National report of the Netherlands

Prof.dr. J.A.E. Vervaele and Dr. A.H. Klip

General remarks

The applicability of the Corpus Juris

The *Corpus Juris* seems to imply that it will always be clear whether or not the *Corpus Juris* (Arts. 1-8 thereof) will apply. This will not always be so, however. There are two reasons for this. Firstly, at the beginning of the investigation (either the national authority or the EPP) the investigators may not have a complete picture of the specific circumstances of the case. This is inevitable and inherent in any form of criminal investigation. The criminal investigation itself serves to determine whether, and if so which, crime has been committed. Secondly, national authorities and the EPP may have a difference of opinion concerning the question whether the CJ is applicable or not. The importance of solving the issue is apparent. The illegal use of powers and collections of evidence may lead to evidence or which is inadmissible or even to the prosecution being declared null and void. A mechanism should be found to resolve such problems at an earlier stage.

Use of language

A translation of the *Corpus Juris* into Dutch was made by Dr. B. de Smet and Dr. G. Stessens of Antwerp University, Belgium. However in the Dutch language this translation bears some elements which make it difficult to use the present text in the Netherlands. The reasons for this are twofold:
a) the use of legal definitions which either do not exist under Dutch law or have another meaning than that which is obviously intended;
b) the use of non-legal expressions which have no meaning or a different meaning in the Netherlands.
The importance of the use of corresponding terminology is evident. The use of existing terms will lead to the adherence to the same meaning under the *Corpus Juris* as well as under national law. The use of different terminology will lead to the recognition that something different was meant in the *Corpus Juris* than that which exists under national law. We will give two examples of each category. Numerous other examples, which stem from these two categories, could also be given.

Ad a. Article 30 refers to the 'partie civile/burgerlijke partij'. This terminology is non-existent under Dutch law. Articles 51-51F of the Code of Criminal Procedure refer to the 'benadeelde partij'. Article 22 refers to 'maatregel van genade/pardon'. Where 'maatregel' is a legal definition for those criminal sanctions which may be imposed on mentally ill perpetrators, the word 'genade' has no legal meaning. What is meant here is 'gratie'.

Ad b. The use of the word 'overmaken' (passim) in the context of 'to address' or 'to transmit' or 'to submit'. In the Netherlands it means to transfer money from one bank account to another. Article 20, paragraph 2 under c uses the expression 'evocatie van zaken'. Where it is unclear what is meant by 'evocatie', 'zaken' has such a broad meaning that one may question where the limitations of the power given to the European Prosecutor in that article are.

Citation of Dutch articles

In this study on the computability of the Dutch legal system with the substance of the *Corpus Juris*, articles will be cited in English if there is a good translation available. For instance, for the articles of the Dutch Penal Code (DPC), the translation by L. Rayar & S. Wadsworth, *The Dutch Penal Code*, published in The American Series of Foreign Penal Codes, no. 30, Rothman & Co., Littleton, Colorado, 1997 will be used.
If there is no such translation available the citation of articles from the Dutch legislation will be in Dutch.

Article 1 – Fraud in the Community Budget

I. Legal framework

1. Dutch Penal Code

In Dutch law, fraud against the EC budget is criminalized under both the general provisions of the DPC and specific provisions in statute law. There is no specific criminal provision for subsidy fraud or for EC fraud.

The general provisions are those of the DPC, of which the following are the most significant for present purposes:

Forgery

Article 225
1. A person who falsely prepares or falsifies a document that is to serve as evidence of any fact, with the object of using it as genuine and unfalsified or of having it used as such by others, is guilty of the forgery of documents and liable to a term of imprisonment of not more than six years or a fine of the fifth category.
2. The punishment in section 1 is also applicable to a person who intentionally makes use of the false or falsified document as if it were genuine and unfalsified, or who intentionally delivers or has at his disposal such document, where he knows or should reasonably suspect it to be used in such manner.

Article 226
1. A person guilty of the forgery of documents is liable to a term of not more than seven years or a fine of the fifth category, where the offense has been committed:
(1) with regard to authenticated instruments;

(2) with regard to bonds or certificates of indebtedness of any State, any province, municipality or public authority;
(3) with regard to shares or bonds or depositary receipts or certificates of indebtedness of any association (vereniging), foundation (stichting) or company (vennootschap);
(4) with regard to talons, dividend coupons and interest coupons pertaining to any of the documents defined in (2) and (3), or with regard to the documentary evidence issued in their place;
(5) with regard to credit paper or commercial paper intended for circulation.
2. The punishment in section 1 is also applicable to a person who intentionally makes use of any false or falsified document defined in section 1 as if it were genuine and unfalsified, or who intentionally delivers or has at his disposal such document, where he knows or should reasonably suspect it to be used in such manner.

Article 227
1. A person who makes a false entry in an authenticated instrument with regard to a fact which the instrument is to verify, with the object of using the instrument or having it used by others as if the entry were a truthful representation, is liable to a term of imprisonment of not more than six years or a fine of the fifth category.
2. The punishment in section 1 is also applicable to a person who intentionally makes use of the instrument as if its contents were a truthful representation, or who intentionally delivers or has at his disposal such instrument, where he knows or should reasonably suspect it to be used in such manner.

Deception

Article 326
A person who, with the object of obtaining unlawful gain for himself or another, induces a person, by assuming a false name or a false capacity, or by artful tricks, or by a tissue of lies, to surrender any property, make available data having monetary value in commerce, incur a debt or renounce a claim, is guilty of false representation and liable to a term of imprisonment of not more than three years or a fine of the fifth category.

Article 326a
A person who by profession or custom purchases goods, with the object of ensuring that they are at his or another's disposal without paying for them in full, is liable to a term of imprisonment of not more than three years or a fine of the fifth category.

Article 326b
A term of imprisonment of not more than two years or a fine of the fifth category shall be imposed upon:
(1) a person who, upon or in a work or literature, science, art or craft, falsely places any name or any mark, or falsifies the authentic name or the authentic mark, with the object of making it appear as if the work had been created by the person whose name or mark he has placed thereupon or therein;
(2) a person who intentionally sells, offers for sale, delivers, has in stock for the purpose of sale or imports into the Kingdom within Europe, a work of literature, science, art or craft, upon which or in which any name or any mark has been falsely placed, or upon or in which the authentic name or the authentic mark has been falsified, as if the work had been created by the person whose name or mark has been falsely placed upon or in it.

Article 326c

1. A person who, with the object of not paying for it in full, by technological means or by means of false signals, uses a service offered to the general public via telecommunication is liable to a term of imprisonment of not more than three years or a fine of the fifth category.
2. A term of imprisonment of not more than one year or a fine of the third category shall be imposed upon a person who intentionally
a. openly offers for dissemination;
b. has at his disposal for dissemination or with a view to importing such into the Netherlands; or
c. manufactures or keeps for motives of pecuniary gain;
an object or data clearly intended to be used in the commission of the serious offense specified in section 1.
3. A person who commits the serious offenses specified in section 2 as a profession or business is liable to a term of imprisonment of not more than three years or a fine of the fifth category.

Criminal Organization

Article 140

1. Participation in an organization that has as its object the commission of serious offenses is punishable by a term of imprisonment of not more than five years or a fine of the fourth category.
2. Participation in the continued activities of a juristic person that has been proscribed in a final judgment and consequently has been dissolved is punishable by a term of imprisonment of not more than one year or a fine of the third category.
3. With respect to the founders or directors the terms of imprisonment may be increased by one third, and a fine of the next higher category may be imposed.

2. Economic Offences Act (EOA)

The specific criminal provisions in statute law can be found in many specific statutes. We have to differentiate between statute law containing economic offences by their link with the Economic Offences Act (Wet Economische Delicten-WED) and statute law providing for autonomous offences.

Since 1950 economic offences have been investigated, prosecuted and tried under the Economic Offences Act (EOA). Article 1 and 1a define economic offences and environmental offences on the basis of an exhaustive enumeration of specific laws and subordinate legislation, creating very detailed offences. These offences are serious offences/felonies ('misdrijven') when committed with intent; otherwise, they are misdemeneanours ('overtredingen') (first paragraph of Article 2 EOA). Rules on sentencing are also set out in the EOA. The general principles of the general part of the DPC and the procedural provisions of the Code of Criminal Procedure apply to the EOA, unless the EOA contains specific provisions.

The offences under the EOA regime that are the most relevant in terms of EC fraud are the following:

Art. 18 of the Imports and Exports Act
'A person who provides false or incomplete information in any application for a subsidy, levy, refund, contribution or declaration as provided for in Article 2b or a right or claim as provided for in the second paragraph of Article 10a shall be guilty of an offence.'

further elaborated by subordinate legislation, such as, for example:

Art. 4a of the Declarations of Origin Decree
'A person who makes or causes to be made a declaration for international trade in goods for the purpose of enabling goods to benefit from preferential treatment in another country but does not have adequate information to show that the goods satisfy the rules of origin determined by the relevant international agreement shall be guilty of an offence.'

Art. 6a of the Declarations of Origin Decree
'A person who supplies information which he knows or might reasonably be expected to know is false in relation to an application for or the issue of a certificate or declaration of origin of goods in international trade shall be guilty of an offence.'

Art. 12 of the Decree on Import and Export of Agricultural Products
'Without prejudice to any other provision of the law, where a person in the course of his occupation or business imports or exports or causes to be imported or exported any goods in respect of which rules have been laid down pursuant to Article 5, 6, 8 or 10, he shall be under an obligation:
a) To record in his accounts all dealings in relation to such imports or exports and to the imported or exported goods, including their clearance, in such manner as is customary in his occupation or trade;
b) To keep all records and documents (notes, correspondence, laboratory reports and other documentation, accounts, registers and all other means of establishing data relating to the dealings) from the time they are made or acquired until such time as three calendar years have elapsed since the end of the year in which the import or export took place.
Failure to do so shall constitute an offence.'

3. *Specific provisions in statute law, not falling under the EOA*

The new Customs Act (Douanewet) of 1995 is an autonomous statute, containing its own criminal provisions:

Article 44
1. Degene die goederen het douanegebied van de Gemeenschap binnenbrengt in strijd met de artikelen 38 en 39 van het Communautair douanewetboek of goederen in andere delen van het douanegebied van de Gemeenschap binnenbrengt in strijd met artikel 177 van het Communautair douanewetboek, dan wel binnengebrachte goederen in strijd met de artikelen 40 en 41 van het Communautair douanewetboek niet bij de inspecteur aanbrengt of van de overeenkomstig artikel 40 van het Communautair douanewetboek aangebrachte goederen in strijd met de artikelen 43 en 44 van het Communautair douanewetboek geen summiere aangifte doet, wordt gestraft met geldboete van de derde categorie, of, indien dit hoger is, ten hoogste eenmaal het bedrag van de rechten bij invoer die van de goederen zijn verschuldigd.

2. Degene die een der in het eerste lid omschreven feiten begaat met het oormerk de rechten bij invoer die van de goederen zijn verschuldigd, te ontduiken of de ontduiking daarvan te bevorderen, wordt gestraft met gevangenisstraf van ten hoogste vier jaren of geldboete van de vierde categorie of, indien dit hoger is, ten hoogste eenmaal het bedrag van die rechten.
3. Degene die uit zee of door de lucht goederen aanvoert ten aanzien waarvan het in artikel 20 genoemde tegenbewijs niet wordt geleverd, wordt geacht die goederen uit zee, onderscheidenlijk door de lucht, binnen het douanegebied van de Gemeenschap te hebben gebracht.

Article 45

Degene die goederen in strijd met wettelijke bepalingen niet aanbrengt bij een douanekantoor van uitgang, of goederen buiten het douanegebied van de Gemeenschap voert in strijd met artikel 183 van het Communautair douanewetboek, wordt gestraft met geldboete van de derde categorie.

Article 46

1. Degene die goederen waarvoor een in wettelijke bepalingen voorziene aangifte niet is gedaan, lost, laadt, vervoert, in enig gebouw, erf of besloten terrein inslaat, voorhanden heeft of daaruit uitslaat, koopt, verkoopt, te koop aanbiedt of aflevert, wordt gestraft met geldboete van de derde categorie of, indien dit hoger is, ten hoogste eenmaal het bedrag van de rechten bij invoer die van de goederen zijn verschuldigd.
2. Degene die een der in het eerste lid omschreven feiten begaat, terwijl hij weet of vermoedt dat de rechten bij invoer van de in dat lid bedoelde goederen niet zijn voldaan, noch de heffing van die rechten overeenkomstig wettelijke bepalingen is verzekerd, wordt gestraft met gevangenisstraf van ten hoogste een jaar of geldboete van de vierde categorie of, indien dit hoger is, ten hoogste eenmaal het bedrag van die rechten.

Article 47

1. Degene die in strijd met wettelijke bepalingen goederen waarvoor vrijstelling van rechten bij invoer wordt genoten, gebruikt of doet gebruiken op een wijze of voor doeleinden waarvoor de vrijstelling niet geldt, of aan goederen die in het vrije verkeer zijn gebracht met toepassing van een verlaagd recht bij invoer of van een nulrecht uit hoofde van hun bijzondere bestemming, een bestemming heeft gekregen die afwijkt van die met het oog waarop het verlaagde recht bij invoer of het nulrecht is toegepast, wordt gestraft met geldboete van de derde categorie of, indien dit hoger is, ten hoogste eenmaal het bedrag van de van de goederen te weinig geheven rechten bij invoer.

Article 48

1. Degene die:
a. een ingevolge wettelijke bepalingen vereiste aangifte onjuist of onvolledig doet;
b. ingevolge wettelijke bepalingen verplicht is tot:
1°. het verstrekken van inlichtingen, gegevens of aanwijzingen, en deze niet, onjuist of onvolledig verstrekt;
2°. het vertonen, overgeven of voor raadpleging beschikbaar stellen van bepaalde gegevensdragers, of de inhoud daarvan, en een zodanige verplichting niet nakomt;
3°. het vertonen, overgeven of voor raadpleging beschikbaar stellen van bepaalde gegevensdragers, of de inhoud daarvan, en valse of vervalste gegevensdragers vertoont, overgeeft of voor raadpleging beschikbaar stelt, dan wel de inhoud daarvan in valse of vervalste vorm voor dit doel beschikbaar stelt;
4°. het voeren van een administratie overeenkomstig de daaraan bij of krachtens wettelijke bepalingen gestelde eisen, en een zodanige administratie niet voert;

5°. het bewaren van boeken, bescheiden of andere gegevensdragers, en deze niet bewaart;
6°. het verlenen van medewerking als bedoeld in artikel 8, vijfde lid, en deze medewerking niet verleent;
wordt gestraft met hechtenis van ten hoogste zes maanden of geldboete van de derde categorie.
2. Degene die een der in het eerste lid omschreven feiten opzettelijk begaat, wordt, indien daarvan het gevolg zou kunnen zijn dat te weinig rechten bij invoer zouden kunnen worden geheven, gestraft met gevangenisstraf van ten hoogste vier jaren of geldboete van de vierde categorie of, indien dit hoger is, ten hoogste eenmaal het bedrag van de te weinig geheven rechten.

Article 49
Degene die niet voldoet aan een hem bij of krachtens artikel 9, vierde lid, 11, eerste lid, 14, tweede lid, 17, tweede lid, of 32 van deze wet dan wel artikel 14 of 69, tweede lid, van het Communautair douanewetboek opgelegde verplichting, wordt gestraft met geldboete van de derde categorie.

Article 50
1. Degene die een tot stand gebrachte identificatiemaatregel met betrekking tot een vervoermiddel, bergingsmiddel, verpakkingsmiddel, goederen, werktuig, leiding, gebouw of terrein, of deel daarvan, in strijd met wettelijke bepalingen schendt, wordt gestraft met geldboete van de derde categorie.
2. Degene die een der in het eerste lid omschreven feiten opzettelijk begaat, wordt gestraft met gevangenisstraf van ten hoogste twee jaren of geldboete van de vierde categorie.
3. Met dezelfde straf als in het eerste lid vemeld wordt gestraft degene die een hem bij artikel 24 opgelegde verplichting niet nakomt.

Article 51
1. Degene die van goederen waaraan herkenningsmiddelen of denatureringsmiddelen zijn toegevoegd, die herkenningsmiddelen of denatureringsmiddelen daarvan geheel of ten dele afscheidt, de werking ervan geheel of ten dele opheft of verandert, wordt gestraft met geldboete van de derde categorie.
2. Degene die een der in het eerste lid omschreven feiten opzettelijk begaat, wordt gestraft met gevangenisstraf van ten hoogste twee jaren of geldboete van de vierde categorie of, indien dit hoger is, ten hoogste eenmaal het bedrag van de te weinig geheven rechten bij invoer.

Articles 76 a-b-c of the State Taxes Act, containing specific provisions on customs criminal law.

Article 76a
1. Medeplichtigheid aan de in de artikelen 44, eerste lid, 45, 46, eerste lid, en 48, eerste lid, onderdeel a, van de Douanewet vermelde overtredingen is strafbaar. Te dien aanzien vinden de artikelen 48 en 49 van het Wetboek van Strafrecht overeenkomstige toepassing.
2. Poging tot de in artikel 46, eerste lid, van de Douanewet vermelde overtreding is strafbaar. Te dien aanzien vindt artikel 45 van het Wetboek van Strafrecht overeenkomstige toepassing.

Article 76b
De Nederlandse strafwet is ook van toepassing op ieder die zich buiten Nederland schuldig maakt aan de in artikel 48, eerste lid, onderdeel b, onder 3°, van de Douanewet omschreven overtreding.

Article 76c
Bij veroordeling wegens een der in de artikelen 44, 45,46, 47 en 48, eerste lid, onderdeel a, van de Douanewet omschreven strafbare feiten kunnen de in artikel 33a, onderdelen b tot en met e, van het Wetboek van Strafrecht genoemde voorwerpen ook worden verbeurdverklaard, indien zij niet aan de in dat artikel bedoelde persoon toebehoren.

The new State Taxes Act (Algemene Wet Rijksbelastingen) is also an autonomous statute, containing its own criminal provisions. For our purpose these criminal provisions can be important in the field of VAT.

Article 68
1. Degene die:
a. een bij de belastingwet voorziene aangifte niet, niet binnen de gestelde termijn, onjuist of onvolledig doet;
b. ingevolge de belastingwet verplicht zijnde tot het verstrekken van inlichtingen, gegevens of aanwijzingen, geen, onjuiste of onvolledige inlichtingen, gegevens of aanwijzingen verstrekt;
c. ingevolge de belastingwet verplicht zijnde tot het voor raadpleging beschikbaar stellen van boeken, bescheiden, andere informatiedragers of de inhoud daarvan, geen, valse of vervalste informatiedragers, voor raadpleging beschikbaar stelt, dan wel de inhoud daarvan niet, in valse of vervalste vorm, voor dit doel beschikbaar stelt;
d. Ingevolge de belastingwet verplicht zijnde tot het voeren van een administratie overeenkomstig de daaraan bij of krachtens de belastingwet gestelde eisen, een zodanige administratie niet voert;
e. Ingevolge de belastingwet verplicht zijnde tot het bewaren van boeken, bescheiden of andere informatiedragers, deze informatiedragers niet bewaart;
f. Ingevolge de belastingwet verplicht zijnde tot het verlenen van medewerking als bedoeld in artikel 52, zesde lid, deze medewerking niet verleent;
g. Ingevolge de belastingwet verplicht zijnde tot het uitreiken van een factuur of nota, een onjuiste of onvolledige factuur of nota uitreikt;
een en ander, indien daarvan het gevolg zou kunnen zijn dat te weinig belasting zou kunnen worden geheven, wordt gestraft met hechtenis van ten hoogste zes maanden of geldboete van de derde categorie.
2. Degene die een der in het eerste lid omschreven feiten opzettelijk begaat wordt gestraft met gevangenisstraf van ten hoogste vier jaren of geldboete van de vierde categorie of, indien dit hoger is, ten hoogste eenmaal het bedrag van de te weinig geheven belasting.
3. Strafvervolging wordt niet ingesteld, indien de schuldige alsnog een juiste en volledige aangifte doet of juiste en volledige inlichtingen, gegevens of aanwijzingen verstrekt vóórdat hij weet of redelijkerwijze moet vermoeden dat een of meer van de in artikel 80, eerste lid, bedoelde ambtenaren de onjuistheid of onvolledigheid bekend is of bekend zal worden.
4. Niet strafbaar is hij die de in artikel 47a bedoelde verplichting niet nakomt ten gevolge van een voor het niet binnen het Rijk gevestigde lichaam of de niet binnen het Rijk wonende natuurlijke persoon geldend wettelijk of rechterlijk verbod tot het

verlenen van medewerking aan de verstrekking van de verlangde gegevens of inlichtingen, informatiedragers of de inhoud daarvan te verstrekken.

II. Comptability and evaluation, also in the light of Dutch proposals de lege ferenda

The signature of the PIF Convention and protocols and of the the OECD Convention on combating bribery of foreign public officials in international business transactions (Paris 17 December 1997) by the Netherlands has been followed by the preparation of the Parliamentary ratification procedure. The Government has prepared a national ratification bill, containing all the adaptations necessary in national law, including criminal law, in order to fulfil the binding obligations. At this very moment, the proposal is awaiting the advice of several professional institutions. It will be on the agenda of the Dutch Parliament in 1999.

The Government did not choose a specific provision for EC fraud in the national legislation, but instead chose to adapt existing provisions and to introduce new provisions. This is in line with the PIF Convention and with the CJ, as they do not oblige any specific criminal provisions.

Concerning the fraud definition in the PIF Convention the Government states correctly that the actual Article 225 DPC already to a large extent provides for the necessary criminal protections. Nevertheless, it is clear that Article 1 of the CJ is further-reaching, by 1) including recklessness and gross negligence (as far as the mens rea is concerned) and 2) by not providing for 'as its effects the misappropriation or wrongful retention of funds'.

For that reason we have to compare the actual provisions and the proposals of the Government in the light of Article 1 CJ.

Mens rea

see Article 10

Actus reus

The actual Article 225 is very broad and can be used for all types of documents (off-line and on-line), including documents linked to the income or expenditure of the EC budget. Moreover, the article does not include the realisation of the effect in the sense of damage to some person. The effect of the behaviour of the defendant (by positive acts or by negligence) is of no relevance for the prosecution of this offence.

The Governement wishes to go further than the PIF Convention and Article 1 CJ, by providing for new articles in the DPC: Articles 227a and b on active and passive fraud (proposol for a bill to concentrate criminal provisions on fraud):

> 'Hij die, anders dan door valsheid in geschrift, aan degene door wie of door wiens tussenkomst enige verstrekking of tegemoetkoming wordt verleend, gegevens verstrekt die naar hij weet of redelijkerwijze moet vermoeden niet met de waarheid in overeenstemming zijn, wordt, indien deze gegevens van belang zijn voor de vaststelling

van zijn of eens anders recht op die verstrekkking of tegemoetkoming dan wel voor de hoogte of de duur van een dergelijke verstrekking of tegemoetkoming, gestraft met hechtenis van ten hoogstens zes maanden of geldboete van de derde categorie'.

'Hij die, in strijd met een hem bij of krachtens wettelijk voorschrift opgelegde verplichting, nalaat tijdig de benodigde gegevens te verstrekken, wordt, indien deze gegevens van belang zijn voor de vaststelling van zijn of een anders recht op een verstrekking of tegemoetkoming dan wel voor de hoogte of de duur van een dergelijke verstrekking of tegemoetkoming, gestraft met hechtenis van ten hoogste zes maanden of geldboete van de derde categorie'.

This proposal on active fraud has in mind the liability of the person providing information in a form other than the written form (including electronic communication) towards the person granting the subsidy; information which the defendant knows or should reasonably know is of importance for a grant or subsidy or for its duration. This proposal on passive fraud aims to criminalize negligence in communicating under statutory obligation information which the defendant knows or should reasonably know that the information is of importance for a grant or subsidy and the negligence might include advantages for him or third persons. These articles aim to criminalize behaviour not linked with written documents and they also contain a broader definition of the mens rea and of the actus reus (the actual effect is of no relevance; the simple fact that one might endanger in an abstract way is sufficient (abstract danger- abstrakte Gefährdung).

One element of the fraud definition of the PIF Convention and of Article 1 CJ is really problematic in Dutch criminal law, namely the **fraus legis clause** in Article 1 (c) CJ. This only exists in tax legislation. That is the reason why the Government wants to introduce a new article in the DPC, **Article 323a**.

'Hij die opzettelijk en wederrechtelijk een subsidie die met een bepaald doel door of vanwege de Europese Gemeenschappen is verstrekt, aanwendt voor andere doeleinden dan waarvoor zij is verstrekt, wordt gestraft met gevangenisstraf van ten hoogste drie jaren of geldboete van de vijfde categorie'.

This criminal provision is explicitly limited to EC subsidies, excluding national subsidies. For the latter, the Governement has chosen administrative enforcement under the GALA (General Administrative Law Act) and the special statutes. In this sense we will have a harsher enforcement system for EC subsidies (including custodial sentences) than for national subsidies. This shows that the assimilation principle works only one way. In our opinion, however, there is still one problem with this provision. The mens rea is formulated as dolus and does not provide for recklessness or gross negligence. Moreover, there are no culpa-variants in the special statutes, with the exception of tax law.

Last but not least, Article 1 (2) CJ provides for a repentant-clause. In Dutch criminal law, this only exists in tax law (Art. 68 (3) AWR). Of course, the court can take the behaviour of the repentant into account as a mitigating factor when passing sentence, but there is no question of being 'non-punishable'. This means

that the Customs laws, the Economic Offences Act and the DPC would need further modification in order to apply the repentant-clause.

Article 2 – Market-rigging

The actual DPC provides for an offence consisting of unfair competition by misleading the public:

> **Article 328bis**
> A person who, in order to establish, preserve or increase his or another person's market position, perpetrates any form of deception and so misleads the general public or a specific person is guilty of unfair competition and liable to a term of imprisonment of not more than one year or a fine of the fifth category, where from such activity any disadvantage to his competitors or the competitors of that other person may ensue.

However, this provision is directed towards the protection of the public (misleading the public) and does not provide for collusion with the official responsible for the decision.

Until recently some provisions of the Dutch Competition law were offences under the Economic Offences Act. However, since 1998 the new Dutch Competition law only provides for administrative sanctions in this field, excluding criminal enforcement. Moreover, the possible harm to the Community's financial interests is of no importance in this respect.

For the implementation of Article 2 CJ it would be necessary to widen the national provision of Article 328bis, including the 'harm element' and including the reference to collusion with the official responsible. However, the textual wording of Article 2 CJ needs further elaboration in order to define clearly the actus reus and the mens rea in order to fulfil the minimum requirements of the legality principle.

Article 3 – Corruption

I. Legal framework

The actual Article 177 of the DPC criminalizes active corruption

> **Article 177**
> 1. A term of imprisonment of not more than two years or a fine of the fourth category shall be imposed upon:
> (1) a person who makes a gift or a promise to a public servant with the object of inducing him to act or to refrain from acting, in the execution of his duties, in a manner contrary to the requirements of his office;
> (2) a person who makes a gift or a promise to a public servant as a result or as a consequence of something he has done or has refrained from doing, in the execution of his duties, in a manner contrary to the requirements of his office;
> 2. Deprivation of the rights listed in article 28, section 1 (1), (2) and (4), may be imposed.

Both corruption with the aim of influencing the official in the future and the corruption linked to the behaviour of the official in the past fall under this provision.

The actual Articles 362 and 363 of the DPC criminalize passive corruption.

Article 362
A public servant who accepts a gift or promise, knowing that it is made to him in order to induce him to act or refrain from acting in the execution of his duties, in a manner not contrary to the requirements of his office, is liable to a term of imprisonment of not more than three months or a fine of the fifth category.

Article 363
A public servant:
1) who accepts a gift or promise, knowing that it is made to hem in order to induce hem to act or to refrain from acting in the execution of his duties, in a manner contrary to the requirements of his office;
2) who accepts a gift or promise, knowing that it is made to him as a result or as a consequence of something he has done or has refrained from doing, in the execution of his duties, in a manner contrary to the requirements of his office;
is liable to a term of imprisonment of not more than four years or a fine of the fifth category.

Both the passive corruption of officials, acting in the line of their duty and violating their duty is punishable. Only when the passive corruption takes place after the fact and the behaviour of the official was in line with his duty, is there no criminal offence.

Articles 178 and 364 provide for specific provisions for corruption and judges

Article 178
1. A person who makes a gift or a promise to a judge, with the object of exercising influence on the decision in a case that is before him for judgment, is liable to a term of imprisonment of not more than six years or a fine of the fourth category.
2. Where the gift or promise is made with the object of obtaining a conviction in a criminal case, the offender is liable to a term of imprisonment of not more than nine years or a fine of the fifth category;
3. Deprivation of the rights listed in article 28, section 1 (1), (2) and (4), may be imposed.

Article 364
1. A judge who accepts a gift or promise, knowing that it is made to him in order to exercise influence on the decision in a case that is before him for judgement, is liable to a term of imprisonment of not more than nine years or a fine of the fifth category.
2. Where a judge, aware of the fact that it is made to obtain a conviction in a criminal case, accepts such gift or promise, he is liable to a term of imprisonment of not more than twelve years or a fine of the fifth category.

II. Comptability and evalution, also in the light of the Dutch proposals de lege ferenda

The signature of the PIF Convention and protocols and of the OECD Convention on combating bribery of foreign public officials in international business transactions (Paris 17 December 1997) by the Netherlands has been followed by the preparation of the Parliamentary ratification procedure. The Governement has prepared a national ratification bill, containing all the adaptations necessary in national law, including criminal law, in order to fulfil the binding obligations. At this very moment, the proposal is awaiting the advice of several professional institutions. It will be on the agenda of the Dutch Parliament in 1999.

The Dutch criminal legislation, especially the part on serious offences against public authority, only relates to the national official (Art. 84 DPC). The term 'national official' has been interpreted in a broad sense by the Dutch Supreme Court (HR 1 January 1992, NJ 1993, 354 and HR 4 February 1995, NJ 1995, 620), therein including 'elke persoon die door het openbaar gezag is aangesteld tot een openbare betrekking om een deel van de taak van de Staat of zijn organen te verrichten'. So every person who has been charged by the official authorities with the aim of exercising duties of the State or its organs is an official, independent of his stature.

Because the notion of 'official' is limited to national officials it is necessary to adapt the national legislation in order to include European or Community officials and the officials of other states.

The Government proposes to adapt the DPC as to

1) the application of the criminal law (territoriality-universality) – general part
2) the criminal provisions on corruption
3) the international criminal law provisions

Comment on the implementation proposal

1. The new Dutch articles on active and passive corruption are joined to the list of articles falling under the protection principle or universality principle for the application of Dutch law. Furthermore, the general part is adapted in order to provide for Dutch jurisdiction over officials of the Netherlands who have committed offences relating to abuse of office abroad and for officials of international organizations (including the Union), having their office in the Netherlands who have engaged in passive corruption

2. The articles on active and passive corruption have been completely adapted in the following proposals:

Artikel 177
1. Met gevangenisstraf van ten hoogste vier jaren of geldboete van de vijfde categorie wordt gestraft:

1°. Hij die een ambtenaar een gift of belofte doet dan wel een dienst verleent of aanbiedt met het oogmerk om hem te bewegen in zijn bediening, in strijd met zijn plicht, iets te doen of na te laten;
2°. hij die een ambtenaar een gift of belofte doet dan wel een dienst verleent of aanbiedt ten gevolge of naar aanleiding van hetgeen door deze in zijn huidige of vroegere bediening, in strijd met zijn plicht, is gedaan of nagelaten.
2. Ontzetting van de in artikel 28, eerste lid, onder 1°, 2° en 4°, vermelde rechten kan worden uitgesproken.

Artikel 177a
1. Met gevangenisstraf van ten hoogste twee jaren of geldboete van de vierde categorie wordt gestraft:
1°. hij die een ambtenaar een gift of belofte doet dan wel een dienst verleent of aanbiedt met het oogmerk om hem te bewegen in zijn bediening, zonder daardoor in strijd met zijn plicht te handelen, iets te doen of na te laten;
2°. hij die een ambtenaar een gift of belofte doet dan wel een dienst verleent of aanbiedt ten gevolge of naar aanleiding van hetgeen door deze in zijn huidige of vroegere bediening, zonder daardoor in strijd met zijn plicht te handelen, is gedaan of nagelaten.
2. Ontzetting van de in artikel 28, eerste lid, onder 1°, 2° en 4°, vermelde rechten kan worden uitgesproken.

Artikel 178 wordt als volgt gewijzigd:
1. In het eerste lid wordt na «belofte doet» ingevoegd; dan wel een dienst verleent of aanbiedt.
2. In het tweede lid wordt na «gedaan wordt» ingevoegd; dan wel die dienst verleend of aangeboden wordt.

Artikel 178a
1. Met ambtenaren worden ten aanzien van de artikelen 177 en 177a gelijkgesteld personen in de openbare dienst van een vreemde staat of van een volkenrechtelijke organisatie.
2. Met ambtenaren worden ten aanzien van de artikelen 177, eerste lid, onder 2°, en 177a, eerste lid, onder 2°, voormalige ambtenaren gelijkgesteld.
3. Onder rechter als omschreven in artikel 178 wordt mede begrepen de rechter van een vreemde staat of van een volkenrechtelijke organisatie.

Artikel 362
Met gevangenisstraf van ten hoogste twee jaren of een geldboete van de vijfde categorie wordt gestraft de ambtenaar:
1°. die een gift, belofte of dienst aanneemt, wetende of redelijkerwijs vermoedende dat deze hem gedaan, verleend of aangeboden wordt ten einde hem te bewegen om, zonder daardoor in strijd met zijn plicht te handelen, in zijn bediening iets te doen of na te laten;
2°. die een gift, belofte of dienst aanneemt of vraagt, wetende of redelijkerwijs vermoedende dat deze hem gedaan, verleend of aangeboden wordt ten gevolge of naar aanleiding van hetgeen door hem, zonder daardoor in strijd met zijn plicht te handelen, in zijn huidige of vroegere bediening is gedaan of nagelaten;
3°. die een gift, belofte of dienst vraagt ten einde hem te bewegen om, zonder daardoor in strijd met zijn plicht te handelen, in zijn bediening iets te doen of na te laten;
4°. die een gift, belofte of dienst vraagt ten gevolge of naar aanleiding van hetgeen door hem, zonder daardoor in strijd met zijn plicht te handelen, in zijn huidige of vroegere bediening is gedaan of nagelaten.

Artikel 363
Met gevangenisstraf van ten hoogste vier jaren of geldboete van de vijfde categorie wordt gestraft de ambtenaar:
1°. die een gift of belofte dan wel een dienst aanneemt, wetende of redelijkerwijs vermoedende dat deze hem gedaan, verleend of aangeboden wordt ten einde hem te bewegen om, in strijd met zijn plicht, in zijn bediening iets te doen of na te laten;
2°. die een gift of belofte dan wel een dienst aanneemt, wetende of redelijkerwijs vermoedende dat deze hem gedaan, verleend of aangeboden wordt ten gevolge of naar aanleiding van hetgeen door hem, in strijd met zijn plicht, in zijn huidige of vroegere bediening is gedaan of nagelaten;
3°. die een gift of belofte dan wel een dienst vraagt ten einde hem te bewegen om, in strijd met zijn plicht, in zijn bediening iets te doen of na te laten;
4°. die een gift of belofte dan wel een dienst aanneemt ten gevolge of naar aanleiding van hetgeen door hem, in strijd met zijn plicht, in zijn huidige of vroegere bediening is gedaan of nagelaten.

Artikel 364
1. De rechter die een gift, belofte of dienst aanneemt, wetende of redelijkerwijs vermoedende dat deze hem gedaan, verleend of aangeboden wordt ten einde invloed uit te oefenen op de beslissing van een aan zijn oordeel onderworpen zaak, wordt gestraft met gevangenisstraf van ten hoogste negen jaren of geldboete van de vijfde categorie.
2. Indien de gift, belofte of dienst wordt aangenomen met het bewustzijn dat deze gedaan, verleend of aangeboden wordt om een veroordeling in een strafzaak te verkrijgen, wordt de rechter gestraft met gevangenisstraf van ten hoogste twaalf jaren of geldboete van de vijfde categorie.

Artikel 364a
1. Met ambtenaren worden ten aanzien van de artikelen 362 en 363 gelijkgesteld personen in de openbare dienst van een vreemde staat of van een volkenrechtelijke organisatie.
2. Met ambtenaren worden ten aanzien van de artikelen 362, onder 2° en 4° en 363 onder 2° en 4° voormalige ambtenaren gelijkgesteld.
3. Onder rechter als omschreven in artikel 364 wordt mede begrepen de rechter van een vreemde staat of van een volkenrechtelijke organisatie.

Passive corruption in the definition of Article 3 CJ includes:

a. directly corrupting or via a third person
b. any offer, promise or other advantage of whatever nature for himself or a third person
c. solicits or accepts
d. in order to carry out an act or in order not to carry out an act, relating to his duties and in breach of his official obligations
e. that harms or might harm the financial interests of the EU

The elements 'offer, promise or other advantage of whatever nature', 'for himself or a third person', 'directly or via a third person' and 'accepts' are not problematic in the light of the existing criminal provisions in the DPC (Art. 363). There is only a textual adaptation necessary in order also to include explicitly 'services'.

The only problem here is the element 'solicits', which is not foreseen in the actual provision under Article 363, but which could be punished under Article 366.

> **Article 366**
> A public servant who, in the execution of his duties, claims or receives or withholds from a payment made by him on the grounds it is owed to himself, to another public servant or to any public funds, any amount which he knows is not so owed is guilty of concussion and is liable to a term of imprisonment of not more than six years or a fine of the fifth category.

However, the Government is of the opinion in the draft Bill that in the light of fluid international cooperation in criminal matters, it is better to adapt Article 366 in that sense by including the term 'solicits'.

The elements 'relating to his duties and in breach of his official obligations' are not problematic in the light of the existing criminal provisions in the DPC (Art. 363). In fact, the provision also includes the punishment of passive corruption in line with professional duties, if this happens before the fact.

Finally, the Dutch provisions on passive corruption do not contain an element on resulting damage. The actual effect of the corruption is of no relevance. The reference to 'harm or might harm' is unnecessary for the purposes of Dutch legislation. The PIF Convention and the protocol do allow it, however (a combination between Art. 7 protocol and Art. 9 of the Convention). Explicitly introducing the CJ clause on harm would limit the effect of the criminal provision, as it would include evidence on (possible) harm.

Active Corruption

The commentary on the elements of passive corruption can also apply to active corruption.

3. Revision of some provisions on international legal cooperation, for instance extradition.

This revision is of no importance in the light of the CJ.

III. Evaluation

The provisions of the ratification bill are in many aspects more fare-reaching than the ones provided for in the CJ. For instance, it also includes corruption by foreign judges and international judges. One problem might be the 'mens rea' element. Whereas the PIF Protocol speaks of 'deliberate action', the CJ does not define the mens rea element. In the Dutch actual provisions there is the necessity of dolus ('knowingly') and the case-law in the past was very keen on this factor. However, during the last few years dolus eventualis has also been accepted and an indirect link between the offer and the result has been considered sufficient. However, in the new provisions 'should have reasonably expected' has been

included in the text. With this element in the mens rea it will be much easier to deal with recklessness or the 'deliberate naivity' of officials.

In the actual proposals the extension of jurisdiction in Article 6 of the DPC is for all duty-offences (including also Articles 4, 5, 6 of the CJ), but the extension of the protection and universality principle is limited to active and passive corruption. When adopting the CJ it will be necessary to provide for further implementing legislation on this point.

Article 4 – Abuse of office

The actual provisions of the DPC do not provide for such a general offence under the title serious offences against public authority. This title does include some provisions dealing with the personal interest of the national official, when, for example, sales contracts or public offers are at stake.

This means that we have to refer to Article 47 of the DPC, dealing with 'induce to the commitment of criminal offences', by means of inter, alia, 'abuse of office'. There must be dolus and the commitment must have been realized.

Article 47

1. The following persons are liable as principals:
(1) those who commit a criminal offense, either personally or jointly with another or others, or who cause an innocent person to commit a criminal offense;
(2) those who, by means of gifts, promises, abuse of authority, use of violence, threat or deception or providing the opportunity, means or information, intentionally solicit the commission of a crime.
2. With regard to the last category, only those actions intentionally solicited by them and the consequences of such actions are to be taken into consideration.

Concerning Article 4(2), under some circumstances, when the defendant vests a right in personam or in rem, this could fall under Articles 416 and 417 DPC, which criminalize knowingly receiving stolen property, colloquially known as 'fencing'.

In other words, in order to comply with Article 4 CJ it would be necessary to adapt the relevant Dutch criminal provisions:

1) under the title serious offences against public authority, a specific provision dealing with Article 4 (2) could be provided either including or excluding Community officials

2) Article 47 could be widened to cover 'abuse of Community office'

The problem with the formulation of Article 4 CJ is that it is far too wide and contains no clear definition of the actus reus and mens rea. What does 'directly' in Article 4 (1) mean? Does it include a professional error? What does indirectly in Article 4(2) mean? What is 'some' personal interest? What is the financial loss in Article 4(2)? The Dutch legality principle in the DPC demands a clearer definition of the offence.

Article 5 – Misappropriation of funds

Also Article 5 CJ is a typical offence in protecting the optimal functioning of the EC institutions, in other words protecting a new 'legal value - Rechtsgut'. It underlines the need for a criminal provision protecting the (financial) integrity of the EU. The national criminal law has to assume that new function, by introducing EU interests as its own, autonomous legal values which deserve protection under criminal law.

There is no such general provision available in Dutch criminal law, not even for national officials. Of course there are specific criminal provisions, as for instance Articles 377 and 378, which determine the liability of public servants employed at the Royal Mint and persons in the service of an assay office, who respectively trade in precious metals or who make an imprint or traces of any gold- or silverwork submitted to their office in violation of the rules pertaining in to their specific fields.

The only solution is to provide for such a specific offence under Dutch criminal law. This offence could also be widened to cover national officials.

Nevertheless, some notions have to be further defined, as for instance the notion of 'abuse of power'.

Article 6 – Disclosure of secrets pertaining to one's office

The DPC contains two provisions on the violation of secrets pertaining to one's office. Articles 272 deals with secrets which the defendant either knows or should reasonably suspect that he is bound to keep by reason of his office, profession or a legal requirement. Article 273 deals with disclosure of secrets related to a commercial, industrial or service organization for persons working in that organization. Moreover, Article 273 criminalizes explicitly the use of these commercial, industrial or service secrets for the motives of pecuniary gain (which could be considered as a specific form of the offence of receiving stolen property/fencing).

The professional secrecy obligations of art. 272 can be defined in formal statutes, but also in other legal sources (delegated legislation, or in the constitutions/charters of professional organizations). The commercial secrecy obligations of Article 273 can even be defined in labour contracts.

We do not envisage many problems with the implementation of the substance of Article 6 (1) in Dutch law. Article 272 is here the main basis, as regards secrets bound to be kept by reason of a person's office. Nevertheless, the EU could have its own secrets interests as far as it has entities which deal with commercial, industrial or service activities. Article 6 (1) does not deal with this and there is also no reference to the personal benefit use of the violation of these secrets.

To conclude on this point we can state that the secrecy obligations bound to be kept by the nature of the office of the Community officials must be very clearly defined in Community legislation. It would of course be preferable to specifically refer in national legislation to the concept of Community office or offices of international organizations. If there are other commercial, industrial or service secrets to protect, this should be added in Article 6(1).

Article 7 – Money laundering and receiving

While implementing the Vienna Convention and the Council of Europe Convention the Dutch legislator has chosen a broad definition of money laundering, including all serious offences ('misdrijven') such as fraud, corruption, etc. Therefore the money laundering offence is not limited to the usual drugs offences or to a specific list of predicate offences. All serious offences ('misdrijven') under both the DPC and the EOA are predicate offences for this purpose. However, the Dutch legislator has not provided for the specific incrimination of money laundering, but rather in 1991 substantially amended the Dutch criminal provisions on receiving/fencing:

Article 416
1. A person who:
a. obtains, has at his disposal or transfers property or who vests a right *in personam* or *in rem* in property or who transfers such right, knowing, at the time the property was obtained or came under his control or at the time the right was vested, that the property had been obtained by means of a serious offense;
b. intentionally, for motives of pecuniary gain, has at his disposal or transfers property obtained by means of a serious offense, or transfers a right *in personam* or *in rem* vested in property that was obtained by means of a serious offense;
is guilty of intentionally handling stolen property and liable to a term of imprisonment of not more than four years or a fine of the fifth category.
2. The punishment in section 1 is also applicable to a person who intentionally derives advantage from the proceeds of any property obtained by means of a serious offense.

Article 417
A person who by custom commits the offense of intentionally handling stolen property is liable to a term of imprisonment of not more than six years or a fine of the fifth category.

Article 417bis
1. A person who:
a. obtains, has at his disposal or transfers property, or who vests a right *in personam* or *in rem* in property or who transfers such right, where he, at the time the property was obtained or came under his control or at the time such right was vested, should reasonably have suspected the property to have been obtained by means of a serious offense;
b. for motives of pecuniary gain, has at his disposal or transfers property, or transfers a right *in personam* or *in rem* in that property, where he should reasonably suspect the property to have been obtained by means of a serious offense is guilty of handling stolen property by negligence or carelessness and liable to a term of imprisonment of not more than one year or a fine of the fifth category.
2. The punishment in section 1 is also applicable to a person who derives advantage from the proceeds of any property where he should reasonably suspect the property to have been obtained by means of a serious offense.

Article 417 ter
Upon conviction for any of the offenses defined in article 416-417*bis*, deprivation of the rights listed in article 28, section 1 (1), (2) and (4), may be imposed and the offender

may be disqualified from practicing the profession in which he committed the serious offense.

As far as the substance is concerned we do not see any problems in implementing Article 7 CJ. The existing articles in the DPC are in line with the substance of Article 7 CJ. One problem could be the definition of the 'author'.

Following the case-law of the Dutch Supreme Court, the provisions on receiving/fencing cannot be used to punish a person who has committed the predicate offence. That means that the money launderer who has also committed the predicate offence can only be punished in the Netherlands for the basic offence. This is also the case if the legal person or a criminal organization has committed the predicate offence and the directors de iure or de facto or participants are the money launderers. To avoid this problem, the Dutch authorities have to adapt either the receiving/fencing provisions in that sense or to provide for an autonomous money laundering offence.

Article 8 – Conspiracy

The DPC contains a traditional article on 'association des malfaiteurs':

Article 140

1. Participation in an organization that has as its object the commission of serious offenses is punishable by a term of imprisonment of not more than five years or a fine of the fourth category.
2. Participation in the continued activities of a juristic person that has been proscribed in a final judgment and consequently has been dissolved is punishable by a term of imprisonment of not more than one year or a fine of the third category.
3. With respect to the founders or directors the terms of imprisonment may be increased by one third, and a fine of the next higher category may be imposed.

This article is much used, also in fraud cases, mostly in combination with forgery.

The definition of Article 8 CJ is in line with Article 140. Also in the Netherlands, the commission of offences is not a condition. Participation in an organization that has as its objective the commission of serious offences ('misdrijven') is punishable. The only difficulty we can see is that the Dutch Supreme Court has defined 'the criminal organization' as structured and durable cooperation of two or more persons with a certain degree of organization. This includes internal rules and common objectives.

It is not clear from Article 8 CJ what is meant by 'necessary' organization.

Article 9 – Penalties

Dutch criminal law does not provide for minimum sanctions. Neither does the CJ. In the DPC and in the EOA some offences linked to Articles 1 to 8 provide for maximum custodial sentences of six years (instead of five years in Art. 9 CJ). Concerning fines, a maximum fine of up to one million ECU is on average higher than the Dutch maxima. Only as regards fiscal offences and customs offences can

the fine be higher, because for such offences the fine can be calculated as a % of the defrauded amount (for instance 100%).

Concerning the additional penalties:

- publication of the conviction is provided for in Article 9 DPC
- the Dutch legislator has introduced a very broad 'confiscation regime' while implementing the Vienna Convention, widening it to cover all serious crimes ('misdrijven'); this is provided for in Article 36e

Article 36e

1. On application by the Public Prosecutor's Office, an obligation to pay a sum of money to the State may be imposed, by separate judicial decision, upon the person convicted for a criminal offense to deprive that person of the unlawfully obtained gains.
2. The obligation may be imposed upon the person specified in section 1 who has obtained gains by means of or derived from the said criminal offense or similar offenses for which a fine of the fifth category may be imposed, and where there is sufficient evidence that they have been committed by him.
3. On application by the Public Prosecutor's Office, an obligation to pay a sum of money to the State may be imposed, by separate judicial decision, upon a person who has been convicted for a serious offense for which a fine of the fifth category may be imposed, and against whom, as a person accused of said serious offense, a criminal financial investigation has been instituted in order to deprive that person of unlawfully obtained gains, where in view of such investigation it is established that other criminal offenses also have resulted in the convicted person unlawfully obtaining gain in any way.
4. The judge shall set the amount at which the unlawfully obtained gains are to be assessed. Such gains include the saving of costs. The value of objects the judge considers to constitute unlawfully obtained gains may be assessed at their market value at the time of the judicial decision or, where there is a need for recovery, by referring to the proceeds of sale by public auction. The judge may set an amount that is lower than the estimated gains.
5. The term 'objects' is to be taken to mean all corporeal property and all property rights.
6. In determining the amount at which the unlawfully obtained gains are assessed, court-awarded claims of injured third parties will be deducted.
7. In imposing the measure, the obligations, imposed by prior decisions, to pay a sum of money to deprive the person of the unlawfully obtained gains shall be taken into account.

Moreover, there are classic confiscation measures in Article 33a cc. So no problems here.

- The prohibition as far as officials are concerned is possible under Dutch criminal law under Article 29 DPC; of course at this point in time it is limited to persons convicted of offences against public office.
- Exclusion from subsidies or exclusion from future contracts can be imposed as an additional penalty for the economic offences under the EOA, but not for common offences under the DPC.

– Legal supervision of the organization or legal person can also be imposed as a provisional measure and/or as a penalty for the economic offences under the EOA, but not for common offences under the DPC.

So, in evaluating we can state that there are no major problems.
For economic offences, the Dutch EOA provides for a more extensive list of additional penalties, for instance the closure of the entreprise (partially or totally), and for far-reaching preliminary measures that can be imposed by the Public Prosecutor or by the investigating judge (for instance the provisional closure of the premises). However, when the predicate offences of the CJ are dealt with under the DPC, some additional penalties provided for in the CJ are lacking.

Article 10 – Mens rea

In Dutch criminal law, the mens rea depends on the criminal provision. Some criminal provisions do require 'dolus', others do not and in economic criminal law, many provisions are of the 'violation of due diligence' type.

Article 10 CJ is in general not problematic for the Netherlands. Moreover, for many violations under Articles 1 to 8 in Dutch law there are both dolus and culpa provisions. The only problem we can see is with Article 1 CJ. Fraud can be punished under this mens rea provision in tax and customs criminal law, but the common provision on forgery (Article 225) in the DPC is somewhat stricter.

Article 225 criminalizes both intentional acts and intentional non-acts. The intentional non-declaration of important information falls under the scope of Article 225. A problem might be the scope of the 'mens rea', including gross negligence. For the use of Article 225 there must be two types of dolus: 1) the person responsible for the forgery must know that the content is not correct or at least that he takes the risk to that effect (dolus eventualis); 2) the person committing forgery must have the intention to use the forged document as if it were genuine and correct or to allow it to be so used by third persons. In other words, Article 225 does not include a culpa-variant of the offence. Nevertheless, the special statutes (as in customs and in tax law for example) provide for culpa-versions of forgery.

For specific comments on the mens rea in corruption cases, see Article 3 supra.

Article 11 – Error

The Dutch Supreme Court has always underlined the importance of the principle 'nullum crimen sine culpa'. This means that even if there is no indication of mens rea in the criminal provision, the defendant can always use 'absence of any fault or culpability' ('avas') as a defence, although this has no legal basis in the codification. The defendant has to prove this (if it was an integral part of the mens rea in the provision then the onus of proof lies with the Public Prosecutor) and the slightest degree of fault or culpability (culpa levis) is sufficient to frustrate his defence. This defence of 'avas' can be used in two circumstances: 1) error as

regards the factual circumstances of the behaviour (**error facti**); 2) error as regards the illegality of the behaviour (**error iuris**).

The Dutch case-law is very strict as regards the 'avas' defence concerning error iuris. The only situation in which it can lead to a serious change is the one in which the defendant has acted in conformity with legal advice given by an authority having legal power in this respect and upon the condition that the defendant could reasonably trust such advice. If an official clearly gives advice which does not conform with the law, no such trust can be deduced from it.

In evaluating we can state that the Dutch case-law is much stricter than the substance of Article 11 CJ. Concerning error facti, it is clear that some indication of culpa levis will frustrate the defence. Concerning error iuris, this defence will not be granted because of negligence as regards the prohibition. Certainly economic operators have a very far-reaching duty to inform themselves about the regulatory obligations.

Article 12 – Individual criminal liability

One and the same offence can lead to the punishment of several persons, who have actively contributed to the commission of the offence. The DPC distinguishes between the liability of principals (Art. 47) and the liability of accessories (accomplice) (Art. 48)

Article 47

1. The following persons are liable as principals:
(1) those who commit a criminal offense, either personally or jointly with another or others, or who cause an innocent person to commit a criminal offense;
(2) those who, by means of gifts, promises, abuse of authority, use of violence, threat or deception or providing the opportunity, means or information, intentionally solicit the commission of a crime.
2. With regard to the last category, only those actions intentionally solicited by them and the consequences of such actions are to be taken into consideration.

Article 48

The following persons are liable as accessories to a serious offense:
(1) those who intentionally assist during the commission of the serious offense;
(2) those who intentionally provide the opportunity, means or information necessary to commit the serious offense.

Under the liability of principals it is not only the person who commits the offence who is included, but also the **auctor intellectualis**, the person who causes an innocent person to commit an offence or the persons who intentionally solicit the commission of an offence (incitement).

The liability of accessories or accomplices is limited to serious offences ('misdrijven'). They do not commit the offence in question (in that case such a person would also be a principal), but are liable for sustaining activities (ante-factum provision of objects for the commission, during the commission, or post-factum). The provisions of the DPC seem to be in line with the CJ on this point.

Article 13 – Criminal liability of the head of business
Article 14 – Criminal liability of organisations

We are dealing with both Articles 13 and 14 under one heading, as they are very intertwined in Dutch criminal law.

Article 51 of the Dutch Penal Code provides for all offences and, in addition to the liability of natural persons, the liability of the juristic or legal persons and of those who have ordered the offence or who have control over such unlawful behaviour (managers and corporate officials).

Article 51

1. There are two categories of criminal offenders: natural persons and juristic persons.
2. Where a criminal offense is committed by a juristic person, criminal proceedings may be instituted and such penalties and measures as are prescribed by law, where applicable, may be imposed:
(1) against the juristic person; or
(2) against those who have ordered the commission of the criminal offense, and against those in control of such unlawful behaviour; or
(3) against the persons mentioned under (1) and (2) jointly.
3. In the application of the preceding sections, the following are deemed to be equivalent to juristic persons: a ship-owning firm [*rederij*] and unincorporated associations, such as an unincorporated company (*vennootschap zonder rechtspersoonlijkheid*), a partnership (*maatschap*) and special funds.

This does mean that in Dutch criminal law we are concerned with a cumulative liability regime of 1) the natural person; 2) the legal person and 3) the managers and corporate officials, who order or lead de facto or de iure.

The legal person is defined according to the definition under the Civil Code, but the case-law has accepted the liability of organizations not having the civil legal form of a legal person. Moreover, legal persons under public law are not excluded (although the Dutch Supreme Court has built in some restrictions for the State as such). Fines may be imposed with a maximum of one million Dutch guilders (Art. 23 DPC). In addition, the proceeds of crime may be confiscated. Articles 20 of Book 2 Civil Code provides for declaration as a 'forbidden legal person' at the request of the Public Prosecutor. The prosecution may so request, when the activities violate public order. Participation in a forbidden legal person is a separate crime (Art. 140 (2)).

When the liability of the legal person can be proved – it is not necessary to prosecute that legal person as such – the Public Prosecutor can prosecute the manager and/or other corporate officials under the rule of vicarious liability. The difference with the liability of the managers and other corporate officials with the liability of natural persons consists of the fact that the former is a type of vicarious liability under two conditions: 1) the manager or corporate official is in a position to intervene (power, competence) and 2) he abstains from doing so. This means that the evidence of the mens rea is very different from the liability of the natural person and easier to prove. Of course the manager or corporate official can always be prosecuted as a natural person (as a principal or accomplice) if the conditions for such liability have been fulfilled.

For further comment see J.A.E. Vervaele in the special edition of the *Revue de Science Criminelle et de Droit Pénal Comparé* (2/1997) on the criminal responsibility of legal persons in the light of the *Corpus Juris*.

In evaluating we can state that the substance of Articles 13 and 14 is very much in line with the Dutch provisions. However, the standards for the liability of both the legal person and the managers and corporate officials seems to be built upon natural persons only. Autonomous standards for corporate liability, including elements of vicarious or strict liability, are absent in the CJ. In the Netherlands there is a vicarious liability regime for the managers and other corporate officials that is not limited to the head of business (it can also be someone from a lower level who holds key responsibility). The term 'head of business' in Article 13 is somewhat misleading, as the substance is much broader.

Article 15 – Extent of the penalty

As stated before, Dutch criminal law does not make use of any minimum sanctions. That means that the judge or court has a wide field of discretion when passing sentence. The Code does not provide for any circumstances which will decrease the penalty imposed. The punishment of the preparatory acts or of the attempt are not such a circumstance, as they widen the scope of criminalization. Grounds must be given for the sentence and the judge/court has to take into account, following the case-law, the seriousness of the facts, the circumstances of the commission and the character of the offender. In reality, the judges/courts take into account a) factors relating to the offence; b) procedural factors (long pre-trial detention; coercive measures which are too harsh...) and c) factors relating to the character of the offender.

For many offences, including economic offences, the Body of Public Prosecutors General has elaborated sentencing guidelines. They are not mandatory, but rather guide the prosecutors in the field.

Dutch judicial practice, both at the level of the Public Prosecutor (transaction policy for instance) and at the level of the judicature, is very much in line with the provision of the CJ.

Article 16 – Aggravating circumstances

The Code provides for three types of circumstances which may increase the legal penalty imposed:

a) general penalty-increasing circumstances, such as, for instance, some offences committed by a public official or the repeated commission of some offences (such as forgery and deception) within a time period of five years ('recidivism'). The penalty can be increased by one third of the basic penalty.

b) specific penalty-increasing circumstances, such as, for instance, some offences committed by the father or mother of a victim; the penalty can be increased by one third of the basic penalty.

c) qualified offences, such as, for instance, some offences accompanied by violence; the penalty is defined in the provision itself. In this category we can find

some provisions containing qualifications linked to 'organized setting'. However, this is not the same as 'criminal organization', limited to the Article 140 DPC.

In the actual provisions the DPC does not provide for aggravating circumstances such as those mentionned under Article 16 (1) a-b-c. Consequently, there can be no upgrading of the penalty to seven years for such aggravating circumstances.

The implementation of this provision is not easy. The Dutch legislator has to adapt his general regime of aggravating circumstances or has to have it linked to the specific offences. Also this last scenario is complicated as the Dutch legislator has not opted for specific offences for EC fraud for instance.

Article 17 – Penalties incurred in the case of concurrent offences

It is of course perfectly possible that a person is confronted with a cumulative indictment. In Dutch criminal law, the **concursus realis** of Article 57 applies, at least for serious offences ('misdrijven').

> **Article 57**
> 1. In the case of the concurrence of acts that are considered to be separate, unrelated activities and which constitute more than one serious offense carrying equivalent principal penalties, one punishment shall be imposed.
> 2. The maximum punishment shall be the total of the maximum penalties prescribed for the acts; however, in the case of imprisonment or detention, punishment may not exceed the maximum of the most severe penalty by more than one third.

As can be derived from this provision, the upgrading to three times the maximum penalty is only possible for fines, not for custodial sentences.

For the concursus realis of misdemeanours or misdemeanours and serious offences, the rule of Articles 62 and 18 (2) must be applied. This means that for every misdemeanour the full penalty is imposed, but the total penalty for misdimeanours is limited to 1 year and 4 months. However, the fine can be cumulated without restriction.

Concerning Article 17 (2), it is difficult to see the difference between offences under Community regulations and offences under national laws. In fact, the *Corpus Juris* is not a federal code, but contains provisions in order to harmonize or unify the national legislations. If a person is confronted with a cumulative indictment, containing provisions of traditional national origin and provisions having a Community dimension, the same rules of the concursus realis apply.

Concerning Article 17 (3), in Dutch law a distinction must be made between penalties already imposed for the same behaviour under criminal law and the ones imposed under non-criminal law. Article 68 DPC provides for the double jeopardy principle (ne bis in idem).

> **Article 68**
> 1. Except in cases in which judgments are subject to revision, no person may be prosecuted twice for an act for which a final judgment has been rendered by a judge in the Netherlands, the Netherlands Antilles or Aruba.

2. Where a final judgment was rendered by another judge, the same person may not be prosecuted for the same act in cases in which:
(1) that person has been acquitted or discharged in criminal proceedings;
(2) that person has been convicted and sentenced and the sentence has been fully served, a pardon has been granted or the sentence has lapsed.
3. No person may be subjected to prosecution for an act that has been finally disposed of, so far as he is concerned, in a foreign country through his satisfying a condition set by the competent authorities in order to avoid criminal proceedings.

The double jeopardy principle is only of value in criminal law and there is rich case-law concerning the meaning of 'same facts'. When, for example, persons use forged documents in customs procedures while belonging to a criminal network, they can be prosecuted and sentenced for 'belonging to a criminal orginazation' under Article 140 DPC. Whether they can still be prosecuted for forgery (Art. 225 DPC) on the same facts depends to a large extent on the factual circumstances. De iure the aims of Articles 140 DPC and 225 DPC are very different, but the circumstances of the facts can show a simultaneousness of behaviour and a substantial coherence in such behaviour and thereby in the liability of the offenders. If this is the case, the douple jeopardy rule does apply.

When sanctions have already been imposed by other non-criminal courts or administrative authorities, general principles of law oblige these sanctions to be taken into account as part of the sentencing policy of the judge/court.

The major problem in implementing this provision is without any doubt the upgrading of the maximum penalty by three times in case of concursus realis of serious offences. This is quite unthinkable in Dutch criminal law. This would mean that maximum sentences of 18 years would be possible. Such sentences would be higher than those imposed for manslaughter or rape. In other words, such a provision would not be proportionate to the ranking of penalties concerning serious offences.

Article 18 – Status and structure of the European Public Prosecutor (EPP)
Article 19 – Seisin of the epp and opening of proceedings

1. Hierarchical position

If a European Public Prosecutor (EPP) were to be established it could certainly only function on the basis of a higher hierarchical position than national public prosecutors.

2. Constitutional Objections I

Since the way in which the European Prosecution Service (EPS) may operate contravenes certain provisions of the Constitution of the Kingdom of the Netherlands as set out below, the establishment of the EPS should find its basis in a treaty. This treaty must be ratified by a two-thirds majority in both Houses of Parliament. This is also a result of the fact that neither the EC Treaty nor the Treaties of Maastricht and Amsterdam provide for the establishment of such an

organisation. In addition, Articles 38 and 39 of the Statute for the Kingdom of the Netherlands require that the Netherlands must take the opinion and the legal systems of the two other constituent parts of the Kingdom (the Netherlands Antilles and Aruba) into consideration.

3. Constitutional Objections II

On the basis of a brief research and investigation (due to time limitations, too) it seems that problems could arise with the following provisions from the Constitution of the Kingdom of the Netherlands:
Article 4, extradition may take place on the basis of a treaty only;
Article 17, the right to be adjudicated by law;
Article 113, para. 1, adjudication of criminal offences takes place before the judicial authorities (i.e. of the Netherlands);
Article 116, competent courts must be determined by law;
Article 119, prosecution of certain civil servants (ministers, for example) must take place before the Supreme Court;
Article 122, para. 1, a pardon may be issued by Royal Decree;
Article 122, para. 2, an amnesty may be given on the basis of law.
We would not exclude that other provisions of the Constitution and of treaties under international law would be opposed to the establishment of the EPP. Apart from this, there are many unwritten constitutional concepts which find their basis in legal practice.

4. Necessary amendments

If the EPP were to be established, then numerous provisions of the national Code of Criminal Procedure (CCP) and other acts, codes and decrees should be changed. This all results from two basic elements of the EPP structure:
- the EPP is higher in hierarchy and may therefore command national services to do or not to do something;
- the EPP may ask for a deferral of the case to the EPS.

5. Specifically as regards Article 18

Article 18, paragraph 1, provides for 'a single legal area' for the purposes of the offences under Articles 1 to 8. This must be seen as limited to the EPS itself and not to national authorities. To give national authorities the same competences in other Member States (transnational competences) would render the EPS superfluous.

6. Accountability

Under the Dutch criminal justice system the Public Prosecutor is independent, in the sense that he or she takes the decision on whether or not to prosecute without orders from others. On the other hand, Public Prosecutors are accountable to the Minister of Justice, who is (in his/her turn) answerable to Parliament (Art. 5 Wet

op de rechterlijk organisatie/Act on the Organisation of the Judiciary). The EPS in its present structure lacks both negative accountability (complaints about the non-performance of the EPS) as well as positive accountability (complaints about the actions of the EPS). In this respect the guarantees under the European Convention on Human Rights and other human rights instruments require a careful division of responsibilities. Against whom may a citizen lodge a complaint with the European Commission on Human Rights if the action was committed by the EPS? Against the European Community? This is impossible, because complaints may only be brought against states (Art. 25 ECHR). Against the national authorities? First, it should be determined against which national authority. This may be difficult if the EPS acts in the face of its own investigations or if more than one state is involved. And even if this national authority can be designated other questions may arise.[1] Is the state to be held responsible for actions taken by a Community organ?

7. Centralisation within the Dutch Prosecutorial Service

The Netherlands is in the process of reorganising the national Prosecutorial Service. One aspect of this is the establishment of a national (not local) Prosecutorial Service which has the task of combating the more serious forms of crime. These efforts should be taken into consideration when building up another (but European) centralized EPS.

8. Legal Basis

The prosecution of criminal offences may only take place on the basis of (written) law (Art. 1 CCP). From this rule is apparent which Public Prosecutor is competent (Arts. 2-11), and which authorities are competent to investigate. See the limitative lists of authorities in Article 141 CCP. The structure of the CJ seems to imply that the national Public Prosecutor will always be in charge of investigations concerning EC fraud. In practice the involvement of a Public Prosecutor only may start when the case is brought to court. In the stages before the trial, other law enforcement agencies may have dealt with the matter, either in an administrative way, or in a criminal way. The automatic transfer of data collected under administrative proceedings to an authority responsible for criminal prosecution (EPS), would run the serious risk of being contrary to the ECHR. Administrative proceedings impose many obligations to cooperate, which may not be imposed on suspects.[2]

---

1 See A.H. Klip, 'The Decrease of Protection under Human Rights Treaties in International Criminal Law', *International Review of Penal Law* (1997), p. 291-310.

2 See Article 6 ECHR and the European Court of Human Rights, 25 February 1993, *Funke* v. *France*, Series A-256A.

9. Opportunity principle I

The decision to prosecute is under the Dutch constitutional system based on the principle of opportunity (Art. 167, para. 2 CCP). This means that the Public Prosecutor may 'in the common interest' refrain from prosecution. In this respect one should also be aware of the fact that there are other ways of reacting to crime, which should neither be considered criminal prosecution in the classical sense, nor refraining from doing anything at all. Under certain circumstances the Public Prosecutor may impose a fine on the perpetrator, in order to prevent prosecution (Art. 74 Penal Code).[3] The offender has **a right not to be prosecuted** if the crime may only be punished by a fine and he pays the maximum fine which may be imposed (Art. 74a Penal Code). How do these rights relate to the possibilities of the EPS to take decisions on prosecution?

10. Opportunity principle II

If the EPS takes the decision not to prosecute, as provided in Article 19 para. 4 *Corpus Juris* (CJ), national provisions may force the opposite effect. Articles 12 to 13a CCP provide for a complaint of an interested person in cases were the Prosecutor has decided not to prosecute. After consideration of the complaint the Court of Appeal may order the Public Prosecutor to prosecute. Does the Court of Appeal also have this power in cases in which it was the EPS which took the decision not to prosecute?

11. Execution of Sentences

It is not entirely clear what it meant by the EPS being responsible for the execution of sentences. This is important with regard to the early release of convicted persons. In the Netherlands this right exists only after two-thirds of the sentence has been completed, while other systems persons may be released much earlier. Of importance here is the fact that persons convicted of EC fraud must receive the same treatment as other prisoners (Art. 1 Constitution of the Kingdom of the Netherlands).

Regarding the execution of sentences for which the EPS is responsible, other questions arise. Does this imply that the EPS also has a say in decisions on the transfer of the execution to another state? Under some treaties the convicted person even has a right to such a transfer. Is this different when the state to which the execution will be transferred is not a Member State?

---

3 See Chrisje Brants and Stewart Field, 'Discretion and Accountability in Prosecution: A Comparative Perspective on Keeping Crime out of Court', in: Christopher Harding, Phil Fennell, Nico Jörg and Bert Swart (Eds.), *Criminal Justice in Europe*, Clarendon Press, Oxford (1995), p. 127-148.

12. Specifically as regards Article 19

Among other provisions of the *Corpus Juris*, the provisions of Article 19, paragraph 1 seems to carry the danger of establishing new bureaucratic ways of prosecution. The EPS must be informed of 'all acts which could constitute one of the offences'. Although this is understandable in the light of the concurrent (but primacy) competences of the EPS, it may bring about a great deal of paperwork. Apart from that, the national authorities will use different standards in submitting 'all cases' to the EPS and will certainly not provide information uniformally, which makes it more difficult to respond adequately.

13. Ne bis in idem

Subsequent decisions of the national prosecutor and the EPP run the risk of violating the principle of non bis in idem, a principle of basic importance under Dutch law and which also recognises foreign decisions.[4] This is provided for in Article 68 of the Penal Code and Article 255 CCP. If, for instance, the Public Prosecutor has notified the suspect that no prosecution will take place as meant in Article 255, subsequent prosecution will be inadmissible. If a decision as provided for in Article 255 CCP has been taken, the Dutch authorities may neither undertake any investigation concerning the same offences for national proceedings, nor assist foreign authorities for criminal proceedings in their country. Reservations to that respect are made to every treaty on international cooperation in criminal matters to which the Netherlands is a party.

14. Conclusions concerning Articles 18 and 19

Many constitutional rules are opposed to the system now introduced by the *Corpus Juris*. This is due to the fact that although the EPS is only to be established for a limited number of crimes, the changes which will be necessary in national law relate to every aspect of the prosecution of criminal offences, as well as to evidentiary matters. In this respect one may ask whether such harmonisation is worthwhile for such a limited number of crimes.

The system contained in Articles 18 and 19 may be compared with the structure of the Office of the Public Prosecutor of the International Criminal Tribunal for the Former Yugoslavia as may be found in the Statute of the Tribunal. It has the right to defer a case to the competence of the Tribunal. Lessons should be learned from the difficulties this comparable system has in being (constitutionally) accepted by the Member States. We should look at what the experiences of the Yugoslav Tribunal and its prosecutor (with almost identical competences) tell us. Is it likely that the *Corpus Juris*/European Prosecution Service will be more effective?

---

4 See Peter Baauw, 'Ne Bis In Idem', in: Bert Swart and André Klip, *International Criminal Law in the Netherlands*, Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht Freiburg, Freiburg im Breisgau (1997), p. 75-84.

The *Corpus Juris* does nothing to remove two important barriers which national prosecutors encounter both in their choice of the accused and in their choice of witnesses (evidence). The prosecution of EC fraud in cases which go hand in hand with corruption among Community officials is almost impossible. This is due to the fact that Community officials are immune from criminal prosecution and are also under an obligation not to provide the information requested by the judicial authorities. This would also be in line with the decisions of the Court of Justice in the case of *Zwartveld* to the extent that the Commission may not refuse to provide an authority responsible for the criminal prosecution of fraud against the EC budget with evidence.[5]

Article 20 – The EPP's Powers of investigation

The use of the expression 'exclusieve bevoegdheden' in Article 20, paragraph 2, in the Dutch version, could be misunderstood (the English version refers to 'the EPP's own powers'). The starting point of the *Corpus Juris* is not that the prosecution of the offence under Articles 1 to 8 belongs to the exclusive competence of the EPP. It accepts the principle of concurrent jurisdiction. Exclusive competences as used in Article 20, para. 2, would give a reason for unwilling national enforcement agencies to do nothing at all upon their own initiative, while referring to Article 20.

The exact legal meaning of the 'aanbevelingen/recommendations' (Art. 20, para. 2, under b) which may be addressed to the national agencies should be determined. If these are orders, which leave the lower authority no discretion, the constitutional consequences earlier described in respect of Articles 18 and 19 apply. If these are requests, one may sincerely question whether they will be given priority, given the workload of national enforcement agencies in respect of serious crime.

The fact that paragraph 3 sums up a number of powers which should be executed by the EPP may lead to inactive national authorities. It should be made clear whether this paragraph prevents national authorities from taking action on their own initiative.

Paragraph 3 sub. a raises the basic question whether only the rights of the defence as mentioned in Article 29 should be applied or whether national rules concerning the interrogation of suspects also apply and, if so, which national rules? In addition, it should be made clear whether an interrogation as meant here, may lead to a report by the EPP which is admissible as evidence in national proceedings. Even under current Dutch law, such a report would be admissible, although the court may require the application of certain rights recognised under Dutch law (reference to the right to remain silent/the presence of legal counsel).

The coercive means of investigation as referred to under paragraph 3 sub. b may be used by any authority charged with the investigation of crime, unless

---

5 Court of Justice, 13 July 1990, C-2/Imm, *Zwartveld and others*, Reports of Cases 1990, I-365; Court of Justice, 6 December 1990, C-2/Imm, *Zwartveld and others*, Reports of Cases 1990, I-4405.

certain places have to be entered (houses, etc.). As soon as the entering of houses are necessary or when the citizen must be forced to cooperate and to surrender certain documents, the permission of the examining magistrate or the court is necessary. No Dutch Public Prosecutor may use such powers on his own account. The Code of Criminal Procedure provides for specific rules concerning the investigation of automated systems. The examining magistrate (not the Public Prosecutor) may order such an investigation (Arts. 125i-125n CCP).

Sub. c, d, e, and f raise the question whether the EPP would be placed on a equal footing with the national Public Prosecutor in relation to its powers and competences. It specifically raises the question whether the EPP may require a preliminary investigation by the examining magistrate. If so, the EPP would have the power to request an expert investigation.

Sub. g deviates on many points from the current Dutch national legislation. The main deviation is that the periods indicated under Dutch law are much shorter than six months. The maximum period a suspect may spend in detention on remand before the hearing in court is 106 days. These 106 days consist of various short periods of detention which apply under different conditions: aanhouden (arrest) (6 hours); inverzekeringstelling (taking into police custody) (3 days, may be extended once only); bewaring (remand in custody) (ten days, may not be extended); gevangenhouding or gevangenneming (detention in custody) (30 days, may be extended twice). Detention on remand may then only be extended by the court at the hearing for as long as the trial is pending. Thus the system provides for different authorities who are competent to order the detention. The longer the pretrial detention runs, the higher the authority whose approval must be obtained and the more requirements there are to be fulfilled. Starting with any police officer who is competent to order aanhouding; inverzekeringstelling may only ordered by the (hulp-) officier van justitie/(assistant-) public prosecutor; bewaring may be ordered by the rechter-commissaris/examining magistrate; gevangenhouding by the judge in chambers; the court at the hearing may prolong detention on remand for periods not exceeding three months (Art. 282 CCP).

The extremely long period of six months, to be extended by an additional three months is incompatible with the current Dutch system which provides for a judicial review at any stage of the detention on remand as described above. It must seriously be questioned whether such a system would be compatible with the European Convention on Human Rights. In addition, the suspect may apply to be set free. The court at the hearing may also release the suspect proprio motu.

Paragraph 4 raises the question whether or not such a delegation must be accepted. As such, the execution of the powers by national authorities but initially given to the EPP, do not give rise to questions other than those related to the EPP. In other words: if the use of such powers by the EPP is compatible with the Constitution of the Netherlands, the same will apply for the Dutch authorities. National authorities, however, may be subject to a hierarchical relationship which may influence the way in which they perform the functions of the EPP.

Article 21 – Closure of the preparatory stage

In the case of a decision not to prosecute a difference is made under Dutch law between 'kennisgeving niet verdere vervolging' and 'buitenvervolgingstelling' (discontinuation of criminal proceedings). The former is a decision by the prosecution and the latter a decision by a court. For these reasons preferably the term 'kennisgeving niet verdere vervolging' should be used, since it is clear that it is a decision of the EPP. In addition, a decision not to prosecute may be taken without a formal notification (sepot).

The chronological steps to be taken under Article 21 correspond to the current Dutch practice. New would be the instruction to notify the European Commission and those who informed the EPP of a crime. There are corresponding provisions related to the position of victims of the crime. Subsequently, this is related to the possibility of victims and other interested persons, lodging an appeal against such a decision to the Court of Appeal (Art. 12 CCP). One may question whether it makes sense to declare this national procedure applicable in cases where the EPP has decided not to continue the prosecution. The eventual result of proceedings ex Article 12 CCP is that the Court of Appeal orders the prosecutor to take up proceedings against a certain suspect. Does the EPP have to follow such an order of a national court? Or does it mean that the national prosecution (not the EPP) should prosecute?

Another question is whether the decision by the EPP not to prosecute binds the national prosecution. Should such a decision, for instance, be seen as an instruction or do national authorities retain their discretion again to consider the case? If the EPP were to be considered as exclusive, there would be no room for alternative national proceedings. This may be entirely different when the EPP is not regarded as exclusive.

Under Dutch law the Prosecutor may independently decide to bring a matter before a criminal court. He neither needs the permission of a higher prosecutor, nor of a court. The provisions and references in Article 21 do not make any sense under Dutch law. However, if the public prosecutor deems a preliminary investigation under the supervision of the examining magistrate to be necessary, he may require the latter to conduct such an investigation. There is no obligation for the Prosecutor to do so.

Article 22 – Bringing and terminating a prosecution

National rules determine which Court is competent both in a relative sense and in an absolute sense. First it is important to determine which Court (Sub-district Court; District Court; Court of Appeal or Supreme Court) is competent. The Courts of first instance are the District Court: for all crimes, as well as a number of limited misdemeanours (Art. 56 Wet op de rechterlijke organisatie/Act on the organisation of the judiciary). The District Courts also hear appeals from the decisions of the kantongerechten (Sub-district Courts). The kantongerechten are competent for all misdemeanours, unless the District Court is competent (Art. 4 Wet op de rechterlijke organisatie).

In relation to the EPP, the question which should be answered is whether the crimes under the articles should be regarded as 'misdrijven' or as 'overtredingen' in the sense of the Wet RO. If we follow the Dutch translation of the *Corpus Juris* this issue has been decided in favour of misdrijven (see passim). This would render the District Court competent. Territorial competence is determined by Articles 2-6 CCP. These articles state that there shall be equal competence for the courts in whose jurisdiction:
the offences have been committed;
the suspect lives or resides;
the suspect stays;
the suspect had his latest known place of residence;
a prosecution for another offence has already commenced;

In addition, offences committed within the territorial sea will be prosecuted before the court whose jurisdiction borders the territorial sea. Offences committed on the territorial sea or on board a ship will be prosecuted before the Amsterdam District Court. When the preceding provisions do not declare a particular district court to be competent, the Amsterdam District Court will then be competent. The order given above is an order of preference. It may require consultations with various national public prosecution services. The suspect/accused has the right for the proceedings against him to be concentrated before one single court. This is linked to the fact that in the Penal Code the court is instructed to impose one sentence on various crimes committed by the accused (see Arts. 57-60 Penal Code). If a single act violates two or more criminal provisions at the same time, the provision which provides for the highest penalty should be applied (Art. 55 Penal Code). Article 55 Penal Code is also of importance in the context of the *Corpus Juris*. The crimes under the *Corpus Juris* will also be crimes under national law for which the national authority may have commenced proceedings.

The Dutch and English texts of paragraph two do not clarify whether pardon and amnesty may still be granted under national law or not. Non-application of the rules on pardon and amnesty is in violation of Articles 1 and 122 of the Constitution. It is also unclear whether any application of the loss of the right to prosecute for the EPP also applies to the national authorities.

The application of the statute of limitations is, in comparison to Dutch law, rather short: five years. Crimes for which imprisonment of more than three years may be imposed may be prosecuted within a period of twelve years (Art. 70 Penal Code). The rule on interruption (stuiting), as formulated in the CJ, is the same under Dutch law. The periods, however, are much longer under Dutch law.

Paragraph 2 sub. b violates various basic rules concerning settlement ('transactie') as a legal concept under Dutch law (Art. 74 –74c Penal Code). Unlike the *Corpus Juris*, Dutch law does not require an admission of guilt. It is a mechanism to prevent a trial only by means of paying a fine. Under Dutch law the prosecution would no longer be free to propose a settlement, if he would not have sufficient reasons to refer the case to the court. One of the important elements of the 'transactie' and related to the fact that the perpetrator does not admit his guilt, is that it is not made public. Under the circumstances described in Article 74a PC,

the suspect even has a right to 'transactie' if he pays the maximum fine provided for the offence.

Thus, the concept of settlement is entirely different from the Dutch 'transactie'. Introducing this concept via the *Corpus Juris* into Dutch law would amount to a serious practical retrograde step in the enforcement of criminal law. More crimes are dealt with by means of 'transactie' than via prosecution before a court. If the *Corpus Juris* system would be introduced, the enforcement of many other crimes would be seriously hindered. The fact that so many crimes end in a compromise (getransigeerd) is the result of the fact that it is not public and does not require a recognition of guilt.

The grounds for the non-application of the possibility of settlement (repeated offences, use of arms, or forgery or fraude of 50,000 ECU or more) do not make sense under Dutch law. The ground of the use of falsified documents almost seems to rule out settlement altogether in the sense of Article 22 para. 2, since most of the crimes of the *Corpus Juris* can only be committed when falsified documents are used.

Article 23 – Execution of sentences

Under Dutch law confiscation is not considered to be a penalty (straf) but a measure (maatregel) in addition to the penalty. The confiscation of the proceeds from crime (ontneming van het wederrechtelijk verkregen voordeel) may be ordered in the final decision of the court on the criminal offence, but also in separate proceedings (Art. 36e Penal Code). This means that the presumption which is implicitly present in Article 23, that there will be a decision on confiscation when the decision on guilt has been taken, does not apply to Dutch law.

The stipulation that confiscation may also take place in places other than those indicated in the order only applies within the territory of the Netherlands. As soon as a confiscation order must be executed transnationally the rules of the execution of judgements in other states apply. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides an excellent instrument for this type of cooperation.

Paragraph 1 sub. a, b and c are already applicable in the Netherlands. As mentioned earlier, Dutch law applies the highest sentence in case several provisions are violated in the same act. It makes a difference between 'eendaadse samenloop' (concurrence of offences) and 'meerdaadse samenloop' (various offences). It is not clear whether Article 17 provides one of these systems. The binding multiplication by three, as provided in Article 17, must be regarded as extremely disproportional under Dutch law. It also violates the rule that Dutch law does not recognise minimum sentences. Applying this rule to current Dutch legislation would mean that three different acts of forgery/falsification of documents must be punished by eighteen years' imprisonment (Art. 225 Penal Code provides for six years). This would mean that in the Dutch legal order EC fraud is considered to be a more serious crime than rape (12 years, Art. 242 PC) and manslaughter (15 years, Art. 287 PC). Only very few crimes, such as murder and war crimes, may be punished by sentences more severe than 18 years.

With respect to sub a, b and c of article 23, paragraph 2, the following remarks must be made. Under Dutch law these are matters to be taken into consideration by the Court, not directly by the prosecution. If a second prosecution would take place (sub. b) the prosecution would not be entertained by the court. Article 68 of the Penal Code stipulates that new proceedings against a person for the same offence may not take place (see Peter Baauw, 'Ne Bis In Idem', in: Bert Swart and André Klip, *International Criminal Law in the Netherlands*, Freiburg im Breisgau (1997), p. 75-84). The situation, described under b cannot occur under Dutch law.

Paragraph 2 of the article implies many previous procedures which it does not mention. In fact it comes down to the application of the transfer of the execution of judgement in combination with the transfer of prisoners. Neither under Dutch law, nor under international law may the sentencing court indicate that the penalty shall be served in another state. The system of international law is based on requests between the administrations. Although the explanatory memorandum refers to international law, the *Corpus Juris* is contrary to basic elements of that system.This system is to be found in various treaties which are applicable to the Netherlands as to other Member States: the 1970 European Convention on the International Validity of Criminal Judgements (European Treaty Series 70), the European Convention on the Transfer of Sentenced Persons (European Treaty Series 112), and the 1987 Agreement on the Application among the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons.

The second presumption is that it is a right for the convicted person to have it sentence executed in another Member State of his choice. This is not the case under Dutch law. The convicted person may bring up the matter with the authorities. It is then within the discretion of the Dutch authorities to submit a request to another state.

Article 24 – Competence ratione loci

The powers provided in Article 24, paragraph a seem to be inherent to the establishment of the EPP. The recognition of an order to arrest in other states, as mentioned under b, corresponds with the cooperation between the Member States, currently in force under the European Convention on Extradition. However, the direct enforcement of judgments without a grant of execution deviates from the current system of transfer of criminal judgements. Currently foreign criminal judgements may be executed in the Netherlands on request, after transformation into a Dutch criminal judgement. There are two reasons for this system. Firstly, legal remedies must be addressed to the authority imposing the sentence. It would not be efficient if a Spanish sentence would be executed in the Netherlands and the convicted person had to address legal remedies to the Spanish courts. Secondly, foreign decisions may contain elements unknown in the Netherlands. For instance, some jurisdictions impose the obligation for those convicted to bear the costs of the proceedings. Dutch law does not provide such a measure.

The system proposed in Article 24 is comparable to the existing system within the three constituent parts of the Kingdom of the Netherlands (the Netherlands, the Netherlands Antilles, Aruba). On the basis of Article 40 of the Statute of the Kingdom, decisions taken in one country may be executed in another. The situation within the Kingdom is somewhat different to that within the European Union. Within the three jurisdictions of the Kingdom, differences in the law may exist, but only on minor points.

Paragraph 2 comes down to a mandated form of international assistance: the request to request a third authority. Apart from the fact that it seems to be highly impracticable, Dutch law does not provide for this form of cooperation. The law on international assistance in criminal matters only provides for requests to foreign authorities for Dutch criminal cases as well as for the execution of foreign requests to the Netherlands for foreign criminal cases. Apart from assistance to International Criminal Tribunals (Yugoslavia/Rwanda), assistance to or from multinational organisations has no basis under Dutch law.

Article 25 – Preparatory stage

Article 25 introduces a procedure alien to current Dutch criminal procedure by means of the introduction of a judge of freedoms. It introduces an additional layer of authorities and powers with competences already existing under Dutch law. Most of this judge of freedoms' proposed competence currently belongs to the examining magistrate. I further refer to my comments on Article 20 in respect of detention on remand and preventive detention. As described earlier, the question whether a civil party may take part in criminal proceedings is decided by the criminal court. Article 94a of the Code of Criminal Procedure provides for the seizure of objects in order to be able to impose the confiscation of the proceeds of crime at a later stage.

Paragraph 2 is superfluous. Articles 94, 94a, and 97 of the CCP provide for the necessary search and seizure even in cases in which the presence of the examining magistrate could not be obtained.

Paragraph 3 is contrary to current Dutch practice in the sense that it is the court at the hearing which will determine whether evidence is admissible or not. A separate proceeding to determine the admissibility of evidence only, is non-existent.

Article 26 – Judgment stage

Article 26, paragraph 1, determines issues already stipulated by the Constitution, the Act on the Organisation of the Judiciary and the Code of Criminal Procedure as well as the European Convention on Human Rights. The courts in the Netherlands only consist of professional judges only.

Paragraph 2 regulates the entirely different matter of the choice of the Member State in which prosecution takes place. The criteria correspond to the Dutch legislation on the transfer of criminal proceedings (Art. 552t-552hh CCP) and the obligations of the Netherlands under the 1972 European Convention on the

Transfer of Proceedings in Criminal Matters (European Treaty Series 73) and the practice under Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters (European Treaty Series 30).

Paragraph 3 seems to deal with the relationship between international/-supranational law and municipal law. Articles 93 and 94 of the Constitution obliges the courts to apply international decisions and international law and that it shall prevail over national law. The other part of paragraph 3 deals with the grounds for the penalty imposed. The obligation for criminal courts to provide grounds for the sentence is found in Article 359 CCP.

Article 27 – Appeal to national courts

Article 27, paragraph 1, stipulates an obligation already provided under national law and the European Convention on Human Rights and its Protocols (especially protocol 7).

Article 404 CCP provides for an appeal by the prosecutor in the case of acquittal. The injured party which appears for the first time on appeal will not be admitted (Art. 421 CCP).

A more severe sentence may be imposed on appeal only by an unanimous decision of the Court of Appeal in matters where there has been an appeal by the accused only (Art. 424 CCP).

Article 28 – Appeal to the European Court of Justice (ECJ)

The preliminary rulings of the court are already provided for under national law. The competence of the Commission to request a preliminary ruling would be new. The same goes for the EPP and national authorities. Which national authorities are meant under c in addition to those which are already competent under a? The competence of the prosecution (either European or national) and the Commission to refer to the Court of Justice for a preliminary ruling is contrary to the current case law of the Court of Justice. Should the prosecution and the Commission have the competence to refer a case to the Court of Justice, the principle of equality of arms, as embodied in Article 6 of the ECHR, requires that such a remedy be given to the defence as well.

Paragraphs 2 and 3 correspond to what is currently applicable under Community law.

Article 29 – Rights of the accused

Paragraph 1 raises the serious question whether this is in compliance with the obligations on Member States under human rights treaties. By exclusively selecting two articles from two human rights conventions only, the *Corpus Juris* excludes the application of other provisions of these two conventions and of other conventions in general. Examples of other rights of the defence may be found in Articles 8 as well as Article 14, and 1 Protocol 1 and many others. Excluding the main body of rights guaranteed under human rights treaties may amount to a violation of the obligations under these conventions. Should the reference to the

two articles in paragraph 1 be meant as an example only, then this must be regarded as superfluous. All Member States are already bound by the ECHR. When it is meant to stress that the EPP itself is also bound to the ECHR, it follows from the obligations on all fifteen member states that their common organs are bound by the same totality of obligations.

Paragraph 2 finds its basis in Article 29 CCP and the case law thereon, as well as in the case law of the European Court of Human Rights (*Funke* case).

Paragraph 3 stipulates some of the rights provided for in Article 6 ECHR and already declared applicable under paragraph 1.

Article 30 – Rights of the commission as partie civile

The injured party (benadeelde partij) only has standing in cases which will be dealt with in court. There is no provision which entitles the injured party to influence the course of criminal proceedings before the hearing. Should the prosecution not bring the case before the court there are two options. The injured party may request the Court of Appeal to order the prosecutor to prosecute. The injured party may also itself initiate civil proceedings before the civil court. The realisation of the latter possibility is a decision independently taken by the injured party only. Even a decision of the criminal court not to receive the injured party in its complaint, does not impede civil proceedings. This is due to the fact that the criminal court can only decide upon civil suits of 'a simple nature' (van eenvoudige aard) (Art. 361 CCP). It may be seriously doubted whether the Commission would fulfil the criterion of Article 361 paragraph 2 under b CCP, that 'it was directly damaged through the proven criminal offence' (aan haar rechtstreeks schade is toegebracht door het bewezen verklaarde feit).

Paragraph 2 creates a right of subrogation to the Commission. Under Dutch law only the injured party that suffered damage directly from the offence has standing in the criminal proceedings. When the injured party transfers its rights to a third party (e.g., to an insurance company), the latter may only follow civil proceedings and is excluded from participation in criminal proceedings.

The State of the Netherlands is never the injured party. Under Dutch law this is logical because it is presumed that the prosecution represents the interests of the state. Would the state also be a injured party, if it were to be represented twice in the same proceedings. Such a system is contrary to the requirement that the prosecution (i.e., the state) shall be impartial and objective. The assimilation principle does therefore not apply here.

If the Commission itself were to be declared as the injured party it has the rights described in Articles 51a-51f CCP. This includes the right to see documents and to be represented by learned counsel. It does not include, however, participation in the investigations or the right to appeal. Under Dutch law evidence is collected by the authorities of the state. Although individuals may be under an obligation to submit certain objects to the state or to testify, evidence as such may only be collected by the state. An injured party may present certain objects as evidence or suggest testimony. It is for the Court to decide whether this is in fact evidence or not.

Article 31 – Burden of proof

Paragraph 1 finds its basis in Dutch law under Article 6, paragraph 2 of the ECHR. Paragraph 2 finds its basis in the case law of the European Court of Human Rights and the decisions of the Court of Justice.

Article 32 – Admissible evidence

The Netherlands in practice has a relatively open system of evidence. Article 339 CCP stipulates that evidence consists of:
a. observation by the judge/court
b. testimony of the accused
c. testimony of witnesses
d. testimony of experts
e. written evidence
Article 344 CCP further stipulates the various forms of written evidence. The forms of evidence mentioned under a will be admissible under Dutch law, since the case law of the Supreme Court accepts many forms of written evidence. A European deposition will certainly be admissible in the Netherlands, because it corresponds to the current practice. No change of law will therefore be necessary on this point. The last sentence under a refers to the requirements of the ECHR. Dutch courts tend to follow ECHR case law. There is neither a provision that makes the registration by video compulsory nor a provision that would prohibit such registration under Dutch law.

In respect of paragraph 1 in general, it should be mentioned that although Dutch law admits almost anything as evidence, it does not give any instructions as to the consequences to be attached to accepted evidence. It is for the court to value the evidence it has before it. It may set aside certain evidence as being less reliable and instead base its decision on the evidence it regards as being the more reliable.

As follows from above, Dutch law does not require that every testimony will be heard at the hearing. The criteria for the courts to accept out of court evidence are based on the criteria of case law on the right to question witnesses in Article 6 ECHR. The introduction of the out of court evidence under b would be very time consuming in comparison with the current practice. It must be mentioned that the European Court of Human Rights does not require that all witnesses will be heard at the hearing (*Unterpertinger/Kostovski*). The right to an interpreter is provided in Article 275 CCP and in Article 6 ECHR.

Paragraph 1, under c refers to situations that are dealt with entirely differently under Dutch law. On the basis of case law a suspect should be informed of his right to remain silent on every occasion that he is interrogated about a possible crime (Art. 29 CCP). This provision is applicable irrespective of the circumstances of the interrogation, the authority posing the questions or the place of the interrogation. 'Statements outside interrogation' therefore refers to standards unknown in the Netherlands. This is due to the fact that every police officer may draw up a report stating what he heard from the suspect. If the suspect was informed of his right to remain silent, the report will be admissible as evidence. Spon-

taneous and voluntary declarations by the accused are always admissible as evidence. There is no such right to the presence of counsel during police investigation stage. There is neither a right nor an obligation to record all the testimony of the accused.

There is no impediment to admitting the documents as referred to under d and e. It would not be a requirement whether the accused was under an obligation to submit the documents or not.

Paragraph 2 represents a rule already existing under Dutch law (Art. 344, paragraph 1 under 5 CCP).

Article 33 – Exclusion of evidence illegally obtained

The formulation of paragraph 1 in itself bears a contradiction. Evidence is either collected in violation of higher rules, when it will then not be admitted. Or evidence is collected in compliance with the rules, when it will then be admitted. A 'justified violation of the law' must, due to the direct application of higher law in the Netherlands, be considered as 'in compliance with the law'.

It will be almost impossible to apply paragraph 2. It stipulates that the rules of the state where the evidence was obtained shall govern the question whether evidence is admissible or not. This means that Dutch courts would have to decide matters of foreign law. Dutch courts are not qualified to do this. Apart from that, the Supreme Court is explicitly hindered from judging whether foreign law has been violated or not (Art. 99, para. 1, sub. 2 Act on the Organisation of the Judiciary). The Supreme Court may only deal with Dutch law and international law. The last sentence of paragraph 2 will be followed by applying the ECHR directly.

Article 34 – Publicity and secrecy

It is an unwritten rule that the information obtained by the state may not be given away to private parties.
As mentioned before, there is no institution comparable to the judge of freedoms in the Netherlands.
To forbid the media from publishing information concerning certain cases is clearly in violation of the Constitution (art. 7) as well as the ECHR (Art. 10): the right of free expressions of opinion.
Since paragraph 3 refers to the requirements under Article 6 ECHR, no changes will take place as regards the current system, which is also in accordance with Article 6 ECHR.

Article 35 – Subsidiarity of national law with regard to the European Corpus

Article 35 seems differentiate between the law of the place of prosecution and the law of the state to which the case has been referred. This refers to concepts which do not exist in the Netherlands. There is no such procedure as 'committal proceedings'. The application of different national law may have certain consequences between national jurisdictions concerning the recognition of foreign evidence.