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The Dutch Approach in Tackling EC Fraud: An Introduction

1. Associations of lawyers for the protection of the financial interests of the EC

On 27 and 28 January 1994, the DASEC, (the Dutch Law Association for the study of the protection of the financial interests of the European Community) in collaboration with the 'Schoordijk Instituut' and the Department of Criminal Law and Criminal Procedure, organized a seminar at Tilburg University. This seminar had a transnational character: participants from all member states were present. People with a professional interest in the legal issues raised by the protection of the financial interests of the Community, such as judges, academics, customs officials, prosecutors, police officials, lawyers in administration and lawyers in private practice were invited.

We, the editors of this book, would like to draw attention to the context in which this seminar and the publication of the proceedings took place. From 1990 on, associations of lawyers for the protection of the financial interests of the European Community have been established in all member states. The Directorate-General for Financial Control, DG XX, in the persons of the former Director-General L. de Moor and Director F. de Angelis, initiated the creation of these associations. The objectives of the associations include 'the dissemination of information, the advancement of knowledge and the promotion of research in the subject of the protection of the EC financial interests at a national level and through contacts among the Associations, the improvement of cooperation and mutual assistance between different jurisdictions and the increase in knowledge of other legal systems'.[1] The Dutch association, DASEC, was founded on 21 November 1990. Since then, various activities have been organized, such as national and transnational seminars, conferences, training days, affording opportunities for training and exchange of views. In November 1991, a seminar was organized at Tilburg University. For three days, academics and legal practitioners gathered to present an introduction to the Dutch legal system, and to discuss the Dutch approach to the legal protection of the financial interests of the European Community and the implementation of the relevant legislation. The seminar organized at Tilburg University on 27 and 28 January 1994, resulting in the

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1 The Development of the Associations in 1993, *Agon* 0, pp. 8-9.

publication at hand, has been the follow-up of the first seminar, organized in November 1991.

The 1994 seminar consisted of two parts. The first part aimed at presenting an overview of the Dutch criminal system by introducing its main participants: the judge, the public prosecutor, the police and the lawyer. Special attention was paid to administrative and penal sanctions. The second part of the seminar examined the role of customs, the special enforcement agencies, the policies of the Ministry of Justice and the Ministry of Agriculture regarding the fight against EC fraud, and the difficulties arising from administrative and judicial co-operation while protecting the financial interests of the EC. Both theoretical and practical issues were brought to the attention of the participants and discussed.

With this book, the editors aim at providing more information about the Dutch criminal and administrative systems and about the way in which the Netherlands protects the financial interests of the European Community. By publishing the proceedings of the seminar we hope that a wider audience can be reached than those who actually participated.

2. The Treaty on the European Union

Along with the European integration process, the importance of the Community budget has grown. The nature of the sources of finances has since the Council decision of 21 April 1970 changed from financial contributions from the member states to a system of self-finance. The sources of the Community budget, both expenditures and revenues, should be protected effectively in order to meet the targets provided by the common policies of the Community. Accordingly, the problem of irregularities with Community funds affects the legitimacy of the European Union.

With the Treaty on the European Union some important provisions have been introduced to enforce the protection of the Community's financial interests. On the one hand, it has been reaffirmed that the Commission and the member states (Title VI of the European Treaty) have the competence to take legal initiatives to combat EC fraud. On the other hand, the member states are obliged to treat fraud against the Community budget as severely as fraud against the national budget. This obligation is laid down in art. 209a in Title II of the European Union Treaty, entitled the *Treaty Establishing the European Community*.

Title VI of the European Union Treaty deals with *Co-operation in the fields of justice and home affairs* (arts. K-K9). Its nature is intergovernmental. Besides the Community pillar and the common foreign and security policy pillar, it is one of the three pillars of the Union treaty. These three pillars form the basis, whereas the clamp of the Union constitutes the 'roof' being the fourth and interlocking element of the

'temple-like' edifice.[2] No legally binding definition of 'justice' and 'home affairs' is given in the European Union Treaty, but the listing supplied in art. K.1 denominates nine areas regarded as such. It stipulates the topics which are considered of common interest to the member states. Among them is combatting fraud on an international scale as long as it is not covered by judicial co-operation in criminal matters, customs co-operation and police co-operation for purposes indicated under point 9. Art. M TEU stipulates that nothing in the European Union Treaty shall affect the treaties establishing the European Communities or the subsequent treaties and acts modifying or supplementing them, except whenever those provisions amend the treaties (arts. G, H, I).[3] Consequently, the Commission has maintained its right of initiative in the field of EC fraud, adding the possibility for the member states to introduce proposals by the Council. It should be emphasized that the provisions of Title VI and the actions undertaken based hereon are not part of European Community law. The common acts provided for in art. 189 EC — regulation, directive and decision — are of no use to achieve the actions undertaken in the framework of the third pillar. Its legal nature is, in substance, public international law. Besides in art. K.9 point 6, the Commission is given the competence to propose to the Council to apply art. 100c of the Treaty establishing the European Community to action in areas referred to in art. K.1 points 1 to 6. However, the first and the third pillar are interconnected not only by way of its institutions, but also by the areas mentioned in art. K.1, e.g. fraud on an international scale and other forms of international crime.[4]

The first pillar comprises, *inter alia*, the former EEC Treaty. It is characterized, contrary to the third pillar, by its supranational nature. The third pillar and the first pillar make reference to the fraud affecting the financial interests of the Community. Art. 209a provides a special disposition in the field of combatting EC fraud. It is a partial codification of the Greek Maize judgment.[5] Art. 209a stipulates that: '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. Without prejudice to other provisions of this Treaty, Member States shall co-ordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organize with the help of the Commission, close and regular co-operation between the competent departments of their administrations.' This provision does not explicitly provide the power to enact subordinate legislation. Neither does it contain a complete codification of the conditions set forward in the Greek Maize judgment. The Court of the European Community considered in that case that sanctions imposed by the member states should, in order to comply with

2 P. Müller-Graff, 'The legal bases of the third pillar and its position in the framework of the Union Treaty', *CML Rev.* 1994, pp. 493-510, p. 495.

3 *See also* art. C of the TEU stating that the single institutional framework shall ensure the respect and further development of the 'acquis communautaire'.

4 P. Müller-Graff, 'The legal bases of the third pillar and its position in the framework of the Union Treaty', *CML Rev.* 1994, pp. 493-510.

5 CJ 21-9-1989, Commission/Greece, 66/88.

the obligation laid down in art. 5 EC Treaty (Title II), be effective, proportionate and dissuasive. The writers of the Treaty codified only the principle of assimilation. The Commission has recently proposed a regulation on the protection of the financial interests of the Community.[6] In art. 6, the principle of assimilation as stipulated in art. 209a Union Treaty has been restated adding the conditions mentioned before in Case 66/88.[7] Also, the proposal of the United Kingdom on this subject stipulates in art. 13 the obligation of a member state to modify or clarify its legislation if it fails to comply with its obligations as laid down in art. 209a.[8] Throughout this book, the range of the obligation laid down in art. 209a TEU is analysed from different angles.

Another very important judgment was delivered on 27 October 1992. According to this judgment in Case C-240/90, the Court of Justice acknowledged the Commission's — and not necessarily the Council's — powers to insert administrative sanctions in regulations for the common organization of agricultural markets.[9] These sanctions — like the exclusion from subventions for a certain period of time — are to be imposed by national authorities, pursuant to provisions in the Commission's regulations. It gives the Commission the power to harmonize the sanctions that the member states impose in case of irregularities.

In the 1980s, more attention has been paid to the question of legal protection under both Community law and national law. Some recent developments at Community level have been pointed out above. The member states have the obligation to prevent irregularities with EC funds by controlling in various ways and by pursuing the irregularities detected. In the member states, action has been undertaken to enforce Community law especially, if non-compliance has a financial impact for the Community. The Dutch efforts made in the context of the (legal) protection of the financial interest of the EC will be presented and discussed in the following articles of this book.

3. Contents of the book

As previously mentioned, the member states are under the obligation to enforce Community law. To enforce Community law and especially to protect its financial interests, the member states are free to choose the administrative, the penal, the disciplinary or the civil way.[10] The principles of effectiveness, proportionality, assimilation and loyal co-operation emanating from the jurisprudence of the Court of Justice condition such enforcement.

6 Com (94) 214 final.
7 CJ, Fromme, 6-2-1989, 54/81, Jur. 1982, p. 1449.
8 Not published.
9 CJ, Commission/Germany, 27-10-1992, C-240/90.
10 CJ, Amsterdam Bulb, 2-2-1977, 50/76, Jur. 1977, p. 137.

The key principle is the principle of effective implementation and enforcement. The effectiveness of the sanctions, the monitoring and investigation powers, provided for in the different branches of law, is an important criterion to decide which form of enforcement system should be chosen. Two aspects are to be distinguished with reference to the principle of proportionality. On the one hand, sanctions should be in accordance with the seriousness of the irregularity that has been committed.[11] On the other hand, sanctions should be a deterrent: it is not sufficient to give a symbolic sanction.[12] This condition requires a certain maximum and minimum as to the seriousness of the sanction. Art. 5 requires the member states to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, they must ensure that infringements of Community law be sanctioned under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature, and which in any event make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed with reference to infringements of Community law with the same diligence as that which they implement with the corresponding national laws.[13]

During the seminar, the emphasis was placed on the Dutch administrative and criminal systems used to enforce Community law. In the first part, the Dutch criminal procedure and the various participants were discussed. In the second part, the Dutch approach to the protection of the financial interests of the European Community was discussed following the two-track system offered by the Dutch legal system: the administrative and the criminal systems. This book follows the same order as the seminar. The first article of part I by M.F.L.M. van der Grinten offers a survey of Dutch criminal procedure highlighting the position of the judge and of the public prosecutor. It also includes the organization, tasks and competence of the Dutch judiciary followed by a description of the stages of a criminal procedure starting with the police investigations before judgment at the trial. Particularly the public prosecutor has an important position. Throughout this book, the important role of the expediency principle in the decision-making process of the public prosecutor is explained. The possibility to make an out-of-court settlement (transaction) occupies a central place. Besides the public prosecutor, the administration is also empowered to make out-of-court settlements. The out-of-court settlement is a sanction that is often used for irregularities regarding EC regulation on, *inter alia*, agriculture, customs, industry and commerce.

The second article by De Moor-van Vught gives an overview of the Dutch penal and administrative systems of sanctioning. The characteristics and central problems of this system are also discussed. First, a striking feature of the Dutch criminal system is the wide margin of discretion of the courts when it comes to imposing sanc-

11 CJ, Watson, 7-7-1976, 118/75, Jur. 1976, p. 1185; CJ, Pieck, 3-7-1980, 157/79, Jur. 1980, p. 2171.

12 CJ, Von Colson and Kamann, 10-4-1987, 14/83, Jur. 1984, p. 1891.

13 R.M.A. Guldenmund, *Introduction to the problem of EC-fraud*. Paper presented at the seminar held on 27 and 28 January 1994, not published.

tions. As the judge is not bound by special minimum sanctions, a wide range of options as to the nature, the degree and conditions to be attached to the sanction are at his disposal. Second, another important characteristic of the Dutch criminal system is the principle of expediency affording the possibility to settle a case by waiver or out of court. In the context of EC fraud, the Economic Offences Act is a central piece of legislation containing regulations on transport, trade, insurance, import and export. It provides special sanctions taking account of the nature of the offence like the (partial) stop to the activities of an offending company. Explaining the administrative sanction system, potential problems are mentioned. On the one hand, the applicability of arts. 6 of the European Court of Human Rights (ECHR) stating procedural rights in the administrative field creates serious problems because the authorities is not fully prepared to change according to the judgments of the ECHR. Another problem is formed by the negative consequences when both the administrative and criminal systems impose sanctions. The various administrative sanctions are discussed with emphasis on their importance in enforcing Community law.

The article by Bevers deals with the police in the Netherlands. Only recently, the organization of the Dutch regular police force has been completely revised. To answer the needs of better co-operation in order to cope with national and transnational crimes, fewer but larger police forces were necessary. This new organization of the national police force deals, on the one hand, with the management of the regional police forces, their internal organization and task division. On the other hand, it deals with their relation to the national enforcement agencies and to their two-edged task, namely, maintaining public order under the supervision of the mayor, and their responsibility for investigating crimes under the supervision of the public prosecutor. Finally, the reorganization is critically evaluated. In the final article of part I, Sjöcrona discusses the role of the defence counsel ('advocaat') in a criminal procedure, pointing out the functions of the defence counsel and the process of becoming a defence counsel. It is followed by an overview of the practical problems that a defendant and his defence counsel may encounter in the various stages of a criminal procedure.

In part II, the authors offer analyses from different angles of the main obstacles in controlling and enforcing Community law in relation to the financial interests of the EU. The problems are of an administrative and or a legal nature. There is a lack of precise and reliable information on the subject of EC fraud and on the communication between member states. As a consequence of the abundance of Community regulations and the ambiguity and complexity of Community legislation, national rules resulting from the implementation of EC law are more difficult to understand and give rise to problems when enforcing EC rules.[14] The surveillance by national administrations is one of the most important preventive measures. In the Netherlands, there are special enforcement agencies with both monitoring and investigating powers with overlapping competences. The workload is heavy, and co-

14 R.M.A. Guldenmund, *Strafrechtelijke handhaving van gemeenschapsrecht*, Arnhem, 1992.

ordination problems are inevitable. The European Court of Auditors detected flagrant deficiencies in this field. In the 1994 report, several serious cases of fraud and mismanagement in the European Union were identified, thus stiffening the opposition to legislation which would increase member states' contributions to the EC.[15] The European Council stimulates the member states and the institutions of the European Community to take the necessary measures to put into effect the reports of the European Court of Auditors.[16] In view of the transnational character of the irregularities, co-operation in both the administration and the criminal field is needed between the national authorities responsible. But, the member states seem to be reluctant to ratify the Conventions elaborated in the framework of the Council of Europe. Practical problems arising from the differences in, e.g. legal administration, legal procedures and conflicting national interests have contributed to the failure to guarantee a lawful, proper and efficient use of Community funds. An assessment of the possible solutions to overcome some of these deficiencies is presented here in the various articles.

A radical solution to deal with irregularities would be to abolish financial aid altogether. The ambiguity of EC legislation may be a temptation to apply for financial aid in cases not covered by the regulation. Providing clear regulation should be given priority, and more energy should be spent avoiding loopholes. Inspection could be improved by combining the inspection of documents, physical checks, *a-posteriori* checks of books and general audits by the auditing departments. It has been pointed out that co-operation between the Customs Department, the Customs Investigations, the 'Economische Controledienst' (ECD: national enforcement agency regarding industry and commerce), the 'Algemene Inspectiedienst' (AID: national enforcement agency regarding agriculture) and the public prosecutor is an essential part of the enforcement effort of Community law. By putting pressure on those member states failing to ratify the international judicial co-operation instruments and by harmonizing the relevant provisions of substantive national law of the member states, the problems could be resolved to some extent.

The Dutch legal system offers *a two-track system* consisting of an administrative and a criminal track. Buruma focuses on this system, while explaining the role of the various national enforcement agencies. Whether it is from the point of view of substantive law, from the organization of the different agencies and their relation to the public prosecutor, from the monitoring and investigative powers or from the point of view of the sanctioning, an administrative and a criminal aspect can always be distinguished when enforcing Community law. The most important enforcement agencies, like the 'Fiscale Inlichtingen- en Opsporingsdienst' (FIOD: taxation), the AID and the ECD, are discussed while pointing out their special competence, and the co-operation among these agencies and between them and the EC officials. In

15 L. Barber, D. Gardner and K. Brown, 'EU attacked on spread of fraud', *Financial Times*, 16-11-1994.

16 Conseil européen, réunion des 9 et 10 décembre 1994 Essen, *Conclusions de la présidence*, p. 20.

their special fields, the national enforcement agencies do not only have monitoring powers but they can also act as police officers. Consequently, problems arise because of the difficulty in distinguishing between the different powers in operational terms.

The importance of customs has long been underestimated in the fight against Community fraud. By pointing out the organization of customs, its respective monitoring and investigative powers, customs legislation and (administrative) sanctions in the field, the author offers an extensive overview of the important role of Dutch customs in the combat against EC fraud.

Dutch customs is part of the Ministry of Finance under the Directorate-General of Taxes and Customs. In the context of customs, both the Customs Department and the Fiscal Intelligence and Investigation Department (FIOD), section Investigations, are important. The task and powers of customsare described in Dirkzwager's article, leaving the FIOD to be treated in the context of the national enforcement agencies by Buruma. After an explanation of the organization of customs, an overview of Community customs legislation is provided, while also referring to a draft for new customs legislation. The legislation in this field is laid down in the Community Customs Code, which came into force on 1 January 1994. Similar to the Act concerning Customs ('Wet inzake douane'), and to the Decision concerning Customs ('Besluit inzake Douane') containing rules for further implementation of the Act concerning Customs, the Dutch Customs legislation has to be changed. A new Bill concerning Customs has been presented aimed at bringing Dutch legislation in line with the Community Customs Act. Following the explanation of the role of customs in the area of fraud with agricultural levies, VAT, antidumping levies and export restitutions, the role of customs concerning the enforcement of the Community Customs Code will be treated as well. The monitoring and investigating powers of customs are described, as well as the imposition of administrative fines, the criminal offences contained in customs legislation and the decision surrounding the prosecution of customs offences.

Bleeker discusses the role of the Ministry of Justice. It is pointed out that the Ministry of Justice is central in determining the policy on the fight against EC fraud both at the national and at the European Community levels. The Dutch gave follow-up to the Resolution of the Council of Ministers of Justice of 13 November 1990 by presenting a memorandum to the Dutch Parliament defining the Dutch government's position regarding the relationship between Community law and Dutch criminal law. This memorandum still reflects the Ministry of Justice's way of thinking.

Fikkert discusses the policy of the Ministry of Agriculture on EC fraud. Since the Ministry of Agriculture executes the common agricultural policy of the EC, on which more than 50 per cent of Community funds are spent, it is strongly involved in the fight against EC fraud. Especially in agriculture, a fair share of monitoring measures have been introduced to detect irregularities with, *inter alia*, expenditure of the EAGGF. The systems installed to implement the EC regulation regarding trade-supporting subsidies and aid to support directly the income of the producers of agricultural products are explained, for example the special devices that have been developed to calculate how many controls should take place, e.g. risk analysis,

randomization. After an overview of the controls on the aid schemes financed by the EAGGF, the various problems in combatting EC fraud in the field of agriculture are critically pointed out.

In his contribution, Schutte presents a survey of the various instruments for international co-operation between administrative and judicial authorities, and their implementation in the Dutch legal system. International co-operation within the framework set by the Treaty on the European Union is described and critically discussed. The author refers to art. 209a of the first pillar of the European Union Treaty and to the central provisions of Title VI concerning co-operation in the field of justice and home affairs (art. K.1. points 7, 8, 9) dealing with a larger number of areas: judicial co-operation, customs co-operation and police co-operation. There is a need for mutual assistance and co-operation at Community level for Dutch legislation and for the legal situation in the other member states, which is diffuse and underdeveloped.

Several conclusions may be drawn from the various articles. Both the administrative and the criminal track need to be explored to answer the challenge offered by EC fraud. Co-operation between the ministries concerned, public prosecution, customs, the Customs Investigations, the special national enforcement agencies (a.o. the AID, the ECD and the FIOD) is not only important for the protection of the financial interests of the EC, but it will also be decisive for an effective and efficient enforcement of Community law. Structures have been set up to discuss the questions of whether to instigate criminal proceedings or to opt for the administrative way, e.g. the Co-ordinating EC Fraud Consultations ('Coördinerend EG-fraude beraad') with the Customs Department, the AID, the ECD, the FIOD and the Ministry of Justice, and the FIOD Customs Investigations, the Contact Officer concerning the Act on Customs ('Contactambtenaar Wet inzake Douane') and the public prosecutor. However, the fight against EC fraud does not stop at the border of each member state. The Commission has stressed the need for co-operation between the member states and for 'strengthening the partnership between the member states extending networks and improving the exploitation of intelligence'.[17] The future will show whether the call from the Belgian Minister of Justice, Wathelet, for the establishment of 'a veritable European system of administration of justice entailing direct co-operation between investigating and prosecuting services in all the member states'[18] can become reality. But, effective administrative and judicial co-operation is of the utmost importance to prevent and to combat the irregularities harming the financial interests of the European Union.

17 European Commission, *Protecting the financial interest of the Community*, The Commission anti-fraud strategy Work programme for 1994, Luxemburg, 1994, p. 10.

18 Mr. M. Wathelet, *Closing address*, Commission of the European Communities, The Legal Protection of the Financial Interests of the Community: Progress and prospects since the Brussels seminar of 1989, Dublin, 1995, pp. 277-280.

4. Recent developments

After the seminar, some important developments took place which are worth mentioning. First, the United Kingdom presented a draft for a decision of the Council for a joint action based on art. K.3 para. 2, using its new competence created by the Treaty on the European Union. This proposal concerns the protection of the financial interests of the Community by criminal enforcement, thus providing a definition of fraud regarding the Community budget and imposing the obligation to introduce an incrimination on EC fraud. In order to answer the needs in the field of judicial co-operation, of problems regarding extradition for fiscal offence and of insufficient identity of legal provisions (the condition of double incrimination), draft articles have been proposed. Second, to contain the problem, a proposal of the Commission for a Regulation and a complementary Convention have been transmitted to the Council.[19] These proposals were some of the main elements of the new strategy of the Commission set out in 'The Commission's Anti-fraud Strategy Work Programme for 1994', where it stressed the need to take measures to ensure coherent action within and between member states. The programme pointed out the necessity for convergence of member states' legal systems in appropriate areas. Consequently, the member states and the Commission should make maximum use in a complementary manner of both the provisions of the EC Treaty and the provisions on co-operation in Title VI of the Union Treaty.[20]

The Commission's proposals were a result of research undertaken in the field of enforcement of Community law in the member states. Both the Regulation and the Convention aim at making measures to counter fraud more effective. The draft Regulation aims at providing a general system of administrative sanctions to be applicable to all sectors of common Community policy. While having the same objective, the draft Convention places the emphasis on the criminal approach instead of on the administrative way. The draft Regulation is based on art. 235 of the European Union Treaty (Title II), whereas the legal basis of the draft Convention is art. K.1.5, which is part of the third pillar.

At Community level, a distinction can be drawn between sanctions in regulations to be imposed by the Commission (direct enforcement) and sanctions laid down in the Community legislation, which the national authorities of the member states should apply according to national procedures (indirect enforcement). In concrete terms, it is seeing the 'brains' as supranational, the 'muscular system' and the 'teeth' as national.[21] Contrary to the original approach of defining administrative sanctions in the agricultural sector, this draft Regulation considers the problem horizontally. According to the preamble of the proposal, a common set of legal rules should be

19 COM (94) 214 final.

20 European Commission, *Protecting the financial interests of the Community, The fight against fraud*, The Commission's Anti-fraud Strategy Work Programme for 1994, Luxembourg, 1994, pp. 12-13.

21 R.M.A. Guldenmund, *Strafrechtelijke handhaving van gemeenschapsrecht*, Arnhem, 1992, p. 2.

enacted for all areas of Community policy. This implies that the sanctions provided in the draft Regulation can now be included in other areas than the common agricultural policy. The impact of this Regulation extends to any regulation having financial consequences for the EC budget. The draft Regulation provides, on the one hand, a harmonized definition of the offence of EC fraud (art. 2). A definition of the term 'EC fraud' is necessary, because it tends to be used broadly. In para. 2, a non-comprehensive list of different possibilities that harm the financial interests of the European Community is given. Included in the definition of fraud is the concept of *fraus legis* provided in art. 3. The regulation gives an enumeration of the various punitive sanctions and reparatory measures to be applied in cases of detected irregularities. The sanctions provided for can be simply the withdrawal of a benefit unjustifiably received, but also a fine consisting in the payment of an amount above the refund of the benefit with interest, and, finally, the exclusion from eligibility for future benefits during a certain period. To choose a measure or a 'Community administrative penalty' depends on whether or not the act or the omission was committed intentionally or through gross negligence. The principle of legality assuring the importance of legal certainty is stipulated in art. 10, and different aspects of the problem of the retroactive effect are dealt with. Finally, art. 11 regulates the checks and inspections performed by the staff of the Commission or experts duly empowered to act on its behalf. The Commission will be given a horizontal, relatively independent power of investigation in the context of the expenditures and income of the Community's finances.

No procedural guarantees are given in the draft Regulation. It is and will be a controversial point of discussion until the European Union adheres to the European Convention of Human Rights.[22] The Court of Justice has been asked to render its opinion on adhesion of the European Union to the ECHR. Due to the absence of a listing containing the fundamental rights of each citizen, the Court of Justice has developed in its jurisprudence a standard of fundamental guarantees for each citizen to be upheld.[23] Further progress has been made by the insertion of art. F para. 2 and art. K.2 para. 1 in the Treaty of Maastricht, stipulating the respect for fundamental rights as guaranteed by the European Convention. Besides the idea of adhering to the ECHR, the Commission has taken other steps to assure the fundamental rights of the citizen in the field of EC law. In view of the need for a more coherent approach of the principles applicable when member states are imposing sanctions for violations of Community law and in order to answer the criticism that the Commission neglected the legal protection of fundamental guarantees, the Commission

22 Already in 1979 the Commission argued the need to adhere to the ECHR (Memorandum of 4-4-1979, Bull of the EC, Suppl. 2/79). In its Communication of 19-11-1990 the Commission repeated and amplified this idea by asking the Council the authorization to negotiate with the competent services of the Council of Europe an additional protocol concerning the concrete modalities in order to have the Community adhere to the ECHR (Doc. SEC(90), 2087).

23 J. Pipkorn, 'La Communauté européene et la Convention européenne des Droits de l'homme', Rev. trim. dr. h. (1993), p. 221-241.

has presented a draft for a horizontal regulation in this field setting out a general legal framework when imposing sanctions. Reference is made, for example, to the principle of legality, the requirement of *mens rea*, the grounds of justification and *force majeure*.[24] Vervaele has pointed out that it is hard to understand why other criminal principles (e.g. rights of the defence) and principles of administrative law have been excluded.[25]

Complementary to the draft Regulation, the Commission has proposed a draft Convention based on arts. K.1 point 5 and K.3 para. 2. This draft Convention aims at ensuring that member states treat fraud against the Community budget as a criminal offence, thus providing a legal framework to bring those responsible for fraud to account for their crimes.[26] The draft Convention mentions the transnational character of EC fraud. As mentioned above, this aspect of EC fraud is the source of many problems. According to Title VI of the European Union Treaty (arts. K.1 nos. 7, 8, 9 and K.3.(2)) the Commission does not have any competence in judicial co-operation on criminal matters, customs co-operation and police co-operation. Therefore, the draft states explicitly that Title III 'Judicial co-operation between the member states' of the draft Convention is not within the scope of the Commission's initiative under art. K.3. para. 2 of the Union Treaty. But the draft articles on extradition, obligation to prosecute, limitation and mutual assistance in general are 'presented to the Council as material for reflection so as to offer a full document'. The definition provided in art. 2 paras. 2-4 is the same as the one in the draft Regulation (art. 2) except in the liability for an attempt to commit fraud against the Community's financial interests. The description in the draft regulation, however, is broader and goes into more detail (arts. 1-3). The objective of the definition of EC fraud is to achieve a harmonized description of the concept of EC fraud in the different Codes of Criminal Law of the member states. Both the (legal) persons criminally liable and the criminal sanctions to be applied in the case of irregularities concerning the EC expenditures and revenue are defined. Rules of jurisdiction in cases of 'multi'-state fraud cases and when the 'essential factual elements constituting a fraud against the Community's financial interests occurred in the territory of a non-member country' (arts. 5-6). The following jurisdiction given to the Court of Justice is very important. It includes: to interpret the provisions of the Convention by way of preliminary ruling in accordance with the procedure laid down in the second and third paragraphs of art. 177 of the Treaty establishing the EC, and to hear and to determine disputes arising from the operation of this Convention, on application from a member state or the Commission.

24 The draft Regulation is only available in French: 'Proposition de règlement relatif aux principes de fond et de procédure applicables aux sanctions communautaires'. The draft has not yet been submitted to the Council by the Commission.

25 J.A.E. Vervaele (ed.), *Bestuursrechtelijke toepassing en handhaving van gemeenschapsrecht in Nederland*, Deventer, 1993, p. 204.

26 *The Commission's Anti-fraud Strategy Work Programme for 1994*, p. 13.

The draft Regulation is more detailed and far reaching than the Convention. The two-track approach adopted by the Commission is the reason for proposing a regulation and a convention simultaneously. Both the administrative and the criminal track should be explored. By examining the steps the Commission has taken to introduce the proposals, this action can be explained by regarding it as an answer to the proposition for a joint action under art. K.3 para. 2 (b) by the United Kingdom. A more acceptable explanation, however, is available, namely the fact that the Commission, at the request of the Council by its Resolution of 13 November 1990, has conducted a comparative study about Community fraud in the different legal systems in order to achieve a greater compatibility of these provisions. The aim was to be informed of the possibilities to approximate the national provisions to 'boost the effectiveness of measures to combat fraud against the Community budget and ensure equivalent treatment in the different member states'.[27] The results of this study are laid down in, e.g., the draft Regulation and the draft Convention.

The Commission of the European Union is planning to propose a directive on 'whistle-blowing'. The idea is to introduce a free-phone through which information regarding fraud can be disclosed confidentially or anonymously. The possibility to pay rewards or bounties will be studied. Besides the problem of payment some other aspects will be examined such as the consequences for the value of the evidence if information is given anonymously, and the obstacles contained in the various legal systems of the Community. It is clear that the Community is searching more and more for far-reaching measures to support and intensify the fight against EC fraud. The Commission has already installed a free-phone service so that each citizen can provide confidentially and in his own language information about irregularities involving Community funds. From the Netherlands, this service can be reached by dialling 06-0224595.[28]

We are facing important developments towards a uniform system of legal protection of the financial interests of the European Community.

5. Concluding remarks

The seminar has been made possible by the collaboration of DASEC, the 'Schoordijk Instituut', the Department of Criminal Law and Criminal Procedure and Directorate-General for Financial Control of the Commission of the European Communities, DG XX.

27 *Incompatibilities between legal systems and harmonisation measures: final report of the working party on a comparative study on the protection of the financial interests of the Community*, Mrs. M. Delmas-Marty, Commission of the European Communities, The Legal Protection of the Financial Interests of the Community: Progress and prospects since the Brussels seminar of 1989, Dublin, pp. 59-93, p. 60.

28 Brussels stelt 'kliklijn' in voor fraude EU-geld, B. Donker, *NRC-Handelsblad*, 12-11-1994.

We would like to express our gratitude to DG XX, the Directorate-General for Financial Control, since the organization of the seminar and the publication of these proceedings would not have been possible without their moral and financial support. In particular we would like to thank Francesco de Angelis and those working with him at Directorate-General for Financial Control for their efforts undertaken and time spent to realize this project which concludes with the publication of the proceedings of the seminar. We also thank Greet van Merriënboer, Ann Musters, Hildegard Penn and Sandra Rincòn for their invaluable help.

January 1995