FOREWORD

Following an initiative by the European Commission, a group of experts worked in 1995 and 1996 under the direction of Mireille Delmas-Marty on the *Corpus Juris* project relating to criminal law and criminal procedure. The aim of the study was to elaborate a number of guiding principles in relation to the protection in criminal law of the financial interests of the European Union within the framework of the European Judicial Space. The aim of the group was not to elaborate a model criminal code or a model code of criminal procedure. The French and English version of the *Corpus Juris* were published in 1997 and since then it has been available in most other European languages.[1] These proposals have been discussed at conferences and have attracted media and political attention. The *Corpus Juris* has fulfilled a function: it has triggered a public debate on the role of criminal law and procedure in European integration. Which are the European interests deserving of protection by criminal law and how can such protection be organised so that its effectiveness can be guaranteed throughout the European legal space?

What the *Corpus Juris* proposes, in essence, is a mixed regime: national and Community elements are combined in such a way that the Member States, and not the European Union, may apply the criminal law. In order to protect the financial interests of the European Union, eight offences are laid down in the *Corpus Juris*, with penalties. With regard to the conduct of investigations, a European Public Prosecutor (EPP) is proposed, this office comprising a Director of European Public Prosecutions (EDPP) and European Delegated Public Prosecutors (EDelPPs) in the Member States. The EPP may exercise its powers of investigation throughout the territory of the European Union. The powers of the EPP are therefore mostly devolved to the Member States. These powers are identical in all 15 Member States of the European Union. During the preparatory phase, judicial control is exercised by an independent and impartial judge, called a 'judge of freedoms', to be nominated by each Member State. *Corpus Juris* offences are tried by the national courts. The *Corpus Juris* only provides legal rules related to the principle of judicial control and to the principle of 'contradictoire' proceedings. The mixed regime put forward by the *Corpus Juris* contains proposals aimed at improving the effectiveness of, and the level of legal protection afforded by, national systems of criminal law and procedure, within a European legal space and within the perspective of European finances. In order to achieve this aim, we have sought common denominators within the different criminal law traditions of the Member States. The resulting proposals have important consequences for international criminal law. In place of a classical model of inter-state cooperation (judicial cooperation, extradition, etc), we chose

1 *Corpus Juris*, introducing provisions for the purpose of the financial interests of the European Union, under the direction of Mireille Delmas-Marty, Economica, Paris, 1997.

a model of criminal law resting on European territoriality: European Arrest Warrants, investigations to take place within a European space, transfer of arrested persons, etc.

The harmonisation of criminal law and of its procedure remains a politically sensitive topic, as does regional integration in criminal law matters, provoking divergent reactions in legal as well as in political circles. The political authorities in the Member States are very conscious that European integration implies new challenges for criminal justice and that reforms are needed. This has led to the new Third Pillar and to the requirement in the Treaty of Amsterdam for a space of freedom, security and justice. Some will argue that the instruments we have at present are sufficient and that existing problems could be remedied through Third Pillar Conventions on cooperation, once such conventions are ratified. They would no doubt also argue that the *Corpus Juris* would entail profound constitutional reforms in the Member States, as well as reforms to criminal codes, to codes of criminal procedure and to the ways in which the judiciary is organised. In its Resolutions of 12 June and 22 October 1997, the European Parliament asked the Commission to carry out a study on the feasibility of the *Corpus Juris*. The European Commission's Unit of Coordination for the Fight Against Fraud (UCLAF)[2] then financed the study on the **follow-up to the *Corpus Juris*** (Suivi du *Corpus Juris*). This study looked at the possible impact of the *Corpus Juris* with regard to the present situation in national law, from the points of view of the need to bring the *Corpus Juris* into force and also of the conditions necessary for the feasibility of its recommendations. The latter seek to achieve an effective, dissuasive and proportionate protection of Community interests, in accordance with Treaty obligations.

The study was organised around two main themes. The first theme related to the questions of feasibility of the *Corpus Juris* in relation to the national laws of the Member States. This theme involved analysing the legal framework and points of compatibility with constitutional law, criminal law and procedure in the Member States, on an article-by article basis. This part of the study was carried out in the fifteen Member States. The second theme concerned specific questions relating to horizontal cooperation between Member States and vertical cooperation between Member States and the European Union. For each of these questions, a group of significant countries was chosen. For the question on business secrecy, banking secrecy and appeal against requests for judicial assistance, Switzerland was also included. The work carried out for the follow-up study was articulated on three levels, the research taking a highly interactive character. There were points of contact in each Member State (and in Switzerland in relation to one question), rapporteurs writing comparative law analyses and experts brought together in a management committee, who directed research and wrote syntheses. Financing for the whole study was granted to the 'Centre for

2 Renamed as OLAF (Office de Lutte Anti-Fraude); see Decision of the Commission, Regulation 1073/99 and 1074/99 and the Interinstitutional Agreement, OJ L 136 of 31.05.1999.

the Enforcement of European Law' of the University of Utrecht, under the responsibility of Professor Dr. J.A.E. Vervaele. Professor M Delmas-Marty was nominated as the person responsible for the final synthesis and the management committee worked under her expert guidance. The study was carried out in record time, namely between March 1998 and September 1999.

The results of this research reveal precious information on the criminal justice systems of the Member States. Firstly, these systems are analysed from the point of view of the *Corpus Juris*)draft of 1997), and secondly possibilities and obstacles relating to horizontal and vertical cooperation are highlighted. The Study Group, the European Parliament and OLAF attach great importance to the accessibility of the research results to a large public. Transparency contributes to the quality of public debate and to the quality of the political and legal work which will follow the research results. The management committee has drawn its own conclusions on the debate and on the results of the follow-up study. That is why the management committee has amended the wording of the *Corpus Juris* on a number of points. These amendments concern both technical improvements and changes to the substance. In Florence (6 and 7 May 1999), proposals were discussed in detail by all the researchers involved in the follow-up study, by representatives of the associations of lawyers for the protection of the financial interests of the European Communities and by representatives of the group of advocates on the rights of the defence ('Defence Rights' group), this group having been established as the result of a initiative within the European Commission.

The publication of the follow-up study consists of four volumes. Volume 1 includes the final synthesis (Necessity, legitimacy and feasibility of the *Corpus Juris*) and four horizontal syntheses of comparative law on the feasibility of the *Corpus Juris*, draft of 1997, in relation to the national legislation of Member States. In an annex, the final synthesis contains, amongst other things, an overview in the shape of a table, comparing national law with the *Corpus Juris* (draft of 1997) as well as the amended text of the *Corpus Juris*. Volume 1 ends with a number of brief notes from members of the management committee. These notes relate to the possible legal bases for the *Corpus Juris*, in particular Article 280 EC, found in the Treaty of Amsterdam. Volumes 2 and 3 include the fifteen national reports bearing on the 35 articles of the *Corpus Juris*, draft of 1997. Volume 4 relates only to questions bearing on horizontal cooperation and vertical cooperation. Under the heading 'horizontal cooperation', the following subjects are discussed: organisation of mutual assistance, procedure for mutual assistance (secrecy and appeals), and evidence collected abroad. Under vertical cooperation, the following subjects are treated: admissibility and evaluation of evidence, the procedural position of the Commission in criminal procedure, the role of the Commission with regard to assistance/participation in the preparation and execution of international letters of request, and the extent to which criminal investigations are secret and are placed in a register.

By no means does the debate on criminal law in Europe and on European criminal law does stop with this publication. The Treaty of Amsterdam opens up the possibility of gradually giving to national criminal law and procedure their deserved places in the process of European integration. The follow-up study of the *Corpus Juris* puts forward ways of conceptualising this objective, making possible its realisation in an evolutionary manner, whilst respecting the rule of law and aiming at the effective protection of European finances, of the Euro and of trans-national interests linked with European integration.

To conclude, I would like to give my heartfelt thanks to the European Parliament and to the European Commission for granting the funds which made this research on criminal law and European integration possible. I would also like to thank particularly all the researchers of the follow-up study to the *Corpus Juris*. In a relatively short time, the points of contact, the rapporteurs and the experts have worked relentlessly to fulfil their tasks. My last words of thanks go to the translators (C. Quoirin and S. White), the editor (P. Morris), and the secretariat (W. Vreekamp), whose contributions have been indispensable. These four volumes are now available to all those who contribute, through theory and practice, to the construction of criminal law and procedure within the framework of the Treaty of Amsterdam and to the construction of the European criminal law of the XXI century.

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1. The meaning of the terms 'application of national criminal law' and 'national administration of justice', as provided for in article 280 CE

In the Netherlands the terms 'application of national criminal law' and 'national administration of justice' are not common terms, neither in legislation nor case-law or doctrine.

Of course we know very well what is meant by 'national criminal law'. Due to the legality principle the boundaries of criminal law and criminal procedure (both in codifications and in special statutes) are very well defined. What we do not know is what is meant by the term *application*.

Secondly, the term 'administration of justice' is not a common term in the Netherlands. It can be interpreted in two ways, as the organization of the judiciary (*rechterlijke organisatie*) or as the judicial procedure (*rechtsbedeling*). The first is an organic interpretation, the second a functional one. Nevertheless, both include aspects which are a substantial part of the Corpus Juris, such as for instance the EPP or judicial review.

The Ministry of Justice is at the moment working on answering questions from the Dutch Parliament concerning the Treaty of Amsterdam and on the explanatory memorandum for the ratification. Its position concerning the sentence in Article 280 and Article 135 is very clear: no harmonisation via the First Pillar in the fields of criminal law, criminal procedure, international cooperation in criminal matters and the organization of the judiciary.

2. Interpretation of the legal basis in the Amsterdam Treaty

The reference to the terms mentioned is only foreseen for Articles 280 and 135 in the First Pillar. This means that the possibilities under 100, 100A and 235 remain open. At this point the case law of the ECJ has not yet excluded the use of the harmonisation of powers in the field of criminal law and criminal procedure. In many decisions, the ECJ has underlined that the influence of Community law in the legal order of the Member States does not depend upon the legal regime in the Member States. Criminal law and criminal procedure have no specific position in the constitutional architecture of the Community legal order. The only exception to that principle is recognition by the ECJ of some general principles of Community law (such as the non-retroactive nature of criminal sanctions), and even there this could be enlarged to include all punitive sanctions as such. This legal reasoning must of course be distinguished from political reality (the way the Council uses the competences foreseen in the Treaty).

The links with the internal market are important, in the sense that this is a *conditio sine qua non* for the use of the powers under Article 100A and Article 235. Personally, I believe that the enforcement of Community standards and

Community regulation in the field of the internal market is a substantial part of the internal market as such. Moreover, it would be strange to accept this functional link for administrative enforcement (or civil enforcement) but to exclude it for criminal enforcement.
I think, personally, that we must distinguish three levels:
- harmonisation of national criminal law and procedure (1)
- rules on transnational cooperation in the criminal field (2)
- rules on Community enforcement (direct enforcement) (3)

(1) See above.
(2) The Third Pillar, title VI (Article 29 etc.) offers very interesting possibilities and the position of the Commission has been reinforced.
(3) Direct enforcement by the European Commission is different from the harmonisation procedure. It gives the Commission powers to investigate and/or to sanction.

The rules on the EPP in the Corpus Juris are a combination of (2) and (3). In that sense they do not directly concern the application of national criminal law, as they provide for a supranational level. Otherwise, in the First Pillar it is difficult to find a legal basis for the attribution of these powers to the European Commission. And this legal basis is a *conditio sine qua non*, in view of the difficulties with the constitutional architecture of some Member States.