Transnational Cooperation of Enforcement Authorities in the Community Area

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1 Administration of the Community Area: Social-economic Integration

Until recently 'compliance and enforcement' in the EU was not a real issue. System building and formulation of regulatory programmes were at the top of the political Community agenda. During the last decade, however, implementation and enforcement of Community law has become one of the priorities of the EU. Once the house is ready and house rules have been determined, it becomes more and more important that those rules are complied with and that the house will not be undermined by inferior upkeep or operations that endanger the structure. This metaphor at once indicates that the inhabitant, community institutions and Member States' institutions and their citizens and corporations, are together confronted with a certain task and that this task relates to the constitutional structure of the community legal order.[1] In other words, the Community legal order does not consist of a common regulatory framework and 15 domestic legal islands. In the first place, the Member States are the main actors in the European integration process, while the Community legal order is based on indirect administration by the Member States. They have not only a legislative task, while implementing and completing Community legislation, but also an important executive and judicial task, putting into practice the Community framework. The Member States are Community actors with a duty and a goal that go far beyond the national interest. They are in charge of realizing the administration of the Community area. This duty has implications on the macro-level – they have to provide for a suitable legal framework -, meso-level – they have to elaborate the operational forms of application and enforcement – and micro-level – what I could call case targeting. They do that of course within the common regulatory framework of Community law, which means that Community rules are addressed to the Member States and within the Member States to citizens and corporations. The Member States have to apply their own legal systems, substantive and procedural rules in order to achieve the goals of Community policies. We speak here about the delegation of Community public policy tasks to the Member States in an institutionalised form. Nevertheless, the increasing socio-economic integration, based upon the customs union, the internal market with the four freedoms and the

1. T. Daintith, *Implementing EC Law in the UK. Structures for indirect Rule* (1995); F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', *MLR* (1993), 19.

common policies effects the institutional and legal autonomy of the domestic legal orders to a great extent. First, both Community regulations and ECJ case-law have a far reaching harmonisation effect and interfere in very sensitive areas of national sovereignty. This is what we call Europeanization: the interlocking of the national and EU levels of governance. Secondly, this harmonisation is necessary to have a minimum of common regulatory standards between the 15 domestic legal orders, in order to make them compatible in the internal market and in order to impose the important principles of mutual trust and mutual recognition. Mutual recognition of the respective national regulatory regimes and their decisions imply to a certain extent similar or compatible regimes and transparency in the nature, structure and functioning. Thirdly, the harmonisation is also a necessity for an effective cooperation between national authorities. This is not only an economic necessity, but also a mandatory Community obligation based upon the principle of Community loyalty of Article 5 of the Treaty. In highly harmonized areas such as the customs union and the free movement of goods, we are very used to cooperation between the national authorities and mutual recognition of each other's administrative decisions, licences etc. Customs decisions, for example, have in principle a Community-wide effect, but we see that the effectivity of this idea does not only depend on common standards and mutual recognition, but also on shared administration and cooperation between the customs authorities (horizontal cooperation) and between them and the European Commission (vertical cooperation). This was also the basic idea of the Sutherland report (High Level Group on the Operation of the Internal Market from 1992) and of the follow-up reports: increasing the European integration by stimulating the shared governance in the administration of the Community area and by increasing collaboration between the authorities of the Member States. Since 1992 there has been an increasing appreciation of the significance of administrative co-ordination and co-operation as an indispensable element in achieving effective market integration in the Community. However, how difficult it can be to realize this administrative partnership can be seen in the regulation on transport of waste in the single market, in the control-regulation on fisheries and in the case-law of the ECJ. The transnational effect of domestic administrative decisions in the Community area, even for highly harmonized policies, is not yet full '*acquis communautaire*'. This is the reason why the Commission reports regularly on the cooperation between administrative authorities in the internal market and the elaboration of national contact authorities, liaison officers, on-line communication etc. and evaluates the policy programmes on these points.[2]

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

2 ENFORCEMENT OF THE COMMUNITY AREA: JUSTICE INTEGRATION

If shared governance is difficult while administrating the socio-economic integration in the Community area, how difficult will shared governance be while enforcing the Community area, taking into account that this touches upon justice integration? Let me illustrate this with one actual example. The Commission decided in the spring of 1996 on a full export ban on British beef. The Community obligation has to be implemented and enforced by the British authorities, but has also enforcement consequences for the whole Community area. All the Member States have to organize their enforcement in a way that they are able to supervise and sanction the violations of the beef embargo. Farms, slaughterhouses, meat industries, meat export and import firms, etc. are the standard addressees. There are several indications that firms from the UK and outside are very active in circumventing the export ban and trade embargo on British beef in the internal market and to third countries. To this end, they have been active in formulating fraudulent transnational network structures, bribing customs officials and falsifying stamps and health marks. The network corporations have activities in several Member States and several ports are used for the traffic. The anti-fraud unit of the European Commission (UCLAF) has investigated some suspicious commercial activities, assisted by the Dutch Agricultural Inspection Service and has discovered that several Belgian firms had relabelled UK beef as Belgian beef for export to Russia, thereby obtaining EC export subsidies. The Belgian firms had already in the past been involved in the fraudulent traffic of forbidden USA meat (because of natural hormones), but nevertheless they had received a new export licence from the Belgian Government and from the Belgian Veterinary Inspection Service. To what extent can national enforcement authorities investigate a transnational case like this, in which several corporations from several countries are involved? To that extent can they impose preliminary measures such as seizure? What is the evidentiary value of the reports of the Community inspections for the national administrative and criminal proceedings? What type of sanctions can be imposed and on whom? etc. The answers to these questions depend very much upon the domestic enforcement systems. Are common standards and harmonisation, mutual recognition and cooperation as regards the enforcement of the Community area indeed very limited? Do we not have shared governance and enforcement partnership and cooperation for sensitive and highly harmonized policy fields such as the common agricultural policy, sanitary protection and food safety?

My answer is yes and no. Let me start with yes. Although the duty to enforce Community law lies primarily with the Member States, Community law has supplemented the power of national enforcement by prescribing Community obligations for enforcement by Member States, obligations which are binding on the whole *trias politica* in the Member States. The Community has done that by a double-track approach, through ECJ case-law obligations and through very detailed enforcement prescriptions in the regulations, at least in policy fields such as agriculture, fisheries and customs. This means that to a certain extent we already have

harmonisation of national enforcement and common standards. This is done by fine-tuning the enforcement duties of the Member States: disclosure of information, inspection duties, sanctioning obligations, etc.[3]
On the other hand, the Community regulations provide for increasing supervisory powers on behalf of the Commission. The more the EU relies on indirect administration and enforcement, the greater the need for direct supervision of the enforcement structure, programmes and activities (second-line enforcement, who guards the guardian?). But at the same time, we also see an increasing competence, such as in free competition, for first-line inspection of the economic operators themselves, carried out by operational inspection-units of the European Commission.[4] The importance of the development of specialised Euro-inspections in fisheries, foodstuffs, agricultural policy, anti-fraud policy, etc., must not be underestimated. They are the possible embryo for future enforcement agencies at the European level. The UCLAF anti-fraud unit is a good example of that and the call, after the EP Parliamentary Inquiry into the BSE Scandal, for a reinforcement of the control and inspection mechanisms of the Food and Veterinary Office in Dublin is in a similar vein.[5]
The second part of my answer was no, we do not have real shared enforcement governance, because the effect of Community rules is too much limited to the 15 domestic enforcement islands. To a large extent we have harmonised, for example, the rules on customs tariffs, customs procedures, etc., even to the point that we now have a Community Customs Code.[6] Although we have a customs union with completely harmonised rules for intra-community circulation, for import from third countries and for export to third countries, etc., the enforcement of these customs rules is to a large extent a domestic issue, even when infringements are common, is to say infringements of the external borders.[7] The *actus reus* for a criminal offence is pre-defined by Community norms, but the procedural elements, the *mens rea* and the sanctions are defined by 15 domestic criminal laws. Cooperation in so far as it exists is cooperation between the domestic legal orders, not shared enforcement

3. J.A.E. Vervaele, 'Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?', in: J.A.E. Vervaele (ed.), *Administrative Law Application and Enforcement of Community Law in the Netherlands* (1994), 161-202; J.A.E. Vervaele, 'Community Regulation and Operational Application of Investigate Powers, the Gathering and Use of Evidence with Regard to the Infringement of EC Financial Interests', in: J.A.E. Vervaele (ed.), *Transnational Enforcement of the Financial Interests of the EU* (19998).
4. C. Harding, *European Community Investigations and Sanctions. The Supranational Control of Business Delinquency* (1993); J.A.E. Vervaele (ed.), *Transnational Enforcement of the Financial Interests of the EU* (1999).
5. COM (96) 223 final, proposal for the establishment of a Veterinary Inspection Agency.
6. Regulation 2913/92, OJ 1992 L 302 and Regulation 2454/93, OJ 1993 L 253.
7. P. Ravillard, *La répression des infractions douanières dans le cadre du grand marché intérieur* (1992).

governance, and there we have a serious problem, while the effectiveness of Community law includes also enforcement and practical compliance. Outside customs, agriculture and to a certain extent tax law, it is even worse; the mutual administrative enforcement cooperation (or international administrative law if one so wishes) is still in its infancy.[8] On the other hand, we have a tradition of international cooperation in criminal matters (Council of Europe Treaties, the European Political Cooperation Treaties, the Third Pillar Conventions, the Schengen Treaties, etc.) but we all know that there is a very difficult relationship between judicial and criminal issues and enforcement in the Community area.[9] Unlike the evolution in the US the Community Treaties do not explicitly provide for enforcement competences – except in the case of free competition. Neither has the ECJ used the 'internal market notion' (commerce clause) for creating Community competences in criminal law.[10] This means that we do not have Community incriminations or Community judicial competences. Moreover, to date the political majority have impeded the use of harmonisation powers for prescribing explicit obligations upon the national criminal enforcement systems. Moreover, in the Treaty of Maastricht the judicial cooperation in criminal matters was set aside in the third pillar[11] under the list of issues of common interest for which the Commission had no right of initiative and the Treaty of Amsterdam goes even further by excluding *expressis verbis* in the first pillar the harmonisation of the criminal law field,[12] which means that we depend upon the political will of the Member States to integrate further in that direction. We can speak here about a clear tension between socio-economic and justice integration, with a Court of Justice in a semi-deadlock position. The Treaty of Amsterdam has otherwise increased the competence of the Court of Justice with regard to cooperation in criminal matters as well as harmonisation in criminal matters within the framework of the third pillar, but has explicitly excluded this competence in the operational field of law enforcement by providing in Article 35 that 'the Court of Justice shall have no jurisdiction to

8. See C. Mulder, 'Cooperation in Tax Matters', in: B. Swart and A. Klip, *International Criminal Law in the Netherlands* (1997), 231-250.
9. This issue was under study in the Council Working Group 'Criminal Law/Community Law'. The results are reproduced in the '*note de séance*' for the 'Justice and Internal Affairs' Council of 29.02/01.03/96, under the title 'Protection pénale des intérêts financiers de la Communauté. Coopération judiciaire et compétence prioritaire'.
10. J.A.E. Vervaele, *Fraud Against the Community. The Need for European Fraud Legislation* (1992); G. Grasso, *Comunità Europee e diritto penale* (1989) and G. Dannecker, *Strafrechtsentwicklung in Europa* (1995).
11. R. Bieber and J. Monar (eds.), *Justice and Home Affairs in the EU* (1995); J. Monar and R. Morgan (eds.), *The Third Pillar of the EU* (1994); P.C. Müller-Graff (ed.), *Europäische Zusammenarbeit in den Bereichen Justiz und Inneres* (1996).
12. See for instance Art. 116 on customs cooperation and Art. 280 on EC fraud, which contain the following provision: 'these measures shall not concern the application of national criminal law or the national administration of justice.

review the validity or proportionality of operations carried out by the policy or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

The emergence of European-level enforcement systems are not only impeded by the incompatibility of existing national enforcement systems, but also by the political attitude of the Member States which protect this domestic area as their last domain. The Union lacks many powers which are usually associated with governance (including the use of coercive and sanctioning powers). It has to co-opt the resources of Member States to exercise its governing capacity. This can only be achieved by elaborating shared governance in the field of enforcement and by providing for transnational enforcement cooperation.

3 SHARED ENFORCEMENT GOVERNANCE BETWEEN MEMBER STATES AND THE EU

What is necessary in order to proceed in the direction of shared enforcement governance between Member States and the EU? To answer that question I would like to point out, briefly, five policies by which we can abolish in the EU the contradiction between European norm-setting and domestic enforcement systems, which are embedded in domestic regulatory regimes. These policies combine and activate the interaction between indirect enforcement by the national authorities and direct enforcement by the Community authorities. The Sutherland Report and follow-ups[13] define that as 'enforcing the rules through partnership', by which the enforcement policy becomes a substantial part of the European integration process.

- The EU has to *increase normative prescriptions concerning enforcement obligations* for Member States and for economic operators and has to do that with an integrated approach, this means that there must be a direct relationship between the norm-setting, the application and the enforcement. The enforceability of norms has to be taken into account. Good examples of this integrated approach can be found in the MacSharry reform in the agricultural sector. Secondly the EU has to go on with the adoption of horizontal enforcement framework regulations. This policy is very much in line with the Sutherland Report. We can find very good examples of this approach in the field of the protection of the financial interests of the EU. Experiences of systematizing the monitoring and sanctioning obligations in the hundreds of sectoral agricultural and fisheries regulations,[14] and by defining common minimum

13. P. Sutherland *et al.*, *The Internal Market After 1992. Meeting the Challenge*. Report to the EEC Commission by the High Level Group on the Operation of Internal Market (1992).
14. Regulation 595/91, OJ 1991 L 67 and Regulation 2847/93, OJ 1993 L 261.

standards of enforcement obligations for the Member States, formed a very good basis for elaborating horizontal enforcement obligations concerning the protection of the financial interests of the EU. Everything in Community policies that has to do with the income or expenditure of the EC, and that is quite a lot, falls into this category. Within the first pillar a horizontal regulation[15] for administrative sanctions, including fines, exclusion of subsidy systems, black listing, removal of advantages, etc., and a horizontal regulation for direct on-the-spot[16] Euro investigation have been elaborated. Within the third pillar a horizontal convention for criminal sanctions has been adopted, further elaborated by three protocols.[17] This horizontal approach towards normative enforcement prescriptions is a significant step forward, although the institutional separation between the first and third pillar can be deplored, while it is difficult to elaborate an integrated approach concerning enforcement issues when criminal aspects of the enforcement issue can only be dealt with in the framework of the third pillar.[18]

– The EU has to *increase the European dimension of the national enforcement agencies*. There are several means by which to achieve this goal. This can be done by financial and technical support, by trainee and exchange programmes, etc. Secondly, it is crucial to oblige Member States to indicate their main responsible enforcement agency, which is also the correspondent for sister organisations and for the European Commission. Thirdly, where necessary, the EU can impose upon the Member States the obligation to create *new, specialized enforcement agencies* in the Member States. We have interesting examples of that in the olive-oil and tobacco sectors.[19] These agencies function under the national sovereignty of the Member States, but are jointly financed by the Commission and are, to a large extent, streamlined in the Community direction. The tasks of these enforcement agencies are determined by the regulations. In Article 1, second part of both regulations, the retention of statistical surveys and unannounced inspections of companies are included, among other things. In the tobacco regulation, moreover, the sharing of eventual administrative law or criminal law procedures, the acceptance of effective investigative competences, as well as the taking of samples, are all included. The

15. Regulation 2988/95, OJ 1995 L 31.
16. Regulation 2185/96, OJ 1996 L 292, see *infra* point 4.
17. Convention, OJ 1995 C 316; First Protocol, OJ 1996 C 313; Second Protocol, OJ 1997 C 221.
18. J.A.E. Vervaele, 'Law Enforcement in Community Law within the First and Third Pillar: Do they Stand Alone?', *The Finnish Yearbook of International Law* (1996), Vol. VII, 353-368.
19. Regulations 2262/84, OJ 1984 L 208 and 593/92, OJ 1992 L 64 for olive oil and Regulation 85/93, OJ 1993 L 12 for tobacco.

agency in question must set up working programmes, compile reports and admit Commission officials to staff meetings.

– The EU has to *consolidate the enforcement supervision powers for the European Commission*. Within the Treaty framework, the European Commission is also the guardian of compliance with Community policies and with Community law. For the time being, the necessary competence can be derived from the general supervisory authority which the Commission possesses with regard to the observance of Community law, which is that provided in Articles 155 and 145 EC Treaty. In practice, however, this has not occurred, but the supervisory competences have been read into the specific bases for Community policy, such as, for example, in Article 43 EC Treaty (agriculture), Article 209 EC Treaty (own resources), Article 113 EC Treaty (trade policy and Community control missions to third countries), Article 130 D-E (structural funds). This means that the Commission needs to have at least an overview of the system of shared governance and administrative partnership, as part of its responsibility for supervising the internal market and the process of European integration. The Commission must be able to monitor the application of Community law, which includes all aspects of effectiveness, thus also the enforcement policy and practice in the Member States. In other words, as the guardian of compliance the Commission has to guard the national guardians. This direct enforcement has a second-line function. The Commission should be able to assess directly the effectiveness of national inspection and sanctioning systems and actors responsible for ensuring compliance with Community law. So a Member does not only have to submit detailed information, but officials do visit Member States and their application and enforcement authorities with the aim of verifying the qualitative and quantitative aspects of compliance. This supervision includes all aspects of effectiveness, thus also enforcement aspects. This is the reason why the Commission (and the ECJ) is so insistent on the notification by national authorities of administrative implementing or complementing rules,[20] and the reason why many regulations impose on the Member States very far-going disclosure of information and the reporting of information, not only concerning legislative measures, but also concerning the practical application and enforcement structure (who is responsible for what and by which means), and on the case targeting by the administrative and judicial authorities. It is no longer a surprise to see in a regulation that the Member States have to communicate the identity of the firms suspected of having committed EC fraud and the results of the administrative and/or judicial proceedings.[21] On the other hand, the Euro-inspectors can undertake visits to the Member States without prior notification and without collaboration with the national authorities. They can do that in order to supervise national enforcement

20. See E. Vos, *Institutional Frameworks of Community Health and Safety Regulations. Committees, Agencies & Private Bodies* (1997).
21. See for instance Regulation 595/91, OJ 1991 L 67.

or for reasons of financial auditing and control. These types of direct investigation can also be implemented upon economic operators, when necessary for the goal of second-line enforcement.

– The EU has to *increase the investigative powers of the Euro-inspectorates*. Over the last 10 to 15 years it has been quite common to find in some Community regulations specific references to operational enforcement powers for officials of the European Commission (the agricultural and fishery field, the veterinary and phytosanitary field, EC fraud).[22] In recent regulations the term Community inspection is no longer a taboo subject. The Euro-inspectors can oblige the Member States to commence an administrative inquiry and they are allowed to take part in them. If the Euro-inspector should decide to participate in an investigation, this Euro-inspection should take place with the cooperation of the national inspectors and under their authority. In principle the Euro-inspectors have the same competences as the national inspectors, except that: (1) The investigation is to be led by national officials. The Euro-inspectors cannot therefore independently and autonomously gain access to company premises, for example. That they can only do in cooperation with the national inspectors. (2) The Euro-officials must not, upon their own initiative, transgress upon the investigative competences of the national inspectors. (3) Certain control activities are to be reserved for national inspectors. So Euro-inspectors can be excluded from acts belonging to the national judicial authority, for instance the formal questioning of persons or searches of premises.[23] However, the Euro-inspectors have access to the information thus obtained.
Hence, we can say that the European Commission has far-reaching administrative investigation powers in order to supervise the enforcement duties of the Member States. Concerning the first-line enforcement on economic operators, the European Commission has to operate together with and under the authority of the national enforcement authorities. We can qualify this administrative investigation as associative investigation. Nevertheless, the Community rules concerning the tasks and competences of the Euro-inspectors are rather vague and do not provide for a system of harmonisation of legal protection. This creates not only problems of enforcement competences, but of course also of respect for the principles of due law.

– The Member States have to *increase the European dimension of their regulatory and enforcement systems, tools and practices*. Until now, the national enforcement legislation and practice have not taken this European dimension into account. Even

22. For an analysis, see J.A.E. Vervaele, 'Community Regulation and Operational Application of Investigate Powers, the Gathering and Use of Evidence with Regard to the Infringement of EC Financial Interests', in: J.A.E. Vervaele (ed.), *Transnational Enforcement of the Financial Interests of the EU* (1999).
23. See for example Art. 6 of Regulation 595/91, OJ 1991 L 67.

in fields such as customs law and agricultural law, we are confronted in many Member States with regulatory and enforcement systems that are based, to a large extent, on the concept of the Nation State. The same is to a large extent true for the enforcement authorities. The Nation State has to review its position in the field of European integration and to mirror that policy in its regulatory and enforcement systems and tools. This European dimension includes measures of transposition and elaborating measures of application and enforcement. Even in fields of total harmonisation or exclusive competence of the EU, Member States have to take legislative measures in order to make their legislation compatible and in order to complete the Community rules.

4 TRANSNATIONAL EUROPEAN ENFORCEMENT COOPERATION

Shared governance in the Community area can only be successful when it is completed with transnational European enforcement. Until recently, cooperation between administrative or judicial enforcement authorities was based on the sovereignty of the Nation State and on the instruments provided for in international, regional or bilateral treaties. Within the Community area there is a need to elaborate forms of direct cooperation between enforcement authorities, which can operate as multi-state agencies. That means that many procedural aspects of competences, evidence gathering, use of evidence, etc. have to be adapted by (minimum) harmonisation and by mutual recognition. The same can be said about the Community-wide value of administrative and criminal sanctions.
The EU has take some steps in that sense by (1) setting up Community units/agencies suited to these tasks; (2) adopting horizontal framework regulations; and (3) setting up transnational data-base systems.

Community Units/Agencies for Transnational European Enforcement

While we have witnessed the increasing use of Community agencies for transnational administration in the Community area, for instance the European Environment Agency and the European Agency for the Evaluation of Medicinal Products,[24] we cannot really speak of a breakthrough in the same direction concerning transnational enforcement. The agencies that have been set up in this respect do not have real enforcement powers, neither for investigation nor for sanctioning.

24. See M. Shapiro, *Independent Agencies: US and EU* (1996) and A. Kreher, *The EC Agencies between Community Institutions and Constituents: Autonomy, Control and Accountability* (1998).

The process of agency-building at the EC level for enforcement tasks, as we have seen with wine inspection, fisheries inspection, anti-fraud inspection, veterinary inspection, etc., needs a regulatory Community framework that provides for at least detailed rules on (1) statute, mandate and investigative powers; (2) compatibility rules between Euro-inspection and national inspection (for example evidence gathering and its use; and (3) enforcement cooperation (horizontal and vertical aspects). By doing that we can create a common regulatory framework for transnational European enforcement cooperation. How difficult this is has recently been illustrated by the BSE crisis and the handling of the proposals concerning the Food and Veterinary Agency. What had to become an independent agency with far-reaching powers has now been set up as a Food and Veterinary Office in DG XXIV.[25] Both the Member States and the European Commission are still very afraid of a European Food Safety Agency with regulatory and enforcement powers. Until now, we can only speak about enforcement units within the administration of the European Commission, for the time being with little prospect of becoming real enforcement agencies. The only exception in the short-term might be the Anti-fraud unit UCLAF, which is responsible for the enforcement of the financial interests of the EU.

In 1987 the European Commission published a 42-point report concerning the more intensive combating of fraud[26] and in 1988 it set up the special anti-fraud unit called UCLAF (*Unité de Coordination et de Lutte Anti-Fraude*) within the Secretariat-General. In 1995 the anti-fraud units belonging to agriculture (DG VI) and customs (DG XXI) were integrated into UCLAF and as a consequence thereof UCLAF now has at its disposal 125 members of staff, emanating from various policy areas. The Euro-inspectors who were not charged with financial enforcement control, but rather with classic enforcement control such as fisheries inspection and veterinary inspection, have indeed remained at their respective Directorates-General. To put it succinctly, in the cases of combating fraud and financial enforcement control one could speak of an integrated approach which has led to one central anti-fraud unit, the UCLAF. UCLAF's mandate, however, does not contain any authority to impose sanctions, but does include administrative investigative powers. In order to answer the question of the range of these investigative powers we have to differentiate between the situation up to the end of 1996 and thereafter. Up to the end of 1996 UCLAF functioned and exercised competences on the basis of the various sectoral control regulations. With the integration of the agriculture, customs and structural funds anti-fraud units, various competences belonging to the sectoral control regulations (see supra) have also been brought within the fold. The investigative powers are also exercised with respect to economic operators (first line), but still in cooperation with and under the authority of the national enforcement authorities. Alongside this, UCLAF possesses a

25. Commission Communication to the EP and the Council on Food, Veterinary and Plant Health Control and Inspection.
26. COM (87) final.

supportive and coordination task with regard to national enforcement.[27] The control powers can therefore be summarised as follows: 1. enforcement support; 2. enforcement coordination; and 3. financial enforcement control.

Enforcement support has a legislative as well as an operational component. Forming part of the Commission, UCLAF is directly concerned with the preparation of the Commission's legislative proposals in the field of the protection of financial interests. Operationally, its tasks can be compared to those of Europol.[28] These consist of extending automated data files with regard to national enforcement legislation, fraud patterns and *modus operandi*. The inflow emanates from the reports from the Member States as well as from the Commission itself. This information centre in the field of EC fraud places UCLAF in a position to be able to carry out risk analysis and, by means of supplying information, to be able to provide support for the national enforcement authorities.

In the second place, in cases of serious and/or border-crossing EC fraud, UCLAF coordinates the efforts of the national enforcement authorities. For this purpose UCLAF has signed cooperation protocols with national enforcement authorities. This coordination can take several forms. In the case of transnational fraud there are several points of departure (persons, places, subject-matters) and various legal systems are at issue. Whosoever dictates when, where and how activities become the subjects of investigation and/or prosecution can be of decisive importance for a successful policy approach. Moreover, knowledge of the various national systems and the actors is of crucial importance so as to, for example, determine on which basis information may be exchanged (mutual administrative assistance, judicial assistance in criminal cases), when letters rogatory can be issued, when evidence can be obtained, when evidence can be used, when jurisdiction can be guaranteed, etc. It is for this reason that UCLAF has employed a 'liaison and criminal law expertise interface'. From this it would seem that UCLAF's coordination role is not limited to administrative investigation and is likewise not limited to the coordination of the administrative control authorities.[29] For an efficient approach, coordination of all the facets of the investigation (whether this is of an administrative law (administrative investigation) or criminal law (judicial investigation) character), as well as the subsequent proceedings, is required. This means that the actions of the administrative,

27. *Protection of the Financial Interests of the Community*, Work Programme 1997/1998, COM (97) 199 def. and *Protection of the Financial Interests of the Community*, the fight against Fraud, Annual Report 1996.
28. Europol Convention, OJ 1995 C 316.
29. European Parliament, *Report on the Commission 1996 Annual Report and its Work Programme on the Protection of the Financial Interests and the Fight against Fraud*, PE 22.169/fin. Rapporteur H. Bösch speaks on p. 14 about 'gathering, sharing and distribution of information and intelligence'.

police as well as the judicial authorities (the Public Prosecutions Department, the investigating magistrate) are all coordinated by UCLAF. This coordination can take place not only at the request of the national authorities, but also upon UCLAF's initiative. Whenever alarming structural patters of fraud develop, UCLAF sets up special task-forces, such as, for example, in the case of cigarette smuggling. To put it succinctly, UCLAF plays a substantial and proactive role in the case of an administrative and judicial investigation. It is an interesting factor that for this task UCLAF has at its disposal not only specialised Community personnel, but also national experts who have been detached to UCLAF. Officials from the national administrations, inspectors from national inspection authorities and members of the national Public Prosecutions Departments and the judiciary are detached to UCLAF for a certain length of time. During this period they are employed as UCLAF officials, but they bring along their own particular expertise and network. This UCLAF structure provides a guarantee for the somewhat delicate operational work which UCLAF has to undertake, whereby it has to coordinate the (judicial) investigation in the Member States, without itself assuming the position of the national authorities. One factor is indeed obvious: UCLAF does not possess independent judicial powers of investigation. But the detached magistrates are indeed pre-eminently placed so as to be able to undertake the coordinating function as regards national judicial investigative work, certainly when this concerns the sensitive area of pro-active investigation and the deployment of special investigative methods.[30] Finally, it is indeed striking that the European Parliament's Committee of Inquiry on customs dealings has argued in favour of further extending these powers and to build up UCLAF into an investigative authority which is capable of exchanging judicial information.[31]

With UCLAF's extensive growth,[32] both in terms of personnel and competences, the necessity to elaborate Euro-controls as regards EC fraud and horizontal control regulation also grew. From 1997 onwards UCLAF's investigative capacities were further increased by a horizontal approach concerning Euro-inspections for the protection of the financial interests of the EU.

30. See European Parliament, *Draft Report on the Independence, Role and Status of UCLAF*, Rapporteur H. Bösch, PE 225.069.
31. European Parliament, *Committee of Inquiry into the Community Transit System*, Rapporteur E. Kellett-Bowman, Final Report and Recommendations, PE 220.895/fin., 1997.
32. For the most recent information see European Commission, *Fight Against Fraud*, Annual Report 1997, COM (98) 276 final and European Commission, *Fight Against Fraud*, Work Programme 1998/1999, COM (98) final.

Horizontal Framework Regulations for Transnational Enforcement

In 1996-1997 two important regulations were adopted: Regulation 2185/96 concerning on-the-spot checks and anti-fraud inspections carried out by the Commission and Regulation 515/97 on mutual administrative assistance, in principle limited to customs and agricultural matters, but in reality also used for other purposes (for example, drugs precursors).

The Euro-inspection Regulation

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

At the end of 1996 the step towards a horizontal Euro-control regulation was taken. This Regulation 2185/96[33] forms a part of the horizontal approach concerning the combatting of fraud and is a concrete supplementation to the general Euro-control provisions (Art. 8) from the Administrative Sanctions Regulation (2988/95).[34] Conspicuous is the fact that as a legal basis herefore, use is simply and solely made of Article 235 and that UCLAF is not mentioned as such.[35] The regulation also bases the vertical cooperation between the Commission and the Member States as regards the implementation of controls on the concept of Community loyalty contained in Article 5 EC Treaty as well as the case-law resulting therefrom. The regulation provides minimum horizontal regulation. 'Horizontal' means that the provisions apply to all EC policy areas, in as far as there are links with EC finances,[36] so also including direct expenses by the European Commission itself. 'Minimum' means that specific provisions from sectoral regulations which go further than this minimum regulation remain in force and may be applied. This Euro-control regulation is pre-eminently an instrument of financial enforcement control, and not one by which to evaluate implementation and enforcement by the Member States. By giving increased first-line investigative powers to the Commission, the overall objective is to reach a homogenous approach as regards enforcement in the Member States, as well as on the levels of control, refunds/additional assessments and punitive sanctions. Article 2 of Regulation 2185/96 describes the Commission's control mandate. The Commission may carry out on-the-spot checks and inspections: 'for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States; or, where, for the detection of irregularities, the situation

33. OJ 1996 L 292.
34. OJ 1995 L 312.
35. This could have the advantage that other officials could also be given a mandate concerning these investigative measures.
36. Only VAT matters have been excluded.

in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community; or at the request of the Member State concerned'. From the description it would seem that the competence criteria have been broadly defined. This concerns not only cases of transnational fraud, but also serious fraud and the Commission can, in exceptional cases, make use of Euro-controls in order to rectify a lack of enforcement in a Member State (the pro-active assimilation principle).

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

The Euro-controls are *expressis verbis* described in Article 7 as first-line controls: applicable to economic operators upon which the measures or the Community administrative sanctions within the capacity of Article 7 of Regulation 2988/95 may be employed, and to third-parties, if these have relevant information at their disposal. This is a broad description due to the fact that the Administrative Sanctions Regulation does not only concern itself with fraud,[37] but also with unintentional irregularities, such as those defined in Article 1(2) of the Administrative Sanctions Regulation.

Moreover, there is a substantial difference as regards financial enforcement control, such as has been discussed in the various sectoral regulations. An important innovation in this regulation is indeed the fact that for the purposes of this horizontal mandate the powers of enforcement are exercised under the authority and the responsibility of the Commission itself (Art. 6). For the first time we are therefore confronted with independent powers of enforcement on the part of the Euro-inspectors, which may be compared with those provided at the level of competition in Regulation 17/62.[38] This form of Euro-control therefore goes considerably further than the classic and financial enforcement controls within the sectoral regulations. This does not detract from the fact that the Commission must inform the Member State, in a timely manner, of the subject, the objective and the legal basis of the

37. See the definition in the Fraud Convention, OJ 1995 C 316.
38. OJ 1962 L 204. A major difference, however, is that in competition the competences have as their objective the imposition of sanctions by the Commission, which is not the case here because evidence of infringement should lead to the imposition of sanctions at the national level.

control. What is precisely meant by 'timely' is indeed for the Commission to determine. In the case of an extreme emergency this may be just before the commencement of the control itself. In any case, the Member States are made aware of the results and of every fact or every suspicion which points to irregularities as far as EC finances are concerned (Art. 8.2).

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

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

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

This regulation goes much further in its definition of mandate, competences and legal consequences than do the sectoral regulations. Nonetheless, many aspects remain unregulated and are left to the procedural rules of the legislation of the Member States (Art. 6(1)). The problem here is that the national rules of procedure on the administrative law and criminal law levels are not yet prepared for Community situations, let alone for the investigative powers of the Euro-inspectors. To summarise, it can be concluded that UCLAF could be considered as a Community enforcement authority with a multi-agency-like construction. In actual fact UCLAF, because of its specialisation (as an anti-fraud unit), is to all intents and purposes a task force.

The Mutual Assistance Regulation

For the internal market and for the customs union it is of primary importance that a framework regulation should exist for the purposes of mutual administrative assistance on a tripartite basis between Member States themselves (horizontal) and between Member States and the Commission (vertical) with a view to the enforcement of the customs and agricultural regulations. The basic regulation from 1981 (Regulation 1468/81),[39] after long negotiations, has been replaced by the new Regulation 515/97.[40] This regulation offers far-reaching possibilities for the exchange of enforcement information, for hot pursuit, cross-border surveillance, controlled delivery, etc. The basic principle is assistance between administrative authorities, upon request or voluntarily. The result is that the administrative inquiry is realised by multi-agency and transnational investigation units. In the regulation there is no definition of the concept of administrative authority, neither organic, nor functional. The criterion is the indication which is provided by the Member State. In this regulation, however, the European Commission, and also UCLAF therefore, is defined as an administrative authority (Title III). With regard to the gathering of

39. OJ 1981 L 144.
40. OJ 1997 L 82. This regulation entered into effect on 13 March 1998. This regulation has a counterpart in the third pillar Naples II Convention on customs cooperation, OJ 1998 C 24 for non-Community matters (for instance drugs, illegal weapons, etc.).

evidence and investigation, various provisions are of importance. Article 1 defines administrative investigation as all operations on the part of the indicated investigative authorities, with the exception of operations which are carried out upon the request or under the direct authority of a judicial authority; a definition which has been adopted from Agricultural Control Regulation 595/91 (see supra). For the time being Article 3 determines that it is not only data which have been obtained in the course of an administrative investigation that are communicated to the requesting authority, but also the essential data obtained during a judicial investigation which can necessarily put an end to a particular fraud. If the national law determines that it is obligatory, then the preceding approval of the judicial authority ('*nihil obstat*') will first have to be acquired. Some agreements with third countries on cooperation and mutual assistance in customs matters go even further, eliminating the authorization procedure by replacing it by a simple information procedure of the requested authorities.[41] Whenever an administrative investigation is sought in a Member State, for example by the European Commission, by way of mutual administrative assistance, then certain rules are here applicable (Art. 9) which also run parallel to the rules provided under Agricultural Control Regulation 595/91, which means that the Euro-inspectors are allowed to be present and operate under the authority of the national enforcement authorities. This formulation allows the European Commission and UCLAF, by way of the instrument of mutual administrative assistance, to implement or jointly to implement transnationally coordinated enforcement investigations. Moreover, it is obligatory for Member States, within the framework of horizontal mutual administrative assistance, to partake in far-reaching reporting obligations to the Commission. Within the framework of economic relations with third countries the Commission has at its disposal the independent competence to carry out an enforcement investigation in third countries (Title IV). These Community enforcement missions are carried out by the Commission itself or by the enforcement authorities of the Member States under the Commission's authority. Finally, the Commission can make use of the Community part of the central data bank, the CIS – Customs Information System (Arts. 24-41), which has as its objective preventing, investigating and combating infringements of the customs and agriculture legislation.

The regulation does not only limit itself to defining the powers of investigation and therefore the possibilities for the gathering of evidence, but also contains provisions concerning the use of evidence. The data obtained (assessments, findings, information, documentation, etc.) from assistance upon request, from voluntary assistance as well as from the Community missions, may be used as evidence by the competent

41. See Art. 12(4) of the Agreement between the EU and Korea concerning cooperation and mutual assistance in customs matters, OJ 1997 L 121, a good example of the new generation of agreements between the EU and third countries in customs cooperation matters.

authorities of the Member States (Arts. 12, 16, and 21(2)). This is also apparent from Article 45(3) which determines that the confidentiality of the exchanged, and in the CIS input data must not form an obstacle to the use of the data in judicial procedures or proceedings subsequently instigated due to the non-observance of the customs and agricultural regulations. So we could state that the framework regulation does not only increase the *transnational enforcement*, but also the *transprocedural enforcement*. But what is *transprocedural* about this cooperation? Before explaining it, I have to make two preliminary remarks:

(1) The international cooperation in criminal matters is based upon international or regional treaties (Council of Europe, third pillar of the EU), containing specific instruments, such as exchange of judicial information, rogatory commission, transfer of the criminal case etc. and procedures for cooperation between judicial authorities. This can be done through diplomatic channels or by direct cooperation between the judicial authorities (as for instance in the Schengen Treaties). The international cooperation in administrative matters, on the other hand, also called mutual assistance, is also based upon international or regional treaties and upon regulations under the first pillar of the European Union, as the mutual assistance regulation here under study. This cooperation also deals with the exchange of administrative information and joint investigations. Traditionally, these two forms of cooperation are completely separate. As far as enforcement is concerned, the cooperation in criminal matters is the mandatary channel when there is suspicion that an offence has been committed; the cooperation in administrative matters can only be used for an administrative procedure, which can include the imposition of punitive administrative sanctions.

(2) The competence of the EU in judicial matters has been set aside in the third pillar. Cooperation in judicial matters cannot be regulated directly within the framework of the first pillar by means of a regulation, and a regulation cannot in principle[42] directly interfere in the judicial area.

The sharp division between administrative enforcement and judicial enforcement has been tempered by two evolutions. First of all, although the enforcement architecture has separated pillars of civil, administrative and judicial enforcement with their own rules and principles of due law, these national borderlines have been undermined since the beginning of the eighties by the European Court of Human Rights (see the case-law on Article 6 of the European Convention on Human Rights) in order to provide for similar due law principles such as the criminal ones, when a criminal charge is at stake. This is the case when the sanctions provided for are serious and have a punitive character, independent of whether they are defined at the national level as

42. Although it could be advocated that the obligations under Art. 5 and Art. 209a EC Treaty oblige the Member States to provide efficient judicial cooperation for the enforcement of Community law in general and for the protection of the financial interests of the EC in particular.

civil law sanctions, administrative law sanctions or criminal law sanctions. Secondly, the legal instruments for cooperation in administrative matters and for cooperation in judicial matters, mentioned above under point 1, provide more and more possibilities of cross-interference, which I would indicate with the term transprocedural. This means that instruments of mutual assistance in administrative matters can be used for the imposition of criminal sanctions and, likewise, instruments of legal cooperation in criminal matters can be used for the imposition of administrative sanctions. The Schengen Treaties[43] and some Conventions on legal assistance in criminal matters[44] provide for the latter possibility. Regulation 515/97 on mutual assistance, here under study, provides for the former. This means that customs authorities can use this instrument even when there is suspicion that a criminal offence has been committed. The evidence obtained by it can also be used in criminal proceedings. This means the end of a long tradition of separation between the administrative and the judicial investigation and, to a certain extent, also a circumvention of the pillar separations in the EU between administrative enforcement and judicial enforcement.

To conclude, this framework regulation concerning mutual administrative assistance offers very appropriate instruments for the coordination of transnational enforcement investigation and allows the Commission to undertake important Community enforcement missions in third countries. Secondly, the regulation has a rough transprocedural effect, by providing for quite effective evidence gathering by national or Community administrative investigation and by harmonising the use of this evidence in the sense that the channel of judicial cooperation in criminal matters is circumvented. However, the problem is that by doing so we also circumvent the procedural safeguards and principles of due law, which are less developed in administrative cooperation. Just to give one example: in the recent Saunders case[45] the ECHR decided that that information may be used in criminal proceedings, but under the strict condition that in the administrative investigation the criminal procedural safeguards would respected, such as, for instance, the privilege against self-incrimination and respecting the right to silence. This example also illustrates that increasing efficiency at Community level must go hand in hand with the adapted protection of due law. New instruments of transnational and transprocedural enforcement ask for new rules concerning the protection of due law and Community law cannot leave this task completely to the Member States or the ECHR, as the integration of justice in the Community needs a proper system by which to protect due law.

43. See for instance Art. 50 (5) of the Schengen Convention.
44. See Art. IIa of the Convention between the Netherlands and Germany in addition to the European Treaty for legal assistance in criminal matters (The Wittem Convention, *Tractatenblad* (1979), 143).
45. ECHR *Saunders* v. *UK*, 17 December 1996 (No. 43/1994/490/572).

Transnational Database Systems

A third element essential for the realization of transnational European enforcement cooperation is the setting up of the necessary technical tools. Many new regulatory instruments, both in EU law and in international law, provide for transnational database systems, for example the Europol Information System, the Customs Information System, the European Information System, the Schengen Information System. The same approach will be used for the enforcement of migration regulations in the European Information System (EIS), based on the pending Convention on External Borders. Under EU law these transnational database systems are used both for the competences under the first and the third pillar.

So we can definitively state that much has been realized over the last few years concerning the elaborations of the instruments, but also at this point we have to underline the fact that the necessary rules concerning legal protection (privacy, principles of due law) are rather soft and under-developed.

5 FROM SHARED GOVERNANCE TO MULTI-LEVEL AGENCY STRUCTURES FOR EUROPEAN ENFORCEMENT

5.1 Horizontality Instead of Vertical Institutionalization

By creating autonomous management structures for transnational administration and enforcement, we could stimulate *denationalized* government structures which erode both national and supranational institutions. Besides denationalizing they also depoliticize by translating the challenges into technical and expertise concepts. Through the use of flexible network structures, on an even keel with enforcement agencies, with one cooperation centre (which might be the European Commission), a forum for joint technical expert management is developed. The new techniques for on-line communication play an important role in this model. The Schengen Information System (SIS), the Customs Information System (CIS), the Europol Information System and the future European Information System (EIS) are very good illustrations of this evolution. The effect of this networking between enforcement agencies and from their interlocking is that the enforcement authorities originating in the Nation State are integrated in a pattern characterized by transnationalization. In this process of transnational cooperation, everything starts with decentralized, informal, personal and hierarchically-based procedures. The informal character in the building process of the network and of the transnational structure is very important. In view of the sensibilities of the Nation States it is overall the only way to proceed and to get things done. But it is also through the multi-level interactions of civil servants from several national and international administrations that they become aware of common interests and will thus reinforce trends towards specific forms of

power-sharing. Only after such informal consensus building of what to do and how to do it, can they elaborate a framework of entrenched procedural rules, which rules are in their turn the building blocks for agency-building. Important in this context is that the position and role of the enforcement authorities will change during the process but this need not mean that they will be separated from their national framework. On the contrary, their respective national departments with their expertise and priority structures will often get carried along in the process of transnationalization.[46]
The process of interlocking (*Verflechtung*, *engrenage*) is the way to realize shared enforcement with interdependent policies and interests, without having to create autonomous European enforcement agencies, independent from the Nation States. In view of this network-model, the enforcement area is an area in which the European Commission can play a very substantial role as a transnational cooperation and coordination unit. Considering the boundary-tied tradition of many enforcement authorities (and of their legal traditions) the European Commission here has a playing-field for setting up very original cooperation forms, which reflect much more an integrated operational approach than a hierarchical, institutional Community-State approach. In that sense we can speak of new paradigms of horizontalisation instead of vertical institutionalization.
Enforcement cooperation in a European regional context will be less and less dependent on classical state to state approaches, and I see the institutional Community-State approach as a variety of this, but even more so as a form of direct operational cooperation between the enforcement authorities themselves. The future of European integration does not consist in building new supranational European institutions but in consolidating and intensifying integration through multi-level government structures with strong multi-level interdependence between the various levels of political institutions.[47] It is important that these multi-level governance structures gain and keep their right of existence in a way that can be fitted into the traditions of the rule of law and democratic administration. In order to obtain and retain the necessary legitimacy a number of checks and balances will have to be incorporated into the new governance structure of Community legal order as well as political accountability. This therefore presupposes a new governance structure based on substantive values linked to expert knowledge. As far as effectiveness is concerned, it is obvious that the new structures can only operate permanently and constructively if they are based on effective rationality and stability. This entails a well-detailed task, proceduralized legal requirements and duties of cooperation for the national authorities.
Gradually, this multi-level governance structure will also have to evolve from multi-level to multi-arena. There, too, the classical distinction between public and private will fade. The emphasis is no longer on institutional-hierarchical distinctions but on

46. Cf. section 4.2.
47. See the contribution of C. Joerges and E. Vos to this volume (71 *et seq.*).

decisive networks that base their legitimacy mostly on expert knowledge, procedural guarantees which create mutual trust and problem-solving capacities. This development avoids a standstill or unequal results through compliance and/or enforcement competition between institutions of Member States (race to the top – California-effect; race to the bottom – Delaware-effect).

It is not by accident that new cooperation procedures are also introduced in the field of enforcement of Community law, but rather due to a number of particular conditions: the legislative activity of the Council and of the Commission in the field of enforcement has considerably increased over the last few years; the Member States continue to show considerable reluctance to accept this Community influence in their legal order; and third, the effective enforcement of Community law demands close cooperation between Community institutions and institutions of the Member States. National enforcement authorities are increasingly confronted with an interdependence of problems in an open market. The open frontiers policy and the Schengen police measures are a fine illustration thereof. The realization of the Customs Union and the consequences for national customs authorities form another good example. In a very recent report by the European Parliament Committee of Inquiry on transit, customs enforcement is qualified as follows: 'Crime is organized at multinational level whereas the 15 customs authorities of the EU continue to think and act within a framework of national boundaries'.[48] And of course the BSE crisis clearly shows the need to deal with this enforcement issue in a European setting with common rule-setting and standards and increased cooperation between enforcement authorities.

Also interesting is that the recent ideological tendencies, both at the EC level and in many Member States, to deregulate and decrease the influence of public authorities in favour of the market principle, increases the need for central supervision and enforcement of the deregulated field. The deregulation and the withdrawal of public authorities from tasks of substantive regulation leads to an increasing centralization of procedural supervision and enforcement tasks.

5.2 Operationalisation of the Multi-level Agency Structure

The trans-European enforcement networks cannot survive on structure alone. They elaborate common law in action programmes, containing information sharing, pooling of expertise, enforcement guides, European standards for analysis, measurement and inspection, data-transmission systems etc.

How can new trans-European enforcement networks become multi-level agency structures? Although the history of American federalism is very different from the European integration process, the experience in the USA with federal-state enforce-

48. European Parliament, *Report on the Commission 1996 Annual Report and its Work Programme on the Protection of the Financial Interests and the Fight against Fraud*, PE 22.169/fin.

ment cooperation can teach us a great deal about how to process information, how to build up action capacity and how to use financial resources as important incentive tools. The reason why the USA experience can inspire us is twofold. First of all, the USA has a long-standing tradition of solving issues concerning the allocation of governing power between the national (federal level) and the states. Secondly, although the governing power has been allocated and divided at federal and state level, the allocated powers have to cooperate in different forms of federal-state cooperation, also in the area of enforcement.

We all know that despite a fear that a central government might abuse its authority, from the moment it was drafted the American Constitution conferred operational police powers and an independent investigative and prosecution competence on the federal government as an inherent attribution of sovereignty. Moreover, through the Bill of Rights, the rule of law and the protection of due law principles were provided for at the federal level with full jurisdictional control by the Supreme Court. Nevertheless, the history of American judicial federalism is not a history of an integrated legal order such as that within the EC, but a history of two separated levels, the federal level and the state level, with their own substantive norms and enforcement systems. Of course, by an extensive use and interpretation of clauses such as the 'commerce clause', the federal competences, including the criminal justice area, has expanded and a federal competence has been created for all transnational enforcement issues. Although the federal enforcement agencies might be enormous organisations with impressive competences, the need for federal-state enforcement cooperation is very real. The way this has been elaborated between the two levels of sovereignty (federal and state) can be very inspiring for the EC-Member State enforcement cooperation within the framework of regional integration. Let us take a brief look at the two important issues: (1) to what extent can we speak of federal enforcement powers in the US compared to the EC; and (2) which models have been elaborated for federal-state enforcement cooperation?

American federalism is based upon the doctrine of enumerated powers. The federal government does not have any 'inherent' or 'intrinsic domestic powers'. State governments are the repositories of 'general governmental jurisdiction', while the federal government has only the 'enumerated powers'.[49] So the federal government has legal competence to govern only concerning those subjects matters which the Constitution designates for it. This can be compared with the attribution of competences to the EU level in the EU Treaties. However, the US Constitution contains general clauses which have been used very widely in order to create federal competences. I here refer to the 'necessary and proper' clause (Art. I, section 8). This implied power can only be used if there is a close and substantial relation with respect to some legitimate federal concern. This can be compared to Article 235 of the EU's Treaty of Maastricht. Article VI, cl. 2 provides for the pre-emptive

49. D.E. Engdahl, *Constitutional Federalism* (1987).

capability, comparable to the supremacy of EC Community law over national law. Very important is the commerce clause of Article 1, section 8, cl. 3, by which the federal government has the power to regulate and to enforce international commerce and commerce between the states. This clause is comparable to the four freedoms in the EC Treaty. Completely different from the EU powers are the autonomous tax power and spending power (Art. 1, section 8, cl. 1). Moreover, Articles XIII, XIV and XV provide for federal enforcement powers. For instance, the enforcement power concerning due process of law (Art. XIV, section 1) is quite important in our context. The police and enforcement powers historically belonged to the exclusive sovereignty of the states. This is a surprising similarity with the attitude of the Nation States in the EU. The difference, however, is that the federal government disposes of the enforcement powers described above, so that we can speak of concurring powers, and that by the use of the commerce clause, congressional power has become virtually limitless since the New Deal. The federal criminal code currently includes more than 3,000 offences and hardly a congressional session goes by without an attempt to add new sections. Criminal cases now consume half of the federal judiciary's total time, and criminal trials account for eighty percent of the caseload in some districts. The federal government therefore provides slightly more than one-quarter of the total national prosecution expenditure.

As stated, the sharp increase in federal enforcement powers, also in the criminal area, does not stand in the way of increasing enforcement cooperation. Certain forms of cooperation are mandated by the Constitution (required forms of cooperation). For example Article IV, section 1, requires each state to give 'Full Faith and Credit' to the 'public acts, Records, and judicial proceedings of every other State'. Section 2, cl. 2 of the same article imposes the duty of interstate extradition. Federal legislation also provides possibilities, as for instance by stimulating the interchange of federal and state civil servants.[50] But for our field, a more interesting is the elaborated but not required forms of cooperation. Although law enforcement agencies, such as the Environmental Protection Agency (EPA) and the Drugs Enforcement Agency (DEA), are huge federal administrations, they depend to a large extent upon dependencies in the states. For 20 to 30 years they have tried to involve state agencies in the enforcement policy. The procedure is in general the following: the federal agency elaborates a general enforcement framework and defines the qualitative and quantitative criteria. State agencies can participate in the offer/tender by introducing elaborated enforcement programmes for the execution of the general federal framework enforcement programme. Once approved by the federal agency, they receive the necessary funding for realising their offer. The consequence of this cooperation is that the enforcement policy is not imposed upon the states, but state authorities can remain first-line enforcers. Meanwhile, however, through the procedure the federal agencies are able to impose the general policy lines and to

50. 5 USCS para. 3371 (1996), chapter 33, subchapter VI: Assignments to and from states.

realise an intensive process of federal-state cooperation under the direction and guidance of the federal authorities. The enforcement related to illegal drugs provides some good examples of far-reaching federal-state cooperation between the federal DEA and state authorities. The two most significant cooperative programmes are the DEA State and Local Task Forces (DEA-Sl Task Forces) and the Organized Crime Drug Enforcement Task Forces (OCDETFs). Both programmes contain far-reaching powers of enforcement assistance and for multi-jurisdictional law enforcement practice. Moreover, the programmes include federal funding for state authorities and systems of financial rewards and penalties (bonus/malus) for the participating enforcement authorities. Within the framework of federal-state cooperation the enforcement agencies provide for law enforcement coordination committees, federal-state task forces, coordinated case targeting and multi-jurisdictional investigative authorities. Not only are the enforcement agencies active in the fields of federal-state cooperation, but also the prosecutors.[51] A Task Force on Federal/State/Local Law Enforcement Cooperation was created by the Executive Working Group of federal, state and local prosecutors. The Task Force issued a 'Memorandum of cooperation', which applies to prosecutors at all levels and to federal agencies under the authority of the Department of Justice.[52] The Memorandum defines 5 major policy goals:

- personal relationships between chief prosecutors and investigators and their counterparts at other levels of government;
- free exchange of information between coordinate law enforcement agencies;
- joint enforcement initiatives, or task forces, between law enforcement agencies;
- mechanisms for promptly resolving disputes between federal and state law enforcement
- administrative reporting requirements and financial incentive awards.

So we can conclude that the typical dual federalism in the US model is to a certain extent moderated by a cooperative federalism, also in the area of enforcement, including the criminal enforcement and police powers. Although the European Union lacks many powers which are usually associated with governance, for instance the power to coercive and sanctioning powers, it has to co-opt the resources of the Member States to exercise its governance capacity. So we have to break through the institutional dichotomy between European norm-setting, on the one hand, and domestic enforcement, on the other, and to build up a functional approach towards

51. See H. Litman and M.D. Greenberg, 'Reporters' Draft for the Working Group on Federal-State Cooperation', 46 *Hasting L.J.* (1995), 1319.
52. The Task Force has further recommended that an executive order be issued that would extend the policies articulated in the Memorandum to all federal agencies with prosecutional and investigative functions. Until now, every enforcement agency continues to elaborate its own policy of federal-state cooperation.

integrated enforcement, including cooperation between the European and national regulatory and enforcement bodies. This idea was already clearly expressed in the follow-up to the Sutherland Report,[53] that insisted on the need for enforcement guides, exchange programmes between officials, liaison officers, common investigation programmes, data-transmission systems, common standards for analysis, measurement and inspection and common rules for administrative and judicial enforcement cooperation.

In the light of these recommendations we can state that the anti-fraud unit of the EC, UCLAF, has been very successful in applying them. In their last work programme for the years 1998 and 1999[54] we can read that UCLAF is working on agreements, Memorandums of Understanding (MOUs), with national enforcement agencies, is setting up special task forces, is realizing multi-agency and transnational inspections and has elaborated specialized sub-units: a liaison and criminal law expertise interface sub-unit, a customs intelligence sub-unit and an anti-corruption sub-unit . Nevertheless, UCLAF is also confronted with the institutional limits enhanced in the Maastricht Treaty as far as it concerns cooperation in judicial criminal matters. Cooperation in dealing with serious fraud cases requires cooperation between judicial authorities. UCLAF is limited to coordination tasks, as the Unit has no judicial investigative powers. Otherwise these judicial investigative powers can only by provided for upon condition that there is a form of judicial control at the European level. Scientific proposals in that sense can be studied in *Corpus Juris*, containing a proposal for the legislative harmonisation of the penal provisions for the purpose of the financial interests of the EU.[55]

6 TRANSNATIONAL ENFORCEMENT COOPERATION: STATE OF THE ART AND NEW CHALLENGES IN THE AMSTERDAM TREATY

The process of European integration has reached such a depth that the institutional struggle between national sovereignty and supra-national competence concerning enforcement has become an important issue which has to be solved. Some Member States are not willing to accept harmonisation in the field of enforcement, especially in the judicial sphere, and by that to preclude a substantial part of the judicial integration necessary for the socio-economic integration of the internal market. On the other hand, the limited governance power of the EU makes it impossible to regulate all the aspects of an integrated common enforcement system. They depend to a large extent upon the regulatory and enforcement systems of the Member States. This

53. SEC 92 2277 final.
54. COM (98) 278 final, *Protection of the Communities Financial Interests, Fight Against Fraud*. Work programme 1998/1999, June 1998.
55. *Corpus Juris*, under the direction of M. Delmas-Marty (1997).

situation creates problems both for the enforcers and the enforced, certainly in a transnational context. The result for the enforcement agencies working in a transnational European setting is that they are or may be considered too dependent on national procedures or have to work in a legal vacuum. Even when specific Community rules have been elaborated, they refer for many procedural aspects to the national rules for application. We could say that the enforcers are to a certain extent the prisoners of 15 domestic islands with their own enforcement rules for enforcing Community norms. On the other hand, the transnational and transprocedural changes in the enforcement architecture undermine the due law position of the enforced, which is obliged to re-activate forum-shopping in order to make its citizens' rights effective, if at all possible. With the fact that the EU does not dispose of classic constitutional powers and that the ECJ cannot apply common procedural safeguards and principles of due law to the extent the US Supreme Court can, a substantial part of the due law protection lies in the hands of the Member States and the ECHR, which have protection systems that are not specifically designed for constitutional and human rights protection in a Community area. Their due law protection is still to a large extent based upon the model of the Nation State with all the classic tools.

So, I would plead for increased justice integration, including criminal law and criminal procedure, in the Community area, but on condition that we can integrate according to the necessary due law protection. By doing that we can find a solution for problems of efficiency and due law protection. This conclusion confirms my thesis that the equilibrium of enforcement powers in the Member States' rule of law tradition has to be transposed to a European level, but this implies real federal judicial and constitutional powers. At that level we can find a solution for the integration of administrative enforcement cooperation, police cooperation and judicial cooperation in criminal matters without jeopardizing our long-standing tradition of due law.

Does the Treaty of Amsterdam offer us better possibilities for an integrated enforcement of the Community area and for justice integration in the sense of my above plea? Also here, my answer is yes and no. Yes, because the Treaty provides for a legal basis for administrative and customs cooperation (Arts. 66 and 135) and anti-fraud enforcement cooperation (Art. 280) in the first pillar, in a much more explicit and elaborate way than in the Treaty of Maastricht. The Treaty also establishes an area of freedom, security and justice (Art. 61), including administrative cooperation and judicial cooperation in civil and administrative matters. In civil judicial cooperation (Art. 65), harmonisation of civil procedure, cooperation in the gathering of evidence, mutual recognition and enforcement of civil and commercial cases is mentioned. A hopeful perspective, indeed. But my answer is also no, because of the fact that all matters of criminal law, criminal procedure, judicial cooperation in criminal matters, and national administration of justice are in Articles 135 and 280 *expressis verbis* excluded from the first pillar and are reserved for the third pillar (Title VI, provisions on police and judicial cooperation in criminal matters). The new third pillar is much better than the former, because it provides for the harmonisation of criminal laws and for a legal basis for operational enforcement cooperation between

law enforcement agencies. However, the institutional competence division between civil and administrative, on the one hand, and criminal, on the other, jeopardize the integrated approach. Concerning the problems with the protection of due law, it is hopeful that the competence of the ECJ has been increased for matters related to the third pillar, although still far more limitated than in the first pillar. Nevertheless, the ECJ will not have jurisdiction to review the validity or proportionality of operations carried out by the law enforcement agencies of the Member States. The so-called '*actes de gouvernement*' doctrine has put the possible influence of the ECJ in justice matters to one side.

Also in the near future we shall have to live and work with a justice landscape in the Community area that resembles a patchwork of bits and pieces. Enforcing Community rules and protecting due law principles on a Community-wide basis will remain a dream as long as we do not accept a further federalisation of the relevant constitutional and justice matters. How many transnational enforcement scandals do we need in order to be convinced?