Community Regulation and Operational Application of Investigative Powers, the Gathering and Use of Evidence with Regard to the Infringement of EC Financial Interests

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Quis custodiet ipsos custodes (Iuvenalis, Satiren)

1 Introduction

For the realisation of the customs union and the internal market it has not only been necessary to remove national technical, fiscal and legal barriers, but the elaboration of a common policy has likewise been necessary in a number of specific policy areas as provided for in the EC Treaty. This Community policy can be attained by attributing regulatory competence to the EC itself, as has occurred, for example, in the case of the agriculture, fisheries, customs and transport sectors. In such a case Member States merely have the competence to implement and to enforce Community regulations. For many policy areas, however, such as, for example, the environment and public health, multi-level or shared governance has been expressly chosen whereby the Community, as well as the national governments, decide as regards legislative competence. The Community legislator has limited competence on the basis of the EC Treaty. All other competences – legislative and enforcement – fall within the policy areas of the Member States.

Standard-setting and Community regulation are key-components in the internal market.[1] In the process of harmonisation and integration during the past decades, this has been a major objective. The EC has been intensely occupied with 'institution building' and the elaboration of the EC into a 'regulatory state'[2] has thereby been very important. However, the possession of common standards and rules is a necessary, but nevertheless still not a sufficient condition for the functioning of the customs union and the internal market. These regulations have as their objective the regulation of socio-economic relationships, which implies that their compliance constitutes

1 T. Daintith, *Implementing EC Law in the UK. Structures for Indirect Rule*, Wiley (1995).
2 G. Majone, *Regulating Europe*, London-New York (1996).

an inherent part of their effectiveness.[3] In order to realise compliance by the economic operators, it is essential that inspection is carried out and that in the case of non-compliance measures are taken either to compel compliance or to sanction the instances of non-compliance. The whole body of rules and acts which are connected to compliance with substantial norms (control, measures, sanctions) I would define as enforcement. This is, however, a very generalised category which needs to be broken down further. Occupying a central position in Community policy is compliance by the economic operators, in most cases citizens and enterprises.[4] Everything which is connected with compliance by economic operators I would define as first-line enforcement. Second-line enforcement would then be 'controlling the control system'. Within the framework of this article we will limit ourselves to one link in the enforcement chain, namely the control phase, which is also designated by the terms research, verification, supervision and investigation.[5] Henceforth I will make use of the neutral term *control* because Community law makes no systematic differentiation between administrative law supervision and criminal law investigation. Moreover, our attention will be devoted in particular to the Community dimension of the control phase as regards the Community's financial interests. The article will therefore be divided between controlling compliance as regards both the Community's income and expenditure structures. This also has the consequence that fair competition and merger control (Articles 85-87 EG Treaty) falls outside the ambit of this article. As is already known, in this particular field the Commission has far-reaching independent, operational powers relating to control and sanctions.[6]

3 F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', *MLR* (1993) p. 19.

4 It is not excluded that public law bodies/authorities would be economic operators. In such a situation they would also be dealt with as economic operators, not only from the perspective of competition for example, but also from the point of view of enforcement.

5 See for the sanctions phase: J.A.E. Vervaele, 'Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?' in: J.A.E. Vervaele (Ed.), *Administrative Law Application and Enforcement of Community Law in the Netherlands*, Kluwer, Deventer-Boston (1994) p. 161-202.

6 See C. Harding, *European Community Investigations and Sanctions. The Supranational Control of Business Delinquency*, Leicester University Press, London-New York (1993); J.-C. Rivalland, *Les entreprises face aux pouvoirs d'enquête de la Commission des Communautés Européennes* (1991); J.M. Leloup, *Droit de la defense et droits de la Commission dans le droit communautaire de la concurrence* (1994); G. Dannecker and J. Fischer-Fritsch, *Das EG-Kartellrecht in der Bussgeldpraxis* (1989).

2 Indirect and Direct Enforcement of Community Law

When we consider the question of compliance with the regulations of the internal market, then we have to assess that enforcement primarily lies within the competence of the Member States. This has as a natural consequence that the Community is very dependent – not only as regards implementation but also enforcement – on national regulations as well as national implementation and enforcement structures. In principle, one could speak of indirect application and enforcement. This does not mean, however, that the Community must wait powerlessly on the sidelines in order to determine whether its policy regulations have been given effect. After all, the Community has legal possibilities at its disposal by which it can influence national competence as regards enforcement. Furthermore, it also has at its disposal powers by which to regulate national enforcement. In the Community's independent legal order, consisting of both Community and national components, this does not have to come as a surprise. The Community's competence to regulate national enforcement is double-tracked, which is binding on all the authorities of the national *trias politica* (the legislative and implementing authorities as well as those charged with the administration of justice). On the one hand, we could speak of regulation by means of the case-law of the European Court of Justice. The Court has transposed the competence regarding enforcement into an obligation which is furthermore subjected to quality requirements (effectiveness, proportionality, and assimilation).[7] The Member States' competence regarding enforcement has been – from a Community law point of view – regulated in an objective-oriented enforcement obligation which must be given actual effect by means of national regulations and their application. On the other hand, we could also speak of a legislative regulation by means of Community Regulations and Directives. By means of a large body of secondary Community legislation, Member States are obliged to adhere to detailed control and sanction obligations. These obligations are not limited to the legislative framework, but are also concerned with enforcement practice and in a number of cases they not only contain obligations to perform to the best of one's abilities but also obligations to guarantee that certain results are attained.[8] From all this it would seem that the principle of indirect enforcement of Community law

7 M. Zuleeg, 'Enforcement of community law: administrative and criminal sanctions in a European setting', in: J.A.E. Vervaele, *et al* (Eds.), *Compliance and Enforcement of European Community Law*, Kluwer Law International, Deventer-Boston (1998).

8 Fisheries Regulation 2847/93 thereby requires that a benefit obtained unlawfully should be 'pruned away'. Many regulations also require that subsidies unjustly paid should effectively be reclaimed.

by the Member States is not absolute. To an increasing extent, by means of legislation and case-law, one can speak of a direct regulation of enforcement by the Community, which consists of a Community law programming of decentralised enforcement. By means of normative programming the EC is penetrating the institutional and legal aspects of national enforcement systems, which in turn leads to interlocking. This does not detract from the fact that it is in principle the legislative, implementing and judicial authorities of the Member States which give flesh and blood to the enforcement of Community legislation. In this respect the government in principle has a freedom of choice and can call upon civil law, self-enforcement, disciplinary law, criminal law or combinations thereof, with specific interpretations as regards organisations, instruments, legal protection etc. The only limiting condition is that the institution of the particular national enforcement system and the resulting application thereof must adhere to Community requirements. To put it succinctly, economic operators are confronted with national enforcement regulations, national enforcement authorities, national control practices and decisions on sanctions.

From recent events, which have also drawn the attention of the press, it would nevertheless seem that the European Commission also operates outside the structure of competition control and that the results of these control systems can have drastic legal and economic consequences. I will here limit myself to two recent examples. In 1995 the European Commission dispatched an inspection team to Japan in order to supervise the production and processing of fish products from the point of view of hygiene and risks to public health. Because an acute danger to public health was determined, the Commission decided, by order, on an immediate ban on the import of fish products emanating from Japan. For a number of companies, among which was the Dutch 'Affish BV', this meant the complete collapse of their major activity. Their litigation procedures have led to interesting legal developments, wherein the phenomenon of Euro-control has come under discussion.[9] For those who are of the opinion that this example is not associated with enforcement, but is instead a feature of regulating entry into the market because it concerns the relationship between third countries and the internal market, here is a second example. The complete trade embargo on British beef, brought into force by the Commission because of the so-called 'mad cow' disease in the UK, requires considerable efforts in order to ensure that the embargo is enforced. In 1997 it became obvious that this embargo was not water-tight when considerable amounts of beef intended for the Russian

9 See case C-183/95, *Affish BV en Rijksdienst voor de keuring van Vee en Vlees*, ECJ 17 July 1997.

market were seized at a Dutch port because there were indications that the meat had not originated from Belgian producers, as was claimed, but in reality from producers in the UK. Investigation did indeed reveal that a Belgian meat-processing plant had illegally imported meat from the UK in order for it then to replace Belgian meat by means of forging labels and health certificates. The extraordinary feature of this investigation was that it was carried out with the cooperation of the Dutch Ministry of Agriculture's General Inspection Service (an administrative inspection and judicial investigation authority) and a European inspection team from UCLAF (Unité de Coordination de la Lutte Anti-Fraude). UCLAF's investigation proceedings were essential because it had emerged from this investigation that not only was the implicated company already responsible for the meat fraud, but that the Belgian Ministry of Health had also granted an export certificate to this company while the company in question had not adhered to various regulations, and that certain inspectors from the Belgian Institute for Veterinary Inspection (*Belgisch Instituut voor de Veterinaire Keuring* (IVK)) had been involved in the fraud.

These two examples therefore make it clear that over the years the Community has not only developed the competence to regulate national enforcement, but also a direct operational power to enforce as far as it is concerned. Economic operators are therefore not only confronted with national enforcement rules and practice, but also, and increasingly so, with Community enforcement rules and practice.

3 Indirect and Direct Control of Enforcement as Regards the Infringement of the Community's Financial Interests

When the national and Community control of enforcement becomes a subject of study, a certain dogmatic distinction becomes useful. This is not an academic exercise, but largely a necessary one because the legal concepts of Community and national law are not, or are not precisely, defined. This division can be elaborated upon by linking enforcement with its objectives:

- control directed towards the observance of substantial norms, such as veterinary norms or fishing quotas: *classic control of enforcement*;

- control directed towards the protection of substantial norms, with consequences for the financial interests of the EC (income and/or expenditure): *financial control of enforcement*;

- control directed towards the observance of financial norms: *financial accounting and auditing*;

- control directed towards compliance with the law by means of administrative authorities: *administrative control.*

These forms of control have their own distinguishing systems as regards standardisation and instrumentation, as well as differences as regards the division of competences between the Member States and the Community. With the exception of administrative control, which only has a second-line function, all the other forms of control contain a first-line as well as a second-line function. Within the scope of this article I wish to concentrate on the classic and financial control of enforcement, because this is the dominant perspective within the framework of the protection of the EC's financial interests. Financial accounting and auditing as well as administrative control are therefore not considered any further.

The point of departure of this analysis is indeed the demand for Community regulation of the enforcement obligations of the economic operators/those to whom norms are addressed, as well as the enforcement competences of the particular enforcement authority. They are indeed decisive in the gathering of evidence. It seems to me to be useful to employ an analytical chart. In the chart the methods of coercion which apply to natural persons (arrest, pre-trial detention, etc.) are not included because these enforcement methods fall exclusively within the domain of the law of criminal procedure and, to date, there is no Community legislation which explicitly regulates national criminal (procedural) law[10] or which attributes operational powers to the Community. The chart therefore concerns the regulation of enforcement competences and enforcement obligations as regards administration, cases, places, means of transport, etc. and which in national law are regulated not only by the law of administrative procedure (supervision) but also by the (economic) criminal law (investigation).

10 This is in principle somewhat different within the framework of the third pillar, whereby standardisation mainly takes place as regards organised crime, combating the unlawful drugs trade, etc. See J.A.E. Vervaele, 'Law Enforcement in Community Law within the First and Third Pillar: Do they Stand Alone?', *The Finnish Yearbook of International law*, Volume VII (1996), p. 353-368.

Enforcement body	**Economic operators/those to whom standards are addressed**
	Primary enforcement powers *compliance prohibitions, orders and duties*
	Secondary enforcement powers *duty of administration and/or registration* *active duty to report or provide information*
Information powers - to demand information - to demand inspection of business details and records	*Passive duty of information*
Technical powers - to enter premises - to investigate cases - to investigate means of transport and loads - to take samples - seizure - to search places - exceptionally: the power to search homes - to demand cooperation in the exercise of these powers - the power to accompany certain designated persons (e.g. Euro-inspectors)	*Duty to cooperate*

With this definition of the forms of enforcement control and the description of the enforcement powers and obligations we are now able to analyse how the indirect and direct enforcement control is organised with regard to the EC's financial interests. It is a logical step first of all to look at the regulation of indirect enforcement, considering that this forms a central point as far as the Member States are concerned. Then we will analyse to what extent and how the Community has provided for direct enforcement with operational competences for the European Commission.

3.1 Community Regulation of Indirect Enforcement by Means of the Member States

By means of Community regulation enforcement obligations are created or are accentuated for Member States as well as economic operators. A number of provisions are directly connected with the objectives of enforcement (primary enforcement obligations); a number are connected with supportive obligations (secondary enforcement obligations).

3.1.1 Community Regulation of the Secondary Enforcement Obligations of the Economic Operators and the Enforcement Systems

In many regulations, and also sometimes in directives, obligations are imposed on *economic operators* which can facilitate primary enforcement. Economic operators are confronted with far-reaching duties of administration and registration, have all kinds of duties to report and to provide information and must lend their cooperation in the case of inspection. These secondary enforcement obligations are in a number of cases very detailed and strict. It is indeed conspicuous that Community law only sporadically prescribes sanctions in the case of the non-observance of these obligations. This usually concerns a duty to observe which must be enforced by the Member States by means of suitable measures (reporting duties). The non-observance thereof is mostly sanctioned by the Member States by making use of administrative law or criminal law sanctions (withdrawal of a permit, administrative law fines, exclusion from the provision of a subsidy, criminal law fines, light custodial sentences).

Nevertheless, Community regulation of secondary enforcement obligations is not limited to economic operators. *Member States* themselves are subjected to equivalent obligations: administration, reporting/providing information and cooperation. These secondary obligations are concerned with providing an insight into the implementation and enforcement route and are thereby, among other things, supported by the administrative control which is exercised by the Commission. Member States should thereby disclose their regulations and implementation and enforcement structure to Brussels. The secondary obligations are not only limited to the 'law in the books', but are also concerned with the 'law in action' (disclosure of enforcement information). There are therefore regulations which are very detailed in describing how national efforts in the field of enforcement must be administered and registered, and of which efforts and results Brussels has to be informed. These notifications may concern enforcement efforts undertaken by the authorities of the Member States regarding control systems, judicial proceedings and sanctions (an enforcement scenario, the amount of control

utilised, the number of refund procedures which have been commenced, punitive sanctions handed out, etc.), but also regarding the conduct of the economic operators (mala fide enterprises). Also the duty to cooperate is concretely elaborated in many regulations. This cooperation may be owed to diverse Community institutions, but also to other Member States.

Conspicuous in this regulation is that compliance with these secondary enforcement regulations is not dependent on the enforcement organisation and enforcement systems within the Member States. Information which is connected to this judicial route (the investigation itself, the criminal court) is also included in this field of application. Secondly, an obvious chronological evolution is discernible. In a first phase the obligations were only concerned with 'law in the books'. In a second phase they were extended to 'law in action'. In a further third phase obligations were then added as regards certain individual enforcement cases. Thereby, in the agricultural control regulation concerning fraud in the agricultural industry (595/91)[11] it became compulsory for Member States every three months to send an overview to the Commission containing a list of irregularities whereby a preliminary administrative or judicial report had been compiled. In this list information should be included on infringements, the extent of fraud, the *modus operandi* of the fraud, etc., as well as the identity of the natural and legal persons involved, so far as this is necessary for combatting fraud. That the community norms are increasingly concerned with aspects of operational enforcement in individual cases is also apparent from the blacklist regulation which has as its objective the ensuring of the economic operators' integrity as regards the European agricultural subsidies.[12] In relation to the economic operators which, within the framework of registration, export refunds and the sale of intervention products against a lower price, have received subsidies from the European Agricultural Guidance and Guarantee Fund (EAGGF) and as regards reliability and risk formation, certain enforcement obligations are imposed on the Member States. These 'unreliable' economic operators are divided into two categories. Category A consists of economic operators which, as natural or as legal persons, have had a final decision of an administrative or judicial authority rendered against them in which it has been determined that they have intentionally, or by means of gross negligence, committed an irregularity and, as a result of which, have received an unlawful financial advantage or have attempted to do so ('finally and

11 Article 2 of Regulation 595/91, OJ 1991, L 67.

12 Council Regulation 1469/95 of 22 June 1995 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, OJ 1995, L 145 and Commission Regulation 745/96, OJ 1996, L 102.

conclusively found to be fraudsters'). Category B concerns the same situation, but here only a preliminary administrative or judicial report has been compiled. Article 1 of the implementing regulation moves this reporting phase forward by determining that 'preliminary administrative or judicial report' should also be understood to mean the preliminary, also purely internal, written evaluation by the competent administrative or judicial authority, wherein it has been concluded that as regards certain facts, it would seem that an irregularity has been committed either intentionally or by gross negligence, this being without prejudice to any later amendment ('suspected fraudsters'). It is obligatory for Member States to report category A and B economic operators to the Commission and to take appropriate measures. In relation to category A and B economic operators payments should be deferred and the control systems sharpened. In relation to category A economic operators, furthermore, they must be definitively excluded from the system of subsidies for a certain period of time.

In principle, the Member State's detailed reporting obligations as regards national enforcement in individual records also apply to judicial information concerning investigation. 'In principle', that is, because Article 4 of the blacklist regulation and certain recent regulations determine that if national provisions provide for the confidentiality of the investigation, then for the purpose of sending the details provided under this blacklist regulation, the consent of the competent judicial authority is here necessary.[13] Being in possession of such a procedure and its institution is left to the national legal system in question. The competent administrative authorities, however, do have an obligation to try and obtain this consent.

3.1.2 Community Regulation of the Primary Enforcement Obligations of Economic Operators and Member States

The fact that Community legislation regulates the primary enforcement obligations of economic operators is not unusual and neither is it new. Since the beginning of European integration, Community law (both primary and secondary) has contained provisions which command and prohibit, duties to provide and to maintain, etc., which, in combination with national law, may form the core of the component part of a system of penalization. The prohibition on the production, or bringing into the market, of wine which has had water added, and commanding the financial sector to draw up a

13 See for example Article 3 of Regulation 1681/94 of 11 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field, OJ 1994, L 178 and Article 4 of Regulation 1469/95, see *supra*.

preventive supervisory system in order to prevent money-laundering are obvious examples.

Since the 1980s sectoral regulations have also contained primary enforcement obligations as far as the Member States are concerned. I would here like to differentiate between
1. enforcement control upon request;
2. enforcement control: regulating the quality and quantity; and
3. the use of evidence obtained by means of the enforcement control.

Enforcement control upon request (gathering of evidence)

As far as own resources[14] are concerned, as well as agricultural subsidies[15] and payments from the structural funds[16] of the EC, the Commission may instruct the Member States to implement *supplementary controls*.[17] This system has already existed since the early 1970s,[18] but has now been elaborated in more detail in the newer regulations. An example of this is Article 6 of the agricultural control regulation (595/91), which contains an obligation to institute an investigation upon the request of the Commission. Furthermore, the concept of inquiry or investigation is explicitly defined as follows: 'Inquiry shall be taken to mean 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'. To put it succinctly, this concerns a request to carry out an *administrative law investigation* (which is inquisitorial, but is not a judicial function), which is negatively defined. Which investigation activities are to be excluded from the investigation at the request of the Commission are, to a large degree, dependent on the national law of criminal procedure. This law will in any case determine when an activity can be carried out at the request of the judicial authorities or under their direct authority. In any event, what a judicial authority actually is depends on the national law.

14 Article 18 of Regulation 1552/89, OJ 1989, L 155, amended by Regulation 1335/96, L 175/3, under revision at the moment, see COM(96) 717 def. en COM (97) 343 def.

15 Regulation 595/91, see *supra*.

16 Article 23 of Regulation 4253/88, OJ 1988, L 374.

17 See J.A.E. Vervaele, *Fraud Against the Community. The Need for European Fraud Legislation* (1992).

18 See for example Article 9 of the Agricultural Control Regulation 729/70, OJ 1970, L 94/15 which as regards control upon request is more sharply defined in Article 6 of Regulation 283/72, OJ 1972, L 36 and, in the case of a positive result, the Member State is obliged to instigate administrative or judicial proceedings.

There are thereby Member States in which the Public Prosecutions Department is not deemed to be part of 'the judicial authorities'. In some common law countries the criminal law investigation will also be in the hands of the police. Furthermore, there is still the question of what exactly is meant by the term *direct* authority. Many national supervisory authorities also have at their disposal the specific competence to carry out such an investigation. This differentiation is also not always clear-cut in national law and many investigative operations are carried out under the authority of the Public Prosecutions Department, but not always under the direct authority thereof. This negative definition consequently leaves room for an extensive interpretation of the concept of investigation.

Enforcement control: regulating the quality and the quantity (gathering of evidence)

It thereby also occurs that the Community imposes obligations on the controlling efforts of the Member States. Many regulations oblige the Member States to draw up control programmes with detailed information on the control criteria, the establishments which must be visited, the frequency of the controls, etc.[19] A certain number of regulations set out mathematically the frequency upon which the control should take place by, for example, determining that at least 5 percent of all subsidised export and agricultural products must be the subject of physical control.[20] A readjustment is later permitted also by means of more specific risk analysis.[21]

Also in the case of regulating powers, the Community has remained at the forefront. Article 5 of the regulation concerning controls in the viniculture sector,[22] for example, determines the minimum competences of the national inspectors: access to vineyards, company premises, warehouses and means of transport, access to administrative documents, the right to make copies of such documents, and the possibility of attachment and/or seizure of property before final judgment. The regulation concerning *a-posteriori* control of trade documents[23] contains the compulsory authority to seize trade docu-

19 See for example Article 10 of Regulation 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC, OJ 1989, L 388 (*a-posteriori* documentary control).

20 See Regulations 386/90, OJ 1990 L 42 and 2030/90, OJ 1990, L 186.

21 See for example Regulation 2064/97 concerning structural funds subsidies.

22 Regulation 2048/89, OJ 1989, L 202.

23 Regulation 4045/89, OJ 1989, L 388.

ments (Article 6), but there it is immediately added that this is not to the detriment of national regulations contained in the law of criminal procedure.

The application of evidence attained by means of enforcement control (use of evidence-evidential value)

During the 1980s the first summary provisions concerning the application of attained evidence appeared in the sectoral regulations. The regulation concerning controls in the viniculture sector thereby contained a specific provision on evidential value in Article 14(2): 'This Regulation shall not prevent the use, in the course of court proceedings or prosecutions started subsequently for failure to comply with agricultural or financial requirements, of information obtained pursuant to this Regulation'.[24] The blacklist regulation, in its Article 4(3), also specifically regulates the relationship between the criminal law autonomy of the Member States and the evidential value of the data: 'The provisions of this Regulation shall not affect the application in the Member States of rules governing criminal proceedings and mutual assistance in criminal matters between Member States. They shall not prevent the use, in the context of judicial proceedings or of proceedings brought subsequently for non-compliance with agricultural regulations, of information obtained pursuant to this Regulation; in the latter case the competent authority of the Member State which provided such information shall be notified of such use'.[25]

These evidence provisions have been established in order to apply the obtained evidence *transprocedurally* within the framework of Community-regulated enforcement investigation. This means that these data can be used as evidence in other proceedings (of a civil, disciplinary, administrative law or criminal law nature). Evidential value should be attached to these data. Evidential value which has not been regulated by the Community, is left to the regulations of national (procedural) law to be determined. These rules of evidence contained in Community regulations concerning EC fraud may be explained by the fact that when it has been determined that EC fraud has taken place, this will lead to diverse judicial procedures, including revindication or additional assessment and eventually also criminal law prosecutions or punitive administrative law procedures against the transgressors.

Finally, Community customs law should here be mentioned. Material customs law, which is the exclusive authority of the Community, has been

24 Regulation 2048/89, OJ 1989, L 202.
25 Regulation 1469/95, OJ 1995, L 145.

harmonised in the Community Customs Code[26] which contains rules covering customs tariffs, the origin of certain goods, customs value, etc. Customs enforcement law, however, remains a national concern, but Community customs law does contain many regulations in the field of procedural law,[27] with not only implications for implementation practices, but also for enforcement practices. It is thereby described in detail which requirements should be met as regards the various notification procedures, as regards recognition and control over customs warehouses and customs transportation, for example. These basic requirements are also of direct importance to the articles of evidence. From recent cases heard before the Court of Justice it would seem that there is here no question of a system of unrestricted evidence, but rather a Community system of strictly prescribed legal evidence, which may not be set aside by evidence attained by the actions of national enforcement agencies, not even when supported by an official report from the investigative authority. This means that, for example, except for specially provided exceptions,[28] goods of a Community character may only be supplied together with a Community-prescribed notification document. Not having a notification document at hand will lead to an irrefutable suspicion, *iure et de iure*, that the goods in question are not Community goods.[29] We are therefore here concerned with far-reaching harmonisation of evidentiary material, which can also work its way into criminal law. The far-reaching harmonisation of material customs law, however, has not yet led to the harmonisation of the enforcement of customs law per se, neither as regards investigative authority, nor the competence to impose sanctions.

3.1.3 Increasing the Community Dimension of National Enforcement Agencies

Community law either implicitly or explicitly defines the enforcement tasks of national enforcement agencies. It is only rarely that these national enforcement agencies are mentioned by name. The actual choice and allocation is left to the Member State. Sometimes, however, the regulation does require that the Member State should allocate one contact agency. This permits the enforcement organisation in Europe to streamline its operations and to work with an enforcement network in a European connection.

26 Regulation 2913/92 concerning the enactment of the Community Customs Code, OJ 1992, L 302 and Regulation 2454/93 containing the implementation provisions, OJ 1993, L 253.

27 I refer for example to Articles 243-246 of Regulation 2913/92 concerning the right of appeal against customs decisions.

28 For specific rules see Articles 378-380 of Regulation 2454/93.

29 For examples see case C-97/95, *Pascoal & Filhos Ltd. and Fazenda Publica*, ECJ 17 July 1997; case C-237/96, *E. Amelynck et al. and Transport Amelynck BVBA*, ECJ 25 September 1997.

Nevertheless, Brussels is conscious of the fact that regulating national enforcement does not mean that in practice the enforcement bodies realise that they have been charged with Community tasks. For this reason the Community has, in the past, already taken steps to also realise this Community dimension in practice. After much criticism from the Member States that they were having to pick up the bill for enforcement, the Community has had to fork out from the European budget. Now, Member States are not only able to retain 10 percent of the recovery costs, but in many cases also 20 percent of the reclaimed amounts of subsidies which have been wrongly paid out, provided, of course, that there is no question of the government itself being responsible for the incorrect payment of the subsidy. Should the Member States decide, upon the explicit request of the Commission, to initiate or continue judicial proceedings in order to reclaim subsidies which have been wrongly paid out, then there are possibilities to recover the legal aid and procedural costs from the Community budget.[30] It is also increasingly the case that the Community co-finances personnel and infrastructural improvements in the enforcement system. An example is the regulation on a-posteriori documentation control[31] which has provided considerable personnel and initial financing over a five-year period.[32]

Alongside this, the Community also provides technical assistance and training programmes. During the last few years the possibilities have been enormously extended with specific training programmes for national officials, also in the field of enforcement. I refer, for example, to the Community programme, entitled OISIN, for the exchange and training of, and cooperation between, law enforcement authorities.[33] This latter programme has as its objective for the period 1997-2000 the promotion of cooperation between the law enforcement authorities by means of financing training, exchange of personnel and the supply of operational expertise, research into operational feasibility and the exchange of information. In this way, special inspection services with a Community dimension are being created step by step.

30 See for example Article 7 of Regulation 595/91, see *supra*.

31 Regulation 4045/89 and Implementing Regulation 1863/90, OJ 1990, L 170.

32 For other examples see Regulation 307/91, OJ 1991, L 37 and Regulation 967/91, OJ 1991, L 100 (co-financing control regarding the export of agricultural products) and the cited control regulations concerning wine and olive oil.

33 Community Joint Action of 20 December 1996, OJ 1997, L 7.

3.1.4 Setting up Specialised Enforcement Agencies in the Member States
In a number of policy sectors the Community was confronted with so much fraud that it felt itself obliged to compel Member States to set up specialised enforcement agencies. This is namely the case in the olive oil and tobacco sectors.[34] These agencies function under the national sovereignty of the Member States, but are jointly financed by the Commission and are, to a large extent, streamlined in the Community direction. The tasks of these enforcement agencies are determined by the regulations. In Article 1, second part of both regulations, the retaining of statistical surveys and unannounced inspections of companies are included, among other things. In the tobacco regulation, moreover, the sharing of eventual administrative law or criminal law procedures, the acceptance of effective investigative competences, as well as the taking of samples, are all included. The agency in question must set up working programmes, compile reports and admit Commission officials to staff meetings.

3.2 Direct Enforcement by the Commission

3.2.1 From a Programme and Policy Evaluation to Enforcement Control
The Commission has a general supervisory function as regards compliance with Community law both by and in the Member States in question. Within that framework the Commission is often charged in secondary Community legislation with evaluating implementation and enforcement in the various policy areas. This programme evaluation can be concerned with aspects of legislation, implementation and enforcement. The Commission thereby issues, for example, reports on the application of the control measures in the Community's fisheries policy, the anti-money-laundering policy, the anti-fraud policy etc.[35] This type of evaluation research draws on information not only from the reporting obligations of the Member States and their various bodies but also from research in the Member States themselves as regards the services in question and, if it should be the case, as regards economic operators, so that an insight may be gained into the effectiveness of the system.

It is obvious that this evaluation research is not directed towards observance or the imposition of sanctions for the infringement of certain norms by

34 See Regulations 2262/84, OJ 1984 L 208 and 593/92, OJ 1992 L 64 for olive oil and Regulation 85/93, OJ 1993 L 12 for tobacco.

35 See for example the Commission Report, *Monitoring the Community Fisheries Policy*, COM (97) 226.

economic operators. Nevertheless, this research can, to the extent that it is directed towards the enforcement part of the policy in question, take the form of second-line enforcement control, namely control as regards the national enforcement agencies. It also occurs that these forms of control can form the point of departure for further enforcement control which can also lead to sanctions in relation to the Member State. For example, in the agricultural sector whenever it appears that the enforcement agencies demonstrate structural shortcomings, with substantial consequences for the quality of enforcement, then the Commission can impose fixed cut-backs on agricultural subsidies within the framework of the yearly clearance of accounts procedure,[36] which has as its consequence that the subsidies, because of a lack of enforcement, will have to be charged to the national budget. A good example is the new Regulation 2064/97 on structural funds which itself, in its Article 3, standardises the evidence which the Member States can employ so as to demonstrate that they have dealt with an irregularity in the right way.[37]

3.2.2 Enforcement Control by the European Commission: Investigative Powers for Euro-inspectors

The independent competences relating to enforcement which Euro-inspectors possess with regard to competition and atomic power stations have their legal basis in primary Community law.[38] Within the framework of our analysis concerning the financial interests of the EC the question arises whether Euro-inspection can also be provided without an explicit basis therefor in the EC Treaty, and also when it is not directed at the imposition of sanctions on the Community level. For the time being the necessary competence can be derived from the general supervisory authority which the Commission possesses with regard to the observance of Community law, such as that provided in Articles 155 and 145 EC Treaty. In practice, however, this has not occurred, but rather these Euro-control powers, taken as supervisory competences, have been read into the specific bases for Community policy, such as, for example, in Article 43 EC Treaty (agriculture), Article 209 EC Treaty (own resources), Article 113 EC Treaty (trade policy and Community control missions to third countries), Article 130 D-E (structural funds), but then not in combination with Article 100 EC Treaty. Finally, Article 235 EC

36 See R. Barents, *The Agricultural Klaw of the EC*, Kluwer, Deventer-Boston (1994); R. Mögele, *Die Behandlung fehlerhafter Ausgaben im Finanzierungssystem der gemeinsamen Agrarpolitik*, Verlag C.H. Beck, Munich (1997).

37 OJ 1997 L 290.

38 This here concerns Community powers of control and sanctions contained in, respectively, Article 85 et seq. EC Treaty and in Article 81 et seq. Euratom Treaty and the Community regulations based thereon.

Treaty offers obvious possibilities to the extent that the necessity for a common market can be severely affected. Article 235 is namely made use of for horizontal framework regulations concerning EC fraud, including standardisation as far as Euro-control competences are concerned.[39]

The competence to implement *financial enforcement control* as regards EC revenue and expenditure has been a settled part of the applicable secondary Community law since the 1970s. The competence to exercise controls in the Member States is attributed to EC officials; such control being applicable to various services in the Member States (second line) and to economic operators (first line). These control measures are therefore a combination of second-line and first-line control. The control measures vary from sector to sector and what is thereby conspicuous is the fact that the Commission was initially ascribed with more possibilities as regards the expenditure aspect (especially agricultural expenditure) than it was as regards the income aspect. The first-line control possibilities have also increased with the passage of time. In 1970 the basic regulation concerning expenditure within the framework of the European Agricultural Guidance and Guarantee Fund (EAGGF)[40] already provided, in its Article 9, the possibility of on the spot inspections of companies by Euro-inspectors. In Article 8 the preventive and repressive enforcement obligations of the Member States were determined. Also, Article 8 contained a re-claim obligation which was imposed on Member States in the case of subsidies which had been wrongly paid out, as well as a regulation on financial liability between the Community and the Member States. Article 8(3) determined that this and that would be further elaborated by the Council by means of an implementing regulation, and this occurred in Regulation 283/72.[41] In this regulation the reporting duties of the Member States were specified and were included in the law of the Community by which a Member State could be requested to initiate an administrative investigation, as a part of which Commission personnel could participate (Article 6, part 1). In the case of an affirmative result, the Member States were indeed obliged to initiate administrative or judicial proceedings so as to reach a formal finding on the irregularity or negligence (Article 6, part 3). Moreover, in 1988 one thing and another were further elaborated upon in an 'Internal instructions concerning administrative and technical procedures to be followed by officials given powers by the Commission concerning sampling and analysis of products for the purposes of the management and control of the European Agricultural Guidance and

39 See section 3.2.3.
40 Regulation 729/70, OJ 1970, L 94.
41 OJ 1972, L 36.

Guarantee Fund'.[42] This instruction determined which companies may be inspected, how samples should have been taken and that the Member States, but not the companies in question, should have been informed beforehand. In 1991 Implementation Regulation 283/72 was replaced by Regulation 595/91.[43] This regulation also contains extensive reporting duties for the Member States (see supra), which should enable the Commission to determine the question of financial liability (of the Community or the Member State in question). Alongside this, enforcement competences are also provided for the Commission. Here also, the Commission has the authority to request the Member State to instigate an investigation (see supra). If the Euro-inspectors should decide to participate in an investigation, then Article 6(3) determines that the Member States, in principle, should be made aware of the essential elements of the investigation at least one week beforehand, although in urgent cases this requirement can be dispensed with. Furthermore, in Article 6(4) it is explicitly determined that the Euro-inspection should take place with the cooperation of the national inspectors and under their authority. In principle the Euro-inspectors have the same competences as the national inspectors, except that: 1) the investigation is to be led by national officials; 2) the Euro-officials must not, upon their own initiative, transgress upon the control competences of the national inspectors; and 3) certain control activities are to be reserved for national inspectors. The Euro-inspectors cannot therefore independently and autonomously gain access to company premises, for example. That they can only do in cooperation with the national inspectors. The latter will also always lead the investigation. Furthermore, the Euro-inspectors cannot transgress upon the powers of control which have been specifically granted to the national inspectors; but they do indeed have access to the same locations and to the same documents as the national inspectors. The regulation also contains provisions relating to criminal law competences. What is here striking is the fact that the Euro-inspectors are not excluded from all the investigation activities. The Euro-inspectors cannot participate in certain activities which are deemed by national criminal law provisions to be reserved by national law for specifically indicated officials. This applies *expressis verbis* to the search of premises or the formal interviewing of persons. A number of provisions relating to criminal proceedings, and this is also the case in the Netherlands, provide the possibility for the investigating authorities to be accompanied by

42 Internal instruction 88/C 264/03, OJ 1988, C 264.

43 OJ 1991, L 67. This regulation is concerned with all irregularities and reclaims in the framework of subsidies obtained from the Guarantees section of the European Agricultural Guidance and Guarantee Fund. The Guidance section falls under the regulation of structural funds subsidies.

experts, and these experts can therefore theoretically be foreign experts or Euro-inspectors. Moreover, the Euro-inspectors have access to all the information, including access to that which has been obtained on the basis of activities in which they are not allowed to participate. Furthermore, it has not here been determined that the confidentiality of the investigation should require that the flow of information should be dependent upon the consent of the competent judicial authorities.

For payments of subsidies out of the structural funds the basic regulation for Euro-control is contained in Article 23 of Coordinating Regulation 4253/88.[44] Article 23 also contains the authority to conduct an enforcement investigation in the Member States, but this provision is much more vague than that contained in Agricultural Regulation 595/91. Implementation Regulation 1681/94[45] does describe in detail the enforcement obligations of the Member States, but does not further elaborate upon the Euro-control aspect. To put it succinctly, the standardisation within structural funds' subsidies, when compared to agricultural standardisation, can only be considered as rudimentary.

As far as the revenue aspect is concerned, in 1970 the system of financial contributions by the Member States (the donation system) was replaced by a system of the Community's own resources.[46] From this date the Community has henceforth received customs rights, agricultural levies and a part of VAT as its own income. These resources are collected by the national authorities. The Member States are naturally obliged to exercise control as regards the determination of own resources as well as having them placed at the Community's disposal. In this regulation the competences and obligations of Commission officials who are involved in national control are regulated. It is a first tentative step, because for every control assignment emanating from the European Commission preceding consultation is first necessary as regards the necessary conditions therefor and the control is strictly limited to second-line control, namely to the administration of the government. Only in Regulation 165/74,[47] an implementation regulation concerning control over the collection of the Community's own resources, were the first steps taken towards first-line control. It was only in 1989, however, that the discrepancies on this point between the agricultural sector and own resources

44 OJ 1988, L 374.
45 OJ 1994, L 178.
46 Regulation 2/71, OJ 1971, L 3.
47 Regulation 165/74, L 20.

were removed. This occurred in Article 18(3) of Regulation 1552/89[48] and the principle was also extended to VAT control in Article 11 of Regulation 1553/89.[49] At this moment in time the competences relating to Euro-control are identical as regards both the income and expenditure aspects. In practice the Euro-inspectors work at the competent Directorates-General, such as agriculture (DG VI) and customs and indirect taxes (DG XXI). Within the particular Directorate-General the Euro-inspectors form an anti-fraud cell.

This overall framework, however, does not provide a complete picture because these regulations do not stand in the way of specific control regulations for certain market sectors. Namely in the agricultural sector there is a veritable patchwork quilt of far-reaching control regulations which also provide the Commission with competences as far as control is concerned. A special feature of these control regulations is that their line of approach is not geared towards the protection of the EC's financial interests, but rather towards the enforcement of substantial norms (classical enforcement control), such as the observance of the wine or fisheries norms, or the veterinary or public health norms.[50] Nevertheless, there is also here a question of a gradual process of exclusive control over national control (second line) also becoming first-line control. In view of the Euro-control in the fisheries sector, this development can be nicely illustrated. One of the first provisions for classic enforcement inspections crept into the fisheries legislation in 1982. I say 'crept into' because there was no question of a Community inspection as such, merely that Commission officials could participate in a national investigation. The norms concerning the various tasks and competences remained vague. This inspection unit belonging to the Directorate-General for Fisheries (DG XIV) has been active since 1983 and has developed into an outstanding source of information for the European Commission. In 1986 the Netherlands was thereby confronted with a critical control report concerning fisheries enforcement, wherein it seemed that the Community inspection had gathered irrefutable evidence concerning overfishing – for some species of fish even up to 200%, concerning insufficient data having been supplied to Brussels and concerning the late closure of fishing. In 1993 a new fisheries control regulation entered into effect.[51] Alongside regulations concerning national inspection, this regulation contains

48 OJ 1989, L 155; amended by Regulation 1335/96, OJ 1996, L 175/3, actually under revision, see COM (96) 717 def. en COM(97) 343 def.

49 *Ibid.*

50 Observing these norms often involves financial implications. For example, meat which has not been able to come up to veterinary norms can be exported with EC refunds (export subsidies).

51 Regulation 2847/93, OJ 1993, L 261.

extensive provisions concerning Euro-control. As a matter of fact, in Title VII (Articles 29-30) aspects of first-line as well as second-line control have been incorporated. As far as the second line is concerned the regulation provides for independent control visits by the Commission. Furthermore, the Commission can demand that national inspection programmes be set up and can check whether and how these are implemented in practice. Alongside this the regulation does provide first-line control by means of Euro-controllers. The provision which has here been utilized has been borrowed from the Agriculture Regulation 595/91, with the difference being that here the investigation is designated as an '*administrative investigation*' instead of merely an '*investigation*', without any further definition, and that the data obtained by means of the investigation, and also data obtained in criminal investigations by national investigation authorities (when premises have been searched or during formal interviews), are subject to the confidentiality principle which pertains to judicial procedures. The possibility of the Commission nevertheless obtaining this information on the basis of a judicial authorization is also not provided for. To put it succinctly, various aspects could still be internally streamlined in the Community regulation.

The experiences gained in the fisheries sector have been transposed to other sectors and have been further elaborated upon. In a regulation relating to viniculture[52] it is explicitly laid down that – in consideration of the extensive fraud which has been perpetrated in this sector – obligatory Community inspection is essential with a view to the uniform application of legislation in the Member States. The regulation also sets out a Community control structure and elaborates rules for mutual cooperation between the control structures in the Member States and between these and the Community inspection bodies.

3.2.3 Horizontal Legislation and the Creation of a Community Euro-inspectorate for the Protection of EC Financial Interests

The European Commission and especially the Directorates-General responsible for the various policy sectors have strategic enforcement information at their disposal. On the one hand, they have an inflow of information which concerns not only the enforcement schemes and systems of the Member States, but also concerning individual files. On the other hand, the Commission has at its disposal independent Euro-control competences which it can call upon for financial and for classic enforcement control, both with regard to the Member States as well as with regard to economic operators.

52 Regulation 2048/89, OJ 1989, L 202.

Because of this the European Commission is well placed in order to harmonise the national enforcement systems and efforts with each other. Harmonisation can be a necessity for two reasons. Because in the first place enforcement is the responsibility of the Member States, it is not beyond comprehension that this national enforcement can vary greatly from country to country. It is up to the Community to indicate, by means of legislation, what the minimum standard should be in order to realise the European dimension of national enforcement. National control authorities which do not have a right of access to companies or which are not able to take any provisional measures are fairly powerless. The question, however, is whether this minimum limit is only concerned with effectiveness, or also with legal protection. In a certain number of regulations attention is therefore also devoted to, for example, the rights of the defence (the right to be heard, the right to have decisions substantiated, etc.). This aspect of harmonisation falls under the notion of Community standardisation of the enforcement obligations of the Member States.[53]

A second point concerns enforcement cooperation in the Community area (the internal market, the customs union). As far as border-crossing enforcement is concerned, the Commission is in a strong position because of the information which it has at its disposal and because it can coordinate the necessary enforcement. In many instances this leads to the formation of networks between national enforcement authorities which have a coordinating role as far as the European Commission is concerned. This does not always mean that a start is made on the formation of Community enforcement authorities, because in certain policy areas there are already national enforcement authorities in existence, which have a tradition of cooperation. The fact that their tasks are to a large extent those of a Community nature, such as, for example, customs services, does not therefore mean that within the foreseeable future a Community customs service will come into existence, let alone a Community customs service possessing supervisory, investigative and administrative sanction powers, such as those provided nationally.

Nevertheless, some aspects, especially in the field of the enforcement of the EC's financial interests, should be differentiated. For the time being the European Community has a direct interest in these protected rights. For this reason it does not seem strange that the Commission possesses extensive powers of control in this field. Traditionally, national departments have also had powers of supervision over their policy areas. In the second place, the

53 See *supra* sections 3.1.1 and 3.1.2.

Member States have no tradition with respect to the interests of Community enforcement. Overall the enforcement practice of the national authorities is essentially national in character. From a survey carried out by the European Parliament concerning customs transit[54] it is conspicuous how limited the experience of the national customs services is with regard to border-crossing customs fraud. Their competences in the field of control and sanctions are strongly embedded in the national legal systems, namely under national sovereignty.

It is precisely in order to render the EC's financial interests secure from transnational fraud that efforts have been made on the Community level to achieve a more decisive Euro-control system with transnational competences in the internal market and in third countries. The powers of financial enforcement, such as those contained in the sectoral regulations concerning EC income and EC expenditure, seem insufficient to be able to conform to this necessity. It is for this reason that during the 1990s horizontal framework regulation has been chosen for the protection of the EC's financial interests. With 'horizontal' is meant that the regulation applies to all policy areas of the Community whenever there is a case of EC revenue or EC expenditure. In this way the sectoral approach is supplemented by a horizontal approach. On the one hand, a specific choice has been made to standardise the administrative law and criminal law control of EC fraud by the Member States by means of horizontal regulation. Recently, and namely in the field of sanctions, far-reaching horizontal instruments have been brought into effect, such as a regulation on administrative sanctions[55] and a criminal law sanctions convention under the third pillar, with protocols.[56] On the other hand, it has been chosen to elaborate an integrated approach as far as the Euro-control powers are concerned. This final process has been reached in two steps.

54 European Parliament, Committee of Inquiry into the Community transit system, Final Report and Recommendations, Rapporteur E. Kellett-Bowman, PE 220.895/def.

55 Regulation 2988/95, OJ 1995, L 31. It should here be noted that the Community regulation does not concern VAT constructions. The Member States have as far as the concept of 'collecting own resources' is concerned, narrowly interpreted this term in a Council Declaration in the Community's favour, whereby VAT is seen as a source of income which is collected by the Member States and partly transferred to the EC Treasury. The Member States do not therefore view it as collecting Community funds, a standpoint which, in my view, is evidence of the renationalisation of Community competences.

56 Convention, OJ 1995, C 316; First Protocol, OJ 1996, C 313; Second Protocol, OJ 1997, C 221.

Setting up Community Euro-inspection with regard to EC fraud

The Euro-control powers were, up until recently, solely regulated in the previously analysed sectoral regulations. The consequence of this was that per Directorate-General there were Euro-inspectors and/or anti-fraud units active and they had diverse powers. An integrated approach was completely lacking. Also under pressure from the European Parliament and public opinion, the European Commission reached the view that it could not go any further with regard to the financial interests of the Community. In 1987 the European Commission published a 42-point report concerning a more intensive combatting of fraud[57] and in 1988 it set up the special anti-fraud unit called UCLAF (Unité de Coordination et de Lutte Anti-Fraude) within the Secretariat-General. In 1995 the anti-fraud units belonging to agriculture (DG VI) and customs (DG XXI) were integrated into UCLAF and as a consequence thereof UCLAF now has at its disposal 125 members of staff, emanating from various policy areas. The Euro-inspectors who were not charged with financial enforcement control, but rather with classic enforcement control such as fisheries inspection and veterinary inspection, have indeed remained at their respective Directorates-General. To put it succinctly, in the cases of combatting fraud and financial enforcement control one could speak of an integrated approach which has led to one central anti-fraud unit, the UCLAF. UCLAF's mandate, however, does not contain any authority to impose sanctions, but does include control powers. In order to answer the question of the range of the control powers we have to differentiate between the situation up to the end of 1996 and thereafter. Up to the end of 1996 UCLAF functioned and exercised competences on the basis of the various sectoral control regulations. With the integration of the agriculture, customs and structural funds anti-fraud units, various competences belonging to the sectoral control regulations (see supra) have also been brought within the fold. This now means that UCLAF possesses investigative powers within the framework of financial enforcement control. This is exercised with respect to economic operators (first line), but still in cooperation with and under the authority of the national enforcement authorities. Alongside this, UCLAF possesses a supportive and coordination task with regard to national enforcement.[58] The control powers can therefore be summarised as follows: 1. enforcement support; 2. enforcement coordination; and 3. financial enforcement control.

57 COM (87) Final.

58 See Protection of the Financial Interests of the Community, Work Programme 1997/1998, COM (97) 199 def. and Protection of the Financial Interests of the Community, the Fight Against Fraud, Annual Report 1996.

Enforcement support has a legislative as well as an operational component. Forming part of the Commission, UCLAF is directly concerned with the preparation of the Commission's legislative proposals in the field of the protection of financial interests. Operationally, its tasks can be compared to those of Europol.[59] These consist of extending automated data files with regard to national enforcement legislation, fraud patterns and modus operandi. The inflow emanates from the reports from the Member States as well as from the Commission itself. This information centre in the field of EC fraud places UCLAF in a position to be able to carry out risk analysis and, by means of supplying information, to be able to provide support for the national enforcement authorities.

In the second place, in cases of serious and/or border-crossing EC fraud, UCLAF coordinates the efforts of the national enforcement authorities. For this purpose UCLAF has signed cooperation protocols with national enforcement authorities. This coordination can take several forms. In the case of transnational fraud there are several points of departure (persons, places, subject-matters) and various legal systems are at issue. Whosoever dictates when, where and how activities become the subjects of investigation and/or prosecution can be of decisive importance for a successful policy approach. Moreover, knowledge of the various national systems and actors is of crucial importance so as to, for example, determine on which basis information may be exchanged (mutual administrative assistance, judicial assistance in criminal cases), when letters rogatory can be issued, when evidence can be obtained, when evidence can be used, when jurisdiction can be guaranteed, etc. It is for this reason that UCLAF has employed a 'liaison and criminal law expertise interface'. From this it would seem that UCLAF's coordination role is not limited to administrative investigation and is likewise not limited to the coordination of the administrative control authorities.[60] For an efficient approach, coordination of all the facets of the investigation (whether this is of an administrative law (supervisory) or criminal law (investigative) character), as well as the subsequent proceedings, is required. This means that the actions of the administrative, police as well as the judicial authorities (the Public Prosecutions Department, the examining magistrate) are all coordinated by UCLAF. This coordination can take place not only at the request of the national authorities, but also upon UCLAF's initiative.

59 Europol Convention, OJ 1995, C 316.

60 European Parliament, Report on the Commission 1996 Annual Report and its Work Programme on the Protection of the Financial Interests and the Fight Against Fraud, PE 222.169/fin, Rapporteur H. Bösch, speaks on p. 14 about: 'gathering, sharing and distribution of information and intelligence'.

Whenever alarming structural patters of fraud develop, UCLAF sets up special task-forces, such as, for example, in the case of cigarette smuggling. To put it succinctly, UCLAF plays a substantial and proactive role in the case of an administrative and judicial investigation. It is an interesting factor that for this task UCLAF has at its disposal not only specialised Community personnel, but also national experts who have been detached to UCLAF. Officials from the national administrations, inspectors from national inspection authorities and members of the national Public Prosecutions Departments and the judiciary are detached to UCLAF for a certain length of time. During this period they are employed as UCLAF officials, but they bring along their own particular expertise and network. This UCLAF structure provides a guarantee for the somewhat delicate operational work which UCLAF has to undertake, whereby it has to coordinate the (judicial) investigation in the Member States, without itself assuming the position of the national authorities. One factor is indeed obvious: UCLAF does not possess independent judicial powers of investigation. But the detached magistrates are indeed pre-eminently placed so as to be able to undertake the coordinating function as regards national judicial investigative work, certainly when this concerns the sensitive area of pro-active investigation and the deployment of special investigative methods.[61] Finally, it is indeed striking that the European Parliament's Committee of Inquiry on customs dealings has argued in favour of further extending these powers and to build up UCLAF into an investigative authority which is capable of exchanging judicial information.[62]

Thirdly, UCLAF undertakes financial enforcement control on the basis of the competences which are provided in the field of own resources and expenditure.

With UCLAF's extensive growth, both in terms of personnel and competences, the necessity to elaborate Euro-controls as regards EC fraud and horizontal control regulation also grew.

Horizontal legislation for Euro-control

At the end of 1996 the step towards a horizontal Euro-control regulation was nevertheless taken. This Regulation 2185/96[63] forms a part of the horizontal

61 See European Parliament, Draft Report on the Independence, Role and Status of UCLAF, Rapporteur H. Bösch, PE 225.069.

62 European Parliament, see *supra*.

63 Regulation 2185/96, OJ 1996, L 292.

approach concerning the combatting of fraud and is a concrete supplementation to the general Euro-control provisions (Article 8) from the Administrative Sanctions Regulation (2988/95).[64] Conspicuous is the fact that as a legal basis herefor use is simply and solely made of Article 235 and that UCLAF is not mentioned as such.[65] The regulation also bases the vertical cooperation between the Commission and the Member States as regards the implementation of controls on the concept of Community loyalty contained in Article 5 EC Treaty as well as the case-law resulting therefrom. The Regulation provides minimum horizontal regulation. 'Horizontal' means that the provisions apply to all EC policy areas, in as far as there are points of departure with EC finances.[66] 'Minimum' means that specific provisions from sectoral regulations which go further than this minimum regulation remain in force and may be applied. This Euro-control regulation is preeminently an instrument of financial enforcement control, and not one by which to evaluate implementation and enforcement. The objective is to reach a homogenous approach as regards enforcement in the Member States, as well as on the levels of control, refunds/additional assessments and punitive sanctions. Article 2 of Regulation 2185/96 describes the Commission's control mandate. The Commission may carry out on-the-spot checks and inspections:

1. for the detection of serious or transnational irregularities; or
2. irregularities that may involve economic operators acting in several Member States; or
3. where, for the detection of irregularities, the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community; or at the request of the Member State concerned.

From the description it would seem that the competence criteria have been broadly defined. This concerns not only cases of transnational fraud, but also serious fraud and the Commission can, in exceptional cases, make use of Euro-controls in order to rectify a lack of enforcement in a Member State (the pro-active assimilation principle).

64 OJ 1995, L 312.

65 This could have the advantage that other officials could also be given a mandate concerning these control measures.

66 With the linkage to the administrative sanctions regulation the VAT-limitation mentioned in n. 56 also applies.

Who can exercise this control mandate? Article 6 determines that the control function can be implemented by authorised officials from the European Commission, who for the first time are also referred to as Commission inspectors. Moreover, detached national experts who have been placed at the Commission's disposal are also authorised to attend to such controls. They therefore increasingly function as experts under the direction of Commission officials. The Commission can also, with the approval of the Member State concerned, call upon the services of officials (inspectors) from other Member States.

The Euro-controls are expressis verbis described in Article 7 as first-line controls: applicable to economic operators upon which the measures or the Community administrative sanctions within the capacity of Article 7 of Regulation 2988/95 may be employed, and to third-parties, if these have relevant information at their disposal. This is a broad description due to the fact that the Administrative Sanctions Regulation does not only concern itself with fraud,[67] but also with unintentional irregularities, such as those defined in Article 1(2) of the sanctions regulation.

Moreover, there is a substantial difference as regards financial enforcement control, such as has been discussed in the various sectoral regulations. An important innovation in this regulation is indeed the fact that for the purposes of this horizontal mandate the powers of enforcement are exercised under the authority and the responsibility of the Commission itself (Article 6). For the first time we are therefore confronted with independent powers of enforcement on the part of the Euro-inspectors, which may be compared with those provided at the level of competition in Regulation 17/62.[68] This form of Euro-control therefore goes considerably further than the classic and financial enforcement controls within the sectoral regulations. This does not detract from the fact that the Commission must inform the Member State, in a timely manner, of the subject, the objective and the legal basis of the control. What is precisely meant by 'timely' is indeed for the Commission to determine. In the case of an extreme emergency this may be just before the commencement of the control itself. In any case, the Member States are made aware of the results and of every fact or every suspicion which points to irregularities as far as EC funds are concerned (Article 8.2).

67 See the definition in the Fraud Convention, *supra*.

68 A major difference, however, is that in competition the competences have as their objective the imposition of sanctions by the Commission, which is not the case here because evidence of infringement should lead to the national imposition of sanctions.

This extraordinary form of financial enforcement control is governed by the applicable Community regulations and is supplemented by 'the rules of procedure of the legislation of the member state'. This is how Article 7 regulates the powers of the Euro-inspectors and thereby also the resources for the *gathering of evidence*. As a basic principle the Euro-inspectors have the same powers as the national administrative inspectors (the principle of assimilation), which they may exercise according to the applicable national law. The regulation subsequently determines that the powers of control may concern namely the administration of an enterprise, computer data, merchandise, the taking of samples, etc. Should any attachment or seizure of property before final judgment be resorted to, then this will occur by means of the national authorities upon the request of the Commission. The Member States must also render necessary assistance to the Commission (in terms of policing) whenever an economic operator resists the Euro-control (Article 9).

With these provisions, however, the preliminary phase of the proceedings, namely the problem of the transition from supervision to investigation, is not adequately regulated, and this is also true as regards Article 1 of the regulation which explicitly determines that the competence of the Member States as regards criminal proceedings and the provisions concerning judicial assistance between the Member States in criminal cases must remain unimpeded. Why should this be so? The regulation contains few Community rules relating to this preliminary phase and compels one to resort to a further reading in combination with the relevant national law. The regulation speaks of assimilation with administrative inspectors. According to Dutch law this means administrative supervision, such as that regulated under the General Administrative Law Act or in other particular Acts of Parliament. *In concreto* this results in a competence which is more limited than those contained in Regulation 595/91 relating to financial enforcement supervision within the framework of agricultural fraud. In this latter regulation it is indeed determined in Article 6 how the Euro-inspectors – in the case of further enforcement when the supervision, due to a suspicion that a punishable act has been committed, has turned into an investigation – can still operate in cooperation with the national inspectors. Also as regards access to information the principle of assimilation with the administrative supervisors should be followed. This means that the Euro-inspectors have access to the same information, and this also applies to judicial information, as that available to the national supervisors. To put it succinctly, the horizontal control regulation offers the Commission more limited possibilities for investigation than does Regulation 595/91 in that it excludes certain investigative operations, but it does offer the advantage that the Commission can operate independently and under its own authority. Because of the lack

of Community rules relating to the preliminary phase, supplementation is extremely dependent on national law and as far as a homogenous approach is concerned, this could only occur to the extent that a Community tradition should exist as regards the administrative-investigative relationship, and that is certainly not the case. One could envisage that the UCLAF, in combatting transnational fraud, is rendered, as it were, a prisoner of national procedural rules. Its competences are prescribed on a Community basis, but not the procedural rules which apply to the exercise of these powers. It would indeed be a wise step to elaborate uniform and Community procedural rules within the framework of transnational European enforcement cooperation.

Also of importance is the fact that Article 8(3) of the regulation regulates the use of evidence obtained during the course of the investigation: 'Commission inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned. The material and supporting documents as referred to in Article 7 shall be annexed to the said reports. The reports thus prepared shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports. Where an inspection is carried out jointly, pursuant to the second subparagraph of Article 4, the national inspectors who took part in the operation shall be asked to countersign the report drawn up by the Commission inspectors.' In contrast to the regulation of the national control systems and especially the gathering of evidence and the evidentiary force attached thereto (see supra) Article 8(3) limits itself to the principle of assimilation. Here also there is, to a great extent, dependence on national law in order to determine which powers the Euro-inspectors may exercise and whether their reports may be used as evidence in judicial proceedings and the subsequent evidentiary force to be attached thereto. An answer should be sought in the national administrative law and criminal procedure systems and one is also aware of the fact that these systems greatly differ from Member State to Member State. This legal mosaic or 'hotchpotch' has implications for effectiveness as well as for legal protection.

This regulation goes much further in its definition of mandate, competences and legal consequences than do the sectoral regulations. Nonetheless, many aspects remain unregulated and are left to the procedural rules of the legislation of the Member States (Article 6(1)). The problem here is that the national rules of procedure on the administrative law and criminal law levels

are not yet prepared for Community situations, let alone for the investigative powers of the Euro-inspectors. To summarise, it can be concluded that UCLAF could be considered as a Community enforcement authority with a multi-agency-like construction. In actual fact UCLAF, because of its specialisation (as an anti-fraud unit), is to all intents and purposes a task force.

3.3 Integrated Enforcement in the European Legal Area

3.3.1 UCLAF: An Independent European Enforcement Agency?

The concept of integrated enforcement in the European legal area for many persons calls to mind the association with European enforcement authorities. Federal authorities which have pushed national authorities aside. There are a number of other possible models,[69] but what is certain is that in Europe, with its increasing integration, there exists a growing need for transnational and European enforcement cooperation. An European economic policy with largely European economic material regulations, an internal market, a customs union, etc., independent from the 15 isolated enforcement islands, is unstoppable. It is also certain that for cooperation there must be a minimum in the way of Community enforcement rules to which the systems will, as such, have to adapt in order to be able to cooperate, and that this enforcement will have to be coordinated.

Regarding the protection of the EC's financial interests it would be the most obvious for the European Commission to exercise this function. In this sense UCLAF satisfies a genuine need. The question, however, is whether UCLAF, if it should expand into a fully-fledged enforcement agency, would not become institutionalised – at arm's length from the Commission – as an independent enforcement agency. In the investigation of EC fraud UCLAF is indeed not only confronted with violations by economic operators, but also with corruption and fraud on the part of EC officials. There are currently proceedings being instigated against some 25 Euro-officials, among others in the tourism and tobacco sectors. Moreover, certain flows of subsidies or decisions with financial implications (such as granting direct subsidies or decisions regarding European public tenders) are not decided upon via the Member States. The gathering of evidence by means of an investigation on the part of UCLAF can therefore not only provide sufficient reason for making use of the evidence in various enforcement proceedings in the

69 J.A.E. Vervaele, 'Transnational Cooperation of Enforcement Authorities in the Community Area', in J.A.E. Vervaele *et al* (Eds.), *Compliance and Enforcement of European Community Law*, Kluwer Law International, the Hague-London-Boston (1999).

Member States, but also in proceedings against Commission officials. These may be disciplinary proceedings at the European institution in question or criminal proceedings in the Member States. UCLAF should therefore be able to decide on the proceedings in a particular case (disciplinary and/or criminal) independently, upon its own initiative and under its own responsibility, on the basis of criteria which have been legally laid down. At the moment UCLAF is dependent, as regards both disciplinary and criminal proceedings, on the institution which must also supervise such proceedings, namely the European Commission. The European Commission in the recent past has not taken a very active position as regards disciplinary sanctions and as regards the lifting of immunity in criminal proceedings against its officials in the Member States. Armed with this knowledge it is only logical that UCLAF should be made independent, an argument which has also recently been raised in the Committee on Budgetary Control's Bosch Report,[70] which was accepted by the General Sitting of the European Parliament. Bosch goes a step further by putting forward the position that UCLAF should become an independent European institution with powers of judicial investigation.

3.3.2 Instruments for Transnational and European Enforcement Cooperation

In specific areas Community law provides instruments for cooperation in the field of enforcement. This concerns the forms of regulations for mutual administrative assistance.[71] For the internal market and for the customs union, however, it is of primary importance that a framework regulation should exist for the purposes of mutual administrative assistance between Member States themselves (horizontal) and between Member States and the Commission (vertical) with a view to the enforcement of the customs and agricultural regulations. The basic regulation from 1981 (Regulation 1468/81),[72] after long negotiations, has been replaced by the new Regulation 515/97.[73] This regulation offers far-reaching possibilities for the

70 Report on the Commission's 1996 Annual Report and on its Work Programme for 1997/1998 on the protection of financial interests and the fight against fraud, Committee on Budgetary Control, Rapporteur H. Bosch, PE 222.169/fin.

71 See for example Regulation 218/92, OJ 1992, L 24 in the field of VAT. For third pillar standardisation concerning judicial assistance in criminal cases, whereby the Commission does not have a right of initiative and on whom also no operational role is apportioned and for inter-governmental Schengen cooperation, see J. Monar and R. Morgan (Eds.), *The Third Pillar of the European Union. Cooperation in the Fields of Justice and Home Affairs*, European University Press, Brussels (1994); P.C. Müller-Graf, *Europäische Zusammenarbeit in den Bereichen Justiz und Inneres*, Baden-Baden (1995) and C. Joubert and H. Bevers, *Schengen Investigated*, Kluwer Law International (1996).

72 Regulation 1468/81, OJ 1981, L 144.

73 OJ 1997, L 82. This regulation entered into effect on 13 March 1998.

exchange of enforcement information, for allowing special supervision to take place, for allowing investigation operations to be carried out and for coordinated investigation, etc. The basic principle is assistance between administrative authorities, upon request or voluntarily. In the regulation there is no definition of the concept of administrative authority, neither organic, nor functional. The criterion is the indication which is provided by the Member State. In this regulation, however, the European Commission, and also UCLAF therefore, is defined as an administrative authority (Title III). With regard to the *gathering of evidence and investigation*, various provisions are of importance. Article 1 defines administrative investigation as all operations on the part of the indicated investigative authorities, with the exception of operations which are carried out upon the request or under the direct authority of a judicial authority; a definition which has been adopted from Agricultural Control Regulation 595/91 (see supra). For the time being Article 3 determines that it is not only data which have been obtained in the course of an administrative investigation that are communicated to the requesting authority, but also the essential data obtained during a judicial or investigative inquiry which can necessarily put an end to a particular fraud. If the national law determines that it is obligatory, then the preceding approval of the judicial authority will first have to be acquired. This is obviously an exception to the general principle formulated in Article 51, namely that the regulation should leave unimpeded the application in the Member States of regulations concerning criminal proceedings and mutual judicial assistance in criminal cases, *including the rules concerning the confidentiality of the investigation*. Whenever an administrative investigation is sought in a Member State, for example by the European Commission, by way of mutual administrative assistance, then certain rules are here applicable (Article 9) which also run parallel to the rules provided under Agricultural Control Regulation 595/91, which means that the Euro-inspectors are allowed to be present and operate under the authority of the national enforcement authorities. This formulation allows the European Commission and UCLAF, by way of the instrument of mutual administrative assistance, to implement or jointly to implement transnationally coordinated enforcement investigations. Moreover, it is obligatory for Member States, within the framework of horizontal mutual administrative assistance, to partake in far-reaching reporting obligations to the Commission. Within the framework of economic relations with third countries the Commission has at its disposal the independent competence to carry out an enforcement investigation in third countries (Title IV). These Community enforcement missions are carried out by the Commission itself or by the enforcement authorities of the Member States under the Commission's authority. Finally, the Commission can make use of the Community part of the central data bank, the CIS –

Customs Information System (Articles 24-41), which has as its objective preventing, investigating and combatting infringements of the customs and agriculture legislation.

The regulation does not only limit itself to defining the powers of investigation and therefore the possibilities for the gathering of evidence, but also contains provisions concerning *the use of evidence*. The data obtained (assessments, findings, information, documentation, etc.) from assistance upon request, from voluntary assistance as well as from the Community missions, may be used as evidence by the competent authorities of the Member States (Articles 12, 16, and 21(2)). This opens up possibilities for the transprocedural and transnational use of the evidence obtained. This is also apparent from Article 45(3) which determines that the confidentiality of the exchanged, and in the CIS input, data must not form an obstacle to the use of the data in judicial procedures or proceedings subsequently instigated due to the non-observance of the customs and agricultural regulations. The provisions concerning the use of evidence are formulated relatively vaguely. The provisions speak of '*may*' and there is not a single reference to the force to be attached to such evidence.

To put it briefly, this framework regulation concerning mutual administrative assistance offers very appropriate instruments for the coordination of transnational enforcement investigation and allows the Commission to undertake important Community enforcement missions in third countries.[74] On the other hand, the force to be attached to the evidence obtained is completely left to the national rules of procedure.

Finally, brief mention should be made of the fact that the Treaty of Amsterdam has extended the powers of cooperation at the enforcement level. Article 209A EC Treaty (new Article 280) has been given a new formulation whereby a more Community-based policy can be implemented and this article can also function as an independent legal basis. Furthermore, the position of the Commission in the Third Pillar has been considerably strengthened and the content of the Third Pillar is much more operational than was the case under the Treaty of Maastricht.[75]

74 A great deal of EC fraud is dependent on dealings in third countries (flow of goods, flow of customs, flow of invoices, flow of money).

75 See the contribution by De Zwaan.

4 Epilogue

The very strength of the integration is the teamwork which exists between the Community and national components within the integrated Community legal order. And this is no different as far as the enforcement of Community law is concerned. This means that also in the future a dual-track policy will have to be employed, consisting of Community-regulated competences relating to indirect enforcement by the Member States and to direct operational competences as far as the Community is concerned. As far as the normative track is concerned, what is striking is the fact that interpretation is strongly dependent on the particular field to be regulated and, as a consequence, a strong ad-hoc quality can be discerned. On the other hand, the horizontal framework rules remain vague at the procedural level, or otherwise they refer back to the applicable national law. What should further be investigated is the question of to what extent does the European integration process compel harmonization as far as the procedural enforcement regulations of the Member States are concerned. The necessary steps have already been taken within the framework of mutual recognition of implementation operations in the internal market and customs union, but as far as enforcement operations are concerned, there is still a long way to go. The doctrine of evidence is thereby a very good example. Even in the fields falling within exclusive Community authority, such as fisheries for example, nothing is regulated concerning evidence or the evidential value to be attached to the reports of, for example, fisheries inspectors. Nevertheless, fisheries activities are very mobile and we are therefore pre-eminently confronted with a transnational area of enforcement. A Spanish fisherman can thereby be confronted with criminal proceedings in Ireland in the event of a serious infringement within Irish waters (or indeed the proceedings may be transferred to Spain), as well as Spanish administrative proceedings relating to the issue of his permit. The items of evidence may originate from Irish fisheries inspectors and/or from Community inspection. The lack of Community regulations in this respect can lead to the inspection reports of the enforcement authorities of another country not being accepted as evidence.

Direct enforcement by the Community with the assistance of Euro-inspections is and will remain a supplementary instrument. Nonetheless, the importance of this instrument must not be underestimated because it can fulfil an important role within the framework of extending enforcement networks on a European scale. The recommendations of the European Parliament's Committee of Enquiry concerning Community customs transit also

point in the same direction.[76] In recommendation 17, for example, there is a plea for a mutual recognition of the burden of proof, and in recommendation 20 it is argued that UCLAF should be recognised as a witness in criminal cases and that UCLAF's right to prosecute should also be recognised. It is for these reasons that it is important that the Euro-control system should become independent, with fully-fledged competences and not be limited to considerations of the financial interests of the EC. There are also many arguments in favour of the independent agencies in the field of the environment, pharmaceuticals and food, etc., not being limited to advisory bodies but rather to extend them into regulatory and enforcement agencies. They must also be in a position to be able to extend coordination with the national enforcement agencies.[77]

The basic condition is indeed that it is completely recognised that the Euro-control powers are in actual fact enforcement competences with legal consequences as far as the citizen is concerned. Briefly stated, the Euro-inspectors' enforcement operations should become embedded in a fully-fledged system of legal protection. Considering the fact that enforcement hereby consists of a Community (control) and national component (sanctions), integrated legal protection must be strived for. In this respect I do not mean that this legal protection should operate via Community channels, but that national legal protection should be established as regards procedural elements which have a Community origin and that this legal protection should be on an equal level within the Community area. This, in my opinion, would also have as its consequence the Community standardisation of national procedural rules. In the future we must avoid the situation where the addressees of certain norms are merely pointed back in the direction of the national law as far as this legal protection is concerned, without the national law being able to offer an adequate answer to the problem. In this respect the Italian company 'Nutral' was informed by the judges of the European Court of Justice[78] that a letter from the European Commission to the Italian Government, with an UCLAF inspection report duly appended, which was later used as the sole piece of evidence in a charge which had been laid by an Italian investigative authority, could not be regarded as a decision with legal consequences which directly and individually affected it in the sense of Article 173 EC Treaty. In the Court's opinion, the action by the European Commission was no more than a recommendation or advice without any legal effect. The Commission's letter does not alter the legal position of

76 European Parliament, see *supra*.
77 Vervaele, *op. cit.*
78 Cases T-492/93 and T-492/93r, Jur II-1023 and case C-476/93P, I-4125.

those concerned. It is up to the Member State in question to take the necessary steps and in these proceedings - which may be of a civil law, administrative law and/or criminal law nature - Nutral would then have the opportunity to enter its defence. This judgment was delivered before the Euro-control framework regulation (see supra) had entered into effect and it is certainly a pertinent question whether it could still be maintained that UCLAF's operations have no legal consequences for those concerned. It can obviously be contended that a control operation is not as such a decision which can be the subject of appeal, considering the fact that national control operations are also not so. It is indeed a stipulation that the judicial authorities should monitor the quality and the legitimacy of the preliminary investigation and that the actions of the Euro-inspectors and their evidence should withstand the test of proper criminal law proceedings as this is a point of discussion within the framework of criminal law proceedings. It is for these reasons that, in my opinion, it was a good decision on the part of the Commission, within the framework of criminal proceedings, to oblige its Euro-inspectors to be heard as witnesses and inspection reports to be submitted as evidence *a charge* or *a decharge*.[79] Effective legal protection as regards the actions of the Euro-inspectors is the most desirable because of the fact that they lack any authoritative relationship with some magistrative authorities (the Department of Public Prosecutions, the investigating magistrate), but they nevertheless interfere in the criminal investigation.[80]

The Community regulation of the rights and obligations of the Euro-inspectors does not exclude national regulation, in fact it is quite the reverse. Many aspects will and indeed should be left to national procedural autonomy. This is not different as far as the Euro-control powers regarding competition are concerned.[81] In the first place competences should be created for national enforcement agencies, which should then provide assistance, deploy the national police, employ measures of pre-judgment attachment/seizure in order to protect evidence, conduct search operations, etc. Furthermore, the Euro-inspectors, as regards rights and obligations, should be equated with national inspecting officials. I am here thinking of making punishable the refusal to cooperate, punishing assault and wilful injury, etc. On the other hand, the Euro-inspectors themselves could also commit punishable acts, such as violations of professional secrecy or acts of active or passive

79 ECJ, 13 July 1990, *Zwartveld*, case C-2/88, Jur I-3365 and ECJ, 6 December 1990, *Zwartveld*, case C-2/88, Jur I-4405.

80 The Corpus Juris could here offer a solution via the institution of the European Public Ministry.

81 See the Dutch Act on the Implementation of EC Competition Regulations, Stb. 1997, 129.

corruption. There are many who advocate this in order that all these aspects could be regulated in one national implementing act, so that a consistent entirety would exist whereby effectiveness and legal protection could be interweaved with each other. It is only in this way that we could be in a position to be able to intertwine the Community powers of investigation as regards the enforcement of Community law with our enforcement systems and thereby also to be able to provide substance to the principles of subsidiarity and shared government.