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FRAUD AGAINST THE COMMUNITY BUDGET: A COMMON CONCERN

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Introduction

Some statistics may lie but there can be no disputing the pervasive nature of fraud against the Community budget. In its 1997 annual report on the fight against fraud, the European Commission revealed fraud amounting to 1.4 billion ECU, i.e. approximately 1.7% of the total budget of just above 82 billion ECU.[2] The phenomenon of fraud now affects a very broad range of Community policies applied by the Member States and its tentacles may also be spreading into the Community institutions themselves. In its report for the year 1997 the European Commission gives a full picture of the current extent of the problem, identifying statistical trends which. for example, show a significant rise in fraud on the "own resources" of the Community budget.[3] Worrying developments of a criminal character such as organized crime and corruption are now associated with fraud against the budget. In the absence of a body of Community criminal law, the Community is having to call on Member States to use their instruments of penal law to combat Community fraud. One fundamental theme of this article is that national law and Community law - and the respective institutions of each system - must work together smoothly if real progress is to be made in this fight.

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2 European Commission, *Protecting the Community's Financial Interests: The Fight Against Fraud, Annual Report 1997*, Office of Official Publications of the EC, Luxembourg, 1998 (hereafter "Commission Fraud Report"), Table 5 of the report, showing global impact of the irregularities reported for the year, p.66. At current rates, the value of one ECU is approximately 0.7 pounds sterling.

3 *Ibid.*, p. 12.

There is a preliminary "psychological hurdle", however, for lawyers, officials and politicians in the Member States to overcome before the challenge of Community fraud can really be met. This is the perception that the Community budget is not their responsibility and that any problems associated with it are for the Commission to address and for Community law, not national law, to resolve. This is not the case. The EC Treaty's objective in relation to Community fraud is that it must be combatted *by national authorities* with the same means and the same vigour as used with regard to fraud against national budgets ("assimilation principle").[4] Politically, the interest in protecting the Community budget could hardly be greater at present. The debate in the UK, Germany and elsewhere in the European Union about the need to restrict or cap national budgetary contributions, and the ongoing discussions concerning the adaptation of the budget to future challenges such as enlargement, should focus minds on the need properly to protect the resources which have already been committed.[5] We will see, however, that the Member States are being very tardy about implementing some of the legal measures which have been adopted to combat EC fraud. Because in this field Community law shows signs of encroaching on national criminal law - hitherto an area of national sovereignty carefully shielded from direct Community intervention - broader constitutional issues concerning the appropriate extent of Community competence and the jurisdiction of the European Court of Justice have begun to intrude upon the more mundane fraudulence of the cigarette smuggler or the adulterer of olive oil.

Nature of the Community Budget

There is a connection between at least some types of Community fraud and frauds committed against national budgets or in relation to national tax revenues. The revenue of the European Community's general budget derives from its "own resources", made up of the revenue from four types of resource: customs duties and levies on products originating from outside the European Community which are subject to the Common Customs Tariff; agricultural charges on non-EU products;

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4 Article 209a EC Treaty, which itself is based on case law of the European Court of Justice (Case 68/88 *Commission* v *Hellenic Republic* [1989] ECR 2965.)

5 Admittedly, the Member States' ideas about reforming the budget lack a certain logic: "Nobody wants to pay more, some want to pay less, nobody wants to get less and we have to spend more for enlargement", as the Belgian Prime Minister Mr Dehaene put it after the recent Vienna summit of the European Council (*Financial Times*, December 14th 1998, p. 13).

a small percentage of the VAT revenue raised and collected in the Member States[6]; and, lastly, GNP-based own resources. In 1997, the percentage distribution of revenues among these different resources was as follows: customs duties (14.8%); agricultural levies (1%), sugar and isoglucose levies (1.5%); VAT-based own resources (42.3%); and GNP-based own resources (34.3%), with a small percentage being made up from other revenue and 5.3% surplus available from the previous year.[7] Comparative figures on the VAT-based revenue from 1996 bear out the objective of the Member States to reduce the relative weight of this component as part of overall Community revenue.[8] The 1997 percentage was 6% less than in 1996.[9]

Loss of tax revenue is a serious problem in the Community budget, one which applies to VAT and also hits domestically regulated excise duties hard. The recent Court of Auditors report indicates the magnitude of the problem: "An indirect calculation of the discrepancy between VAT collected and theoretical VAT for nine Member States revealed an average annual difference of 70 000 Mio ECU (1991-93). Comparison with a similar exercise carried out 10 years ago shows that the discrepancy has more than doubled."[10] It should be apparent that VAT and excise fraud will adversely affect the national budget much more than the Community one. The Commission's 1997 report on fraud recognises this.[11]

Nature and Extent of Community Fraud

Community fraud is increasingly associated with the cross-border activities of

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6 Currently being reduced from a high of 1.4% to 1%: see D W Williams, *EC Tax Law*, Longman, London, 1998, p.49.

7 Court of Auditors, *Annual Report concerning the financial year 1997. Report on activities financed from the general budget* (hereafter "Court of Auditors Report"), Official Journal (OJ) C 349, 17th November 1998, Annex I, Diagram I.

8 See the detailed discussion in David W Williams, *EC Tax Law*, Longman, 1998, p. 49.

9 Court of Auditors Report, p.10.

10 *Ibid.*, p.16.

11 Referring to cigarette trafficking and fraud involving alcoholic beverages, the Commission notes: "The impact on the Community budget in terms of own resources (customs duties and the Community's share of VAT) represents, on average, only 25% of the total impact on the budget (customs duties, VAT and excise duty)." (Commission Fraud Report, footnote 1 on p. 13).

organized criminal groups. Recent fraud reports by the Commission and commentaries by Commission officials reveal many examples of large-scale fraud against Community revenue and expenditure and bring clearly into focus the increasingly transnational nature of much serious fraud committed against the budget. Such serious frauds call for co-ordination of the work of Community and national anti-fraud bodies, and also internal co-ordination of anti-fraud activities at national level, something which is mandated by Article 209a, second paragraph, of the EC Treaty itself.[12] The respective powers and responsibilities of these bodies in terms of Community law will be analysed further below; at this point it is sufficient if we note that their joint investigations cover increasingly large sums - the average impact of these cases on the budget was 3.7 million ECU in 1997 compared to 2.3 million ECU in 1996.

Although increasingly sophisticated techniques and technologies are being put to use to assist in the commission of fraud against the budget, the basic typologies of fraud in the different sectors of own resources, agricultural fraud, structural funds fraud or direct expenditure fraud are straightforward.[13] In the case of own resources fraud, the most frequent example is false declarations of origin of goods made to avoid payment of duties. This type of fraud, when committed systematically, undermines the system of preferential trade preferences which is part of the Community's "dynamic trade policy open to the rest of the world."[14] Legal proceedings are in progress in the UK in relation to a case involving exports of cloth from Indonesia to this country where the cloth was falsely represented as satisfying the rules of origin requirements; the preferential treatment given to the cloth as a result of these false representations is said to have cost 2 million ECU in unpaid duties.[15]

The Commission has identified the involvement of at least fifty international criminal syndicates who specialise in targeting particularly highly taxed products such as

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12 This provision states that: "... Member States shall co-ordinate their action aimed at protecting the financial interests of the Community against fraud. To this end, they shall organise, with the help of the Commission, close and regular co-operation between the competent departments of their administrations."

13 The typology which follows is drawn from L Kühl, 'The Criminal Law Protection of the Communities' Financial Interests against Fraud - Part I', 1998 *Criminal Law Review*, 259-269 (260- 262).

14 Commission Fraud Report, p.17.

15 *Ibid.*, p. 28.

cigarettes and alcohol.[16] An example of a VAT fraud carried out by such groups is the following case described by the head of the Commission's Anti-Fraud Task Force, a VAT fraud involving Denmark, Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain and the UK:

> "In this case, computer components were purchased under the intra-Community VAT system by a particular company from a firm established in another Member State, the products being delivered free of VAT. The purchaser did not declare this purchase in his own Member State and therefore did not pay the VAT due. In turn, he delivered the products to another company in the same Member State, making out a 'VAT included' invoice. He pocketed the VAT thus paid by the purchasers and vanished whereas, under the rules of the system, the final purchaser was entitled to recover the amount of the tax paid."[17]

The intra-Community VAT system referred to in this quote is the system employed in the internal market since 1st January 1993 when that market became legally effective pursuant to Article 8a of the EEC Treaty (now 7a of the EC Treaty). Under this system the VAT is no longer paid at the time of importation of the goods, as this would be tantamount to treating it as a barrier to entry and thus inconsistent with internal market theory, but later, on the evidence of periodic declarations by the taxpayer. Responding to the critique of the Court of Auditors of this system in its annual report for 1997 as being inherently prone to fraud, the Commission places the blame squarely on the shoulders of national control systems whose "complexity" should not be underestimated.[18] In a detailed discussion of the control regime, White has drawn attention to certain continuing inadequacies in the relevant Community regulations.[19] The Commission is also aware of these but appears to share White's suspicions that the Member States may not yet be ready to co-operate fully in this field if it means more strict Community intervention.

The examples cited so far have been drawn from the revenue side of the budget.

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16 *Ibid.*, pp. 8, 17 et seq.

17 Per Brix Knudsen, 'Fraud against the EC Budget', in P J Cullen and W C Gilmore (eds.) *Crime sans frontières. International and European Legal Approaches*, 1998 Hume Institute Papers on Public Policy, Volume 6, Nos. 1 & 2, pp. 111-115 (113).

18 Replies of the European Commission to the Court of Auditors Report, p. 20.

19 S White, *Protection of the Financial Interests of the European Communities: The Fight against Fraud and Corruption*, European Monographs Series No. 15, Kluwer, The Hague, 1998, p 70.

Fraud may also, of course, affect expenditure, as the statistics show only too well. It is not necessary here to rehearse more examples. Rather, we should now look at the policy approach to tackling such fraud, beginning with the link to the broader fight against organized crime in the European Union.

EU Anti-Fraud Policy

At the very highest political level, the European Union has pinpointed the risks posed by organized crime to legitimate trade in the internal market and to the integrity of banking and other financial systems. The European Council has endorsed the Council of Ministers' "Action Plan to combat Organized Crime".[20] This strategic document, adopted in April 1997, stipulates political guidelines and a series of detailed measures designed to tackle the phenomenon. It places considerable emphasis upon improving co-operation between national authorities charged with crime-fighting and on ensuring they also work together with Community authorities. The issue of fraud and its ramifications is a major concern of the policy outlined in the plan. The European Council first grimly notes the "massive proportions" that fraud and corruption now take on in the European Union.[21] It sees the fight against fraud very much as a matter of common concern between Community and Member States. Indeed, it issues a strong call to Member States "to consult regularly the competent services of the Commission with a view to analysing cases of fraud affecting the financial interests of the Community."[22]

In the Action Plan document, fraud is bracketed together with corruption, money laundering and other EU-wide criminal activities which seek to establish financial gain for the criminals involved. The "general approach" of the Council, which was first formulated by a High Level Group of national officials, is to ensure that the "Union should have the instruments to confront organized crime at each step on the continuum from prevention to repression and prosecution."[23] With regard to fraud, specific implications are drawn for national legislatures and administrators. Legislation should, for example, be "fraud-proofed" and the exchange of information between financial and fiscal authorities, on the one hand, and law enforcement or judicial authorities within Member States, on the other hand, stepped up. Legislation

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20 Action Plan to Combat Organized Crime (Adopted by the Council on 28th April 1997), OJ C 251, 15.8.97. The plan was subsequently endorsed by the European Council.

21 Action Plan, p.1.

22 *Ibid.*, recommendation no. 10, p. 9.

23 *Ibid.*, p. 2.

should "not invite fraud and other undue exploitation."[24] Political guideline no. 12 addresses national tax administrations as well as legislatures and policy-makers when it calls for much closer co-operation at the national level between fiscal and law enforcement authorities in the fight against organized crime. VAT and excise fraud are singled out for attention by this section of the plan, which suggests that prevention and repression by Member States of such forms of "organized fiscal fraud" have not been sufficiently rigorous in the past.

The political guidelines of the strategy document are matched by a plan of action consisting of a series of recommendations - a "work programme". Recommendations 29 and 30 are of particular relevance to fraud: no. 29 repeats the essence of political guideline no.12, recommending specific measures to improve the effectiveness of the fight against fiscal fraud, such as bringing to an end, in cases linked with organized crime, any "legal bar" on exchange of information between fiscal and law enforcement or judicial authorities. Recommendation no.30 calls upon Member States to examine "how to take action and provide adequate defenses [sic] against the use by organized crime of financial centres and off-shore facilities, in particular where these are located in places subject to their jurisdiction." Readers in the Channel Islands might wish to take note.

The focus of this Action Plan is, first and foremost, on developing or improving methods of co-operation among criminal justice authorities, fiscal authorities and customs agencies of the Member States in crime-fighting. The Council is expected to draw up legally-binding Conventions to put in place an improved legal framework for such co-operation. Shortly, we will see that an anti-fraud Convention already exists. Council and Commission are called upon either to facilitate or co-ordinate aspects of this co-operation at the policy or executive level. In operational terms, a significant role is envisaged for the Europol body, the European Union's structured police agency based in the Hague, whose remit is currently limited to intelligence analysis and information exchange between police and criminal justice authorities but which is set, after entry into force of the Amsterdam Treaty, to play a more operational role by participating in transnational criminal investigations. The Action Plan on Organized Crime envisages that Europol will, in future, liaise directly with the Commission's anti-fraud unit, UCLAF.[25]

There is an important structural question which is not resolved by the Action Plan to Combat Organized Crime but which is of crucial importance for the future of co-

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24 *Ibid.*

25 *Unité pour la Coordination de la Lutte Anti-Fraude.*

operation in police and criminal justice matters, including the fight against fraud. This was the issue identified by the European Parliament in comments by its Committee on Civil Liberties and Internal Affairs on the Action Plan: "namely whether organized crime should in future be combatted by harmonizing the definition of major criminal offences and the provisions relating to criminal procedure, or by improving cooperation between the Member States while retaining differences in the national criminal systems."[26] It is evident that the Parliament objected to some Member States raising "reservations on grounds of sovereignty" to legal harmonisation. European Union policy on this fundamental question currently hangs in the balance. The policy regarding fraud against the budget is, however, proving to be the first real testing ground for the debate concerning the desirability of harmonising - or "unifying"[27]- national criminal law or criminal procedures in order to protect Community interests. In this connection, we will now assess the state of play represented by the existing legal instruments. Here, it is necessary first of all to distinguish between legal measures adopted under the intergovernmental provisions of Title VI of the Maastricht Treaty on European Union, better known as the "Third Pillar" of the European Union, on the one hand, and instruments of Community law, on the other.[28]

Intergovernmental Instruments to Protect the Community Budget

Criminal law remains within the jurisdiction of the Member States. It is not immune to indirect influence by norms of Community law but the Community lacks any general competence to create substantive offences or to prescribe criminal penalties.[29] Neither the Court of First Instance nor the Court of Justice itself is a criminal tribunal. For this reason, the decision of the Member States to "criminalise" fraud against the Community budget could not be implemented by a Community law

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26 European Parliament Session Documents, A4-0333/97 Report on the Action Plan to Combat Organized Crime, by Committee on Civil Liberties and Internal Affairs, 29th October 1997 (Rapporteur Mrs C Cederschiöld).

27 A method which does not rely on bringing existing national criminal law rules into line so much as drawing up common rules afresh, partly by merging national traditions: see M. Delmas-Marty, 'The European Union and Penal Law', *European Law Journal*, Vol. 4, No. 1st March 1998, pp. 87-118 (106 et seq.).

28 For a general discussion of the European Union's "pillar structure" see P J G Kapteyn and P Verloren van Themaat, *Introduction to the Law of the European Communities*, 3rd. English edition edited by L W Gormley, Kluwer, The Hague, 1998, ch. 2.

29 Delmas-Marty, op. cit.

instrument, whether it be a Regulation or Directive.[30] Title VI of the Treaty on European Union provided a viable alternative. Established at their Maastricht summit, it offers a Treaty basis for Member States, acting unanimously outside Community jurisdiction, to draw up Conventions on a range of "Justice and Home Affairs" matters, including "combatting fraud on an international scale" (referred to in Article K.1). Such Conventions do not have the status of Community law but create obligations under international public law. These Conventions are first drawn up, by means of Council acts to which they are annexed, by the Council upon signature by the representatives of Member State governments. They can enter into force, however, only upon subsequent ratification by all Member States in accordance with their constitutional requirements. This can be a very long drawn-out process. Member States may, under Article K.3 (2) (c) of the Treaty on European Union, agree to confer jurisdiction on the European Court of Justice to interpret the Conventions or to rule on any disputes concerning their application. Otherwise than by such express stipulation in Conventions, the European Court of Justice is excluded from any role in "Third Pillar" co-operation.

The "Convention on the protection of the European Communities' financial interests" was signed on 26th July 1995.[31] There is insufficient space here to consider fully the gestation of the Convention.[32] It is interesting, however, to note that the last UK government played a significant role in its adoption. The UK's concerns about fraud on the budget prompted it in 1994 to propose measures designed to achieve greater compatibility in the laws and regulations of the Member States. The proposals were prompted partly by concerns that not all Member States had laws in place to deal with EC fraud, or that if they did, they were not tough enough or not being applied as rigorously to Euro-frauds as national frauds. The UK's proposals in due course merged with Commission proposals to form the text of the Convention as eventually adopted.

Probably the major achievement of the Convention is the agreement on a common definition of fraud affecting the Communities' financial interests. The definition in Article 1 (1) comprises "intentional acts or omissions" relating, in respect of expenditure, to:

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30 See Article 189 of the EC Treaty which gives the Community institutions the legal authority to make law by adopting such general legislative measures. Decisions, also mentioned in the Article, have specific addressees.

31 OJ C 316, 27.11.95, pp. 48-57.

32 For this, see the background discussion in the Council's Explanatory Report on the Convention, adopted on 26th May 1997 (OJ C 191, 23.6.97, pp. 1-10).

"- 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 European Communities or budgets managed by, or on behalf of, the European Communities,

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

– the misapplication of such funds for purposes other than those for which they were originally granted;"

and, *in respect of revenue*, to:

"- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,

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

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

Member States are obliged by Article 1 (2) of the Convention to ensure that the conduct referred to in these definitions is the subject of criminal offences in their national law. In turn, such offences - including any participation in them, or attempts or instigations to commit them - must be made punishable by penalties satisfying the criteria of effectiveness, proportionality and deterrence, criteria first established in case law of the European Court of Justice.[33] Any "serious fraud", by which is meant fraud above a minimum amount which must not be set at a sum exceeding 50 000 ECU, must involve deprivation of liberty (Article 2 (1)).

Thus, as the Explanatory Report on the Convention adopted nearly two years after signature of the Convention itself explains, the Convention "is designed to ensure greater compatibility between Member States' criminal law provisions by establishing minimum rules in criminal law."[34] This is not full-scale harmonisation of criminal law or anything like it. In particular, the jurisdiction of national courts,

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33 See Case 68/88 *Commission* v *Hellenic Republic* [1989] ECR 2965.

34 *Ibid.*, Report of 26th May 1997 OJ, C 191, 23.6.97, pp. 1-10 (3).

and national procedures in criminal matters, are left untouched. The Convention has been followed up by two Protocols designed to enhance certain aspects of mutual legal assistance in cross-border matters and to attack criminal phenomena such as money-laundering and corruption when they are committed in connection with fraud against the budget.[35] The Commission attaches particular importance to its own role in assisting and helping co-ordinate national investigations into cross-border fraud.[36] The parent Convention already obliges national authorities to co-operate in the investigation, prosecution and punishment of fraud offences which concern at least two Member States (Article 6 (1).[37] It was, however, felt necessary to emphasise the Commission's role as facilitator of such co-operation and as a co-ordinating agency. Article 7 of the Second Protocol therefore requires the Commission and the Member States to assist each other in the fight against fraud, active and passive corruption and money laundering. The Commission will give "technical and operational assistance" to the Member States, in so far as this is required to help them co-ordinate their investigations. To this end, the provision also stipulates that the Commission and the Member States may exchange information with one another.[38]

By Council Act of 29th November 1996 the Member States eventually agreed to stipulate that the European Court could have jurisdiction by way of preliminary rulings concerning the interpretation of the 1995 Fraud Convention.[39] This solved a long-running dispute about the appropriateness of Court oversight of "Third Pillar" instruments in which the UK took the role of the main opposer. Pursuant to the Protocol agreed on 29th November 1996 Member States may declare that they wish to "opt-in" to European Court jurisdiction. They are given a choice between allowing all their courts to refer questions of interpretation of the Fraud Convention

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35 The First Protocol of the Convention on the protection of the European Communities' financial interests is annexed to the Council Act of 27th September 1996, OJ C 313, 23.10.96, pp. 1-10. The Second Protocol of the Convention on the protection of the European Communities' financial interests is annexed to the Council Act of 19th June 1997, OJ C 221, 19.7.97, pp. 11- 22.

36 L Kühl, op. cit., p. 268.

37 Furthermore, the 1995 Convention provides, perhaps rather ambitiously, for co-operation between national prosecutors in order to "centralize" prosecution of offenders in a single Member State, in cases where more than one Member State has jurisdiction (Article 6 (2)).

38 Tax lawyers and tax prosecutors should also note the terms of Article 6 of this Convention which prescribes that "A Member State may not refuse to provide mutual assistance in respect of fraud, active and passive corruption and money laundering for the sole reason that it concerns or is considered as a tax or customs duty offence."

39 OJ C 151, 20.5.1997, p. 1. Jurisdiction may also be invoked in relation to the Protocols.

or limiting the reference procedure to courts of last resort. The UK Government remains basically opposed to any opt-in to Court jurisdiction in "Third Pillar" matters. Subject, therefore, to a change of heart, the result is that UK courts will not be able, in the course of national proceedings, to refer questions arising from the Fraud Convention to Luxembourg for an authoritative ruling.[40]

The final instrument to mention in this section is the recently concluded "Naples II" Customs Co-operation Convention.[41] Another instrument adopted under the intergovernmental provisions of Title VI of the Treaty of European Union, it recognises the crucial role that Customs plays in prevention, detection and prosecution of offences involving cross-border illicit trafficking in goods of all kinds. Owing to the very nature of its work, HM Customs in this country is dependent on good co-operation with overseas and especially EU partners. The Customs Co-operation Convention builds upon the 1967 Naples Convention on Mutual Assistance between Customs administrations by elaborating upon existing forms of mutual assistance. It also contains innovative provisions which seek to regulate certain forms of operational cross-border actions described as "special forms of co-operation", namely hot pursuit, cross-border surveillance, controlled delivery, covert investigations and joint special investigations.[42] The relevance of this Convention to the topic of fraud is that its provisions on mutual assistance apply in the context of excise and VAT fraud; the special forms of co-operation referred to shall be available to combat "illegal cross-border trade in taxable goods to evade tax or to obtain unauthorised State payments in connection with the import or export of goods, where the extent of the trade and the related risk to taxes and subsidies is such that the potential financial cost to the budget of the European Communities or the Member States is considerable."[43]

It must, finally, be noted that to date none of these "Third Pillar" instruments has entered into force. Indeed it is rather astonishing to note that not a single Member

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40 Divergent interpretations of Third Pillar instruments across the Union are likely to result from this *à la carte* approach to Court jurisdiction (cf. N Fennelly, "Preserving the Legal Coherence within the New Treaty: The Court of Justice after the Treaty of Amsterdam", 1998 5 *Maastricht Journal of European and Comparative Law*, pp. 185-199).

41 Council Act of 18th December 1997 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on mutual assistance and co-operation between customs administration, OJ C 24, 23.1.98, pp. 1-23.

42 Some of the provisions governing these matters are subject to reservation (see Article 30 of the Convention).

43 Article 19 (2)(c) of the Customs Co-operation Convention.

State has taken steps to ratify the parent Fraud Convention, more than three years after signature. In the words of Commissioner Gradin, the Conventions and related protocols remain "a dead letter".[44] This is obviously a source of acute disappointment to the Commission, if perhaps tinged with a note of satisfaction that Member States appear unable to bring into force effective legal measures outside the Community law framework. Member State governments agreed at their Amsterdam European Council meeting in June 1997 to set a deadline for ratification of mid-1998 but this has expired without action. The European Parliament appears even more uncomprehending and frustrated than the Commission at the delays and is beginning to suggest that these intergovernmental instruments be replaced by Community law measures, which offer a clearer prospect of swift entry into force and greater legal effectiveness.[45] As we shall now see, there are already on the Community law statute book several anti-fraud measures which, according to the Commission's Fraud Report, seem to be working effectively.[46]

Community Law Instruments to Protect the Community Budget

The first point to note in relation to Community instruments adopted to assist the fight against fraud on the Community budget is that they eschew any encroachment on the criminal jurisdiction of the Member States. Thus, the Community Regulation of 18th December 1995 on the protection of the Community's financial interests, whose main purpose is to lay down a basic legal framework for the formulation of uniform Community administrative penalties, explicitly states that it "will apply without prejudice to the application of the Member States' criminal law."[47]

Secondly, the scope of Community instruments developed to assist the fight against fraud is broader than that of the "Third Pillar" Fraud Convention. Regulation 2988/95 uses the concept of "irregularity" to capture *both* the types of fraud covered

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44 Commission Fraud Report, Foreword, p. 4.

45 See the Parliament's resolution of 7th October 1998 calling on the Commission on the basis of the EC Treaty's new Article 280 (*infra*) "to submit proposals for regulations which may substitute for conventions and additional protocols that have not been ratified." (Resolution A4-0297/98 on the independence, role and status of the Unit for Coordination of Fraud Prevention (UCLAF) (Court of Auditors Special Report No. 8/98 concerning the Commission departments responsible for fighting fraud) (C4-0483/98), published in provisional edition of Minutes of the Parliament's sitting of Wednesday 7th October 1998.)

46 Commission Fraud Report, pp. 47 et seq.

47 Council Regulation No. 2988/95, OJ L 312, 23.12.95, pp. 1-4.

by the Fraud Convention of 1995 and other irregularities. The composite term "irregularity" is defined in Article 1 (2) of the Regulation as: "any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure."

The main difference between the Regulation and the Convention definition is, as the Commission notes, that the former "covers both simple omission due to error or negligence which is likely to have a harmful effect on the Communities' budget, and intentional and deliberate acts which correspond for their part to the more restrictive concept of fraud as defined in the penal convention."[48]

The Regulation entered into force on 26th December 1995, a mere three days following its publication in the Official Journal. It is directly binding on Member States without any need for national legislative implementation or ratification. As already indicated, the general principles set out in the Regulation are intended to provide a framework of a uniform system of Community administrative penalties. The system established by the Regulation means that a Member State's "competent authorities" will be empowered to impose administrative penalties (including fines) for intentional or negligent cases of fraud against the budget. The penalties may be imposed on any economic operator found to have committed an irregularity, whether natural or legal persons or "other entities on which national law has conferred legal capacity" (Article 7 of the Regulation). The penalties shall be of a type consistent with the Regulation but their nature and scope will be determined by further Community rules. The Commission Fraud Report indicates that it is currently "pursuing its policy of introducing administrative penalties into the fields of own resources and direct expenditure."[49]

Another Community instrument to which attention should be drawn is the Regulation of 11 November 1996 concerning Commission on-the-spot checks and inspections to detect fraud. In force in all Member States since 1 January 1997, this Regulation too steers clear of any claim to affect "Member States' powers regarding the prosecution of criminal offences" or, for that matter, "the rules governing mutual

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48 Commission Fraud Report, Glossary, p. 67.

49 *Ibid.*, p. 48.

assistance between Member States on criminal matters."[50] But it is certainly envisaged that the inspections carried out by the Commission in exercise of the powers conferred by the Regulation - inspections which may be made either independently or alongside officials of the Member State - may produce evidence for use in national criminal proceedings. Article 8 (3) of the Regulation indicates that reports prepared by Commission inspectors, provided that they are drawn up in accordance with the procedural requirements of national law "shall constitute admissible evidence in administrative or judicial proceedings of the Member State ... in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors." According to the Commission, the on-the-spot inspection powers are working well: it has reported that, in 1997, it used the powers given it by the Regulation in six Member States, including the UK. Moreover, it appears that there were "no serious disputes about the respective roles of the Commission and national inspectors."[51]

The Community instruments referred to are clearly proving to be valuable tools in the fight against fraud. Their effectiveness contrasts with the failure of "Third Pillar" methods. For this reason, Commission and Parliament efforts are likely to turn, after entry into force of the Amsterdam Treaty, to developing the Community law framework for fighting fraud. The Amsterdam Treaty extends the possibilities for action in the Community sphere by conferring on the Council, in the new Article 280 of the EC Treaty, legal authority to enact "the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States." Hopes that these new legal provisions may offer a basis for converting unratified Convention instruments into Community law measures may however be frustrated by the last sentence of the new Article 280 (4), which stipulates that the Council measures "shall not concern the application of national criminal law or the national administration of justice."[52] This clause is indicative of Member States' continuing reservations about the intrusion of Community measures into the national criminal domain.

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50 See recital 16 of the preamble and Article 1 of the Regulation which is published in OJ L 292, 15.11.96, pp. 2-5.

51 Commission's 1997 annual report, p. 47.

52 See European Parliament report referred to in note 45 above.

National Law to Protect the Community Budget

Learned commentators in both England and Scotland attest to the fact that the UK's two main domestic legal systems are certainly compatible with the "assimilation principle" which requires equally repressive treatment of Community and national frauds.[53] One consequence of this principle would be that the English common law offence of "cheating the public revenue" - an offence which persists notwithstanding the existence of statutory offences applicable to similar conduct - should be available to deter or repress serious cases of EC fraud.[54] With regard to sanctions, UK tax legislation provides a good example of the recognition in UK law of a scheme of administrative penalties comparable to some of those outlined in Regulation 2988/95, referred to above. It is with reference, *inter alia*, to the UK's tax enforcement regime that Leigh has concluded, from a UK perspective, that "there is no abstract reason why a system of administrative enforcement and administrative penalties could not be made to apply to EC benefit and funding regimes".[55] A body of Community "administrative penal law" in the area of fraud would not, in other words, be entirely foreign to UK practice.

As to compliance with the broad definition of fraud or irregularities in the European instruments referred to, a European Commission source has cast doubt on whether existing English law would fully fit with the necessary scope of the prohibition.[56] Scots law on fraud is still common law based and thus lacks the specificity of English statutory definitions. For this reason and with reference in particular to the case of *Adcock Archibald*[57], Scots commentators take the view that the law north of the

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53 The assimilation principle is enshrined in Article 209a of the EC Treaty. The opinion of Smith is that in all probability law in the United Kingdom would exceed the assimilation obligation (A T H. Smith, *Property Offences: The Protection of Property through the Criminal Law*, Sweet & Maxwell, London, 1994, p. 25).

54 Cf. *R* v *Mavji* [1987] 2 All ER 758.

55 L H Leigh, "United Kingdom: The System of Administrative and Penal Sanctions" in Commission of the European Communities (ed.), *The System of Administrative and Penal Sanctions in the Member States of the European Communities, Volume I - National Reports*, Office for Official Publications of the European Communities, Brussels and Luxembourg, 1994, pp. 353- 373 (362).

56 L Kühl, op. cit., Part II, p. 327. It is not possible to do justice to this argument or the counter-arguments given the scope of the present article.

57 1925 *Justiciary Cases* 58. Incidentally, a case which comes in for much criticism from Brian (now Lord) Gill in his PhD thesis *The Crime of Fraud: A Comparative Survey* (University of Edinburgh, 1975) when he describes it as indicating " a liability so wide-ranging and indeed so limitless that is well and truly out of hand."

border "is, in terms of the crimes which it recognises, ... well placed to deal with fraud of all sorts, including fraud on the European budget."[58]

On the question of jurisdiction to try transnational frauds against the Community budget in England and Wales, on the one hand, and Scotland, on the other, it is also necessary to distinguish between the two systems. At common law in England jurisdiction in relation to offences involving foreign elements is determined by reference to the place where the last act or event took place or was intended to take place. Scottish common law rules on criminal jurisdiction are somewhat more flexible.[59] The English doctrine is inadequate to deal with international fraud, including fraud against the Community budget, where the conduct which goes to make up the offence can take place, at different stages, in several different countries. Concern that the "last act" doctrine might result in an increase in fraudulent activity in and around the financial centre of the City of London prompted the enactment of Part I of the Criminal Justice Act 1993, the effect of which - for England and Wales - is to facilitate jurisdiction where one of the ingredients of a fraud or other serious offence occurs in England and Wales.[60] Having apparently solved the problem, it is not clear why, at the end of 1998, this Part of the Act has not been brought into force.

The terms of s.71 of the Criminal Justice Act 1993 do apply, however, currently in both England and Scotland; this provision creates what Arlidge and Parry call "an offence of aiding and abetting frauds on the Community committed outside the United Kingdom".[61] The provision makes it an offence to assist in or induce any conduct outside the UK which involves the commission of a serious offence against the law of another Member State, where that offence involves contravention of rules designed to protect the Community budget. The section requires evidence in the form of a certificate to be produced by the Member State concerned to prove the occurrence of the specified offence. The admissibility of evidence obtained in

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58 A Brown, "Fraud Cases in the Scottish Criminal Justice System", AGON: BULLETIN TRIMESTRIEL (Associations des juristes européens pour la protection des intérêts financiers des Communautés europénnes), 1997, Nos. 16 and 17(p. 10).

59 *Laird and Goddard* v *Her Majesty's Advocate*, 1984 *Scottish Criminal Case Reports* 469.

60 See s. 2 of the 1993 Act. This refers to "Group A" offences as defined in s. 1 to include an array of statutory offences punishable under the Theft Acts of 1968 and 1978 and the Forgery and Counterfeiting Act of 1981 as well as the common law offence of cheating in relation to the public revenue, referred to above.

61 *Arlidge & Parry on Fraud* (2nd ed. by A Arlidge), Sweet & Maxwell, London, 1996, p. 364.

another jurisdiction in the European Union is not, in general, automatic, in any UK jurisdiction, assuming it can be obtained in the first place.[62] There is more general work going on in the context of "Third Pillar" co-operation to improve mutual assistance arrangements so that such difficulties may be ironed out.

Conclusions

Community fraud is currently a very hot topic in the Member States and in the Community institutions. Money matters and losing large amounts of it to fraudsters matters even more in times when the commodity is scarce. If, as some allege, fraud is possibly being committed or connived at by the European Union's institutions, then this only makes matters worse. A number of topical matters may be mentioned by way of conclusion to illustrate some of the continuing difficulties faced in the fight against Community fraud.

First, *Corpus Juris*.[63] This is a study - with, it must be said, a very grandiose name - which was commissioned by the European Commission. The eight distinguished academic experts involved in the study produced a collection of thirty-five proposed penal rules for the protection of the European Union's financial interests. The study was directed by Professor Delmas-Marty of the University of Paris who has also made clear that the group had an additional objective, namely the creation of "a largely unified European legal area" in which fraud can be prosecuted without territorial restriction, under the direction of a European Public Prosecutor.[64] The rules, if adopted would go far beyond anything considered in this article, effectively "unifying" aspects of criminal law and procedure at central level. There is no legal basis in the Treaties for such a programme. Logically, therefore, the rules have not been presented in the form of an official proposal for action. They mark one possible - cogently argued, but currently not very likely - way ahead. Delmas-Marty and her colleagues have, however, certainly succeeded in drawing public attention to the constitutional issue of how to reconcile continuing Member State sovereignty over criminal matters with effective action to combat serious trans-border criminality affecting an essential Community interest. The broader sovereignty debate is to be

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62 See R G Stott "Mutual Legal Assistance - The View from the Scottish Trenches", in P J Cullen and W C Gilmore (eds.) *Crime sans frontières. International and European Legal Approaches*, 1998 Hume Papers on Public Policy, Vol. 6, Nos. 1 & 2, pp. 191-197 (196).

63 M Delmas-Marty et al., *Corpus Juris - introducing penal provisions for the purpose of the financial interests of the European Union*, Economica, Paris, 1997.

64 See her summary in the *European Law Journal* article, op. cit., pp. 110-115.

felt here too.[65]

Resistance to greater Community, as opposed to intergovernmental, powers to fight fraud against the budget can be attributed partly, also, to genuine and long-standing concerns about the ability of the Commission to manage the general budget effectively and prudentially.[66] Suspicions of fraud and corruption within certain Commission programmes have surfaced more recently; in response, M. Santer has made proposals to reform the Commission's handling of fraud cases, especially when enquiries require to be conducted internally.[67] On 2 December 1998, the European Parliament received notification from the Commission President of proposals for a Regulation which will set up an independent body outside the Commission to be known as OLAF.[68] It will carry out enquiries both externally in the Member States and internally, inside all EU institutions.[69]

The lack of confidence and uncertainty which currently surround the management of Community funds by the Commission create an unfavourable environment in which to embark on radical projects such as *Corpus Juris*. It is easier, then, at present, to concentrate on more mundane, but still complex, matters like improving forms of mutual legal assistance and making sure that national authorities co-ordinate their investigations and prosecutions of transnational fraud, drawing on Commission information and expertise where available. Important new laws and regulations have been put in place both at European and domestic level to help combat Community fraud. Inexplicably, at both levels, there are delays in bringing some of the most important provisions into force. Words have yet to be matched by deeds in the fight against fraud.

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65 Contrast the *Daily Telegraph* onslaught on the proposals in its edition of 30th November 1998 ('Alarm over Euro-wide justice plan', pp. 1-2 and editorial comment) with the response by the UK expert who sat on Delmas-Marty's expert panel: J Spencer, 'Fraudbusters get set for Euro action', *The Times*, 8th December 1998, p. 39.)

66 House of Lords Select Committee on the European Communities, Session 1993-94, 12th Report, *Financial Control and Fraud in the Community*, HMSO, London, 1994.

67 See Agence Europe, Daily Bulletin, no. 7355, 3rd December 1998, pp. 8, 14-15.

68 *Office pour la Lutte Anti-Fraude.*

69 Commission Press Release of 2nd December 1998, IP/98/1048.