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Subsidy Fraud

1. Introduction

An adequate enforcement of community-law depends to a large amount upon the enforcement-obligations of the Member States of the European Communities (EC) on the one hand and the control/inspection powers of the EC institutions on the other hand.

We all know that the last years a lot has been done by the EC institutions as well as by the Member States to protect in a more effective and efficient way the financial interests of the EC and to prevent and to sanction fraud against the Community.

Nevertheless, we must be conscious about the fact that there is still work to be done if we want to deal with it in a appropiate and efficient way. In fact, the level of fraud against the Community and the non-respect of community law in general, is considerable and forms an obstacle for further integration.

There are two ways to get to an adequate system for preventing and sanctioning fraud against the Community, two systems which can be cumulated:

a. increase the control and sanctioning power of the EC;
b. approximate the national legal provisions, sanctions and practices.

The approximation of national practices is extremely important. The custom services and the special enforcement agencies need sufficient instruments and manpower and have to collaborate at a national and European level. To stimulate a better functioning in practice and to facilitate cooperation possibilities, the EC has elaborated co-financing and professional training programmes.

Although practice is indeed very important we may not forget that the legal framework defining both the instruments and competences and their limits (principles of due process) is a sine qua non for any practice in this field.

Before we look upon the subsidy fraud provisions in the laws of the Member States, I would like to underline that the comparative law approach at this conference is in line with other initiatives. At EC level a comparative study of

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the administrative sanctions in the Member States has been undertaken by DG XX (Financial Control) and a comparative study of the custom sanctions in the Member States had been undertaken by by DG XXI (Customs).

At the Council of Ministers of Justice in november 1991 a general comparative study of the criminal law provisions of the Member States, in the light of combatting fraud against the Community, was at stake.

2. Important Issues which arise from a Comparison between the National Laws of Member States concerning Subsidy Fraud

If we look upon the provisions in the law of Member States concerning subsidy fraud we have to underline that these provisions concern both national subsidies (in the economic and social field) and EC subsidies (Agricultural Fund; Regional Development Fund; Social Fund; etc.).

Subsidy fraud is not an old standard-concept in criminal law. Forgery for instance exists in every country, although there are significant differences in the criminal provisions. But when we compare the criminal law provisions to combat subsidy fraud we have to distinguish between three different ways of handling it:

a. some Member States have a special provision in the criminal code;
b. some Member States have a special law concerning subsidies, which provides also for criminal sanctions;
c. some Member States have neither a special provision in the criminal code, nor a subsidy law with sanctions and have to rely - as far as possible - upon the general fraud provisions in the criminal code, such as forgery, dishonesty, bribery, etc.

The comparative analysis of the provisions in the law of the Member States shows us significant differences. These differences between the law in the Member States lead to the question whether an approximation is needed or not, and if needed to what extent. To answer that, we have to take into account that approximation or harmonization is not an aim in itself, but must be necessary in the light of the realization of the aims of the EC Treaty.

Does the legislation in the Member States provide for an enforcement system that protects the financial interests of the EC in an analogous (assimilation) and in an effective way? To answer this question we have to look upon both instrumental and due process elements.

The questions are the following:

a. Are there any substantial differences between the law of the Member States concerning subsidy fraud? We can think of the provisions, the intent (mens rea), the territoriality-applications, the sanctions foreseen, etc.
b. In the case there are, do they have a negative impact on the effectiveness of the protection in the light of the community law?
c. Is there any need for approximation or harmonization?

d. In which way can this be realized? Here we can think of solutions at community level, harmonization of the national law by community instruments and harmonization of the national law by intergovernmental instruments.

3. A Summary of the Discussion

The discussion started with the putting into perspective of the importance of the subject under discussion. Community fraud has to be seen as merely an example of the general problem of the enforcement of EC law.

Furthermore, subsidy fraud is considered to be a side-problem of the general system of EC subsidies (and levies). The difficulty to control subsidy fraud results from the complexity of this system. The effectiveness of the system is therefore brought up here.

Although the instrumentality of the subsidy system is quite an important issue, it is not the only matter worthy of our attention, the principle of due process should be taken into consideration too. This means that there has to be a good legal system that contains guarantees for the European citizens to have the same rights for every citizen. A balance has to be found between the principles of instrumentality and of due process. The problem of due process doesn't only concern the finances of the EC but is of general interest to the whole EC order, as is for instance clearly shown by the discussions about the European Political Union.

After these three relativizations were made, there was much discussion on the question what kind of system would be appropriate for the sanctioning of EC fraud in general. Three groups could be distinguished:

(1) those who advocated a purely federal model for the sanctioning of EC law. A European penal Code or the insertion of EC penal law in the existing Treaty is their objective. Reactions to this extreme opinion like: 'we are not the USA' and 'we have to be realistic, there is no political will for it' were bound to come;

(2) those who argued in favour of national sanction systems and who found it impossible to accept a federal system. According to these participants, EC fraud is more a practical problem: so why should penal law (already) be harmonized? First we have to know more about the different national sanction systems. Are they as divergent as everybody says? Those who gave an affirmative answer to this question thought that it would be too difficult to even find one equivalent section, let alone to create a whole sanction system on EC level.

(3) others who were between these two extremes and

a who pleaded for administrative sanctions on EC level and related sanction-powers of the Commission, analogous to the anti-trust system (section 85-87 of the EC Treaty). Penal sanctions should, in their view, be complementary and should only exist on national level, or;

b who preferred a certain common setting of rules. This means the promotion of harmonization or approximation of just the parameters, the general criteria which are incorporated in the national legislations of the Member States (section 100, 100A and 235 of the EC Treaty). No detailed harmonization then, nor 'harmoniser seulement pour le gout d'harmoniser'. And the denial of a European penal system.

However, when you choose for EC sanctions, a balance between instrumentality and due process has to be found on this level too. This means that due process rules have to exist on both national and EC level.

Even though a solution for the above-mentioned controversies has to be found, there shouldn't be lost sight of the importance of the secondary systems, that is the practical side of the fight against EC fraud. Relevant questions in this context concern the means for detecting fraud (bank information, telephone taps, domiciliary visits), the obtaining of evidence and the bringing of evidence before the court. In Scotland special problems seem to exist with regard to evidence concerning cross-border fraud. In the Netherlands difficulties arise regarding oral witness and obtaining evidence from countries like Switzerland and from taxagents.

In this respect, cooperation between the various investigation services is seen as crucial. The institution of special national units and a coordinating central European unit (because 'someone needs to say what has to be done') for the investigation of EC fraud could contribute to an improvement of such cooperation. We shouldn't leave it to the natural process but start with the setting up of such a system. Also the publication of a newsletter containing practical descriptions of important fraud cases could be within the bounds of possibility.

This need for community knowledge about (the fight against) EC fraud is felt by many of the participants.