LAW ENFORCEMENT IN COMMUNITY LAW WITHIN THE FIRST AND THIRD PILLAR: DO THEY STAND ALONE?*

by
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1. INTRODUCTION: MEMBER STATES' DUTY OF ENFORCEMENT

The duty to enforce Community law lies primarily with the Member States. The fact that Euro inspectorates exist in policy sectors such as agriculture[1] and fisheries,[2] and that the European Community fraud coordination agency (UCLAF)[3] plays an ever more active role in supervising observance leaves this basic principle intact. As far as the EC budget is concerned it is true that almost all revenues are obtained and 80% of all expenses paid out via the national administrations. These are per force the Member States' bodies which have to implement Community policy and in doing so have to enforce Community law as best they can and, if needs be, sanction any infringements.

This community enforcement duty which applies unconditionally to both the legislative, executive and judicial powers of all Member States, has, as far as interpretation is concerned, not been left entirely to their discretion. The Community imposes instrumental requirements. Thus, e.g., the bodies involved in executing this community duty should give regard to the legal principles deduced by the European Court of Justice (ECJ) from the community loyalty and enforcement rules included in Article 5 EC Treaty. The Court of Justice has obliged the Member States to provide procedures and sanctions which are effective, proportional and dissuasive. Furthermore, they have to sanction infringements of community law provisions

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[1] Regulation 2048/89, OJ 1989, L 202 for wine growing; regulation 2262/84 for olive oil, OJ 1984, L 208 and regulations 2075/92, OJ 1992, L 215 and 85/93, OJ 1993, L 12 for tabacco growing.

[2] See regulation 2847/93, OJ 1993, L 26.

[3] The competences of the UCLAF have not been regulated explicitly in a community regulation. In case of operational action Euro officers may rely on specific provisions in the regulations or framework stipulations, such as Article 12 agriculture monitoring regulation 3508/92, OJ 1992, L 355 or (in future) on Article 18 of the amendment to regulation 1552/89 concerning the EC's own resources (COM (94) 458 def., OJ 1994, C 382).

M. Koskenniemi (ed.), The Finnish Yearbook of International Law, 353-368.

analogous to the sanctioning of comparable infringements of national law (*principle of assimilation*).[4] This requirement has to be met not only in legislation but also in practical enforcement. The Community, furthermore, has the competence to develop, via legislation, community rules on national enforcement (*supervision and sanctioning*).[5] This has recently been confirmed as regards administrative enforcement rules.[6] These rules have to be applied by the Member States. Besides instrumental requirements, the Member States must also apply the community law principles concerning legal protection when enforcing community law.

In other words, the Member States' duty of enforcement has been given a goal-oriented interpretation by community law and has thus become community conditioned. It is per force up to the Member State to structure its enforcement system within the margins of community rules and obligations, and to make its choice from national enforcement regulations and instruments for application in community policy enforcement. In principle, the entire gamut of possibilities is at its disposal (ranging from self regulation to prison sentences). However, under certain circumstances community obligations will oblige Member States to apply punitive sanctions of an administrative or even criminal nature, or to impose prison sentences. Thus, e.g., some regulations oblige Member States to use public law means of enforcement.[7] If certain forms of national fiscal fraud or subsidy fraud are sanctioned under criminal law, then pursuant to the assimilation principle comparable EC fraud will have to be penalized likewise.

2. AUTONOMOUS CRIMINAL LAW ENFORCEMENT?

Nevertheless, in proceedings before the ECJ Member States often turn to national criminal law to find arguments for not implementing certain community obligations. The main argument is usually that the Community lacks the competence to intervene in national criminal autonomy. And yet, it is standard case law that the principle of Community law primacy itself resists a Member State's appeal to national regulations, even criminal legislation, to refuse fulfilling its obligations. After all, the efficacy of

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[4] See especially case 68/88, *European Commission v. Greece,* ECR 1989 (2965) and the announcement of the Commission in reply to this case, OJ 1990, C 147/3. For comments see J.A.E. Vervaele, *Fraud Against the Community* (Kluwer, Deventer 1993).

[5] See 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) pp. 161-202.

[6] Case C 240/90, ECR 1992 (I-5383).

[7] Article 31, para. 1, Regulation 2847/93, OJ 1993, L 26 obliges Member States to 'initiate administrative or criminal law proceedings' in case of fisheries offences.

community law should not vary according to the sector of national law which it affects.[8] In other words, criminal (procedural) law is within the Member States' competence, but community law may impose certain criteria as regards execution and interpretation of that competence within the framework of community law enforcement. Not only should national criminal law be disregarded in case the enforceable standards are in conflict with community law (negative integration), but community also imposes some undeniable demands on the national criminal enforcement regulations which - according to the Member State's own choice - also serve to guarantee the observance of community law, and the legal principles developed by the ECJ on the basis of Article 5 EC Treaty apply unconditionally (*positive integration*). As yet there is, as far as the EC Treaty is concerned,[9] no current community legislation in force which prescribes the application of criminal sanctions. There are some prescriptions regarding the standards to be applied (*norma agendi/prohibendi*), or stipulating the criteria to be met by sanctions. It is as yet uncertain whether the Community has the competence to force Member States to treat infringements of community regulations as a criminal offence, or to prescribe criteria concerning the nature and severity of the sanction, the effect *rationae materiae, rationi loci,* procedural aspects, application modalities (time limits, dismissal, etc.) or international cooperation in criminal matters. Harmonization of parts of national criminal (procedural) legislation within the EC pursuant to Article 100a in conjunction with Article 235 EC Treaty, therefore, remains a contended issue. In the *ad hoc* working group Community law-Criminal law, part of European Political Cooperation,[10] it turned out that some delegations did not consider it impossible for a community regulation to compel Member States to impose only penal sanctions. However, this would be on the condition that the specific criminal offence comes under community law and that harmonization would not take as far as to infringe the principles of criminal and criminal procedural law which are considered very important by - some of - the Member States. In order to be safe, the Dutch ministerial opinion already included a few examples of such principles: criminal liability of legal persons, minimum sentences, principle of opportunity, *et cetera*.[11] This harmonization issue is very important these days, especially as regards the enforcement of community customs legislation,[12] of which the obligations and prohibitions concerning import and

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[8] Case 82/71, Italian *Public Prosecutions Office v. Sail,* ECR 1971 (0119).

[9] Thus, e.g., Article 27 of the ECJ Statute, which is part of primary EC Law, prescribes the application of national criminal law.

[10] This working group has now been integrated into the direction group judicial cooperation within the third pillar. For the report of the ad hoc group see J.A.E Vervaele, *Fraud against the Community* (Deventer 1992) p. 313.

[11] Reports of the Dutch House of Commons 1991-1992, 22 300 VI, 39, p. 12.

[12] Regulation 2913/92, OJ 1992, L 302.

export only involve the external borders of the Community and which are therefore the same for all Member States, and the fight against EC Fraud. The advice of the *ad hoc* group, which was not unanimous, gave ample room to the Ministers of Justice to charge the Commission to further investigate the need for 'increased compatibility' between the administrative and criminal enforcement provisions of the various Member States.[13] The word harmonization is carefully avoided. The ECJ has not yet given any explicit opinion as regards this tricky issue of principle either. Only AG Jacobs has given a clear statement on the matter: 'Certainly, then, Community law in its present state does not confer on the Commission (or on the Court of First Instance or the Court of Justice) the function of a criminal tribunal. It should be noted, however, that would not in itself preclude the Community from exercising, for example, powers to harmonize the criminal laws of the Member States, if that were necessary to attain one of the objectives of the Community.'[14]

3. LAW ENFORCEMENT AND MUTUAL COOPERATION

What is more, the community duty of enforcement does not stop at the national borders. The internal market and the free movement of goods, persons, services and capital entail that many infringements of community law are transboundary. On the basis of Article S EC Treaty the ECJ has provided for a community obligation for Member States to cooperate mutually (*horizontally*) and with the Community (*vertically*).[15] This cooperation concerns both execution[16] and enforcement of community law. Not only the components of the national *trias politica* are bound by this, but also the community bodies,[17] all within their own competences. This duty of cooperation in principle covers all forms of cooperation including criminal judicial cooperation. The same reasoning applies to both judicial assistance in criminal matters and national criminal law. It is in essence the competence of the Member States, but if the Member States choose this means of enforcement, community law will have its effect and the community legislator may then also impose requirements and, if necessary, develop

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[13] Resolution of 13 November 1991, OJ 1991, C328.

[14] Conclusion AG Jacobs in case C 240/90, ECR 1992 (1-5383), consideration 12.

[15] See J. Temple Lang, "Community Constitutional Law: Article 5 EEC Treaty", *Common Market Law Review* (1990) p. 645; O. Due, "Artikel 5 van het EEG-Verdrag. Een bepaling met een federaal karakter?", *SEW* (1992) p. 255; M. Lück, *Die Gemeinschaftstreue als allgemeines Rechtsprinzip im Recht der Europäischen Gemeinschaft* (Baden-Baden 1991) and M. Blanquet. *L'article 5 du Traité CEE. Recherche sur les obligations de fidélité des Etats membres de la Communauté* (Paris 1994).

[16] The ECJ has confirmed several times that Member States' administrations are obliged to cooperate in order to realize the internal market and to operate mutual recognition.

[17] Zwartveld case, C 2/88 Imm., ECR 1990 (I-3665).

some initiatives.[18] Whether this right of initiative goes as far as to allow the community to force Member States to develop a closed system of judicial assistance in criminal matters in order to enforce community law within the community area, remains to be seen. What is important, though, is that owing to the Union Treaty a new Article 209a has been included in the EC Treaty which explicitly obliges Member States to cooperate and to act in coordination, as well as impose a duty of cooperation for the competent administrative bodies mutually (*horizontal*) and with the Commission individually (*vertical*). The scope of the article is limited to protecting the EC's financial interests, but those aware of the diversifications of EC revenues and expenses know that a large part of EC legislation has financial aspects. The question is whether Article 209a in conjunction with Article 100a EC law provides a sufficient legal basis in future for harmonization of international enforcement provisions of the Member States and per force for an integrated enforcement approach within the communal space. The answer to this question, however, has been taken over by the speedy political developments in the European enforcement field: Schengen, Third Pillar and Europol.

4. THIRD PILLAR OF UNION TREATY

Most people will by now be duly familiar with various aspects of the Schengen Execution Agreement which came into force in the Spring of 1990. To achieve freedom of movement within the internal market towards the end of 1992, as stipulated by the present Article 7a of the EC Treaty, has required extensive police and judicial cooperation and harmonization in a number of areas. Due to the differences in opinion between the Member States and the Commission on the manner of realization of this free movement of people and especially the related supervisory mechanisms, the entire internal market concept threatened to go up in smoke. For that reason the European Council has installed the Coordination Group Free Movement of People and charged it with the coordination of all intergovernmental and community actions. These actions have resulted a working plan (Document of Palma) which may be considered a blueprint for cooperation in fields of Justice and Internal Affairs (JIA). The countries that took the initiative for Schengen, closely followed by other countries,[19] have, however, clearly indicated that they prefer to regulate this enforcement cooperation outside the community structure in an intergovernmental agreement. In view of the political reality, the European Commission has resigned itself to this development, a

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[18] See the comments of C.W.A Timmermans to case 1/78 IAEA, ECR 1978 (2151) in La sanction des infractions au droit communautaire, in *FIDE II, La sanction des infractions au droit communautaire* (Lisbon 1992) p. 54; see also case C 9/89, *Spain v. Commission*, ECR 1990 (1-1405).

[19] Only the UK seems to be adverse as regards both community and intergovernmental cooperation.

decision against which the European Parliament has initiated legal proceedings before the ECJ.[20]

The same motives applied when the three pillar structure of the Union Treaty, which came into force in November 1993, was further elaborated. In the Third Pillar (title VI), a new institutional cooperation framework has been designed within the Union structure as regards Justice and Internal Affairs (JIA). This pillar is separate from the first pillar and has an overridingly intergovernmental interpretation. The Member States consider a number of issues such as asylum and migration policies, combatting drug addiction and international fraud, judicial and police cooperation matters of common interest (Article K.1). Even though the European commission is fully involved in the activities of this Third Pillar, it has been explicitly refused the right of initiative in a number of matters including judicial cooperation in criminal matters, and customs and police cooperation (Article 3, para. 2). This means concretely that the Commission cannot take any initiatives to put on the agenda of the Council any proposals of decisions in these matters in the form of joint positions, cooperation, joint action or conventions. It therefore seems that integration and harmonization in these essential community law enforcement areas are exclusively at the Member States' discretion.

Yet, Article K.1 explicitly stipulates that the aim of the Third Pillar is to achieve the goals of the Union, therefore also those of the first pillar and especially the free movement of people. Nevertheless, the areas mentioned where the Commission has no right of initiative remain explicitly excluded from possible communitarization via the passarelle formula (Article K.9). It is important, though, that Articles K.1 and M explicitly maintain the *acquis communautaare* ('without prejudice to the powers of the EC'), and Article B of the Common Provisions for the three pillars (title I) stipulates that the aims of the Union include: the full enforcement and further development of the *acquis communautaire.* This institutional entwining opens up possibilities for the Court of Justice in its capacity of guardian of the *acquis communautaire* to review the acceptability of Third Pillar decisions, even if its competence is not explicitly provided for.[21]

The major advantage of the Third Pillar is without doubt that all old intergovernmental cooperation forms (TREVI, CELAD, the European Committee for combatting drugs, the mutual assistance group GAM, the judicial cooperation group, etc.) have been integrated in one structure.[22] Secondly, the Third Pillar entails for

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[20] Case C 445/93, *European Parliament v. European Commission*, pending.

[21] See A. Lo Monaco, "Les instruments juridiques de coopération dans les domaines de Justice et des Affairs intérieures", *Revue de Science Criminelle* (1995) p. 21.

[22] See J.J.E Schutte, "Europese samenwerking inzake justitie en veiligheid", themanummer *Panopticon, Europees strafrecht in intergouvernementeel en communautair perspectief* (1992) p. 533. Article K.7, however, allows for the possibility that two or more Member States cooperate more closely. This also legitimizes the Schengen agreements. However, all this

both Member States and Community the obligation to cooperate in a number of areas. Thus, options are provided to enhance the internal efficiency of intergovernmental cooperation within the European area and to increase the coordination with (the enforcement of) community policy. The European Union needs an integrated approach in which context Third Pillar matters may be complementary to community policy. Advanced police cooperation in the shape of Europol or cooperation between the public prosecutors or the judiciary of the Member States are just a few examples.

And yet there are signs that the complementary concept is of no real interest to the Member States. There is rather a tendency to consider the matters of common interest as defined in Article K.1 as being exclusively Third Pillar and then to interpret them as extensively as possible. The legislative developments in matters concerning EC fraud and criminal law are some good examples thereof. There is a clear intention to integrate criminal law in European cooperation which is, however, at the same time clearly linked to an equally explicit wish to exclude the Community from it.[23]

5. COMBATTING EC FRAUD IN THE UNION

Since the sixties the European Commission has been busy securing adequate protection of the Community's financial interests within the legal orders of the Member States. The Euro-crimes draft Treaty of 1974,[24] intended as a protocol to be attached to the EC Treaties, already provided for the combatting of EC fraud as well as a community territory principle. The necessary political consensus to approve this draft Treaty has never been achieved within COREPER. It took until the late eighties before, owing to increasing criticism concerning EC fraud, new energy was put into possible solutions. A proposal for a framework regulation on community monitoring competence and community administrative sanction prescriptions, as well as a proposal concerning the legal principles involved with penal administrative sanctions,[25] were withdrawn by the Commission in 1994 and replaced by two new proposals.[26] The Commission

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subject to the condition that there is no conflict with the third pillar. The Schengen agreement of 1990 too already provides (Art. 134) that the Schengen stipulations apply only in as far as there is no conflict with community law.

[23] See also L. Salazar, "Le Conseil des ministres de Justice face aux nouveaux défis de Maastricht", *AGON, Bulletin trimestriel des Associations des juristes européens pour la protection des intérêts financiers des Communautés européennes* (1995) pp. 3-4.

[24] OJ 1976, C 222.

[25] See 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) pp. 161-202.

[26] COM (94) 214 def., OJ 1994, C 216.

working group responsible based its work on the results of comparative law studies on administrative and criminal enforcement of community law within Member States, on recent case law of the ECJ and on new provisions in the Union Treaty. Both proposals aim at protecting the Community's financial interests and may be qualified as framework proposals for a broad, horizontal approach of matters with implications for the revenues and expenses of the Community (own resources, VAT, agriculture subsidies, structural funds subsidies, etc.). Both proposals contain identical definitions of EC fraud, which means any act or omission contrary to the applicable law, committed either intentionally or through gross negligence in respect of a duty of care which has as its object or effect a diminuation of the Community's own resources or other revenues, or the misappropriation, wrongful retention or misapplication of monies paid by the Community.

Despite the identical goals and the uniform areas of application the proposals draw attention primarily by their differing institutional structures. After all, proposal 1 is a proposal for regulation within the framework of the First Community Pillar of the Union Treaty. Although the proposal bears the noncommittal title 'Concerning the protection of the financial interests of the Communities', it comprises a framework regulation for administrative sanctioning. The proposal distinguishes three categories of infringements of the EC's financial interests. Whoever infringes the EC's finances without intention or gross negligence (objective infringement, strict liability variety) commits an irregularity for which the following measures may be imposed: withdrawal or reclamation of incorrectly paid contributions, possibly increased with interest, the loss of illegally obtained profits and the entire or partial loss of a security or deposit. These are in fact sanctions which consist of the withdrawal of a beneficial decision and may therefore be considered reparatory sanctions. However, these measures are explicitly excluded from the concept of sanction in the draft regulation. In case of wilful action or gross neglect (subjective infringement, *mens rea* variety) the offender commits fraud which should, in case specific community legislation so provides, also be sanctioned by means of an administrative sanction imposed by the Member States or the Commission, over and above the measures for irregularities. Such sanctions may include administrative fines; total or partial removal of an advantage, even if only part of it was illegal; exclusion from subsidies for a subsequent period of time and nullification or definite withdrawal of the recognition needed to qualify for subsidy funds. The proposal also provides for the possibility, should the need arise, to include administrative sanctions for irregularities in specific community legislation (strict liability). Thirdly, the proposal provides the *fraus legis* concept which results in the loss of all rights or profits. The proposal furthermore contains a framework regulation concerning the competences of Euro-inspectorates.

What is striking is that the proposal for regulation is not based on Article 100a in conjunction with 209a but on Article 235 with the explicit consideration in the Explanatory Memorandum that: 'The Commission considers the legal basis for the Community law instrument to be Articles 235 EC and 203 Euratom. The objective is

to establish horizontal Community rules that do not merely provide for Community penalties (a specific sectoral instrument would have sufficed for that purpose) but would apply across the board to the general management of the Community's finances; the default legal bases available in the two Treaties must accordingly be used (...). Article 209a EC writes a specific provision for the Member States' obligation to treat fraud against the Community budget in the same way as fraud against their own, but contains no enabling provisions for subordinate legislation.' I should think this interpretation juridically debatable and also a missed opportunity to structure enforcement harmonization on the legal basis of Article 100a in conjunction with Article 209a. Rather, in case of administrative sanctions it is now assumed beforehand that the Treaty does not attribute competence and that therefore the emergency solution of Article 235 has to be invoked. In a matter so singularly communitarian as the Community's finances. And yet, the ECJ did recognize this competence, even outside the scope of the common agricultural policy.[27] The Article 235-option for administrative sanctions entails an almost automatic buy-out of criminal sanction prescriptions. It will therefore come as no surprise that the second proposal concerns a treaty within the framework of the Third Pillar of the Union, aiming to oblige Member States to include EC fraud[28] as a specific criminal offence in their criminal legislation. Attempt at fraud would also have to be criminalized and both natural and legal persons would be criminally liable. The criminal sanctions would consist of custodial sentences or pecuniary fines or both and a number of aggravating circumstances will be defined. Besides some provisions on criminal jurisdiction, the proposal also contains a set of stipulations on judicial cooperation in criminal matters.[29] Finally, the ECJ is attributed competence, either following a request by a Member State or the Commission or according to the prejudicial 177-option.

These two proposals are the results of difficult legal and political consultations within the Commission, during which the directorates general, the legal service and the

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[27] 28. Case C-240/90, Germany v. Commission, ECR 1992 (1-5383); F. Schockweiler, *La répression des infractions au droit communautaire dans la jurisprudence de la Cour*, Luxembourg June 1995, not yet reported, 6-7: 'Depuis cet arrêt, il est ainsi établi à l'exclusion de tout doute que la Communauté dispose d'un pouvoir normatif propre lui permettant d'édicter des sanctions (...). Ce pouvoir devrait ainsi appartenir à la Communauté dans tous les cas où elle a compétence, a quelque titre que ce soit, pour imposer une réglementation uniforme dont l'effectivité et l'efficacité exigent que la méconaissance de la réglementation soit assortie de sanctions ayant un effet égal dans tous les Etats membres.'

[28] This proposal is limited to fraud with intention or gross negligence. The concepts of 'irregularities' and *'fraus legis'* are left out.

[29] These stipulations concerning mutual judicial cooperation have been added as an indication, because the third pillar right of initiative of the Commission does not cover judicial cooperation in criminal matters.

secretariat general seldom agreed. The statement to the press of the secretary general[30] was not exactly welcomed by all directorates general. It stated that '[t]he community has no power to legislate in criminal law matters, which are reserved for the Member States. Consequently it is not possible for Community law to harmonize the penalties applicable in the event of criminal fraud.'[31] That this statement was not welcome is understandable because it constituted, if not a U-turn, at least a deviation of some hundred degrees. Since the Euro-crimes draft treaty, the Commission has, after all, tried to integrate criminal law protection of the EC's financial interests in the legal order of the Community.

In other words, these proposals radically divide the protection of the community's financial interests and, consequently, also the legal enforcement of community law, between the First Pillar (administrative enforcement) and the Third Pillar (criminal enforcement).[32] This new development is surprising and may have some far-reaching consequences as regards intensification of European integration, for as we know only too well, enforcement of community legislation is the final act in European integration.[33] Why surprising? During the preparations of the Justice Council of November 1991, the officials representing the various Member States agreed in the *ad hoc* working group that 'the intensity and quality of economic and political integration in the Community is also determined by observance of community law in the Member States and the provisions made for law enforcement (monitoring, investigation and the application of sanctions) in the event of violation of community law'.[34] Secondly, the legal aspect of the Third Pillar in no way obliges the Commission to take an exclusive Third Pillar approach as regards criminal enforcement of community law. Article K.1 makes no mention of criminal law or EC fraud. It only speaks of international fraud and judicial cooperation in criminal matters. Furthermore, these matters of common interest are not to be interpreted as claims to authority (in contrast to the EC competences), let alone exclusive claims to authority. In case of international combatting of fraud, customs cooperation and judicial cooperation in criminal matters, therefore, the consideration is which aspects should be regulated within the framework of the community First Pillar and which in that of the intergovernmental Third Pillar. The fact that this analysis has not been made, or followed up, in case of the protection

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[30] IP/94/531.

[31] F. de Angelis, directorate-general financial control, inaugural speech, *Revue de science Criminelle* (1995) p. 6.

[32] This development is, both from an instrumental and a guarantee perspective, basically at odds with moulding public enforcement law. See Vervaele, J.A.E., *Handen en tanden van het (gemeenschaps)recht* (Deventer 1994).

[33] That became only too obvious with the Italian milk quota case and the super levies.

[34] See Vervaele, J.A.E, op. cit.

of the EC's financial interests, a matter which lies, after all, close to the heart of the Community, is worrying. The Commission thus runs the risk of forfeiting its right of initiative and furthermore fails to act upon Article 155, which states that the Commission is responsible for both execution of community policies and policing compliance.

6. EC FRAUD PROPOSALS BEFORE THE EUROPEAN PARLIAMENT

The European Parliament, which because of its budget authority pays a lot of attention to EC finances, is also worried by this situation. As late as 11 March 1994 the European Parliament requested the Commission, pursuant to Article 138b (2) EC Treaty, to draw up a regulation on the operational competences of UCLAF; a directive on harmonization of criminal law protection of the Union's Financial interests; a regulation on the administrative sanctions of community law and a legislative decision concerning the financial and disciplinary responsibility of civil servants involved in executing the budget.

The two proposals of the Commission did not meet this request at all and it was therefore to be expected that the EP would be extremely critical. Pursuant to Article 235 EC Treaty and Article K.6 of the Union Treaty the EP was asked for advice on both proposals. The Committee on Budgetary Control studied the proposed regulation;[35] the Committee on civil liberties and internal affairs advised on the Treaty and on an English proposal for a joint action.[36]

As far as the regulation on administrative sanction prescriptions was concerned, the Committee on Budgetary Control mostly disagreed with the legal basis. Article 235 is discarded decisively on legal and political grounds. This should be replaced by Articles 43, 100a and 209a, which would, incidentally, attribute the right of co-decision-making to the EP. The proposal is furthermore amended in order to provide the UCLAF with real operational competences, to regulate the evidential value of its control findings and to provide a legal basis for the cooperation of UCLAF and the judicial services. Concerning the proposal for a treaty on criminal law protection of the Financial interests of the EC, the Committee on civil liberties and internal affairs is of the opinion that the Community has the authority to protect its financial interests itself and furthermore has the obligation, pursuant to Article 155, to execute community policy and to supervise its observance. Administrative and criminal enforcement cannot be separated absolutely and should therefore be regulated within one and the same institutional setting, being the community one. The proposed treaty is for that reason

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[35] Report of the committee on budget control, rapporteur D. Theato, A4-0040/95, 3 March 1995.

[36] Report of the Committee civil liberties and internal affairs, rapporteur R. Bontempi, A4-0039/95, 3 March 1995. The English proposal, not for a convention but for community action, was made in the ad hoc group community law/criminal law and aimed at providing effective criminal law protection for the financial interests of the EC.

considered a 'renationalisation of community policy'. The European Commission is per force requested to withdraw the proposal for treaty and to draw up a directive instead. Suiting the action to the word a draft directive ad *informandum* was accepted, legally based on Article 100a in conjunction with Article 209a. This directive specifically demands the criminalization of EC fraud and in a way which meets the quality demands set by the ECJ. The Member States are furthermore requested to set out further rules concerning EC fraud in relation to laundering, liability of legal persons and managers, attempt, cumulation of administrative and criminal sanctions, demarkation of policy discretion concerning settlement and dismissal, judicial cooperation in criminal matters *et cetera*. This directive leaves intact the necessity of a Treaty on international fraud combatting complementary to EC combatting of fraud. As the Commission failed to meet the EP's request for action, both rapporteurs threatened to initiate proceedings before the ECJ because of failure to act (Art. 175 EC Treaty).

7. DECISIONS ON THE EC FRAUD PROPOSALS

The opinions of both rapporteurs are agreed on by most members of the European Parliament on 15 March 1995. Commissioner Gradin nevertheless ignores the EP's advice, because there is no political will within the Council to choose that option. In June 1995, the proposed regulation and convention were discussed by the ECOFIN Council and the JIA Council respectively. This institutional division in the preliminary stages is most unfortunate, both in view of the relatedness of the two issues and in view of the fact that the JIA Council is also authorized to issue community legislation in the First Pillar fields concerning justice or internal affairs (Art. K.8). Yet, the Commission's choice to involve the ECOFIN Council is quite understandable in view of the pro-active Third Pillar stance taken by most Ministers of Justice and Internal Affairs, who limit their competence *ad excluedendum* to Third Pillar cooperation. The fundamental discussions of both proposals in the working groups were difficult owing to disagreement on numerous aspects. Both texts were adopted by the Councils of Ministers.[37] They were even on the agenda of the European Summit in Cannes. The positive remarks in the conclusions of the presidency,[38] however, give no inkling of the fact that both proposals were heavily amended by the working groups and Councils of Ministers and at the Government Leaders Summit itself. The Member States have tried to limit the influence of both regulation and convention as much as possible.

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[37] Regulation 2988/95 on the protection of the European Communities financial interests, OJ, 1995 L 312/1; Council Act of 26 july 1995 drawing up the Convention on the protection of the European Communities' financial interests, 95/C 316/03, OJ 1995, C 316/48.

[38] The European Council is pleased that the discussions on the regulation and the Agreement concerning the protection of the financial interests of the Community have been concluded. It has established that there is agreement on the text of the Agreement which is to be signed before 31 July next.

I will limit myself to cover only the major aspects. The similar definitions of fraud in the regulation and the agreement were lost on the way. The regulation now only speaks of irregularities, which will be settled by means of measures (non-punitive sanctions)[39] and irregularities, involving intention or gross negligence, which will be settled by means of punitive administrative sanctions. The strict liability clause has disappeared. In the convention, only the concept of fraud is used. What is striking is that now the *mens rea* of this issue is interpreted more strictly; it is limited to intentional acts or omissions. Gross negligence and non-observance of care duties have thus disappeared. This does not remove all overlap, for certain actions may now come either under the concept of intentional irregularity or that of fraud, introducing the risk of double jeopardy and sanctions. Neither text as yet contains a *ne bis in idem* or anti-cumulation clause, but in Article 6 of the regulation, a new text has been included which regulates concurrence of both procedures, at least in case of concurrence of punitive sanctions. In short: if administrative sanction proceedings have been initiated against a person and if subsequently criminal proceedings are initiated on the basis of the same facts, the competent authorities *may* suspend imposing punitive administrative sanctions until the criminal proceedings are concluded (dismissal, settlement, no prosecution, conviction). Afterwards the administrative proceedings shall be resumed unless that is precluded by general legal principles. In case of resumption the administrative sanction should at least be equivalent to that prescribed by community rules. The administrative authority may take into account any penalty imposed by the judicial authority on the same person in respect of the same facts. This regulation therefore is a combination of 'le pénal tient l'administratif en état' and the 'Anrechnungsprinzip' (the first sanction has to be offset by the second sanctioning authority). It is admirable that the Community legislator should take account of the legal protection of the accused, however, it does give rise to the question, whether this does not completely undermine the efficacy of community law, as, e.g., in case of the administrative sanctions in community agricultural law. In some countries criminal proceedings take very long and the resumption of administrative proceedings depends on national law. It is furthermore unclear what general principles of law (and of what national, community or international origin) may obstruct resumption. The Commission was of the opinion that community administrative sanction rules, being part of a directly applicable regulation, should take precedence over criminal convention obligations, but this point of view obviously did not make it. The framework regulation for euro-controls also largely disappeared and, in conflict with existing sectoral regulations, prior notification of the Member State is required.

Even less has remained of the original contents of the convention. Third Pillar cooperation is not necessarily faster than its community counterpart. As is indicated in the preamble, the intention is to further elaborate on this convention by adding a second convention text during the Spanish and Italian presidencies (1995-1996). The

[39] These measures also remain possible in case of *fraus legis*.

obligation to specifically make EC fraud punishable as a criminal offence has been replaced by a rather complex set of prescriptions. Article 1 concerns acts or omissions; Article 2 is about criminal sanctions. In short: intentional fraud with EC money, either by acts or omissions, for an amount larger than 4,000 ecus should be criminalized. A specific qualification as a criminal offence is no longer required; general criminal offences such as deception, forgery *et cetera,* may be used instead. In case the intentional preparation or supply of false, incorrect or incomplete statements or documents is not covered by the above offences in any of the Member States, it should be made punishable as a criminal offence either in the form of participation in or instigation or attempt to commit fraud. Also in general, participation in or instigation or attempt to conduct fraud must be punishable. The criminal sanctions to these offences should be effective, proportionate and dissuasive. As regards serious fraud, the rule is that penalties involving deprivation of freedom, which can give rise to extradition, must be imposed under sentences which allow for transferral. Exactly what constitutes serious fraud is left to the Member States' discretion, but the threshold should be no higher than 50,000 ecus. Furthermore, criminal liability for legal persons has been deleted; only factual managers are left. As far as criminal jurisdiction is concerned, community territory or rules of precedence no longer apply. There is only a duty for the Member States to try and cooperate in order to concentrate, if possible, all proceedings in one Member State. The extradition duty has also disappeared. The text now only contains a few provisions on *'aut dedere aut iudicare'* and the fiscal exception to extradition in case of EC fraud is deleted. Double criminality, however, does remain a requirement. The clauses on judicial cooperation in criminal matters have also been stripped bare. What is new is the criminal *ne bis in idem* provision, though it comes with a few exceptions. And finally, the government leaders in Cannes have completely gutted the ECJ's authority. The 177 procedure (prejudicial questions) has disappeared. Disputes about interpretation or application of texts must primarily be investigated and dealt with under the K-Pillar of the Council. Only after six months, if there is no solution imminent, the ECJ is attributed competence but only in matters pertaining to Articles 1 (definition of fraud) and 10 (notification of the Commission about implementation measures). This competence is very minimal and entirely incomprehensible. After all, the criminal definition of fraud (punishable conduct and criminal sanctions) is already divided over Articles 1 and 2.

In my opinion the result is most disappointing. The regulation is a framework regulation, which is actually one step back from where we were as regards existing sectoral regulations and the ECJ's case law. The proposed convention has by now been stripped so far there is nothing substantial left. It is highly debatable whether the political mandate as formulated at the European Summit in Essen has been carried out.

8. CONCLUSIONS

The legislative developments in the field of EC fraud clearly indicate that the

Member States do not apply the Third Pillar structure as a necessary complementary for the enforcement of community law. The issue of EC fraud is a community matter *par excellence*. A matter, however, in which aspects of customs, police and criminal cooperation play important roles. It is a functional issue for which both the community and the Third Pillar should work out an integrated plan of action. Besides community combatting of fraud by DGs and UCLAF and the use of community instruments (monitoring regulations, community part of Customs Information System, VIES, IRENE), it should be investigated whether and how Europol, Schengen, judicial cooperation *et cetera* may play a role in an integrated approach to combatting EC fraud. Instead of combining the community and intergovernmental components into a complementary enforcement system, an endless fight over competency has ensued which has not as yet yielded any tangible results. Small wonder the European Commission, the European Parliament and a number of Member States, with a view also to the Intergovernmental Conference in 1996, should plead for further integration of the First and Third Pillars and for abolition of the unanimity rule in the Third Pillar.

The way in which the combatting EC fraud issue has been handled, is illustrative of the many important pending issues and therefore of the new institutional relationships within the Maastricht structure. There are numerous signs that the enforcement of community law will be regulated increasingly outside community legislation. The Member States usually are not very keen on effective enforcement of community law and they resort to sovereignty or judicial criminal law rhetorics to undermine the effect of community law. Thus, e.g., the community has had regulations on mutual administrative cooperation for years now. Yet, the revision of the regulation on mutual administrative support in customs and agricultural matters, which is very important for overall enforcement, proves sheer agony.[40] The construction of the Customs Information System (CIS), with both community and international components, and the Third Pillar CIS Convention gave rise to heated disputes on authority between the First and Third Pillars last year. Here too agriculture and customs policy are at the heart of community law. And yet, everything possible is done to transfer enforcement aspects as much as possible to the Third Pillar. As the CIS and Schengen-SIS should later ideally integrate into the European Information System (EIS), a topic on which a Third Pillar convention is being organized, this development is quite important.

The result of all this is that within the European Union rules of punitive administrative law, including the administrative fine, and rules of criminal law are institutionally divided. This has far-reaching consequences for the success of integrated enforcement, both from the point of view of instruments and of legal guarantees. There is a division of assets within public enforcement law. Should this development continue it is to be expected that the Commission, in the context of the community pillar, will have to concentrate on community administrative enforcement provisions and will have

[40] Revision of regulation 1468/81, OJ 1981, L 144/1.

to avail itself more of community punitive provisions. This will then lead to an increase in administrative enforcement in the Member States, unless of course the Member States manage to include yet more artificial anti-cumulation provisions *(ne bis in idem* provisions) in the regulations.

At first sight the discussion seems to be limited to a fight over authority. In fact, however, the discussion is about whether and how Europe wishes to integrate in fields of internal affairs and justice. Member States are aware that they will have to cooperate on a number of issues. Yet, a few of them do so only grudgingly and even then preferably in such a way as to keep a say in the matter. *Ergo,* not via the obligatory community way. This is also the reason why there is so much resistance against judicial review competence for the Court of Justice. This latter issue proved very delicate in all conventions of the Third Pillar, including the Europol and External Boundaries conventions. By denying authority to the Court of Justice or by taking it away all chances are lost not only of an integrated approach to European integration within the Union, but it also puts an irrevocable end to the tradition of legal protection as introduced by the ECJ. This is very worrying in view of the European Court of Human Rights' limited possibilities as regards these Third Pillar issues. For that reason, the current discussion on the building blocks of the Maastricht architecture for police and judicial cooperation, as related to the enforcement of community law, is certainly important, not only for the efficacy of enforcement and European integration, but also for the legal protection of the citizen.