,000 ecus. The duty of communication is then made explicit. First, the Member States have a duty of communication concerning their national systems (preventative and prosecutorial rules, responsible agencies, procedural rules); secondly, there is a duty to communicate regarding cases of irregularity. It is appropriate to mention in this regard:

- the identification of the irregular act;
- the duration and amount of the irregularity;
- the identification of the individuals or corporations implicated in the irregularity or a statement that legal provisions preclude such identification;
- the way the irregularity was detected;
- the financial consequences and the possibilities for recovery;
- the agencies or entities which uncovered the irregularity and the services or entities responsible for them on the administrative or judicial level.

Finally, it is appropriate to prepare a report tracking the progress of the investigation and its result (the administrative or judicial decision).

The Commission wanted in this way to eliminate the differences between the internal control of the financing of the structural funds and the internal control of the agricultural expenditure (Guarantee Section) and the "own" resources (revenues) – at least as to the substance of the obligation of communication. However, that did not please the Member States. France, notably, appealed against the Commission to the Court of Justice on three grounds.[38] First, France alleged that the new Code of Conduct created obligations for the Member States which went beyond those provided for the in Regulations. Second, the Commission imposed these obligations in a Code of Conduct although it did not have the authority to do so. And thirdly, the Commission was thus guilty of acting *ultra vires*. France believed that the Code of Conduct, which had been created by an "Antifraud

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[36] Code of Conduct on the modalities of the application of Article 23, paragraph 1, of Council Regulation No. 4253/88 concerning irregularities and the organization of an information system regarding them, 90/C/200/03, *OJ*, C 200/3. This Code of Conduct is not a Directive or a Regulation approved by the Council and is not published in the Regulation Section of the *Official Journal* (series L), but in the Communication Section (series C).

[37] Note 35, *supra*.

[38] C 303/90, *France v. EEC*, Nov. 13, 1991, ECR, unpublished.

Coordination Committee," should have been the subject of a regulation approved by the Council.

The Court decided the case on November 13, 1991. According to the Court, which adopted the conclusions of the Advocate General, this Code of Conduct was "an act designed to produce legal effects", which went far beyond Article 23 of Regulation No. 4253/88, which meant that the Commission had exceeded its competency. Accordingly, the Code of Conduct has now been annulled, and it remains for the Commission to introduce in the Council a new proposed regulation if it wants to be armed with sufficient control powers in the area of the use of the structural funds.

4. CONTROL EXERCISED BY THE COMMISSION RELATIVE TO THE NATIONAL CRIMINAL (PROCEDURE) LAWS

4.1. Secrecy and Criminal Procedure

Based on the discussion of the Commision's internal control of agricultural expenditures, "own" resources, and structural funds, led by the Commission it is possible for us to rephrase the control competencies of the Commission as follows: 1) obtaining information based on the Member States' reporting obligation; 2) the obligation to conduct an administrative investigation, in which the Euro-inspectors can take part, in a certain number of sectors; and 3) the participation in the national control.

These three forms of inspection available to the Commission can raise common points under national criminal procedure law. Some of the information which must be reported may concern data made part of the judicial investigation or instruction. The administrative controls, in which the Commission may participate, and the national control itself naturally present common points with the criminal process, if only by virtue of the fact that a large number of the officials involved in the investigation are also persons having judicial powers and that the investigation, in the case of reasonable suspicion that a crime has been committed, can be transferred to the judicial authorities (prosecutor/*juge d'instruction*).[39]

Already by the end of the 1970's, this problem was the subject of a case before the Court of Justice in Luxembourg which proves that these considerations are not only theoretical in nature or an academic exercise. In the years 1974 and 1975, Italy experienced a fraud on import taxes ("own" resources) on the importation of non-EC butter. The T1 documents (for imports from a non-EC country) were replaced in Italy by T2 documents (EC

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[39] Translator's Note: The French term, *juge d'instruction*, has been used throughout the text of this book because there is no English translation which adequately depicts the role this official plays in the justice system.

transit) which, with the connivance of the Italian Customs Service, permitted the importation tax to be evaded. In 1976, the Commission, which tracked down the fraud, asked for an administrative investigation in which its Euro-inspectors should have also participated. The investigation began and brought to light the existence of a link with an investigation of the Italian financial police, the *Guardia di Finanza*, which had discovered an illegal shipment of butter in 1975. The Commission then asked the Italian authorities for authorization to conduct interviews with the Guardia di Finanza and for information relative to the investigation which it had conducted.

The two requests were refused because, in the meantime, the investigation had passed into the hands of the judicial authorities and thus fell under the guarantee of the secrecy of the preliminary instruction. It is also important to note that the *Guardia di Finanza* has responsibility for administrative as well as judicial investigations. The Commission, which needed the information to determine Italy's responsibility, did not stop there and brought Italy before the Court of Justice on the basis of a Treaty violation.[40]

In his conclusions, the Advocate General, Mr. Wagner, dealt with Italy's two principal arguments which were: 1) the Commission cannot exercise its competencies if, in the Member State responsible for enforcement, an investigation can lead to a judicial inquiry under the control of the court; 2) the Commission cannot exercise its competencies due to the fact that a judicial inquiry, effectuated by the judicial authorities or officials, falls within the guarantee of secrecy. The Advocate General advanced that it would be strange if the Commission's involvement in a national investigation depended on whether, under national law, a criminal investigation is considered either an administrative function or a judicial function. According to Mr. Wagner, this had never been suggested and the exclusion of the Commission from all investigations touching on the criminal domain cannot be inferred from the text of the regulations. By this reasoning, the investigative authority of the Commission relative to the most serious infractions is, or would become, a matter of form devoid of substance. The only possible distinction which could be maintained, according to Mr. Wagner, would be that between the individuals who exercise strictly judicial functions and those who investigate independently of their status. In the latter case, the Commission could not be excluded even if the investigation took place before a *juge [d'instruction]*.

As far as the secrecy of the preliminary investigation is concerned, Mr. Wagner observed that Italy followed the most rigid system. According to him, it would be unthinkable that each Member State invoked its own

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[40] 267/78, *Commission v. Italy*, Jan. 10, 1980, ECR 31.

internal rules; in that way, the control competencies of the Commission would vary from one Member State to another. In addition, the Commission's officials are bound by an obligation of secrecy based on Article 214 of the EC Treaty. It is for these reasons that the Commission was of the opinion that the internal rules should give way to the applicable Community law:

> As regards the scope and limits of privilege in matters of criminal investigation the Commission adds that the report which it requires in order to establish in particular the facts giving rise to the liability for the levy is not in the possession of this or that body or department of the State but of the State itself together with all its administrative and judicial machinery. It is therefore not possible to claim that the Commission must deal solely with the Italian customs administration and not on the contrary directly with the Italian courts.

The Advocate General did not entirely subscribe to the views of the European Commission, but he nonetheless recognized it for the most part to the point of saying that the Commission can and must obtain the information. His conclusions were as follows:

> When in the case in point, an investigation is directed by a judge, there is no longer any violation of the rule when the Commission asks for information known to the judge, even if this information may not be available to local customs officials. We think, consequently, that national rules on the confidential nature of criminal investigations cannot be invoked to block the Commission from fully participating in investigations in the manner prescribed in Article 14 of Regulation No. 2/71 or in Article 18 of Regulation No. 2891/77.[41]

In its decision, the Court did not mention the supremacy of Community law and its salutary effect. It examined the regulation and arrived at the following remarkable conclusion:

> It is proper further to recall that the Community regulations do not mention the relationship between the powers of inspection in relation to establishing the Community's own resources, on the one hand, and the guarantees provided by municipal law for the proper conduct of criminal proceedings on the other.
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> It follows from these considerations that in the present state of Community law, the inspection measures which the Commission may request and with which it must be associated cover all those which the

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[41] Note 27, *supra*.

national authorities may carry out, but it is not possible to infer from the regulations in question an intention to alter the relations between the administration and the judicial authorities.

Rules which, in the national systems of criminal law, prevent the communication to certain persons of documents in the criminal proceedings may therefore be relied upon against Commission in so far as the same restrictions may be relied upon against the national authorities.

In this decision the Court avoided taking advantage of the problem to propose a solution. It is probable that the regulation did not provide a sufficient legal basis, but the Treaty, and in particular Article 5, imposes the autonomous requirements on the Member States of enforcement and Community loyalty. It also appears that the supremacy of Community law stops at the doors of the criminal tribunal, which one cannot accept given the general principles of Community law.

As later Community regulations which directly broach this problem show, the problem was not really resolved by the Court's decision. Article 1(3) of Regulation 595/91[42] on control of agricultural expenditure thus specifies:

> This regulation shall not affect the application, in the Member States, of rules relating to criminal proceedings or mutual assistance between Member States at judicial level in criminal matters.

The regulation goes on to impose an obligation on the Member States to provide detailed reports apropos of which Article 3(3), in a logical manner, specifies:

> If national provisions provide for the confidentiality of investigations, communication of this information shall be subject to authorization of the competent court.

Alongside that, the regulation also provides for the the Commission to order an administrative investigation in and by the Member State – an investigation in which Commission officials can participate. In so far as this control competency is concerned, Article 6(4)(2) stipulates:

> Insofar as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, Commission officials shall not take part in such acts. In any event, they shall not participate in particular in any event in searches of premises or the formal questioning of persons under national criminal law. They shall, however, have access to the information thus obtained.

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[42] *OJ*, 1991, L 67/11.

One could infer from reading these provisions that Commission officials have total access to information obtained pursuant to a specific administrative investigation, even if this information is obtained during acts of instruction (for example, search of a residence) from which the Commission is excluded. The question which remains is whether this is really the case in circumstances where the information specifically falls under the secrecy of the preliminary investigation given the scope of Article 1(3). If Article 1(3) were not applicable here, which I can with some difficulty imagine, it would give birth to a disharmony between Article 3(3) and Article 6(4)(2). If Article 1(3) were nonetheless applicable, it would result in the content of the control competencies depending entirely on national procedural rules and the organization of the police and judicial investigation.

What is not settled equally poses a problem. There is no regulation concerning the liability (criminal) of the Euro-inspectors (for violation of professional secrecy); nor is there anything which determines the status of the information obtained and its ultimate use as evidence in a European or national proceeding. There are therefore problems which call for further regulatory solutions either in the Treaty or in secondary Community legislation.

4.2. Judicial Instruction and Proof

Alongside the spectrum of competencies of the Euro-inspectors and their harmonization with internal procedural rules, some questions are also posed apropos the legal character of the acts of the Euro-inspectors and the value of the information gathered or documents assembled by them as evidence. This aspect was dealt with in the *Zwartveld* case.[43]

In the context of an investigation of forgeries and fraud in a sale of fish on the Dutch market, thus a Community fraud, the *juge d'instruction* asked the European Commission for the Euro-inspectors' reports and ultimately for them to appear at a hearing as part of the search for evidence. This request for judicial assistance was denied by the Commission based on the Protocol on privileges and immunities of the European Community. The reasons for the refusal were explicit:

> Asked to state whether it considered that the production of documents requested in connection with possible frauds against Community rules was capable of interfering with the proper functioning or the independence of the Communities and if so, why, the Commission stated that the reports drawn up by its inspectors were documents which of their nature could not be used except for internal information. They were purely internal

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[43] C 2/88, *Zwartveld*, July 13, 1990, ECR, I3365.

documents and could not commit the Commission or reflect its position. Their production might in addition jeopardize the Commission's relations with the Member States in the delicate area of supervision.

The Court of Justice decided that the protocol was relative in nature and should give way to Article 5 of the Treaty. According to the Court, Community loyalty and collaboration which flow from Article 5 do not affect only the Member States but also European institutions. These institutions, and particularly the European Commission, must collaborate with the Member States in order to effectuate the Treaty. This applies in particular when the judicial authorities responsible for implementing the law formulate requests in this sense. The Commission was then ordered, absent invoking imperative reasons, which it could not do in this case, to communicate the reports and to make its officials available to testify during the national instruction proceeding. It is equally important to underscore that the Court considered itself competent to pass on requests for judicial assistance and is ready to evaluate the reasons proffered for non-compliance.

In the *Weddel and Co. BV*[44] case, the refusal of a Community institution to authorize its officials to testify before a national court was also in issue. A professional organization invested with administrative law powers ("Produktschap voor Vee en Vlees") was responsible for providing authorizations for the importation of beef; it operates as such as a Community regulatory body. It executes Community functions based on Regulations Nos. 2539/87[45] and 2806/87.[46] Under the latter regulation, it decided to give import authorizations for quality beef in only 0.2425% of the cases. Produktschap had, however, guaranteed Weddel that an unlimited quantity of beef could be imported and for this that it was possible to obtain an import authorization which would also be officially confirmed by a Euro-inspector. At minimum, it can be established that there were many ambiguities in the regulation itself.

During the national legal proceeding, Weddel demanded that the Commission make a Euro-official available as a witness and this request was refused by the Commission. During the testimony of the national witnesses it appeared that the Euro-official had given his agreement *expressis verbis*. Weddel appealed to the Court of Justice. The Advocate General dealt with several aspects in his conclusions. According to him, the declarations of Community officials have no binding force; the positions taken by a Commission official could not always be taken as the official positions of the

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[44] C 54/90, *Weddel and Co. BV*, Feb. 18, 1992, ECJ, unpublished.

[45] Regulation No. 2539/87, *OJ*, 1987, L 241/6.

[46] Regulation No. 2806/87, *OJ*, 1987, L 268/59.

Commission. The exchanges of letters, telexes and telephone calls between officials and the national agencies concerning the application of the agricultural regulations were not officially linked to the Commission. The Produktschap should exercise its own professional responsibility even when it is based on the statements of a Commission official. The Advocate General also cited Article 19 on the Status of Officials which says:

> An official may not bring before the court, in any fashion, observations he made while performing his duties without authorization from the authority which appointed him. This authorization can be refused only if the interests of the Community so require and if such a refusal would not subject the official in question to criminal liability. The official is bound by this obligation even after the termination of his employment.

According to Weddel, if the official refused to appear as a witness because the Commission withheld its permission, under Dutch law he would be exposed to civil imprisonment, which in that regard, is a deprivation of liberty which has the same consequences as a criminal sanction. The Advocate General rejected this idea. If Community law contains a legitimate reason permitting a refusal to testify, it is then the Community law, which prevails over the national law, which should be applied. In effect, the position of the Community official vis-à-vis the national court and the national proceeding, in so far as there was a question as to performance of his duties, would be defined by Community law.

The Court of Justice, which applied the criteria of the *Zwartveld* case, determined that the authorization to testify presented no danger to the proper functioning of the Community or the entente among the Member States. For these reasons, the Court of Justice annulled the Commission's refusal and the Court has not since revisited the question of the criminal liability of the EC official concerned.

II. ENFORCEMENT OF COMMUNITY SANCTIONS

As previously stated in the introduction to this article, the EC Treaty does not expressly envisage sanction powers at the Community level with the exception of the fines and periodic payment penalties provided for in Article 87(2)(a) of the EC Treaty (unlawful competition and formation of cartels).[47]

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[47] G. Grasso, *Communità Europee et diritto penale. I rapporti tra l'ordinamento communitario e i sistemi penali degli Stati membri*, Milano, 1989; K. Tiedemann, "La protection pénale des intérêts financiers de la Communauté," Commission européenne, Luxembourg, 1990, pp. 141-160; K. Tiedemann, "Reform des Sanktionswesen auf dem Gebiet des Agrarmarktes der Europaïschen Wirtschaftsgemeinschaft", in *Festschrift für Pfeiffer*, Köln, 1988, p. 101.

Does that mean that the EC Treaty contains no basis for sanctions in areas other than competition, for example the common agricultural policy? The question is controversial. Some Member States defend the position that the principle of legality and the prohibition against interpretation by analogy mean that the EC Treaty contains no other legal basis. Others (the European Commission and Council) are of the opinion that the EC Treaty effectively contains the legal bases. Beyond the general impact of Article 172 of the Treaty, there is Article 79(3) pertaining to transportation[48] and Article 40 (2)&(3) on agriculture. The latter states:

> 2. With a view to achieving the objectives set out in Article 39, a common organization of agricultural markets shall be effected.
> 3. The common organization in one of the forms mentioned in paragraph 2 may comprise all measures necessary to achieve the objectives set out in Article 39....

The notion of "all measures required to" could also encompass the sanctions for an effective realization and enforcement of Community law (full effect).

A second contested point is whether the Commission can freely decide – without delegation from the Council – administrative sanctions pursuant to its competency to establish the rules for executing [Community law] in secondary Community legislation. Article 145(3) of the EC Treaty states that the Council delegates to the Commission the implementation of its regulations. It is again emphasized in Article 155 that the Commission exercises its competencies according to the rules imposed by the Council. Thus, the Council defines the fundamental aspects of the common agricultural policy following the procedure in Article 43 of the EC Treaty and establishes the rules for the execution of the basic regulations or delegates this power to the Commission on the basis of Article 145(3).

The Council has clearly established, in a procedural decision,[49] that the essential elements of the powers which it delegates to the Commission must be fixed by it. The question thus remains whether sanctions must be considered as "essential elements" or rather as "application provisions." It is only in the latter instance that the Commission can freely, without specific delegation, provide for sanctions.

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[48] The Council has made use of this power in the transportation field. Under Article 22 of Regulation No. 1017/68 (*OJ*, 1968, L 175/1), the Commission may, on delegation by the Council, impose fines and periodic payment penalties. Certain authors contend that Article 172 is the legal basis for these sanctions while others rely only on Article 79(3).

[49] Council Decision, July 13, 1987, fixing the methodology for the exercise of the powers of implementation conferred on the Commission, *OJ*, L 197/87, 33.

The Legal Service Council has rendered the opinion that sanctions must be considered as "essential elements" and that:

> the provisions empowering the Commission to adopt detailed rules for the application of regulations establishing the common organization of the various markets constitute a sufficient legal basis for the adoption by the Commission of inspection and penalty measures provided that the essential elements relating to such measures have been adopted by the Council acting on the basis of Article 43.[50]

By contrast, the Commission believes that the Court has given a broad enough definition of "the application provisions" – all measures necessary to the application of the basic regulation provided that they do not contradict the basic regulation or another Council regulation.[51] The Commission has always been of the opinion that the powers that the Council attributes to it in regulations permitting it to establish the application provisions in question encompass not only the power to fix complementary or specific conditions as to the granting of a subsidy or the levying of a tax, but also to decide the control and sanction rules necessary to the efficient and uniform application of the measures in question. The fact that in the past the European Commission has not used this power in all areas does not mean that it has renounced it.[52] Additionally, that could only be done on the basis of a modification of the treaty.

Apropos the discussion of Community sanction competencies it is important to draw the distinction between sanctions which are applied by the Member State, which are prescribed by the Community – by regulation or directive – and administrative sanctions, which are applied by the Community itself and must only be executed by the Member States. This distinction is not an academic fiction since it is only in the latter case that the issue of a parallel with the system of Community administrative sanctions in the competition field arises.

The discussion relative to Community sanction powers in general and the authority for the sanctions it can inflict is not solely academic. If the Community possesses the claimed competencies, the Community

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[50] *European Communities, the Council, Legal Service Opinion*, document no. 7672/89, confidential.

[51] 121/83, *Zuckerfabrik*, May 15, 1984, ECR, 2039; 809/79, *Ditta Fratelli Pardini v. EEC*, Jan. 17, 1980, ECR, 139.

[52] Absent Community sanctions, the Member States have the right and the duty to take measures necessary to provide an effective safeguard. The European Commission has a general supervisory power by virtue of Article 155 of the EC Treaty. See also, 804/79, *Commission v. U.K.*, May 5, 1981, ECR, 1045, and 269/80, *Tymen*, Dec. 16, 1981, ECR, 3079.

administrative sanction system existing for illegal competition can also be extended in the future to other policy sectors. The discussion does not concern only the future because the European Commission has already introduced, here and there in the past, administrative sanctions in the regulation of fishing and agriculture. They were questions of restitution of monies improperly obtained, confiscation of deposits, reduction of quotas, etc.

It is erroneous to presume that the European Commission adopted this method of proceeding in order to complete, in a logical manner, its control and sanction powers in the regulations. A certain discontentment reigns in the European Commission concerning the non-systematic way in which in the past it has provided for control and sanction powers in the Community legislation.

Finally, in order to better consolidate the Community secondary legislation on controls and sanctions relating to the common agricultural policy, in October 1988 the Commission started a working group.[53] The mission of this working group was to make a comparative study of the directives and regulations in the different sectors of organization of the agricultural market with the purpose of elaborating a coherent, systematic approach to a system of controls and sanctions. This should have promoted not only the identification and efficiency of controls and sanctions in the Member States, but also constituted an indispensable auxiliary instrument – like standard provisions – for the future drafting of regulations and directives.

In its comparative analysis, the working group arrived at eleven families or eleven types of measures. There was a question of sanctions or *penalties* only when the obligation consisted of more than a simple reimbursement with interest of an amount improperly received. The working group suggested that the Member States conduct an in-depth administrative inspection (of the documents) during the examination of subsidies:

- provisions indicating clearly the objective of the inspection by the Member States in a practical and defensible way;
- enunciation of the concrete points of investigation as well as a detailed description of them in relation to the specific subject matter;
- specification of the nature of the inspection (audit, physical inspection, analysis) and indication of the frequency of inspections in the sector and the chances of fraud;
- indication of the minimum number of inspections and where there are significant findings of fraud, increasing the number.

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[53] The working group was set up by DG XX (Financial Audit), assisted by representatives of DG VI (Agriculture), DG XIV (Fishing), the Legal Service, and AFCU (the Antifraud Coordination Unit).

These control standards must not be considered as rigid instruments. These controls are supposed to be sufficiently representative of the amount of financial support, the geographic division, and quantitative factors. In one sector in-depth inspections will be necessary, in others an occasional sounding will suffice.

As for sanctions, the working group was of the opinion that one could not leave the protection of the financial interests of the EC solely to the safeguards offered by the laws of the Member States. There are great differences between the systems of safeguard in the laws of the Member States and it is also their nature (administrative or penal law), as well as the severity of the sanction, which entails a check on the protection of Community law. A European integration necessitates not only Community legal norms but also a certain minimum standard for compliance with them. Imposing restrictive rules on the Member States with the goal of obtaining enforcement of Community law is a possibility, but in practice the process is difficult.[54] That is why it is preferable to provide for administrative sanctions in the secondary Community legislation itself. In order that these sanctions can have a preventative and deterrent effect, it is at least necessary that they eliminate any economic advantage. According to the working group, the introduction of Community administrative sanctions in secondary Community legislation does not mean that the Member States cannot incorporate more severe administrative or penal sanctions into their national laws. The Community administrative sanctions must be considered as minimums.

In the past, the Court of Justice has had to repeat itself several times on the legal foundation of certain sanctions and on the challenges raised to the jurisdiction of the Commission and its institutions. A fundamental point of departure in the Court's case law is that the sanctions – penal or not – can only be applied in circumstances where they rest on a clear and unequivocal legal principle.[55] This applies as much for the sanctions prescribed by the Commission as it does for those independently imposed by the Member States enforcing Community law. It is exactly apropos the existence of this legal foundation and the legal consequences flowing therefrom that so often causes cases to be brought before the Court of Justice.

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[54] Harmonization of the national provisions affecting the enforcement of Community law, and in particular sanctioning, is complex and politically sensitive. Cf. the Report of the *Ad Hoc* Community Law and Penal Law Group on European Political Cooperation (EPC) presented to the Council of Ministers of Justice, November 1991.

[55] 117/83, *Könecke*, Sept. 25, 1984, ECR, 3291, conclusion No. 11.

We focus here on the imposition and confiscation of undertakings regarding which there is important case law. Thus, in the *Köster*[56] case, the daily order concerning the validity of Articles 1 and 7 of Regulation No. 102/64, in circumstances where they dealt with certificates of export for cereals, and the undertaking given to obtain these certificates was at issue. The Köster firm had incurred a forfeiture of its undertaking for not exporting within the time limits.

First, the Court affirmed that an undertaking is a necessary and adequate means permitting the competent bodies in authority to carry out an optimally effective market intervention policy. Moreover, the Court stated that the forfeiture of undertaking is not analogous to a criminal sanction which means that it does not have a punitive aspect because it constitutes only the guarantee of performance voluntarily assumed.[57] As for competency, the Court stated that the Council had satisfied Article 43, paragraph 2, line 3 when it defined, in its agricultural regulations, the essential elements. On the other hand, the provisions for application of the basic regulations may be formulated following procedures other than those under Article 43 – whether by the Council itself or by the Commission by virtue of an order conforming to Article 155.

The Court determined that the order given to the Commission to initiate certificates of export also included that of imposing an undertaking as an export prerequisite. In other words, the requirement of an undertaking, instituted by the Commission, which was not explicitly provided for, can be a feature of application. Additionally, the Court gave a broad definition to the concept of "application provisions": "It is for 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."[58]

The legal character of the undertaking also occupied a central position in the case, *Maizena GmBH v. Balm*.[59] The Court stated that in the case where the undertaking loses its fixed character and in certain circumstances appears

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[56] 25/70, *Köster*, Dec. 17, 1970, ECR, 1161.

[57] See also the international case, 11/70, *Handelsgesellschaft v. Einfuhr*, Dec. 17, 1970, ECR, 1125.

[58] *Zuckerfabrik*, note 49, *supra*; *Ditta Fratelli Pardini v. EEC*, note 49, *supra*; 809/79, *Ditta Fratelli Pardini v. SPA*, June 26, 1980, ECR, 2103.

[59] 137/85, Nov. 18, 1987, ECR, 4587.

to take on the legal character of a sanction,[60] that means little in as much as this sanction was not made an integral part of the deposit regulation nor had it thus assumed a criminal character. The consequence of this is that the general principles of the penal laws of the Member States (*in dubio pro reo*, *nulla poena sine culpa*, etc.) which are part of Community law are not applicable.

The Advocate General, Mr. Mischio, had already concluded his findings by stating that this sanction was *sui generis* in Community law. The deposit of an undertaking is, according to him, a specific phenomenon of administrative law, within the context of Community law and the legal problems must be resolved in this context.[61] All the instrumentalities of Community law cannot, without more, be put on the same footing as the concepts which already exist in the national systems. This does not prevent, and this aspect is also underlined by the Court, the deposit of an undertaking and its confiscation from responding to general principles of proper administration and fundamental rights. There are many other important cases on this subject.[62]

In any case, the case law does not reflect that the Community, and more particularly the European Commission, should generally have any competence – as part of its application powers – to prescribe adequate measures, including administrative sanctions. The issue is, however, whether they can take a form which goes beyond that of a deposit and its forfeiture and if they can take on a punitive character without losing their administrative nature. As I noted above, the European Commission believes that its powers to apply the Council's decisions (Art. 143(3), EC Treaty) also includes the power to establish inspection and sanction provisions necessary to the uniform, efficient application of the rules in question. Thus, the Commission believes itself to be acting legally in formulating and concretizing its sanction powers.

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[60] See also C 199/90, *Italtrade*, Nov. 27, 1991, ECR, I 5545.

[61] Cf. also R. Barents, "The System of Deposits in Community Agricultural Law", in Efficiency v. Proportionality, *Eur. L. Rev.*, 1985 and K. Teidemann, "Das Kautionsrecht der EWG, Ein Verdecktes Strafrecht?", *NJW*, 1983, 2727.

[62] Other than those already mentioned, *Internationale Handelsgesellschaft v. Einfuhr*, note 57, *supra*; *Köster*, note 56, *supra*; *Maizena Gmbh v. Balm*, note 59, *supra*; see 265/78, *Ferwerda*, March 5, 1980, ECR, 607; 122/78, *S.A. Buitoni*, Feb. 20, 1979, ECR, 677; 47/81, *Merkur*, April 29, 1982, ECR, 1389; 181/84, *Sugar v. IBAP*, Sept. 24, 1985, ECR, 2889; C 155/89, *Belgium v. Philippe Brothers*, July 12, 1990, ECR, 3300.

Putting substance to words, it recently drafted a proposed regulation[63] clearly circumscribing its inspection and sanctions powers in enforcing the common agricultural and fishing policy. This regulation is remarkable in the first place – and I cite the statement of purpose – because it is declaratory in nature. That means that the European Commission already considers that it has acquired the powers described therein and that it need not await approval in order to effectively exercise these powers. This point of view is not shared by all the Member States. The statement of purpose says:

> The Commission has always been of the opinion that the competence the Council accorded it in all its regulations to establish the application provisions includes not only that of fixing the complementary or specific mechanisms for granting a subsidy or levying an amount, but also that of establishing inspection and sanction rules necessary for an effective and uniform enforcement of the measures in question. The large majority of the Member of States have long shared this view. However, very recently, the Member States have put the power of the Commission to determine inspection and sanction provisions into doubt. The Commission does not share this doubt.

That the Commission and certain Member States were in opposition was also apparent in the recent case, *Anklagemyndigheden v. Hansen & SPMI/S*,[64] before the Court of Justice in Luxembourg. It appeared from the "hearing report" that, according to Denmark, the establishment of sanctions falls within the exclusive competence of the Member States:

> The imposition of sanctions is and must remain a national question because criminal policy has been made the subject of international cooperation only in a sporadic fashion and each country thus retains its own tradition both as to the level of the sanctions and the discretion given to the judge. The Danish government believes that the criminal policy of a country is linked to its national culture and that it is therefore of decisive importance to the development of the totality of the society that the ability of the Member States to follow an independent policy in this area not be reduced to nothing."[65]

The European Commission manifested its disagreement with the Danish position. The fact that, in a particular area, the Commission has not itself

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[63] Proposed Council regulation relating to inspections and sanctions applicable under the common agricultural and fishing policy, COM (90) 126 déf., *OJ*, 1990, C 137, modified by COM (91) 378 déf., *OJ*, 1991, C 294.

[64] 326/88, *Anklagemyndigheden v. Hansen & SPMI/S*, July 10, 1990, ECR, I 2911.

[65] *Id.*, p. 7.

imposed sanctions and instead has compelled the Member State, via secondary legislation, to provide for the sanctions in national legislation does not mean that the European Commission does not possess the power to ultimately do that.

This proposed regulation, in fact, constitutes a normalization of the framework as to the inspection and sanction competencies exercised by the Commission. The competencies set forth are conceived of as standardizing measures. That means that other measures (controls, sanctions) can be fixed when they are necessary to the regulation in question. The standard measures of control can include: inspection of the books of account, on-site requests for more precise explanations, examination of documents, the taking and verification of samples. The subjects, whether individuals or corporations, on whom the Community rules impose these obligations, must do everything to facilitate access to the locales and properties visited. It is notable that these Community control powers, which are exercised by European officials or their designees, are identical to those set forth in the well-known Article 17 of the application Regulation No. 17/62[66] concerning illegal competition and the formation of cartels. (Art. 85, *et seq.*, of the EC Treaty). These explicit control powers, expanded and completed in order to enforce the law by the case law of the Court of Justice, have apparently served as an example.

Beyond the control powers, the proposal also includes a series of provisions relating to the sanction powers of the Commission. Article 4 contains a non-exhaustive list of financial and economic sanctions which can be prescribed for the Member States by the Commission: the obligation to pay an amount greater than that unlawfully received including interest (fines); the total revocation of a benefit conferred by Community law even if the wrongdoer unduly profited from only a part of this benefit (exclusion); the refusal or withdrawal of the benefit for a period exceeding that affected by the loss if it is related to the reliability of the beneficiary (suspension or disqualification).

These types of financial and administrative fines are also parallel to the competence to impose fines for violations of Article 87(2)(a) of the EC Treaty, even if the fines here are imposed by the Member States instead of the European Commission itself. The proposed regulation is rather less careful in its terminology; in the opinion of the Legal Service of the European Commission, it follows from Article 172 of the EC Treaty that, in the appropriate case, sanctions can be applied by the Commission itself within the framework of the modalities of application. This hypothesis concerns Community decisions against which an appeal must be made before

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[66] Regulation No. 17/62, *OJ*, 1962, since modified several times.

the Court of Justice. (Art. 173, EC Treaty). The proposed regulation does not provide for this in explicit fashion.

The Commission underscores in the proposed regulation that the imposition of a sanction for a violation infers a subjective element of culpability (negligent or intentional), even if the sanction is administrative. At the same time, the Commission does not exclude the possibility, even if the subjective element does not exist, of nonetheless imposing sanctions if the violation justifies it. This means that strict liability is a foreseeable possibility.

Another point deserving of attention is that the competent institutions of Member States enforce the sanctions. In other words, the sanction is prescribed by the European Commission and the application and execution of it belongs to the national courts.

Thirdly, this does affect the national obligation to enforce Community law and to ensure that violations of it be sanctioned by appropriate measures under their national laws and that conditions, both substantive and procedural, be analogous to those for violations of national law of a similar nature and importance. The statement of rationale moreover signals that the Member States must insure that the sanctions in question be applied consistently with the principle of *non bis in idem*. Is this thus a general obligation and if so, in what cases? The question remains cautiously in repose.

In February 1990, the proposed regulation received the approval of the Budgetary Control Committee of the European Parliament,[67] even though certain amendments were considered to make the inspections and sanctions more effective. Thus, suppliers, warehousemen, transporters and other third parties must authorize the execution of controls and to this end must facilitate access to the locales and properties visited. Moreover, it is expressly provided that those upon whom the sanctions can be imposed can be individuals or corporations. The European Parliament insisted, however, that Commission officials be accompanied by officials from the Member States. This is why the amendment states that pursuant to the exercise of its competencies, the Commission may conduct controls using its own personnel or, in cases of necessity, by appointed, duly accredited officials, who will collaborate with the competent national officials from the Member States during the course of the control activities.

The divergencies of opinion among the Member States and the European Commission apropos the sanction powers of the Council and the Commission are not limited to discussions. Germany recently brought a case before the

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[67] See European Parliament, Report of the Budgetary Control Committee, Reporter, P. Prince, February 8, 1991, A3-0024/91, 05/DOC-NE/RR/103918.

European Court of Justice.[68] It concerns administrative sanctions in regulations on incentives and subsidies for mutton production and aid to agriculture; in other words, the application of the declaratory regulation cited above. The regulations explicitly provide for not only the restitution of the amount improperly received, but also an exclusion, for the following economic year, from eligibility for subsidies under the subsidy regulation.[69]

Germany is of the view that the Treaty does not contain a legal foundation for such an exclusion because it is penal in nature, and restitution plus an additional penalty is not provided for in the Council regulations (and thus cannot be imposed by the Commission based on delegation or its application powers). On the other hand, the Commission believes that the Community possess the competency to prescribe restitution and exclusion and that it also may, as a mode of application, provide for such administrative sanctions. The Commission recognized, however, that an explicit delegation from the Council is required for administrative fines.

In this case, the Advocate General, Mr. Jacobs, made his conclusions known in June 1992. He underlined that the Court, in its case law,[70] had left it to Community law to prescribe administrative sanctions. Even the Germany government recognized this competency, although it concluded that the Commission had exceeded its jurisdiction in this case. Mr. Jacobs opined that the prescription of sanctions is also possible in matters other than those relating to illegal competition and that it is incumbent upon Community law to determine the question whether such sanctions possess a criminal or administrative character. Articles 87 and 172 of the EC Treaty, only, concern sanctions, and the Council, according to him, has no relevance in circumstances where, as in this case, it is not a question of sanctions applied by the Commission but rather of sanctions prescribed by the Commission to the Member States. This means that the Commission can certainly, in the context of its application powers – and naturally taking into account the principle of proportionality – prescribe administrative sanctions for purposes of harmonization in the Member States. It appears, in this regard, that not all dissuasive sanctions have a penal character (referring to the enhanced fines for illegal competition).

In my opinion, Mr. Jacobs' reasoning can be criticized on this point. Even if it is incumbent on Community law to draw this distinction, Community law is itself linked to the respect for fundamental rights which are an integral

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[68] C 240/90, *Germany v. Commission*, Oct. 27, 1992, ECR.

[69] Regulation No. 1260/90, *OJ*, 1990, L 124/15, and Regulation No. 1279/90, *OJ*, 1990, L 126/20.

[70] 50/76, *Amsterdam Bulb v. Produktschap voor Siergewassen*, Feb. 2, 1977, ECR, 138, and C 53/88, *Commission v. Greece*, Nov. 8, 1990, ECR, I 3931.

part of it. The Commission may have the competency to prescribe administrative sanctions, but must they satisfy the criteria in the case law on Article 6 of the European Convention on Human Rights, if they have a criminal character? Mr. Jacobs does not deal explicitly with this question, but it appears, however, from his finding no. 12 that he would answer it in the affirmative.

On October 27, 1992, the Court rendered its judgment in this important case. The Court recognized the competency of the Community, pursuant to the common agricultural policy, to prescribe administrative sanctions for the Member States which must be applied by them to perpetrators of economic frauds. The only other condition Article 40(3) imposes on this power is that the sanctions be necessary to an effective enforcement of the common agricultural policy. The sole power to determine which solutions are adequate in the context of the realization of the objectives of the common agricultural policy belongs to the Community legislature. The Court recognized that a need for harmonization exists:

> It is appropriate to observe in this regard that since the requests for subsidies are too numerous to allow for systematic and complete controls, a reinforcement of the controls is difficult to envisage. By the same token, the enforcement of national sanctions would not guarantee that uniform measures will applied to the perpetrators of frauds." (Conclusion no. 21).

The Court rejected two important German arguments. In the first place, the argument based on Article 87 of the EC Treaty is not relevant in circumstances where it is a question of the Community prescribing, not enforcing, sanctions. In the second place, the Court established, unfortunately unsupported by specific reasons, that the exclusion does not amount to a criminal sanction, but is rather a specific administrative instrument made an integral part of the system of aid and designed to insure the proper financial management of public, Community funds. Thus, the decision states:

> The Community is competent to establish sanctions, which, like exclusions..., go beyond the mere restitution of a benefit improperly paid." (Conclusion no. 29).

Thus, the exclusion is only an example of a possible sanction.

One can deduce from this that administrative sanctions and periodic penalty payments also cannot be excluded, in advance, from the Community's sanction powers.

As far as the sanction competencies of the European Commission are concerned, conforming to its decision in *Köster*,[71] the Court held that sanction provisions do not belong in the category of essential elements which must be previously determined by the Council pursuant to its delegation power, but that they can be added by the Commission as part of an application provision. Thus, the Court's conclusion states, "The Commission is competent to establish penalties and exclusions...." (Conclusion no. 43). The Court does not permit here, unlike its statement regarding the sanction powers of the Community, the introduction of other forms of sanction.

Thanks to this decision, the way is now open for discussion within the Council of the proposed Council regulation relating to the sanctions applicable to the common agricultural and fishing policy.[72]

In conclusion, we should not lose sight of the fact that the European Commission can take supervisory measures with regard to the Member States in the context of performing its functions - measures which strongly resemble the prescription of administrative sanctions, if they are only applied to the Member States themselves. The common fishing policy gives us several interesting examples.

The Member State has the obligation to stop fishing when a certain quota has been attained. If the Member State does not do so or does so late, and thus there is a surplus catch, it is subtracted from its quota in the year, or years, following. This quota reduction strongly resembles an administrative sanction.

The Community has gone even further in control Regulation No. 3483/88.[73] In this regulation, the bodies charged with enforcement in the Member States are compelled to act, on the level of control and sanction, with regard to fishermen from other Member States who are in violation (for example, illegal catches brought to their ports). If the enforcement turns out to be deficient, the European Commission can subtract, in the form of a sanction, the illegal catch from the quota of the Member State which failed in its duty to enforce. In fact, a Member State is sanctioned for not respecting an obligation to enforce linked to the fishermen and boats of other Member States which commit infractions in its waters or when docking in their ports.

The Court of Justice decided, in a Spanish case,[74] that the reduction of quotas should not be considered a sanction for non-compliance with the obligations flowing from Community law, but as a supervisory measure in

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71 *Köster*, note 56, *supra*.

72 Note 63, *supra*.

73 Regulation No. 3483/88, *OJ*, 1988, L 306/2.

74 C 9/89, *Spain v. EC*, March 27, 1990, ECR, I 1383.

the context of the policy of fishing conservation. The Adovate General nonetheless referred in his findings to "a penalty whereby illegal catches which are not prosecuted are counted against his quota..."

III. THE SIGNIFICANCE FOR CRIMINAL PROCEDURE IN THE EUROPE OF TOMORROW

Thus it appears from this discussion, that the inspection powers of the European Commission clearly have an administrative law character. It is, however, erroneous to conclude from this that there is no relationship with national (procedural) criminal law, in as much as the control and the sanction, imposed by the European Commission, do not leave the national (procedural) criminal law intact.[75] In most Member States the separation between the administrative law control and the judicial inquiry is not absolute. Most of the time, the same body, endowed with two types of competency is involved. Even under the assumption that the separation is absolute, we must recognize that many criminal cases begin in the economic sphere with an administrative control or investigation.

The role that the European Commission plays or can play in administrative controls/investigations runs headlong into the national rules of criminal procedure. The national rules have not been conceived on the basis of a Community enforcement component. The European rules take very little cognizance of the criminal law because the Member States – who make the final decision in the Council of Ministers – prefer to leave the criminal law totally outside the Community framework. It is about time to endow the administrative control, which is an essential part of the Community's competency, with a better legal, regulatory base, to carefully reflect on its relationship to national criminal procedure, and to regulate, in a decisive way, the rights and duties of the officials, enterprises and/or citizens concerned.

This means that we should recognize that the administrative control and certain aspects of the judicial investigation take on a Community dimension. The problems relating to secrecy, the evidentiary value of the data obtained, and the control powers of the Euro-officials are only the tip of the iceberg. Apropos the Community control over economic activities to insure respect for Community law (and thus the battle against fraud), it is important to rethink the classic relationship between the national administrative control,

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[75] H. Sevenster, "Criminal Law and EC Law," *Common Market Law Review*, 1992. G. Grasso, note 47 *supra*; J.A.E. Vervaele, Fraud Against the Community: Need for a European Fraud Legislation, note 4 *supra*; cf. also the interesting chronicles, "Droit communautaire" and "Droit pénal international" in the *RSC*.

often linked to a Ministry, and the Community control, on the one hand, and the relationship between the administrative control and the judicial investigation, on the other. It is especially the criminal proceeding, which is linked to the enforcement of Community policies, which must be rethought in this sense.

Nor do Community sanctions leave the criminal (procedural) law intact. The day when one distinguished administrative and criminal sanctions in an absolute fashion is gone. It appears clearly from the case law of the European Human Rights Commission and the European Court of Human Rights[76] that the legal classification in the national law is not determinative. Administrative sanctions of a punitive nature must be considered as *criminal charges* within the meaning of Article 6 of the European Convention on Human Rights. In circumstances where the European Commission prescribes such sanctions to the Member States or enforces punitive sanctions, it is important to respect the guarantees of the three paragraphs of Article 6. This means that the basic principles of criminal law (fair trial, presumption of innocence and rights of the defense) become applicable.

In other words, by virtue of the disappearance of the distinction between administrative and criminal sanctions, the fact that the European Commission acts only on the level of administrative law sanctions is of relative significance. In the case where the punitive character of these sanctions is recognized, it matters little whether they are administrative or criminal. The same basic legal principles are in force.

Independently of the fact that much attention is given to legal safeguards and the protection of fundamental rights in the enforcement of Community law in the national case law and in the case law of the Court of Justice relating to the enforcement of Community law, all the problems are not resolved. The Community is not a party to the European Convention on Human Rights which precludes an individual complaint against the Community. Other legal problems, which, it is true, are not dealt with in a satisfactory manner in the Convention, such as the applicability of the principle *ne bis in idem*,[77] are in issue. The Community sanctions can be cumulative with other national administrative and/or criminal law sanctions. A regulation must also be drafted to deal with this situation.

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[76] ECHR, *Öztürk v. Federal Republic of Germany*, Feb. 24, 1984, Series A, No. 73, and *Lutz v. Federal Republic of Germany*, Aug. 25, 1987, Series A, No. 123. Cf. also M. Delmas-Marty, *Procès pénal et droits de l'homme, Vers une conscience européenne*, Paris, 1991.

[77] Article 4, §1 of the 7th Protocol to the Convention deals only with criminal procedure.

The realization of the European Union remains an open question. It goes even to its physiognomy. Nonetheless, European integration is an undeniable fact and it keeps growing – even if it is on the basis of intergovernmental accession. The interface between Community law and national enforcement grows continuously. It seems that even though the criminal (procedural) law is still sleeping, protected by national sovereignty, in the meantime, the policy premises, which are at the basis of a national sovereignty over law, are in tatters. It is thus time to rethink the relationship of the Rule of Law to criminal law at the Community level and to examine if, and in what way, the state model of our criminal law can be guaranteed in a European federal union.