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# 1 Summary

Member States have the competence and the obligation to implement and to enforce Community law. How they do this belongs in principle to their freedom of policy. During the last few years, however, this policy freedom has been objectively bound to and completed by Community law, in the form of case law of the Court of Justice as well as by secondary Community legislation. In this way a process of harmonisation has come into its stride, which has substantial consequences for the national enforcement laws.

For some time conventional wisdom was that the criminal law of the Member States would remain unaffected by Community law. The thinking was that the Community operated only in the areas set out in the Treaty and there was no reference in the Treaties to matters of criminal nature; but during the 1970s the ECJ had made it clear that, while the primary competence in criminal matters rested with the Member States, Community law sets limits on what the Member States were free to do.

The impact which Community law has on the Member States' criminal law has two aspects. In the first instance, in certain situations Community law requires that particular parts of a Member State's criminal law should not be applied. Additionally, Member States should refrain from adopting measures that constitute a threat to the realisation of Community objectives.

In other situations, however, the obligation is a positive one whereby the state is required to impose duties on individuals or other legal persons within its jurisdiction, duties which might have to be enforced by the state's criminal law. The Member States must in particular ensure that violations of Community Law are sanctioned according to conditions of content and procedure which are analogous to those that apply to violations of national law of a similar nature and importance, and which render the sanctions effective, proportionate and of a deterrent nature. To apply sanctions under analogous conditions entails the application of the assimilation principle.

Duties are imposed on individuals by EC law in a number of ways, for example through Treaty Articles. It is possible for regulations to impose duties directly on individuals but also to impose a duty on the states to adopt measures to ensure compliance by individuals. Directives, on the other hand, always require action to be taken by the Member States to achieve goals set in the directive. A directive sets the objectives to be achieved and leaves the choice of implementing methods to the states, but this could include an obligation to be imposed on legal persons within that state.

The Treaty of Amsterdam has made some changes. Art.29 II No.3 TEU, mentioning for the first time criminal matters, contains the approximation of rules on criminal matters in the Member States. This approximation could happen through Art.31 (e) TEU by progressively adopting measures establishing minimum rules, for example in the way of framework decisions, Art.34 (b) TEU. Furthermore, Art.209A ECT was changed in to Art.280 ECT, which now contains a Art.280 IV, stating that the Council shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community. This constitutes for the first time a competence for the Community in criminal matters, even though the range, which Art.280 IV covers, is disputed. Some may argue that Art.280 IV contains a criminal competence to inflict penal sanctions, others say that it only confirms the competence of the Community to impose administrative sanctions. On the basis of Art.280 IV, the EC has issued a directive on the criminal law protection of the Community's financial interests.

There is little doubt that Europeanization is making headway now in the field of criminal justice. Some provisions of the Union Treaty (like Art.29, 31, 34 TEU) are at least an indication of the forces which are likely to shape future developments. There exist different possible lines of development: more intensive co-operation, assimilation and harmonisation, for example in the form of a model penal code or in form of the proposed Corpus Juris. They all have their weaknesses.

Co-operation faces first of all the problem that conventions need ratification and experience from the past shows that many States hesitates in ratifying them.

Assimilation does not guarantee effectiveness and does not solve the problem of cross-border crime. The criminal rules in the different Member States can still continue to be very different and thereby create oasis for criminals, who pick the States with the smallest punishment.

Harmonisation faces beside others first of the entire problem that there exists a risk that the Member States would loose their national identity and that they could only agree on the smallest common denominator. That would bear the danger that entrenched guarantees would get lost.

The European Council held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union. Because criminals must find no way of exploiting differences in the judicial systems of Member States, it was proposed that a unit "Eurojust" should be established. On 19 July 2000 the Council of the European Union decided to set up Eurojust as a network of judges, prosecutors, magistrates and national policemen that will facilitate the exchange of information and the co-

ordination among judicial systems in criminal prosecutions and even in civil processes.

Furthermore it should be observed that the Commission proposed the creation of a European Public Prosecutor as a supranational institution. It presented a green book considering the possible advantages.

# Abbreviations

Art.	Article
DG	Directorate General
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
ECT	Treaty of the European Community
EJN	European Judicial Network
EPP	European Public Prosecutor
EU	European Union
Europol	European Police Office
JA	Juristische Arbeitschriften
JZ	Juristen Zeitung
NJW	Neue Juristische Wochenschrift
NStZ	Neue Strafrechtszeitung
OLAF	Office européen de lutte anti-fraude
TEU	Treaty of the European Union
UCLAF	Unité de coordination de lutte antifraude
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

## 2 Introduction

All EC Member States have a system of criminal law. On the whole, this criminal law has come about at the initiative from the Member States themselves. Sometimes the penal provisions have been made in order to carry out an obligation imposed by the EC. As a result of the increasing economic integration within the EC, the differences between national systems of criminal law may lead to problems in the near future. It can be observed, that even in those areas of criminal activity that are of equal concern to all Member States, the legislation and specific practices of each one demonstrate a variety of approaches.<sup>1</sup>

At the time of its establishment, the Community did not wish to cover criminal law. Therefore, criminal law was left outside the scope of the EEC, and remained within the sovereign jurisdiction of the Member States. So the EC has no competence regarding criminal law.<sup>2</sup> The Community, itself without authority in criminal matters, is dependent on national legislation and enforcement practice.<sup>3</sup> Not least because of its perceived significance as an essential badge of sovereignty, criminal law and justice is often cited as the paradigm example of an area of activity that is exempt from the penetrating forces of Community law.<sup>4</sup> However, it soon turned out that the view that Community law would not affect national criminal law was not tenable. Both the Treaties and secondary Community law are sources of obligations on the Member States in the sphere of criminal law.<sup>5</sup> The discussion concerns the emergence of a “European criminal law space“ and the impact of European law (of various kinds) on national criminal law and criminal justice. The problem is the rapidly developing, expanding and increasingly sophisticated “European crime space“, contrasted with a much less developed and effective “European criminal law space“.<sup>6</sup>

This essay will analyse the current situation and try to answer the question if there exists a “European Criminal Law“ and if the Community is aiming towards a European criminal law space. It will focus on the question of harmonisation and give an outlook for the future in regard to the proposal of an EPP.

One main aspect will be the fraudulent activities regarding the financial interests of the EC. The budget, defined as “the visible sign of a true patrimony common to citizens of the Union“, is the supreme instrument of European policy. To say this emphasises the extreme seriousness of any crime which undermines this

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<sup>1</sup><http://www.euroscop.dircon.co.uk/corpus6.htm>

<sup>2</sup>Eisele, page 991

<sup>3</sup>Vervaele, page 183

<sup>4</sup>Baker, page 361

<sup>5</sup>Sevenster, page 29

<sup>6</sup>Harding MJ, page 224



patrimony.<sup>7</sup> Criminal justice in this area comes up against obstacles pertaining both to the lack of continuity in criminal procedure (criminal justice authorities usually being competent only within national borders) and to the disparity of the legal systems. If the same offences are differently punished in different Member States, then the forbidden activity will move to the State with the lowest punishment and thereby distort the international competition situation.<sup>8</sup> It is absurd that the borders are open for criminals but closed for the prosecution.<sup>9</sup>

As a result of the modern information systems it does not matter anymore where the criminals are situated geographically. In a society that is based on the principles of the free movement, even traditional law offences gain an international dimension.<sup>10</sup> Lawbreakers do not think in geographical terms, but their clever legal advisers do, who point out specific offences and perpetrators, often in advance, and the gaps and deficiencies in the existing international agreements.<sup>11</sup>

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<sup>7</sup>Delmas-Marty 1997, page 13

<sup>8</sup>Sieber 1993, page 795

<sup>9</sup>Zieschank, page 262

<sup>10</sup>Sieber 1997, page 370

<sup>11</sup>Schomburg, page 52

# 3 Criminal law in the EU

## 3.1 Criminal competence of the EC

### 3.1.1 no criminal competence of the EC

There is neither Community criminal law nor a Community law of criminal proceedings. There are no penal sanctions at EC-level and there is no Community criminal investigation and prosecution. The lacking competence comprises the jurisdiction to prescribe as well as the jurisdiction to enforce.<sup>12</sup> For the enforcement of its laws by means of punishment, the Community is dependent on the Member States.<sup>13</sup> The Member States did not give up their sovereignty regarding criminal law.<sup>14</sup> This arises in part from the inevitable relation between the need for state security and the protection of other important national interests and the availability of criminal law as an obvious means of guaranteeing such interests; in part from the culturally specific character of some crime and the nationally specific thrust of much policy formulated to deal with crime problems.<sup>15</sup> The case law of the ECJ confirms that criminal law is generally up to the Member States.<sup>16</sup>

It is obvious that this decision is mainly political.<sup>17</sup> But there are also legal considerations.

Criminal law is very closely connected to the State. It influences and limits the sphere of freedom of the citizens and therefore needs very strict democratic protection. The democratically legitimated enforcement of penal repression as well as the guarantee principles of criminal law is forms of its function as a measure of the citizen's freedom, besides its obvious function as a measure of protection for social goods.<sup>18</sup> Considering the effect that criminal sanctions of the Community would have on the rights of individuals should have been expressly provided for in the Treaty.<sup>19</sup> Criminal law demands democratic legitimacy, which the EC has not reached yet.<sup>20</sup> The Community does not have an institution, which would be comparable to the national parliaments. Purely parliamentarian

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<sup>12</sup>Tiedemann, page 24

<sup>13</sup>Sevenster, page 31

<sup>14</sup>Dannecker, page 869

<sup>15</sup>Harding/ Swart, page 87

<sup>16</sup>Bickel vs Franz, C-274/96

Donatella Calfa, C-348/96

Lemmens, C-226/97

<sup>17</sup>Musil, page 69

<sup>18</sup>Kaiafa-Gbandi, page 242

<sup>19</sup>Biancarelli, page 262

<sup>20</sup>Dannecker, page 869

legislation is naturally strange to the EC as an international organisation.<sup>21</sup> The Council, the legislative organ of the Community, is composed of representatives of the executive and not directly democratically legitimated.<sup>22</sup>

It is sometimes stated that these considerations are only valid regarding a competence to create direct supranational sanctions. Apart from that, the EC can force Member States to implement national laws through regulations or directives. Directives are only aimed at the Member State and the resulting law after the implementation contains the direct democratic legitimacy of the national legislator.<sup>23</sup>

This argument can be considered as misleading because it does not at all answer the question whether the Community has foremost competence to enact directives, which enforce the undertaking of penal measures, and whether such directives could consequently be binding upon the Member States. An obligation for the national legislator to incriminate an activity - with a specific content- cannot be held valid as long as the subject imposing it has no relevant competence.

Furthermore it should be noted that the standards for the legitimisation of criminal law are taken out of the national constitutions, which are for example the principles of retroactivity and analogy.<sup>24</sup> The EC has no constitution; the protection of individuals is not strong enough. This was recognised which can be proved by giving regard to the discussion around the draft charter of fundamental rights. The ECHR cannot replace a constitution, especially since the EU cannot join the ECHR yet<sup>25</sup> and is thereby no addressee of the ECHR. The principles of the ECHR need the judicial protection of the ECJ.<sup>26</sup>

### **3.1.2 Influence of EC law on criminal law**

That the EC has no competence in criminal matters does not mean that the Member States are completely free to decide if or how they carry out enforcement. The Member States have enforcement duties under the Treaty.<sup>27</sup> It has to be noticed that the national criminal law has become more and more “European“. The strong influence of the EC law also on the criminal law of the Member States cannot be denied.<sup>28</sup> The Treaty of Amsterdam allows for that fact, for example by introducing Art.280 IV ECT and Art.29II Nr.3 in connection with Art.31(e) TEU.

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<sup>21</sup>Musil, page 70

<sup>22</sup>Sieber 1991, page 970

<sup>23</sup>Sieber 1991, page 972

<sup>24</sup>Braum, page 498

<sup>25</sup>Opinion 2/94 of 28 March 1996

<sup>26</sup>Braum, page 498

<sup>27</sup>Vervaele, page 183

<sup>28</sup>Zieschank, page 256

The fact that it is no longer possible for Member States to determine their criminal law without reference to Community law became apparent as individuals began to resist the application of Member States criminal law by relying on Community grounds.<sup>29</sup>

### 3.2 The Council of Europe

The Council of Europe operates on an intergovernmental basis and its crime control instruments take the form of treaties to which its Member States may choose to accede.<sup>30</sup> The Institutions of the Council of Europe have worked on all aspects of criminal law, including constitutional law and human rights, material and procedural rights and international co-operation.<sup>31</sup> The Council of Europe has concluded 20 conventions, which are relevant for criminal law. Between these, the European Convention on Extradition of December 13, 1957, followed by two additional protocols in 1975 and 1978 and the European Convention on Judicial Mutual Assistance in Criminal Matters of April 20, 1959 and its additional protocol of 1978 occupies central significance.<sup>32</sup> Almost all Member States of the Council of Europe signed these conventions. Also environmental protection is covered through the Convention on the Protection of the Environment through Criminal Law from 1998. Especially in this field international co-operation is very difficult and the danger of trans-border offences extremely high;<sup>33</sup> but it should not be concealed that the Member States partly hesitate to ratify the conventions. The European Convention on the International Validity of Criminal Judgements in Criminal Cases of May 28, 1970<sup>34</sup> is only ratified by 10 States;<sup>35</sup> the 1978 protocol (on facilitating mutual assistance in fiscal matters) is not yet ratified by one Member State.<sup>36</sup>

The impact of the ECHR on the operation of national criminal justice has long been a fact of life for criminal lawyers in a number of European Countries, and other European Council instruments have had an increasing impact on procedural and penal matters.<sup>37</sup> Today, the ECHR guarantees elementary procedural rights all over Europe.<sup>38</sup> It ranks now as one of the most developed international regimes for the protection of the rights of individuals and groups. In terms of crime control, however, it acts as a brake rather than to facilitate enforcement, in that it has set more rigorous limits on the exercise of state powers of law enforcement. But although in one sense it may thus be seen as a hurdle to enforcement of

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<sup>29</sup>Guldenmund..., page 108

<sup>30</sup>Harding MJ, page 229

<sup>31</sup>Sieber 1997, page 371

<sup>32</sup>Schübel, page 106

<sup>33</sup>Sieber 1997, page 371

<sup>34</sup>ETS No.70 in Bassiouni, page 625

<sup>35</sup>Jung, page 418/419

<sup>36</sup>Official Journal, C-216 01/08/2001 p.0014-0026

<sup>37</sup>Harding ELR, page 374

<sup>38</sup>Sieber 1997, page 371

criminal law, on another view it has added to the vitality of such processes by reinforcing respect and confidence in criminal justice systems, so that there may well be a longer-term profit from the enforcement perspective.<sup>39</sup>

Sub-regional or bilateral conventions in between the EU (as for example the Schengen agreement) are no substitute for the conventions of the Council of Europe but they supplement them.

### **3.3 The 3rd pillar**

A possibility to protect Community interests, even though the EC lacks competence in criminal matters, is the conclusion of international contracts or conventions in the framework of the 3rd pillar. The outcome is not Community law in the common sense but international law.<sup>40</sup> These treaties or conventions will be traditional international law agreements, enforceable as international treaties but not through any central organisational mechanism.<sup>41</sup>

#### **3.3.1 Intergovernmental Method**

The term intergovernmental connotes a structure of co-operation and common decision-making, which enables the participants to retain sovereignty. Practical legal co-operation in the wider sense rests primarily on an even-tighter network of multilateral agreements, on “small-scale“ legal co-operation in the stricter sense, on extradition, on the transfer of proceedings or judgements and on the transfer of convicted persons.<sup>42</sup>

An EC agreement has been drawn up for the mutual recognition of criminal sentences (the so-called Ne-bis Treaty).<sup>43</sup> A second EC agreement concerns the application among Member States of the Council of Europe Treaty on the transport of sentenced persons. Furthermore there is the EC agreement concerning the application among Member States on the European Treaty for the Combat of Terrorism.<sup>44</sup> These agreements require the use of national criminal law in a certain way to deal with mutual problems involving transnational criminality. There is thus, in fact, a firmly established practice of international intrusion into the sphere of national criminal law in order to achieve certain common multinational objectives.<sup>45</sup>

Most of the existing treaties originated within the Council of Europe. To some extent there is already an overlap: for instance, the respective Council of Europe

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<sup>39</sup>Harding MJ, page 230

<sup>40</sup>Eisele, page 991

<sup>41</sup>Harding MJ, page 334

<sup>42</sup>Schomburg, page 52

<sup>43</sup><http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

<sup>44</sup>Official Journal C-178, 02/08/1976 p.0030

<sup>45</sup>Harding ELR, page 380/381

Convention and the EC Directive on money laundering cover similar ground and use similar terminology; there is a Council of Europe Convention on Mutual Assistance in Criminal Matters and also now a proposed EU Convention on the same.<sup>46</sup>

It is sometimes submitted that Member States sovereignty has a better guarantee in the framework of the Council of Europe, because there no supranational law is made. This type of co-operation in the sphere of international legal assistance is not as far-reaching as the substantive adjustments that the Commission has in mind.<sup>47</sup> But today, the efforts for unification of European criminal law are no longer pursued in the Council of Europe. This kind of law is too dependent on national tradition.<sup>48</sup>

### 3.3.2 Problems

The system introduced within the third pillar basically suffered from the following problems: conventions may not come into force within a reasonable period of time for lack of ratification. As a result of the fact that it has not been possible to create a proper synergy between the European Parliament and the national parliaments, joint operations are reduced. The instruments adopted do not include any appropriate follow-up measures.<sup>49</sup> There exists no unitary legal assistance agreement, which would settle the basic questions once and for all in a general section and deal with special instruments in a special section. Some Member States may delay significantly to ratify such a convention.

Apart from that Member States may express reservations and exempt themselves from different regulations causing lacunas again in the intended form of protection.<sup>50</sup>

And thirdly, even in respect of that to which states have committed themselves, there is no strong accountability for any breach of obligation.<sup>51</sup> There is at present little opportunity for judicial scrutiny and individual challenge of third pillar measures compared to the way in which Community instruments may be reviewed or interpreted by the ECJ. There has been some feeling that the operational culture of third pillar activity enables policies to be worked out and even implemented with little transparency and accountability.<sup>52</sup>

Another problem area is the lack of a uniform interpretation of the conventions themselves in the various Contracting States.

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<sup>46</sup>Harding MJ, page 333

<sup>47</sup>Sevenster, page 37/38

<sup>48</sup>Oehler, page 613

<sup>49</sup><http://www.eurocep.dircon.co.uk/corpus6.htm> 19.11.2001

<sup>50</sup>Kaiafa-Gbandi, page 246

<sup>51</sup>Harding MJ, page 335

<sup>52</sup>Harding MJ, page 337

There is the additional complication that already the initial remedial measures will produce new problems: on the basis of Article 35 TEU the European Court of Justice will at last also be able to deliver preliminary rulings on the interpretation of the conventions under Title VI (police and judicial co-operation). However: this instrument is only available to those States and between those States which have recognised this jurisdiction in accordance with Article 35 (2) TEU.<sup>53</sup>

Furthermore, there will be no getting away from inconsistencies as a result of language barriers.

Not to forget, the process of negotiations and adoption of international agreements to harmonise substantive laws and procedures is notoriously slow. The system of negotiations involves governments and ratification by national parliaments is needed as well. This is a democratic and therefore slow process.<sup>54</sup>

### **3.3.3 Most important 3rd pillar acquis regarding fraud**

The budget, defined as the “visible sign of a true patrimony common to citizens of the Union“, is the supreme instrument of European policy. To say this emphasises the extreme seriousness of any crime which undermines this patrimony.<sup>55</sup>

Fraud against the EC is fraud against the flow of funds to and from the Community budget.<sup>56</sup> It occurs in a variety of ways, normally involving either non-payment of tax or duties or unjustified receipt of subsidies. The impact of fraud is both direct, in terms of loss of national revenue and indirect, as Community policies are distorted and do not achieve their intended aims.<sup>57</sup> It is generally agreed that substantial difficulties exist in prosecuting frauds against Community funds in national courts. National criminal laws and procedures are essentially territorial in scope. Problems may arise by virtue of the absence of or differences in, substantive criminal laws, rules of evidence, or procedural rules. Furthermore, elements of the crime are committed in various Member States and no national authority has complete jurisdiction. Not all Member States have laws, which enable such frauds to be prosecuted extraterritorially. Apart from that, the legal mechanisms for collecting evidence from other jurisdictions are ineffective and outdated.<sup>58</sup>

Some steps are taken in preventing fraudulent activities.

The most important acquis to be mentioned here are:

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<sup>53</sup>Schomburg, page 55

<sup>54</sup>Nilsson, page 326

<sup>55</sup>Delmas-Marty 1997, page 13

<sup>56</sup>Vervaele, page 184

<sup>57</sup>Bell, page 154/155

<sup>58</sup>Nilsson, page 326

1. Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' financial interests<sup>59</sup>(the PIF Convention)
2. Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests- Statements made by Member States on the adoption of the Act drawing up the Protocol<sup>60</sup>
3. Council Act of 29 November 1996 drawing up, on the basis of Article K.3 of the Treaty on the European Union, the Protocol on the interpretation, by the way of preliminary rulings, by the ECJ of the Convention on the protection of the European Communities' financial interests<sup>61</sup>
4. Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests- Joint Declaration on Article 13 (2)- Commission Declaration on Article 7<sup>62</sup>

The PIF convention establishes a common definition of fraud and requires all Member States to treat the offences meeting this definition as criminal offences punishable by criminal penalties, including custodial sentences for serious cases. It further includes provisions to ensure that rules on jurisdiction and extradition between Member States cannot provide loopholes to avoid prosecution for fraud while placing Member States under an obligation to cooperate in the fields of criminal investigation, prosecution and sanction of fraud. In the two protocols to the Convention further agreement was reached on a common definition of corruption involving officials of the European Communities or officials of the Member States (first protocol) as well as on other subjects, such as money laundering and confiscation of proceeds of fraud (second protocol).

The methods that were chosen for harmonisation of the penal repression in the fields where this happened were not the same. As it has just been shown, in the case of fraud against the EC financial interests, the step to harmonisation was made the classical instrument of international co-operation, namely with a convention. In the case of money laundering, the relevant attempt took place in the form of a directive.<sup>63</sup>

### **3.3.4 From “horizontal“ to “vertical“**

There has been a development from the horizontal co-operation between Member States towards a verticalisation of the fight against EC fraud. The adoption of the PIF Convention and the two Protocols harmonising the definition

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<sup>59</sup>Official Journal C-316, 27/11/1995 p.0049-0057

<sup>60</sup>Official Journal C-313, 23/10/1996 p.0002-0010

<sup>61</sup>Official Journal C-151, 20/05/1997 p.0001-0014

<sup>62</sup>Official Journal C-221, 19/07/1997 p.0012-0022

<sup>63</sup>Kaiafa-Gbandi, page 245/246



of the offence of fraud against the financial interests of the EC marked a significant step in the direction of legislative co-ordination. All Member States however have not ratified the Convention.<sup>64</sup>

### **3.3.5 UCLAF, OLAF and Europol**

The primary level of Community intervention is enacting national criminal legislation for the purpose of harmonisation- as we have seen above.

Another instrument to tackle fraud was the establishment of UCLAF, which became operational in July 1988. It belongs to the secondary level of the function of common coordinative organs for a harmonised implementation of penal repression related to certain crimes over the EU. Although UCLAF has been developed into an autonomous task force, it has no independent criminal investigative powers. Investigation and prosecution remain matters for national authorities, although UCLAF may be able to obtain assistance by exerting political pressure. On the other hand, UCLAF plays an important role in co-ordinating anti-fraud activities, both in the Member States as well as in some of the applicant States.<sup>65</sup> Confronted with many still existing gaps, it was finally decided to enhance the role of UCLAF, now to be called OLAF, and to increase its independence.

OLAF was established by Commission Decision of 28 April 1998 and came into being on 1 June 1999. The office was empowered to exercise the Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, as well as any other act by operators in breach of Community provisions. The Office was further empowered to carry out internal administrative investigations to combat activities as specified above as well as to investigate breaches of obligations by officials and servants of the Communities (and similar breaches by Members of the institutions) which are likely to lead to disciplinary and criminal proceedings. The Office shall exercise its powers in complete independence.<sup>66</sup>

Another important institution on the secondary level is Europol. Europol, which has been operational since 1998, having replaced the Unit for Combating Drugs, has nowadays a broader crime co-ordinating role facilitating exchange of information collection, analysis and provision of information and intelligence support for national investigations and maintenance of computerised information. It constitutes in other words a supranational organ with competence in the whole EU, explicitly active in the field of penal matters but with no self-executive

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<sup>64</sup><http://www.era.int/domains/corpus-juris/public/main/about.htm>

<sup>65</sup>Nuutila, page 178

<sup>66</sup>van Gerven, page301/302

powers. Europol is held, together with OLAF, as the first step of institutions necessary for the development of a common space of freedom, security and justice.<sup>67</sup>

### **3.3.6 Court of Auditors**

Whether or not the internal control is working optimally is determined by the Court of Auditors, responsible for supervising the Community budget, the collection as well as the payment side. It examines both the legality and the legitimacy of revenue and expenditure, and sees whether or not finances have been well managed. The Court of Auditors also has the power to check on the use of Community finances (subsidies, interventions, etc.). In its annual reports, the Court of Auditors rakes both the European Commission and the Member States over the coals for their practical application of internal control.<sup>68</sup>

### **3.3.7 Problems specifically regarding fraud**

Additionally to the problems co-operation is facing, a specific problem in relation to fraud can be mentioned here. Traditional co-operation, aimed more at individuals than at criminal organisations and with a bilateral rather than multilateral context in mind, seems ill suited to the type of Community fraud we are facing today. This type of fraud seems to require horizontal co-operation being dropped in favour of verticalisation of procedure at the expense of the Community institutions.<sup>69</sup>

## **3.4 The 1st pillar**

As already stated above, both the Treaties and secondary Community law are sources of obligations on the Member States in the sphere of criminal law.<sup>70</sup> In principle, no criminal justice provision is immune from Community law influence because the supremacy of the latter ensures that it takes precedence where it is in conflict with domestic law.<sup>71</sup>

A direct influence of EC law on national criminal law exists first in a negative respect: the national legislator is not allowed to legislate against Community law.<sup>72</sup> For instance, he has to limit the extent of penalties in the interest of the free movement of persons.<sup>73</sup> That means that, because of Community law, the

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<sup>67</sup>Kaiafa-Gbandi, page 252/253

<sup>68</sup>Vervaele, page 185/186

<sup>69</sup>Delmas-Marty 1997, page 26

<sup>70</sup>Sevenster, page 29

<sup>71</sup>Baker, page 363

<sup>72</sup>Tiedemann, page 25

<sup>73</sup>Conegate vs HM Customs..., C-121/85

Member States can have the duty to change or even eliminate national criminal law.<sup>74</sup>

Positively requiring the use of criminal law for purposes of implementing EC policies or enforcing Community rights is potentially more significant, but in fact fits into a wider and more established pattern of directed use of national criminal law in order to achieve agreed international goals. This can mean that new duties for citizens and administration are established.<sup>75</sup> International treaties have sometimes required signatory states to use criminal law in certain ways to deal with mutual problems involving transnational criminality, but this is more a question of the 3rd pillar.

### **3.4.1 Sanctions under EC law**

#### **3.4.1.1 Supranational sanctions**

The contracting parties of the EC have given the EC no competence regarding criminal law. This follows clearly from a regulation which allows the Community to impose punitive measures: Art. 15 of Regulation 17/1962<sup>76</sup> allows the infliction of fines, but it states in the 4th paragraph that “decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature“. These fines are administrative fines. This means that the Community can punish offences independently with sanctions, even if this action can be considered as quasi-criminal-law.<sup>77</sup> This shows that, although penal sanctions are absent, other penalties do exist.

This kind of sanctions is first of all found in the area of competition law on a civil law level: Art. 81 (2) ECT provides the example of nullity of prohibited agreements. The prohibitory rules of Art.81 and 82 ECT create in effect “offences“ and are dealt with as such through the exercise of powers on the part of EC bodies. Breaches of these articles are investigated and penalised by the European Commission (the Competition DG) exercising powers laid down in Regulation 17/1962. The supranational prosecution causes national and supranational double procedures and problems with the principle “ne bis in idem“.<sup>78</sup>

As already stated, any penalties imposed in this context are categorically stated not to be of a criminal nature and the ECJ has affirmed that the Commission’s procedure is “administrative“ and not a criminal proceeding.<sup>79</sup>

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<sup>74</sup>Greve, page 69

<sup>75</sup>Greve, page 69

<sup>76</sup>Regulation 17/62, Official Journal P 013, 21/02/1962 p.0204

<sup>77</sup>Weigend 1993, page 780

<sup>78</sup>Sieber 1991, page 967

<sup>79</sup>Musique Diffusion..., C-100-103/80

On the other hand, there can be little doubt that in substance these administrative penalties have strong analogies with criminal law process.<sup>80</sup> They can be extremely high- up until one million Euro and furthermore up until 10% of the last years turnover of a company;<sup>81</sup> but in the case *Germany vs Commission*<sup>82</sup> the General Advocate draws attention to the fact that typically, the purpose of a criminal sanction exceeds that of simple deterrence, and will normally involve such matters as the stigma of social disapproval or moral condemnation. Thus, “the amount of the penalty, in a criminal case, will often reflect the extent of society’s disapproval of the conduct in question, rather than any more pragmatic consideration. In contrast, in the case of a non-penal sanction, even one imposed in the event of negligence or fraud, the judgement of fault may indeed be a necessary presupposition, but it is not usually the ultimate purpose of the penalty. When it is a question, for example, of civil indemnification based on negligence or fraud, the objective pursued by the penalty is to compensate the victim and, sometimes, to dissuade the perpetrator of the wrong, but not to stigmatise a criminal act, even if it may be necessary to determine responsibility before inflicting punishment.”<sup>83</sup>

The EC competition offences are the kind of Community law, which most obviously look like criminal offences in the usual sense of the term. But there are other examples of EC administrative offences and sanctions. In the context of agricultural regulation, for example, fraudulent declarations were penalised by the imposition of surcharges or exclusion from subsidies.<sup>84</sup> These sanctions were legally based on Art.34 (2) ECT. The ECJ confirmed that the Community has competence in this area and stated further that these sanctions are of administrative and not penal character.<sup>85</sup> The case law of the ECJ shows that penalties imposed by the Community may take various forms.<sup>86</sup> Admittedly, Member State authorities ultimately apply such sanctions, but they are provided for and determined at the Community level.

Further examples of this kind of Community-level administrative penalty can be found in the fisheries sector, in the situation where the Commission may refuse the issue a fishing licence and in the administration of European Social Fund payments.<sup>87</sup>

Some case law of the ECJ points in the direction that they recognised the quasi-penal character of certain sanctions but the ECJ never admitted a criminal

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<sup>80</sup>Harding ELR, page 378

<sup>81</sup>Eisele, page 899

<sup>82</sup>*Germany vs Commission*, C-240/90

<sup>83</sup>Advocat General C-240/90, E.C.R. 1992 p.I-05385

<sup>84</sup>see e.g. Regulation 3007/84, Official Journal L 283, 27/10/1984 p.0028

but: this regulation is no longer in force

<sup>85</sup>*Commission vs Greece*, C-68/88

<sup>86</sup>*Germany vs Commission*, C-240/90

<sup>87</sup>Harding ELR, page 379

character. In the Maizena case<sup>88</sup> the Court expressed itself most clearly on the problem of whether it is appropriate to recognise a Community regulation requiring the repayment of a released deposit as criminal in character when it is evident that the obligation subscribed to was not performed during the period covered by the deposit. The ECJ observed that under such conditions, the repayment of a deposit already released, “ceases to be guarantee and becomes a penalty when the undertaking has not been complied with and no longer can be complied with“. The Court underscored that, “thus in a system involving advance release of a security, the penalty constitutes the corollary of the system of security and is intended to achieve the same objectives as the security itself.“ Having said that this sanction is inflicted as forfeiture, the Court concluded that: “it is therefore an integral part of the system of security at issue and is not criminal in nature.“

Even if the sanctions that are imposed are only administrative, the actual impact of such sanctions should not be underestimated and those subject to these measures of control might raise legal protection arguments, which usually apply to criminal proceedings.

This represents the evolution of a significant supranational system of enforcement and sanctions, but has so far rarely attracted the attention of criminal lawyers; yet it amounts to a “ghost“ system of criminal law at the supranational level.<sup>89</sup>

### **3.4.1.2 The influence of EC law on national sanctions**

The principle points of contact between Community law and national criminal justice systems arise through the jurisdiction of the ECJ and, secondly, through legislation.

#### **3.4.1.2.1 The EC Treaty**

There is one Treaty clause that does refer to the national criminal law of the Member States in order to prosecute what one could call a Community offence. Contrary to what one might expect, this criminal law does not concern economic delicts. It concerns Art.194 (1) Euratom, on the obligation of professional secrecy. This article imposes a duty on each Member State to treat an infringement of this obligation as falling within its jurisdiction, and therefore to prosecute the civil servant in question.

Furthermore, Art.3 and 27 of the Statute of the ECJ, concerning the prosecution of judges, and that of witnesses and experts, are relevant. The latter provision uses the same formula as Art.194 Euratom: the Member States shall treat an offence as if it had been committed before one of its own courts.

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<sup>88</sup>Maizena, C-137/85

<sup>89</sup>Harding MJ, page 332

National provisions imposing penal sanctions can infringe Art.28 ECT, for example if they lay a heavy burden of proof on the importer concerning the lawfulness of his importations and impose a penal sanction on this duty.<sup>90</sup> Infringements of the freedom of establishment and the freedom to provide services may occur.<sup>91</sup> It is clear that national legislation, which infringes the Treaty, is incompatible with the Treaty and that in this respect criminal law forms no exception. In other words: provisions of national law imposing penal sanctions must take account of the aims and objectives of the Treaty and may form no barrier to their realisation.

#### **3.4.1.2.2 The ECJ**

As was stated right above, the ECJ had made it clear that, while the primary competence in criminal matters rests within the Member States, Community law sets limits on what the Member States are free to do.<sup>92</sup>

The ECJ has developed a body of fundamental principles that shape its jurisprudence, a number of which touches upon issues of central concern to criminal lawyers. For instance, both substantive criminal laws and sentencing provisions have been held to infringe the fundamental principle of proportionality and, thus, to be incompatible with Community law. Even if an obligation is in itself compatible with the Treaty, disproportionality in the implementation (forms and methods) can lead to a conflict with EC law. Disproportional measures and sanctions are considered as measures having an equivalent effect to quantitative restrictions in the sense of Art.28 ECT.<sup>93</sup> Since Community law is supreme over national law,<sup>94</sup> this means that proportionality is a valuable tool for checking the coercive powers of the Member States.<sup>95</sup>

Furthermore, the Member States are obliged to provide a system of enforcement that guarantees efficiency, effectiveness, proportionality (as stated above) and deterrence.<sup>96</sup> Art.280 of the Amsterdam Treaty confirmed that.<sup>97</sup>

Apart from the principle of proportionality, the principle of non-discrimination also effects the law of criminal proceeding. In the *Milchkontor* case, the Court said that “the rules and procedures laid down by national law must not have the effect of making it virtually impossible to implement Community regulations and national

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<sup>90</sup>Bouchara, C-25/88

<sup>91</sup>Webb, C-297/80

<sup>92</sup>see 2.4.1.2.1.

<sup>93</sup>Sevenster, page 46

<sup>94</sup>Costa vs ENEL, C-6/64

<sup>95</sup>Baker, page 362

<sup>96</sup>Vervaele, page 183

<sup>97</sup>Jung, page 420

legislation must be applied in a manner which is not discriminatory compared to procedures for deciding similar but purely national disputes“.<sup>98</sup>

The most celebrated example of a tangible Community law criminal justice principle authored by the Court resulted from the decision in *Commission vs Greece*<sup>99</sup>, better known as the Greek Maize case.

The Greek Government had failed to take steps to deal with a conspiracy fraudulently to evade Community import levies on consignments of maize, even though the Commission had provided evidence that it was being perpetrated with the collusion of Greek officials. The Court held this to be a breach of the obligation under Article 5 (now Art.10) ECT to guarantee the application and effectiveness of Community law and composed the following important principles for the imposition of penalties under Community law:

“Whilst the choice of penalties remains within (the) discretion (of the Member States), they must ensure... that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.”<sup>100</sup>

These remarks proscribe adverse discrimination in the enforcement of Community law in comparison with that of equivalent domestic law. This “principle of assimilation“, as applied to abuse of the Community budget, was codified by the Maastricht Treaty<sup>101</sup> and further strengthened in the Treaty of Amsterdam,<sup>102</sup> providing a nice example of what the Court can achieve when its ruling resonate with the political agenda; but the real importance of Greek Maize lies in the fact that both the principle of assimilation and the prescription for the objective of penalties have been allocated a place amongst the general principles applied by the Court.<sup>103</sup> The response to the ruling in this case shows that Community law can have a real impact upon the criminal justice systems of the Member States.

In a general way, one could argue that the ECJ, implicitly but necessarily, even recognised the existence of a Community sanction power in its decision in *Amsterdam Bulb*<sup>104</sup>, where the Court decided that, “in absence of any provision in the Community rules providing for specific sanctions to be imposed on individuals for a failure to observe those rules, the Member States are competent

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<sup>98</sup>Milchkontor, joined cases 205-215/82

<sup>99</sup>*Commission vs Greece*, C-68/88

<sup>100</sup>*Commission vs Greece*, C-68/88

<sup>101</sup>Art.209A of the Maastricht Treaty

<sup>102</sup>Art.280 ECT

<sup>103</sup>Baker, page 365

<sup>104</sup>*Amsterdam Bulb*, C-50/76

to adopt such sanctions as appear to them to be appropriate.<sup>105</sup> This decision was upheld in even clearer terms in the Greek Maize case, where the ECJ concluded that, where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Art.5 (now Art.10) of the Treaty requires the Member State to take all measures necessary to guarantee the application and effectiveness of Community law.

As can be seen, Member States criminal law has been adapted to serve Community interests, and the ECJ has enunciated guiding principles of criminal law enforcement in this context.

### 3.4.1.2.3 Regulations

Regulations sometimes refer to national law for the imposition of sanctions. In a number of cases there exists a division of work between the Member States and the EC. The Member State constitutes the sanction but regarding the substantive law it refers to an EC regulation.<sup>106</sup> A known example is fraud in regard to subsidies. The operation of the Community in this field has been the result of laxity of the Member States for an effective penal protection of its goods.<sup>107</sup>

Few regulations contain penalty provisions themselves. One example is Art.8 (1) of the regulation on financing of the Common Agricultural Policy, which says that Member States must ensure the prosecution of irregularities and the reclamation of the sums of money lost.<sup>108</sup>

It can be observed that there exists a tendency that the Community does not only prescribe the necessary measures any more, but imposes- partly very detailed- duties to inflict sanctions.<sup>109</sup>

The transition of the Community towards an intervention in enacting national penal provisions of a specific content constitutes qualitatively a very advanced step of the EC engagement in the field of penal repression. This step can be explained historically because of the efforts of the ECJ to present the sanctions of the different regulations as „administrative fines“ despite their more or less obvious penal function, in order to overcome by this way the obstacle of the missing criminal competence.<sup>110</sup>

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<sup>105</sup>Biancarelli, page 252

<sup>106</sup>Weigend 1993, page 780

<sup>107</sup>Kaiafa-Gbandi, page 244

<sup>108</sup>Regulation 729/70, Official Journal 1970, L 94/13

<sup>109</sup>Sieber 1991, page 965

<sup>110</sup>Kaiafa-Gbandi, page 245



### 3.4.1.2.4 Directives

Up until now the Community mostly used an indirect way to protect its own interests: it obliged the Member States through directives to punish certain offences and left it up to the national legislator, if he wanted to use penal or administrative sanctions.<sup>111</sup> That the Community possesses this kind of competence is accepted.<sup>112</sup>

Directives leave the choice of forms and methods for achieving the desired results up to Member States (Art.249 ECT). Sanctions will therefore never be included in a directive. Some directives<sup>113</sup> show that the competence of the Community regarding directives only excludes the establishment of sanctions, as long as the directive has a legal basis. With other words: the lacking competence of the Community does not cover the whole criminal law but only the sanctions.<sup>114</sup>

Some authors dispute this. They claim that a detailed description of the *actus reus* would create *de facto* a criminal competence, which the Community does not possess.<sup>115</sup> But this is a question, which cannot be answered abstractly. It has to be decided for each individual case. The principle of proportionality can thereby be used as a guiding principle, whereby the burden of the Member States has to be as slight as possible.

It should be noted that certain norms and standards for directives are established. As the Greek Maize case<sup>116</sup> showed, the principle of assimilation and effectiveness bind the Member States in their implementation of the directive. The national courts have the duty to apply national legislation, especially implementing legislation, in the light of the relevant directives. The interpretation rule also applies in an anticipatory way, that is, also before expiry of the time limit for implementation a directive,<sup>117</sup> but following the case law of the ECJ this duty is limited by the general principles of legal certainty and non-retroactivity.<sup>118</sup>

This system is facing the problem that, since the directive is only binding as to the result to be achieved, but leaves to the national authorities the choice of form and method, Member States transplant their duty in different ways and with different intensity. Various authors assume that there are great differences in the maximum

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<sup>111</sup>Weigend 1993, page 782

<sup>112</sup>Dannecker, page 873

<sup>113</sup>e.g. Directive 308/91 on the Prevention of the Use of the Financial Systems for the Purpose of Money Laundering, Official Journal L 166, 28/06/1991 p.0077

<sup>114</sup>Tiedemann, page 26

<sup>115</sup>Eisele, page 994

<sup>116</sup>see 2.4.1.2.2.

<sup>117</sup>Sevenster, page 44

<sup>118</sup>Kolpinghuis Nijmegen, C-80/86

punishments and in the infliction of punishments.<sup>119</sup> A reason for that is that the amount of the penalty is basically co-determined by the rules of the substantive part of criminal law of the Member States. This general part is quite different from State to State and therefore leads to different sentences.<sup>120</sup>

### **3.5 Former attempts for harmonisation**

In the past, there have been attempts to harmonise the criminal law of Member States in certain areas. If these had been successful, it would have led to the existence of Community criminal law.

Efforts of internationalisation of criminal law appeared mainly after the Second World War and their starting point was the ECHR. Other important conventions of the Council of Europe<sup>121</sup> as well as international conventions in general, especially in modern times of international crime and globalisation also belong to the same field, while a form of internationalisation of criminal law is finally the recent establishment of the Permanent International Criminal Court.<sup>122</sup>

In 1962 a working party of government representatives was formed, which was to study the matter at hand. Its task was to set out ways to provide for better harmonisation of criminal law provisions in connection with the EEC, particularly regarding fraud against the Communities. The topics were: investigation and prosecution of Community law, the position of EC personnel in criminal proceedings, and national sanctions for the enforcement of Community law. The focus of attention was the combat of fraud caused by loopholes in EEC legislation, especially fraud at the expense of the EEC budget. The work stopped when France left the working party in 1966, thereby blocking the draft treaty.<sup>123</sup> The main reason for France's withdrawal was the proposal to allow prosecution and the execution of penal sentences in another Member State. In private law, there exists a regulation on jurisdiction and recognition and enforcement of judgements in civil and commercial matter.<sup>124</sup>

In 1972 a new working group set to work. The need for a solution had not diminished. Two draft treaties were submitted to the Council in 1976. One concerned the criminal liability of EC civil servants; the other was a "Eurocrimes" proposal, concerning protection by criminal law of the EC's financial interests, and the prosecution of violations of Community law.

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<sup>119</sup>Sevenster, page 58

<sup>120</sup>Kühl, page 784

<sup>121</sup>see 2.2.

<sup>122</sup>Kaiafa-Gbandi, page 239/240

<sup>123</sup>Greve, page 35

<sup>124</sup>Council Regulation 44/2001, Official Journal L 307,24/11/2001 p.0028

The European Parliament has continually taken an active interest in the Community law/criminal law relationship. On behalf of the Legal Committee of the European Parliament a Report was presented, which dealt with legal aspects of this relationship. Following this report a resolution was passed, in which the European Parliament declared its support for the draft treaties presented and urged the Commission to carry out further research in to problem areas, such as the criminal liability of legal entities in Member States.<sup>125</sup> The European Parliament requested for a list of national implementing provisions, which include sanctions for violations of Community law. Since then, not much has been heard of this list or the other items. Maybe because this could be considered as a task of Sisyphus, for research would have to be done in all Member States into the implementation of hundreds (thousands?) of directives and regulations.<sup>126</sup>

The draft treaties were drawn back<sup>127</sup>, but the Intergovernmental Conference on European Political Union in Maastricht has resulted in the creation of a specific legal basis in the Treaty text, in particular in Art.209a (now Art.280 ECT),<sup>128</sup> which provides for the protection of the financial interests of the Community.

In the field of police and judicial co-operation, there was a developing body of activity that anticipated the EU 3rd pillar: the so called TREVI process, set up in 1976 to facilitate European police co-operation against terrorist violence, leading eventually to the emergence of Europol and the Schengen regime of co-operation as regards border controls constructed by a number of EC states. The thrust of such developments was then swept into the new 3rd pillar range of activities established by the TEU, enabling the formulation of policy and the adoption of conventions on a range of European criminal law matters coming under the broad umbrella of “justice and home affairs“.<sup>129</sup>

In this connection even the set up of UCLAF and OLAF as (anti-) fraud unit can be mentioned.<sup>130</sup> The budget has set aside money for the combat of fraud.

A quite substantive proposal for a “model penal code for Europe“, dating from 1971, died an early death even within the Council of Europe.

The observed process of harmonisation of criminal law in the EU differs from other relevant efforts, as for example in the Council of Europe. This is so, because it takes place in the frame of a constructed supranational organisation. The harmonisation-process has first of all different objects of reference. Here, one is interested not only in international forms of criminality, but also- or rather mainly-

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<sup>125</sup>Resolution of 7 March 1977, Official Journal C 57, 07/03/1977 p.0055

<sup>126</sup>Sevenster, page 37, footnote 34

<sup>127</sup><http://194.17.147.132/westlawse/index.asp?id=2>

<sup>128</sup>Vervaele, page 90

<sup>129</sup>Harding MJ, page 332

<sup>130</sup>see 2.3.5.

in the protection of special legal goods of the EU itself as a supranational organisation. On the other hand, the process of harmonisation of criminal law in the EU takes place with different legal instruments on the grounds of the relevant possibilities that the Union has from its constitutional treaties, and especially from the Treaty of Amsterdam in the 3rd pillar. Finally, the harmonisation-process in the field of criminal law is being advanced in practice within the EU with common cooperation networks of penal repression, as for example Europol.<sup>131</sup>

## **3.6 Current changes in the Treaty of Amsterdam**

### **3.6.1 Framework decisions**

The Treaty of Amsterdam has redefined the 3rd pillar. Although criminal law co-operation remains intergovernmental in nature, it contains now norms, Art.29 II No.3 and Art.31 e TEU, which provide for an approximation of rules for criminal matters in the Member States, including the possibility to establish minimum rules. The procedure, which has to be used for that approximation, is regulated in Art.34 II TEU. Particularly interesting are the framework decisions, introduced by Art.34 II b TEU. This new type of Council acts, which is placed somewhere in the middle between conventions and directives is expected to bring a significant advancement in harmonisation procedures for criminal law in the EU in comparison to the classical instruments of the conventions.<sup>132</sup>

One framework decision, that is already adopted, is the Framework Decision on Criminal protection against fraudulently or other unfair anti-competitive conduct in relation to the award of public contracts in the common market.<sup>133</sup>

These rules show a new development. Already in the approximation of rules for criminal matters, a revaluation of this field compared to earlier can be observed. The old TEU did not consider criminal law at all. This development walks along with a simplification of the procedure, which applies first of all to framework decisions. Before the Treaty of Amsterdam one would have needed a convention with all its problems which are stated above. Furthermore, since a framework decision shall only be binding upon the Member States as to the result to be achieved but shall leave the national authorities the choice of form and method, this might encourage the readiness of its conclusion. Compared to directives, framework decisions represent a less drastic instrument because they are placed in the 3rd pillar and follow therefore international, not Community rules. The limitations of Member States sovereignty are therefore smaller.<sup>134</sup>

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<sup>131</sup> Kaiafa-Gbandi, page 240

<sup>132</sup> Kaiafa-Gbandi, page 249

<sup>133</sup> Official Journal, C-253 04/09/2000 p.0003-0005

<sup>134</sup> Musil, page 69

### 3.6.2 Art.280 IV ECT

The Treaty of Amsterdam has for the first time established a competence for the Council to adopt the necessary measures in the field of the prevention of and fight against fraud affecting the financial interests of the Community. The areas covered by Art.280 ECT fall into two categories: external and internal measures. The former concerns the fight against fraud affecting the financial interests of the Community in the Member States; the latter concerns the same kind of fraud within the Community institutions, bodies and agencies.<sup>135</sup>

The question is if Art.280 IV ECT<sup>136</sup> covers only sanctions with administrative character or if the EC may act within the penal field as well now.

Some authors claim that Art.280 IV ECT only allows the use of non-penal sanctions.<sup>137</sup> They use as their main argument Art.280 IV (2) ECT. They argue that the final clause was inserted in the Article for the very purpose of making it plain that the Article was not meant to confer upon the Community any power to enact criminal law, which did not previously exist. Art.280 IV could only be used to introduce supplementary measures, which did not concern the application of national criminal law or the national administration of justice.<sup>138</sup> They consider Art.280 IV ECT as the final statement that the Community has a competence regarding administrative sanctions.<sup>139</sup> Furthermore they emphasise that it should not be forgotten, that historically there has been no intention of the Member States to concede criminal power to the Community.<sup>140</sup>

The opposite opinion claims that Art.280 IV ECT grants the Community a partly criminal law competence, which would apply on a complementary basis.<sup>141</sup> Their arguments are based on different aspects. First of all, one knows well the technique, used in Community regulations, of stating expressly for the attention of the legislator that a measure does not have to be a “criminal law“ measure. Those who drafted Art.280 ECT knew this language and this technique. Equally revealing is the terminology used in Art.280 IV ECT, which refers not to the existence of national law, but to its application. It is known that it is usually the primacy of EC law, which makes national law inapplicable. Guaranteeing the application of national criminal law presupposes therefore that there exists, and that there could exist in the future, Community legislation that could hinder national law.<sup>142</sup>

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<sup>135</sup>van Gerven, page 299

<sup>136</sup>see supplement A

<sup>137</sup>Grasso, page 377; Spencer; page 380; Musil, page 68

<sup>138</sup>Spencer, page 380/381

<sup>139</sup>Musil, page 69

<sup>140</sup>Kaiafa-Gbandi, page 257

<sup>141</sup>Bacigalupo, page 370; Tiedemann, page 385; Spinellis, page 383; Delmas-Marty 2000, page 374

<sup>142</sup>Tiedemann, page 385

Additionally, one could focus even closer on the wording. First, the mention of “national“ penal law presupposes that there is going to be also another kind of penal law which is not national, namely that there is going to be also a Community penal law. Secondly, according to the wording, the measures to be taken by the Council shall not concern the application of national criminal law; but it is obvious that measures, which have no penal character, could not interfere with the national criminal law. Consequently, the measures to be taken by the Council may also include penal measures. Thirdly, it is unlikely that the national administration of justice would possibly be affected by the measures to be taken by the Council if these measures were not of a penal character.<sup>143</sup>

There is also a systematic argument. The first sentence of Art.280 IV ECT requires the Council to guarantee an effective and equivalent protection of financial interests of the EC and the necessary measures for the prevention and fight against Community fraud includes criminal measures, in accordance with the terminology and the system followed by the Treaty. When Art.280 II ECT mentions “measures“ to fight fraud at the national level, there is no doubt that this expression relates to and is meant to include (national) criminal law.<sup>144</sup> It would therefore be strange if the same expression (“measures“), mentioned again in Art.280 IV(1) ECT, a priori excluded every criminal measure.<sup>145</sup>

There can also be raised a teleological argument for such a complementary Community power. How else could the Council guarantee an effective and equivalent fight against fraud in and by the Member States - the latter’s administration of criminal justice being responsible for the application of criminal laws and, as the case may be, of Community regulations?<sup>146</sup>

As a result of the variety of arguments, the second opinion seems convincing. This shows that we have moved from a situation where the protection of the financial interests of the Community was an extra-Communitarian issue and was only within the domain of the Member States to a situation where, for the first time, the Community has an active role to play in this protection.<sup>147</sup>

### 3.6.3 Directive

The new directive<sup>148</sup> on the criminal law protection of the Community’s financial interests is based on the line of thought that Art.280 IV ECT grants a criminal competence to the Community. This is expressly stated in the Explanatory

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<sup>143</sup>Spinellis, page 383

<sup>144</sup>Zieschank, page 260

<sup>145</sup>Delmas-Marty 2000, page 374

<sup>146</sup>Tiedemann, page 385

<sup>147</sup>Bacigalupo, page 370

<sup>148</sup>see supplement A

Memorandum<sup>149</sup> of the directive by underlining that “Art.280 IV ECT covers all measures in the area of preventing and curbing fraud. It is in this context that the second sentence specifies exceptions to this, so given the general purpose of the article, the second sentence can but be interpreted narrowly. The wording and the legal context of the article do not preclude the adoption of measures setting certain harmonisation objectives of a criminal type, provided that they do not concern the application of national criminal law or the national administration of justice.“

The Explanatory Memorandum further emphasises that the advantage of an act adopted on the basis of Art.280 ECT is that it affords the benefits that go with the 1st pillar Community legislation. Community law offers supervisory mechanisms not available under the 3rd pillar, namely the power conferred on the Commission, as guardian of the Treaties, and the powers of the ECJ in this context.

After a first chapter lining out the purpose and some general definitions, Chapter II of the directive goes on to specify the conduct that damages the financial interests of the Community, namely fraud, active and passive corruption, with certain provisions on equal treatment, and money laundering, and requires Member States to make criminal offences of such conduct. Chapters III and IV contain provisions on liability and penalties, including for bodies corporate. Chapter V contains provisions on co-operation of national authorities with the Commission and the final provisions.

### **3.7 Conclusion**

The discussion if a European Criminal Law is desirable is surpassed by the actual development. Generally there exists a tendency towards a closer connection between EC law and criminal law. The work with criminal law is getting more offensive.<sup>150</sup> We are on the road towards a European criminal law space and cannot turn around.

It is now possible to talk in terms of an emergent “European criminal law space“, although its structure is fragmented, complex and not especially visible. There is a largely cohesive and in some sense merged Council of Europe/EU/EC multilateral system in existence. This, cumulatively, supplies the framework for the emergent (though as yet not very high profile) “European criminal law space“, but the fact that the “European Criminal Law“ is not quite homogeneous causes problems with fundamental principles of criminal law, namely with transparency and legal certainty.

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<sup>149</sup>Explanatory Memorandum 1.2. in [http://www.europa.eu.int/eur-lex/en/com/dat/2001/en\\_501PC0272.html](http://www.europa.eu.int/eur-lex/en/com/dat/2001/en_501PC0272.html)

<sup>150</sup>Jung, page 419

# 4 Is harmonization necessary?

## 4.1 pro

Some authors claim that the global challenges of international criminality cannot be played a lone hand by national authorities, but has to be answered by co-operation. The arising information- and risk-society supports the present tendency that criminal systems in Europe grow together. The distribution of legislative action on central and de-central organs, the mutual influence of these systems as well as the co-ordination of the executive powers using these rules are closely connected. Historical, political, economic and cultural aspects influence the development of these factors. Out of this results the need for standardisation or even harmonisation.<sup>151</sup>

If the criminality is not bound to national borders any more, then the official reaction may not be particularistic either. Oasis without or very mild criminal sanctions allure criminal tourism. Harmonised criminal law would solve that problem.<sup>152</sup> Gaps in the legal protection and the control of criminality demand European standards and instruments as well as democratic needs, which are expressed in the protection of human rights.<sup>153</sup>

In spite of the greater uniformity resulting from the case law of the ECJ, the disparities remain large between countries in areas as important as, for example, the burden of proof, the degree of certainty required for a conviction, the admissibility of written evidence or of previous statements made by the defendant, and the extent of the right to silence. It is sometimes essential to produce evidence collected in one Member State before the legal authorities of another; but at present, there is no general rule to determine the conditions for the admissibility of this evidence. Without aspiring to harmonise national laws completely, mutual recognition of the admissibility of evidence is indispensable.<sup>154</sup>

The aim, as it is stated in Art.29 TEU, to provide the citizens with a high level of safety within an area of freedom, security and justice is interpreted by some authors as pointing towards unification.<sup>155</sup>

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<sup>151</sup>Sieber 1997, page 380

<sup>152</sup>Sevenster, page 30

<sup>153</sup>Jung, page 418

<sup>154</sup>Delmas-Marty 1997, page 36

<sup>155</sup>Sieber 1993, page 963



## 4.2 contra

One could claim that the aim of fighting transnational criminality could be reached easier, namely through an advanced co-operation on the basis of acceptance of differences between the national laws, thus through confident co-operation of the Member States on a basis of respect for national traditions.<sup>156</sup> On the other hand, as was pointed out already above<sup>157</sup>, there is a political stagnation of a process which, by adding protocols to conventions which are signed but not ratified, consists of building a paper wall against a problem of crime which is very real and is expanding rapidly.

Partial tries for harmonisation bears some risks. First, there can be mentioned that harmonisation could lead to a large number of rules which could make the legal finding more complex<sup>158</sup>, even though the aim of harmonisation should be to make everything less complicated. Then, from a realistic viewpoint, it has to be stated that harmonised criminal law would not lead automatically to a common application of the law. Especially if harmonisation only takes place in the special part of the law, the substantive part stays applicable and keeps up the differences between the Member States. The solution to these problems could lie in a supranational instance of appeal.

Furthermore there is a risk that the agreement will be reduced to the smallest common denominator. This would include the danger that entrenched guarantees would get lost. Apart from that, partial harmonisation could lead to a stronger protection of supranational objects of legal protection, which would lead to a loss of coherence in the national legal order.<sup>159</sup>

As the main argument, the sceptic towards harmonisation claims that the penal code of a state expresses the national and cultural peculiarities. There is no homogeneous European opinion of what constitutes the right, rational and socially reasonable criminal policy. Some of the countries trust in a harsh criminal policy more than others. Only criminal codes, which had been grown out of national tradition, could find the necessary acceptance.<sup>160</sup> To keep up the national identity is the main cause against harmonisation.

On the other hand, it should not be overseen that there is quite some dispute about the question, which rules bear the culture of a state. Some think, it is the rules of the substantive part of criminal law because a lot of special laws are similar in different states. Other sees the similarities in the substantive part and argues that the special part of the criminal rules expresses the national and cultural

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<sup>156</sup>Zieschank, page 263

<sup>157</sup>see 2.3.2.

<sup>158</sup>Delmas-Marty 1997, page 40

<sup>159</sup>Zieschank, page 268/269

<sup>160</sup>Weigend, page 785

peculiarities.<sup>161</sup> This surprising discord raises doubts regarding the thesis, that criminal law is a characteristic product of a special culture.

## **4.3 different approaches**

### **4.3.1 more intensive cooperation**

It is not unrealistic to foresee further development in inter-state co-operation at the European level and the logical end of this process would include: an obligation of assistance, with little scope for discretion, and the disappearance of traditional exceptions, such as those based on military and fiscal considerations; the possibility of states extraditing their own nationals; developments in the field of mutual assistance; and, as mutual trust and understanding grow, transfer of proceedings and the execution of sentences may become the rule rather than the exception. All of this would imply a considerable simplification of procedure.<sup>162</sup>

On the other hand, the weaknesses of co-operation were shown already above.<sup>163</sup>

### **4.3.2 Assimilation**

The assimilation principle means that the Member States' national laws on infringements, the intent or result of which is unlawful curtailment of government revenue or unlawfully acquired payments in the form of subsidies, refunds or financial support, also apply to unlawful curtailment of the revenue of Community Institutions or unlawful receipt of payments from these Institutions. The same applies to submitting false documents or making false declarations with the intent to curtail revenue or receive payment.

Assimilation is no synonym for harmonisation. The latter would mean uniform offences and criminal sanctions in the Member States.<sup>164</sup>

The principle of assimilation, taken up in 1989 in the Greek maize case<sup>165</sup> on the basis of Art.10 ECT, is now enshrined in Art.280 II ECT: "Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests".

It should be noted that, while the principle of assimilation has the advantage of simplicity in its formulation and its implementation, it does not guarantee

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<sup>161</sup>Sevenster, page 64

<sup>162</sup>Harding/ Swart, page 103

<sup>163</sup>see 2.3.2.

<sup>164</sup>Vervaele, page 87

<sup>165</sup>see 2.4.1.2.2.

effectiveness in criminal justice. Assimilation is not able to solve the problem of cross-border criminality. The report drawn up by the Commission in November 1995 on the application of Art.209 A (now Art.280 ECT) concluded that in the future in certain areas, improvement on the assimilation option will only be able to be made by harmonising national practice more closely at the Community level. This means that, in addition to the assimilation option, the options for co-operation and harmonisation through closer integration of national practices must also be explored.<sup>166</sup>

### 4.3.3 Corpus Juris proposal

The Corpus Juris was initiated by the Xxth Direction of the European Commission for the protection of the Union financial interests. A group of eight academic lawyers from different Member States were asked to produce proposals, which would deal with the problem of EU budgetary fraud. The aim of this draft, that has already been amended once,<sup>167</sup> was to constitute a basic instrument of penal repression within the EU, even for the limited field of its financial interests initially.<sup>168</sup> For the first time, the judicial jurisdiction of the EU would not only be that of supreme authority to whom national courts defer when seeking interpreted legal guidance. The EU would become the actual, and single, prosecuting authority in cases of suspected budget fraud, with the right, through its agents, both to conduct investigations into its suspicions and conduct trials within all member countries according to its own rules of law as described in the Corpus Juris.<sup>169</sup>

It should be observed that it was declared the thin end of the wedge, for as the seminar programmes states, it was conceived as an embryo of a future European criminal code.<sup>170</sup>

The Corpus Juris is divided into two parts. Part I set out certain acts of fraud, corruption, market rigging and money laundering that would become criminal offences throughout a single legal area of the EU. Part II deals with procedure and evidence and would create an EPP responsible for the investigation and prosecution of fraud on the EU budget.<sup>171</sup>

A problem the Corpus Juris is facing is that there would exist two different justice systems in force inside the same jurisdiction. These two systems are far from being homogeneous, as they are based on different ideologies and different opinions of what a rational criminal policy is like.

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<sup>166</sup>Delmas-Marty 1997, page 17/18

<sup>167</sup>known as the proposals of Florence, which have not been published yet officially

<sup>168</sup>Kaiafa-Gbandi, page 255

<sup>169</sup><http://www.euroscep.dircon.co.uk/corpus3.htm>

<sup>170</sup><http://www.keele.ac.uk/socs/ks40/torq1.htm>

<sup>171</sup>Bell, page 160

With the adoption of the above-mentioned directive<sup>172</sup>, the Corpus Juris proposal died, except the discussions around an EPP.

#### 4.3.4 A Model Penal Code

The idea of a Model Penal Code was first introduced in 1971 in the Council of Europe but the result of the discussion was negative. No advantage could be found in the harmonisation of criminal law as such. 22 years later the idea came up again.<sup>173</sup> It should solve the problem of the increasing freedom of movement for criminals but still closed borders for the prosecution. The promoters of the Model Penal Code see the only way out from the problems caused by the European integration through even further integration.

A Model Penal Code would represent an idea covering the whole substantive criminal law. It is not thought to be binding. Flexible deviations from the model are allowed. Its aim is to offer an orientation.<sup>174</sup> A Model Penal Code can recommend minimum standards and leave space for further supplementary rules. Furthermore it could contain a “maximum list“ to avoid over-criminalization. So while the Corpus Juris strives after harmonisation, a Model Penal Code would only offer orientation.<sup>175</sup>

Since a model penal code is normally not binding, it is much easier to agree on it. The national legislator has the possibility to deviate from the model rules, for example to keep national particularities. On the other hand, because of its flexibility the harmonising effect is much smaller than the one of binding conventions or EC directives; but model rules can still have quite a harmonising effect because the development of a Model Penal Code would create a better understanding for other national legal systems.<sup>176</sup> The creation of a Model Penal Code can be seen as a “soft“ way of harmonisation.

Here again exists the risk that the Member States only agree on a dogmatic minimum program and that the program, on which it is politically easiest to agree- the program of strengthened repression-, would keep the upper hand.<sup>177</sup>

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<sup>172</sup> see 2.6.3.

<sup>173</sup> Sieber 1997, page 369

<sup>174</sup> Jung, page 423

<sup>175</sup> Jung, page 423

<sup>176</sup> Sieber 1997, page 378

<sup>177</sup> Weigend 1993, page 792

## **4.4 Legal basis for harmonization**

A rule to remember is set out in Art.5 ECT according to which the Community possesses only the power conferred upon it by the Treaty and, moreover, that for powers thus conferred relating to areas which do not fall within its exclusive competence, the Community must respect the principle of subsidiarity. This means that for any Community action the institution concerned must be able to point to a specific legal basis to support its action, and moreover be able to justify, when it has no exclusive power, that the action proposed cannot be better achieved by the Member States.

### **4.4.1 Art.280 IV ECT**

Art.280 IV ECT cannot provide the proper legal basis for a harmonisation of criminal law because the field it covers is not wide enough. It can only be used in the framework of the Community's financial interests.

### **4.4.2 Art.95 ECT**

It should be considered further, if Art.95 ECT could be used. It was proposed as a legal basis regarding the protection of the financial interests of the Community. Then the measures should have as their object the establishment and functioning of the internal market within the meaning of Art.95 ECT; but even if it seems clear that the Community budget is essential for the continued existence of the Community, and that the Community is essential to ensure the continued existence of the internal market, case law holds that this is not to be used to legislate on matters which are really only ancillary to the functioning of the single market.<sup>178</sup> If Art.95 ECT cannot provide a proper legal basis for protectionary rules of the financial interests of the EC, it definitely cannot provide the sound legal basis for harmonisation of criminal law in general.

### **4.4.3 Art.308 ECT**

Nor could a competence be based upon Art.308 ECT as a necessarily supplementary engagement of the Community fulfilling the goals of the common market according to the implied power theory, which has been developed from the ECJ. Although it looks like a "catch-all" provision, it is generally taken as only enabling the Community to enact legislation falling within the broad outlines of the powers of the Community as conferred by other articles. The activity of the Community within the frame of Art.308 ECT presupposes a field, for which the Community has already been competent.<sup>179</sup>

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<sup>178</sup>Spencer, page 380

<sup>179</sup>Spencer, page 380

#### **4.4.4 Art.34 (2d) / Art.40 TEU**

Since criminal law is, following these considerations, not covered by the ECT yet (except the new directive), I consider the 3<sup>rd</sup> pillar as the right framework to look for a legal basis to harmonise criminal law.

In order to bring a draft like the C.J. or any other similar proposition for harmonisation in force, the way to be followed could be the procedure of Art.34 (2d) TEU, namely the recommendation of a convention established by the Council, which the Member States would have, then, to adopt according to their respective constitutional requirements.<sup>180</sup> An alternative as a valid legal basis for such a far-reaching criminal reform could be found in Art.40 TEU that would permit some Member States to establish a closer form of co-operation in the field of combating transborder crimes.

#### **4.5 Conclusion**

The question is if improved crime prevention, increased risk of getting caught, and international police co-operation and development of court procedures could be more effective strategies, than new criminal codes in combating crimes. But it cannot be denied that most tries aiming in that direction were not really successful.

The free movement of people, capital and services within the European Union has made it necessary to create a “European legal space“ in criminal justice, in which the decisions of the criminal courts of one Member State are automatically recognised in another, and in which certain universal rules apply- particularly about obtaining and using evidence. Harmonisation may thereby well be a worthwhile goal in some areas, and it may be argued that in that covered by the ECHR it should be accepted as a matter of principle.

In the end it all comes down to the right balancing of controversial principles: efficiency and the rule that criminal law is the ultimate ratio, simplicity and variety, unification and protection of cultural differences.

Criminal law may not be used as the driving force to achieve political unification; criminal law should rather be the outcome of such unification.

It can be argued that it is a good idea to try harmonisation in the area of Community fraud- as it happened through the directive. This can be considered as a pilot project. Following that, gradually the jurisprudence and the legal academics could develop a substantive part for criminal law.

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<sup>180</sup>Kaiafa-Gbandi, page 259



# 5 Future Perspective: A European Public Prosecutor?

## 5.1 Traditions

In Europe we face two completely different legal traditions regarding prosecution. On one side, an accusatorial tradition, which allows private prosecution and structures prosecution as a duel between two parties (the prosecution and the defence) carried out before an impartial and neutral judge, who does not participate in an active manner in the search for evidence. The only job of the prosecutor is to prosecute using the evidence the police gave him.<sup>181</sup>

The other tradition is inquisitorial, relying on the active search for truth by the authorities representing the state and having responsibility for the investigation. In practise, the power of investigation is shared between the Public Prosecutor and the judge. This judge acts not only as an investigator but is also responsible for certain judicial decisions (including, eventually, remands in custody and supervision orders).

The two different procedural models have the same fundamental objectives: to find the truth, to punish the guilty, and not to impact adversely on the innocent.

Both models have evolved in time and their original features have become overlaid. The 15 national criminal justice systems are increasingly converging, thereby weakening the traditional opposition between the Anglo-Saxon and continental policing models. The central direction that seemed to be the key-characteristic of most continental systems has become more diffuse due to a growing emphasis on locally and regionally determined intervention, while the Anglo-Saxon system of Community policing has been challenged by the repeated creation of new central structures.<sup>182</sup> This evolution was partly spontaneous and partly because the 15 EU Member States are members to the Council of Europe, under whose auspices the ECHR and the jurisprudence of the ECHR developed guarantees of fair trial.<sup>183</sup> The result of this evolution is that the national systems in force in Europe have become more compatible than they were previously.

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<sup>181</sup>Spencer, page 250

<sup>182</sup><http://eipa-nl.com/public/public%5Feipascope/99/folder%5Fscop.../99%5F3%5Fart4.ht>

<sup>183</sup>Delmas-Marty/ Spencer, page 309



## 5.2 Green book

The directive<sup>184</sup> alone cannot be the solution for the problems of transnational criminality regarding the financial interests of the Community. The prosecution is still bound to the national borders. Therefore worked the Commission on the thought of an EPP and presented a green book, discussing this idea. It was first brought up in the Corpus Juris proposal, which was mentioned before, to be set out in a new Art.280a.

Right now, the situation can be described as follows: OLAF carries out the preparatory stage of internal investigations within the Community institutions. When those investigations let appear acts which may give rise to criminal liability, OLAF must transfer the investigation for those aspects of the file to the judicial authorities of the Member States where the Community institution involved is located. Such authorities will then be confronted with the immunity of persons and premises pertaining to the Community and will have to apply for permission from the Community to carry out hearings, seizures, on-the-spot investigations and the like.<sup>185</sup>

Furthermore, fraud committed at a supranational level poses unique problems for prosecutors at a national level where elements of the crime are committed in various Member States and where no national authority has complete jurisdiction, either to investigate or prosecute the fraud and recover funds. A major obstacle is the lack of common standards of evidence, which prevents Member States from accepting evidence gathered in other Member States. Evidence must be sought by commission rogatory (which means that each Contracting State shall request from any other Contracting State to undertake in its territory rogatory action with respect to any judicial procedures<sup>186</sup>), a process which is usually slow and often completely ineffective.<sup>187</sup> The sharing of information is difficult between law enforcement authorities, local and national police forces do not cooperate effectively enough to enable them to catch organised criminals from the other side of national frontiers.<sup>188</sup>

This situation is already beginning to be solved with the Amsterdam Treaties and in trying to make the EU into an area of freedom, security and justice. Cross-border co-operation has increased considerably in the last ten years. The tasks and powers of Europol have been increased; OLAF and the EJM have been set up. But much more still needs to be done.

Therefore it is proposed to turn over those matters to an EPP. The EPP would be based on the principle of European territoriality: in the preparatory stage prior to a

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<sup>184</sup> see 2.6.3.

<sup>185</sup> van Gerven, page 318

<sup>186</sup> <http://www.oic-un.org/26icfm/c.html>

<sup>187</sup> Spencer, page 252

<sup>188</sup> [http://europa.eu.int/comm/justice\\_home/news/laecken\\_council/en/eurojsut\\_en.htm](http://europa.eu.int/comm/justice_home/news/laecken_council/en/eurojsut_en.htm)

ruling (investigation and prosecution), the largely decentralised EPP would enjoy identical powers in the fifteen countries of the Union (directing investigations, overseeing judicial procedures), while offences committed anywhere on Union territory would elicit the same responses. The EPP would be independent of both national authorities and Community institutions would have a relatively low-key central structure and would enlist the services of delegated European prosecutors (selected by each Member State from among its national prosecutors). He would be authorised to take up cases on his own initiative and would be required to investigate all substantive evidence.<sup>189</sup> An EPP would be focused on fraud on the Community budget whomever it was committed by.

Politically, it seems obvious that the main obstacle to the creation of a EPP is the fact that national authorities would lose a part of their autonomy with regard to the beginning, conduct and conclusion of criminal prosecutions. It would knock a dent in the national sovereignty of the Member States, even though the dent the EPP would make would be minimal, because he would deal with only a small minority of cases.<sup>190</sup>

At the legal level, the main obstacle to the creation of a European Public Prosecutor stems from the separation of European legal systems into two completely different traditions. Furthermore it has to be remembered, that the EPP would only work within the Community; but elements of the offence may occur in third states, both in cases of subsidy fraud and customs fraud. Witnesses, evidence and assets may be situated outside the Union. The EPP would not be able to request mutual assistance from countries outside the European Union.

On the other hand, attention must be drawn to the problems of co-operation, which were stated above.<sup>191</sup> None of the European judicial co-operation instruments is as yet operational, whilst fraud is gaining ground and criminal networks are increasingly organised. Furthermore these instruments are not adapted to fight against organised crime. They were meant to combat individual fraud. Under these conditions, a solution must be sought at the Community level, focusing on vertical co-operation. The creation of a European “judicial“ space presupposes the participation of “judicial“ authorities.<sup>192</sup> The establishment of an EPP would enable solutions to be found, at least in part, to the problems of jurisdiction, of offences constituting a crime in the country seeking extradition and in the country holding the accused and of delay. The energies and resources of prosecutors must be united, not dispersed, when they have to cope with highly organised crime.<sup>193</sup>

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<sup>189</sup><http://www.euroscop.dircon.co.uk/corpus6.htm>

<sup>190</sup>Spencer, page 253

<sup>191</sup>see 2.3.2.

<sup>192</sup>Delmas-Marty/ Spencer, page 307

<sup>193</sup>Spencer, page 253

Another aspect should not be forgotten when thinking about closer co-operation or even the creation of an EPP. Increased international co-operation between authorities tends to disturb the fragile balance between prosecution and defence in a criminal case. In this respect, the accused will have to acquire his own rights to co-operation, to the extent necessary for his defence (for instance, the right to compel the attendance of witnesses from abroad). The logical end here would be a situation in which national borders are no longer obstacles for the defence in a criminal case either.<sup>194</sup>

The creation of an EPP would imply an amendment of the ECT. Such an amendment would have to be ratified by each of the Member States according to the procedure required by the Treaties.

### **5.3 Alternative solution: Eurojust**

The European Council held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union.<sup>195</sup>

As a result of the fact that criminals must find no way of exploiting differences in the judicial systems of Member States, it was proposed that a unit “Eurojust“ should be established. On 19 July 2000 the Council of the European Union decided to set up Eurojust.<sup>196</sup> It was finally created on 6 December 2001.<sup>197</sup> It is composed of national prosecutors, magistrates or police officers of equivalent competence, detached from each Member State according to its legal system. They will at the same time continue as members of the national organisation from which they come.

Eurojust has the task of facilitating the proper co-ordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol’s analysis, as well as co-operating closely with the EJM.<sup>198</sup> The EJM is a decentralised network between EU lawyers and judges working on criminal cases and tries to help them exchange information rapidly and effectively, whereas Eurojust is a central unit. It will increase, speed up and improve judicial co-operation- the co-operation between legal systems and national courts that enables criminals to be caught and tried quickly, fairly and efficiently in cross-border cases. It will be able to give immediate legal advice and assistance in cross-border cases to the investigators, prosecutors and judges in different Member States. It will also handle letters rogatory.<sup>199</sup> Eurojust will be, above all, an instrument to reinforce the co-operation between the judges and the

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<sup>194</sup>Harding/Swart, page 103

<sup>195</sup>[http://europa.eu.int/council/off/conclu/oct99/oct99\\_en.htm](http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm)

<sup>196</sup>Official Journal, C-206, 19/07/2000 p.0001-0002

<sup>197</sup>[http://europa.eu.int/comm/justice\\_home/news/laecken\\_council/en/eurojust\\_en.htm](http://europa.eu.int/comm/justice_home/news/laecken_council/en/eurojust_en.htm)

<sup>198</sup>[http://members.aol.com/esceptic/cj\\_folder/cj\\_article4.html](http://members.aol.com/esceptic/cj_folder/cj_article4.html)

<sup>199</sup>[http:// europa.eu.int/comm/justice\\_home/news/laecken\\_council/en/eurojust\\_en.htm](http://europa.eu.int/comm/justice_home/news/laecken_council/en/eurojust_en.htm)

prosecutors of each Member State in order to guarantee the rights and freedom of the European citizens as a whole.<sup>200</sup>

Art.2 (2) of the Council decision expresses that „it shall be the task of the liaison officers at Eurojust:

- (a) to provide investigating authorities of other Member States as well as the Commission of the EC and Europol with information on relevant substantive and procedural law of the State from which they have detached or indicate an appropriate body for such information,
- (b) subject to the law of their State of dispatch, to provide judicial authorities and other authorities responsible for criminal investigations as well as the Commission and Europol with information on the position regarding investigations and any judgements in criminal matters or arrange contacts with the investigating body in their State of dispatch,
- (c) in cases where investigations are in progress in two or more Member States into offences which are connected, to provide support for the co-ordination and conduct of joint investigations,
- (d) to provide legal advice in support of Europol`s work of analysis if so requested,
- (e) in further treaty negotiations on extending the powers of Europol, to deliver expert opinions in judicial support of Europol if so requested,
- (f) to exchange experience of weak points in the cross-border combating of crime and the combating of criminal offences against the financial interests of the Union.“

Furthermore, Art.5 (1) obliges Eurojust to update continuously the documentation on currently applicable legal instruments issued by the European Judicial Network and supplement it with indications regarding the treatment of problem cases in judicial legal assistance and particular procedural provisions of the Member States.

In view of the multitude of treaties and protocols which are also to be applied in the future, together with their differing degrees of declarations and reservations, national problems of competence, the requirement to produce the necessary judicial/public prosecutor`s decisions rapidly, increasingly frequent occurrence of conflicts of jurisdiction precisely in the area of organised crime and not least in view of the documentation and language difficulties, there is a need for a legal documentation and clearing agency (Eurojust) corresponding to Europol and tailored to judicial requirements. This agency will exist alongside Europol and would also cooperate with Europol.<sup>201</sup>

Eurojust marks a further qualitative step in closer judicial co-operation and goes beyond the current and potential work of the European Judicial Network. Establishing a central round table of liaison officers and magistrates will probably

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<sup>200</sup><http://hugin.lub.lu.se/cgi-bin/ftxt/ebSCO/html2838508/01914545>

<sup>201</sup>Schomburg, page 59/60

have a certain added value. It will be easier to communicate within a team working in a joint office than among decentralised contact points in the Member States, even in the light of improved technical means of communication. A central office can also increase cost-efficiency, facilitate the building up of a collation of relevant documents and guarantee that specialists with expertise in judicial co-operation are available at any time.<sup>202</sup>

In the Commission's opinion, Eurojust should be more than a documentation and information centre providing advice on abstract level. This unit should be involved in individual criminal investigations. It could track down and reveal a possible hidden correlation between cases and investigations, which often cannot be easily identified at the national level.<sup>203</sup> This would point in the direction of an EPP.

## 5.4 Conclusion

One may presume that establishing Eurojust is a step in the right direction without getting too far. A specific judicial liaison office would at the same time constitute a starting-point for the separation of powers in Europe, without obliging States to cede sovereignty at a point where they are (still) unable and/or unwilling to do so with regard to pan-European co-operation. But with regard to the problems of transborder crime, which the Community is facing now, it can be considered as not avoidable that the EC is heading towards an EPP.

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<sup>202</sup>[http://europa.eu.int/celex/cgi/sga\\_rqst?SESS=18352!CTXT=7!UNIQ=7!APPLIC=celex](http://europa.eu.int/celex/cgi/sga_rqst?SESS=18352!CTXT=7!UNIQ=7!APPLIC=celex)

<sup>203</sup>[http://europa.eu.int/celex/cgi/sga\\_rqst?SESS=18352!CTXT=7!UNIQ=7!APPLIC=celex](http://europa.eu.int/celex/cgi/sga_rqst?SESS=18352!CTXT=7!UNIQ=7!APPLIC=celex)

# Supplement A

## **ART.280 IV**

THE COUNCIL, ACTING IN ACCORDANCE WITH THE PROCEDURE REFERRED TO IN ART 251, AFTER CONSULTING THE COURT OF AUDITORS, SHALL ADOPT THE NECESSARY MEASURES IN THE FIELDS OF THE PREVENTION OF A FIGHT AGAINST FRAUD AFFECTING THE FINANCIAL INTERESTS OF THE COMMUNITY WITH A VIEW TO AFFORDING EFFECTIVE AND EQUIVALENT PROTECTION IN THE MEMBER STATES. THESE MEASURES SHALL NOT CONCERN THE APPLICATION OF NATIONAL CRIMINAL LAW OR THE NATIONAL ADMINISTRATION OF JUSTICE.

## **2001/0115 (COD)**

### **PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE CRIMINAL-LAW PROTECTION OF THE COMMUNITY'S FINANCIAL INTERESTS**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 280(4) thereof,

Having regard to the proposal from the Commission, [12]

[12] OJ C

Having regard to the opinion of the Court of Auditors, [13]

[13] OJ C

Acting in accordance with the procedure referred to in Article 251 of the Treaty,

Whereas:

(1) The institutions and the Member States attach great importance to the protection of the Community's financial interests and to the fight against fraud and any other illegal activities that damage Community financial interests. The protection of the Community's financial interests concerns not only the management of budget appropriations, but extends to all measures affecting or liable to affect its assets. All available means must be deployed to fully attain these objectives, in view of the legislative power devolved to the Community level, while maintaining the current distribution and balance of responsibilities between the national and Community levels.

(2) Criminal law in the Member States needs to make an effective contribution to protecting the Community's financial interests.

(3) The instruments laid down on the basis of Chapter VI of the Treaty on European Union concerning the protection of the European Communities' financial interests, namely the Convention of 26 July 1995 [14] and the Protocols of 27

September 1996, [15] 29 November 1996 [16] and 19 June 1997, [17] contain several provisions on closer alignment of criminal law in the Member States and on improving cooperation between them. As these instruments have not been ratified by all Member States, their entry into force continues to remain uncertain.

[14] OJ C 316, 27.11.1995, p.48.

[15] OJ C 313, 23.10.1996, p.1.

[16] OJ C 151, 20.5.1997, p.1.

[17] OJ C 195, 25.6.1997, p.1.

(4) Under Article 280 of the Treaty it is possible to include in a Community legislative act any provisions of these instruments that do not concern the application of national criminal law or the administration of justice in the Member States.

(5) In many cases, fraud involving Community revenue and expenditure is not restricted to a single country, but is often the work of organised criminal networks.

(6) Since the Community's financial interests can be damaged or threatened by acts of fraud, corruption or money laundering, common definitions of these types of conduct need to be adopted in order to protect these interests.

(7) Changes need to be made, as appropriate, to national legislation to make corruption involving Community officials or other Member States' civil servants a criminal offence. As regards Community officials, these changes to national legislation must not be restricted to acts of active and passive corruption, but must also cover other offences affecting or liable to affect Community revenue or expenditure, including offences committed by or directed towards people with powers at the highest level.

(8) Acts of fraud, corruption and money laundering need to be made punishable criminal offences. Member States determine the criminal penalties applicable to offences under the national provisions adopted pursuant to this Directive, without prejudice to the imposition of other penalties in certain appropriate cases, and make provision for custodial sentences, at least in cases of serious fraud. They take whatever measures are required to ensure that these penalties are applied. The penalties must be effective, proportionate and dissuasive.

(9) Businesses play an important role in areas financed by the Community and people with decision-making power in businesses should not avoid criminal liability in certain circumstances.

(10) The financial interests of the Community can be damaged or threatened by acts committed in the name of bodies corporate.

(11) Changes need to be made, as appropriate, to national legislation, so that bodies corporate can be held responsible for acts of fraud, active corruption and money laundering committed in their name that damage or threaten to damage the financial interests of the Community.

(12) Changes need to be made, as appropriate, to national legislation to make it possible to confiscate the proceeds of acts of fraud, corruption and money laundering.

(13) For the purpose of ensuring effective action against fraud, active and passive

corruption and the money laundering that goes with them damaging or liable to damage the Community's financial interests, there is a need to lay down measures for cooperation between the Member States and the Commission. This cooperation involves processing of personal data and in particular the exchange of information between the Member States and the Commission and between the Commission and non-member countries. This processing must comply with the rules on the protection of personal data, notably Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [18] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [19] and the relevant rules concerning the confidentiality of judicial investigations.

[18] OJ L 281, 23.11.1995, p. 31.

[19] OJ L 8, 12.1.2001, p. 1.

(14) Those Member States who have yet to ratify the instruments laid down on the basis of Chapter VI of the Treaty on European Union concerning the protection of the European Communities' financial interests should do so forthwith, so that the provisions not falling within the scope of Article 280(4) of the Treaty (namely jurisdiction, judicial assistance, transfer and centralisation of prosecutions, extradition and enforcement of judgments) can also enter into force.

(15) This act, which sets out to align national legislation as regards the criminal-law protection of the Community's financial interests, respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

**HAVE ADOPTED THIS DIRECTIVE:**

Chapter I Purpose and definitions

Article 1 Purpose

The purpose of this Directive is to bring the Member States' legislation closer together as regards the criminal-law protection of the financial interests of the Community.

Article 2 Definitions

For the purposes of this Directive:

1) 'official' shall mean any Community or national official, including any national official of another Member State;

2) 'Community official' shall mean:

- any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of employment of other servants of the European Communities,

- any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other Community servants.

Members of bodies set up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated as



Community officials, inasmuch as the Staff Regulations of Officials of the European Communities or the Conditions of employment of other servants of the European Communities do not apply to them;

3) 'national official' shall mean any person with the status of 'official' or 'public officer' as defined in the national law of the Member State for the purposes of the application of that Member State's criminal law.

Nevertheless, in the case of proceedings involving an official from one Member State instituted by another Member State, the latter shall not be bound to apply the definition of 'national official' except in so far as that definition is compatible with its national law;

4) 'legal person' shall mean any entity having such status under the applicable national law, except for States and other public bodies exercising state authority and public international organisations.

## Chapter II Offences

### Article 3 Fraud

1. For the purposes of this Directive, fraud affecting the Community's financial interests shall consist of:

(a) in respect of expenditure, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the Community or budgets managed by, or on behalf of, the Community,

- non-disclosure of information in violation of a specific obligation, with the same effect,

- the misuse of such funds for purposes other than those for which they were originally granted;

(b) in respect of revenue, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has the effect of unlawfully reducing the resources of the general budget of the Community or budgets managed by, or on behalf of, the Community,

- non-disclosure of information in violation of a specific obligation, with the same effect,

- misuse of a legally obtained benefit, with the same effect.

2. For the purposes of this Directive, serious fraud shall consist of any case of fraud as defined in paragraph 1 and involving a minimum amount set in each Member State. This minimum amount may not be more than 50 000 euros.

### Article 4 Corruption

3. For the purposes of this Directive, passive corruption shall consist of the deliberate act on the part of an official, whether directly or through an intermediary, of requesting or receiving advantages of any kind whatsoever, for themselves or for a third party, or accepting a promise of such an advantage, as inducement to breach their official obligations and carry out or refrain from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community's financial interests.

4. For the purposes of this Directive, active corruption shall consist of the deliberate act of promising or giving, directly or through an intermediary, an advantage of any kind whatsoever to officials, for themselves or for a third party, as inducement for them to breach their official obligations and carry out or refrain from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community's financial interests.

#### Article 5 Equal treatment

1. Member States shall take the necessary measures to ensure that in their criminal law the descriptions of the offences constituting conduct of the type referred to in Article 3 of this Directive where committed by their national officials in the exercise of their duties apply in the same way where such offences are committed by Community officials in the exercise of their duties.

2. Member States shall take the necessary measures to ensure that in their criminal law the descriptions of the offences referred to in paragraph 1 of this Article and in Article 4 where committed by or in respect of their government ministers, elected members of their parliamentary assemblies, members of their highest courts or members of their national audit body in the exercise of their functions apply in the same way where such offences are committed by or in respect of members of the Commission of the European Communities, the European Parliament, the Court of Justice or the Court of Auditors of the European Communities in the exercise of their duties.

3. Where a Member State has enacted special legislation concerning acts or omissions for which government ministers are responsible by reason of their special political position in that Member State, paragraph 2 may not apply to such legislation, provided that the Member State ensures that Members of the Commission of the European Communities are also covered by the criminal legislation implementing Article 4 and paragraph 1 of this Article.

4. This Directive shall apply without prejudice to the provisions on the lifting of the immunities contained in the Treaty, the Protocol on the Privileges and Immunities of the European Communities, the Statutes of the Court of Justice and the texts implementing them.

#### Article 6 Money laundering

1. For the purposes of this Directive 'money laundering' shall consist of the types of conduct listed below involving the proceeds of fraud, at least in serious cases, and of active and passive corruption as referred to in Articles 3 and 4, where committed deliberately:

(a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any persons involved in the commission of such activity to evade the legal consequences of their action,

(b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity,

(c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity,

(d) participation in one of the acts listed in the three preceding indents and association for the purpose of committing the act.

2. Money laundering shall be regarded as such even where the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in that of a third country.

#### Article 7 Duty to criminalise

1. Member States shall take the necessary measures to transpose the provisions of this Chapter into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences.

Member States shall take appropriate measures for the purpose of establishing, on the basis of the objective factual circumstances, when such conduct is deliberate.

2. Member States shall take the necessary measures to ensure that the intentional preparation or supply of false, incorrect or incomplete statements or documents having the effect of fraud as referred to in Article 3 constitutes a criminal offence if it is not already punishable as a principal offence or as participation in, instigation of, or attempted commission of such fraud.

#### Chapter III Liability

##### Article 8 Criminal liability of heads of businesses

Member States shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by their national law in the event of conduct as referred to in Chapter II on the part of a person under their authority acting on behalf of the business.

##### Article 9 Liability of bodies corporate

1. Member States shall take the necessary measures to ensure that bodies corporate can be held liable for fraud, active corruption and money laundering as referred to in Chapter II and committed for their benefit by any person who has a leading position within the body corporate, whether acting individually or as a member of an organ of the body corporate, based on:

- a power of representation of the body corporate, or
  
- an authority to take decisions on behalf of the body corporate, or

- an authority to exercise control within the body corporate, as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.

2. Without prejudice to paragraph 1, Member States shall take the necessary measures to ensure that a body corporate can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of an act of fraud, active corruption or money laundering for the benefit of that body corporate by a person under its authority.

3. Liability of a body corporate under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

#### Chapter IV Penalties

##### Article 10 Penalties on natural persons

Without prejudice to the provisions of the second paragraph, Member States shall take the measures necessary to ensure that the conduct referred to in Chapter II as well as involvement in such conduct as an accessory or instigator and, with the exception of the conduct referred to in Article 4, the attempted commission of acts involving such conduct are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases involving serious fraud, custodial sentences.

However, in cases of minor fraud involving a total amount of less than 4 000 euros and not involving particularly serious circumstances under its laws, a Member State may provide for penalties of a different type from those laid down in the first paragraph.

##### Article 11 Penalties on bodies corporate

1. Member States shall take the necessary measures to ensure that a body corporate held liable pursuant to Article 9(1) is punishable with effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from engaging in business activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.

2. Member States shall take the necessary measures to ensure that a body corporate held liable pursuant to Article 9(2) is punishable by effective, proportionate and dissuasive penalties or measures.

##### Article 12 Confiscation

Member States shall take the necessary measures to enable the seizure and, without prejudice to the rights of bona fide third parties, the confiscation or removal of the instruments and proceeds of the conduct referred to in Chapter II or property the value of which corresponds to such proceeds. Any instruments, proceeds or other property seized or confiscated shall be dealt with by the Member State in accordance with its national law.

#### Chapter V Final provisions

##### Article 13 Cooperation with the European Commission

1. As part of the cooperation with the Commission on fighting fraud, corruption and money laundering as referred to in Chapter II, Member States shall take the necessary measures to enable the Commission to provide all the technical and operational assistance required to facilitate the coordination of investigations undertaken by the relevant national authorities.

2. Member States shall take the necessary measures to enable the relevant authorities in their countries to exchange information with the Commission for the purposes of facilitating the establishment of the facts and ensuring effective action

against the conduct referred to in Chapter II. Such measures shall require the Commission and the competent national authorities to take account, in each specific case, of the requirements of confidentiality of investigations and protection of personal data.

3. Any processing of personal data by the Commission and the Member States pursuant to this Directive must be in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

4. In order to safeguard the confidentiality of judicial investigations and in connection with the exchange of information under paragraphs 1 to 3:

(i) the Member State supplying information to the Commission is entitled to lay down specific conditions for the use of such information by the Commission and by any other Member State to which this information might be transmitted;

(ii) in the event of disclosure to any other Member State of personal data it has obtained from a Member State, the Commission shall inform the Member State which supplied this information of the disclosure;

(iii) before disclosing to a third country personal data which it has obtained from a Member State, the Commission shall obtain an assurance that the Member State which supplied the information has authorised this disclosure.

Article 14 Domestic law

Nothing in this Directive shall prevent Member States adopting or maintaining, in the field covered by this Directive, more stringent provisions in their domestic law for the purpose of effectively protecting the financial interests of the Community.

Article 15 Transposition

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 December 2001.

Such measures adopted by the Member States shall contain a reference to this Directive or shall be accompanied by such reference when officially published.

The methods of making such reference shall be laid down by Member States.

2. Member States shall promptly communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

Article 16 Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Article 17

This Directive is addressed to the Member States.

Done at Brussels, [...]

For the European Parliament For the Council

The President The President

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