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Report

drawn up on behalf of the Legal Affairs Committee

on the relationship between Community law and criminal law

Rapporteur: Mr Paul DE KEERSMAEKER

PE 41.400/fin.

English Edition

By letter of 10 December 1969 the Legal Affairs Committee requested authorization to draw up a report on the relationship between Community law and criminal law.

Authorization was given by the President of the European Parliament in his letter of 12 December 1969.

Following several changes of rapporteur, Mr. de Keersmaeker was appointed rapporteur on 20 June 1974.

The Legal Affairs Committee held an initial detailed discussion on 7 March 1972. The draft report was discussed at its meetings of 21 October 1975, 19 October 1976 and 21 January 1977. At this last meeting the motion for a resolution was adopted by 16 votes in favour with one abstention.

The following were present: Sir Derek Walker-Smith, Chairman; Mr. de Keersmaeker, rapporteur; Lord Ardwick, Mr. Bangemann, Mr. Bayerl, Mr. Bouquerel, Mr. Broeksz, Mr. Krieg, Mr. Masullo, Mr. Memmel, Lord Murray of Gravesend, Sir Brandon Rhys Williams, Mr. Santer, Mr. Scelba, Mr. Schmidt, Mr. Schwörer and Mr Tomney.

C O N T E N T S

A

The Legal Affairs Committee hereby submits to the European Parliament the following motion for a resolution, together with explanatory statement:

MOTION FOR A RESOLUTION

on the relationship between Community law and criminal law

The European Parliament,

- having regard to the report of the Legal Affairs Committee (Doc. 531/76);

1. Recognizes that a general harmonization of the national criminal law of the Member States of the Community is a complicated and sensitive subject, so that it is unlikely to be achieved in the near future, but stresses that where offences against Community law are concerned, harmonization should be the Community's aim;

2. Emphasizes that Community legislation must, if the Community is to function properly, be respected throughout the Member States and that, to this end, there must be sanctions against those who contravene the provisions of Community law;

3. Notes, however, that the Commission's powers of sanction are not of a nature to provide a complete solution to the problem of Community law enforcement;

4. Urges the Commission of the European Communities to make full use of such powers of sanction as are conferred upon it by the Treaties;

5. Calls upon the Member States, therefore, to cooperate urgently in measures designed to ensure that breaches of Community law are the subject of sanctions under their national legislations particularly to prevent fraud upon Community funds;

6. Notes the difficulties and drawbacks such as those caused by: like cases not treated alike, distortion of competition, disregard of the ne bis in idem rule, effects of the principle of territoriality, which nevertheless inevitably result from a system whereby the Community must rely almost entirely on the national legal systems of Member States for the enforcement of Community law ;

7. Is pleased to note that the Commission has submitted to the Council draft protocols, on which Parliament has been consulted, to be added to the relevant Treaties concerning
(a) the criminal liability and protection of Community officials, and
(b) common rules for the suppression of infringements by individuals in matters governed by Community legislation ;

8. Awaits the report of its Legal Affairs Committee on these draft protocols ;

9. Invites the Commission to study the laws of the Member States on the criminal liability of legal persons, an area in which the differences between Member States cause particular difficulty, as much Community legislation affects such persons rather than natural ones ;

10. Invites the Commission to consider the use of Article 100 of the EEC Treaty to harmonize existing provisions of national legislation relating to sanctions for breaches of Community law, and to undertake studies in and consultations with the Member States to assess the practicability of the future use of Article 100 ;

11. Instructs its President to forward this resolution and the report of its committee to the Council and Commission of the European Communities and to the national Parliaments and Ministers of Justice of the Member States.

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B. EXPLANATORY STATEMENT

A. INTRODUCTION

1. This draft report already has a relatively long history. A letter of 5 December 1968 from the Chairman of the Committee on Agriculture to the Chairman of the Legal Affairs Committee raised the question of sanctions to be applied following breaches of Community law. The Legal Affairs Committee considered the subject to be of such importance that it requested, and obtained, permission to prepare an own-initiative report on it. A draft note (PE 22.504) was drawn up by Mr BOERTIEN and on the basis of it the committee held a discussion at its meeting of 7 March 1972. Since that date, there have been various changes of rapporteur. Your committee considers it preferable to start afresh at this stage, particularly in view of the developments and changes that have occurred in the structure and law of the Community since 1972.

B. THE NEED FOR SANCTIONS IN COMMUNITY LAW

2. First of all, the scope of this report must be established and it is helpful here to look at the Eighth General Report on the Activities of the European Communities in 1974. Paragraph 145, p.76, begins thus: 'Criminal law as such is not a matter of Community competence but remains within the jurisdiction of the individual Member States. In general the question of harmonization of national criminal laws does not arise at the moment.' Your committee agrees with this statement. Criminal law is not only an area in which there are the widest possible divergences between the legal systems of the Member States but is also one which affects vitally the liberty of the citizen and the order and security of the state, and therefore is regarded as particularly a matter of national sovereignty. It seems quite inappropriate at this stage in the development of the Community to think in terms of any general harmonization, although it may be hoped that this will not always be the case.

3. However, the Community has a set of defined objectives to be fulfilled and tasks to be carried out for which it makes provision through its legislative process within the framework of the Treaties. If this process is to be wholly effective, the legislation it produces must be enforced and respected throughout the Community, and this will not be achieved without the aid of sanctions against those who contravene the provisions of Community law. Otherwise the Community will remain vulnerable to numerous and varied frauds. It must be recalled that so far the Community acts mainly within an economic context and is therefore

not concerned with many traditional criminal law situations, although some, such as forgery of Community documents, are clearly of importance to it. The Community's interest consequently lies in the field of criminal law as it relates to economic matters.

Here there is a considerable problem of terminology. As a Community criminal law would operate in the area where matters of business, commerce and economics are regulated by Community law, so it is important to know what is contained within that area. One may refer to 'economic law' but this is, unfortunately, a concept which has reached different stages of development in different Member States, such development not taking place invariably along the same lines. In France it is a well-established concept, whilst the notion of 'law of the economy' is utilised in German and Italian legal literature. In the Netherlands, the expression 'social-economic law' is found, whilst in the United Kingdom the term 'economic law' is not used at all, although 'commercial law' and 'business law' are found. When it is borne in mind that the use of the same phrase by different authors does not necessarily mean the same thing, one realises the dimensions of this problem, a study of which falls outside the scope of this report.

4. It may be, however, that within the Community context it is sufficient simply to speak of Community law, so that the difficulties of definition are avoided. Article 2 of the EEC Treaty provides that: 'The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it'.

Given that starting-point, the Community's legislation has been mainly directed towards an end conceived in terms of regulating the economy, within the limits of the Treaties. It is, therefore, legislation of this nature which the Community seeks to have respected. Hence it is not concerned with measures to prevent violence, maintain public order and secure national safety.

5. As for the character of the sanctions themselves, the Community must consider, besides administrative and other civil sanctions, fully penal sanctions, if the proper observance of its law is to be ensured, for the lessening importance of distances and greater facilities for crossing frontiers have given delinquents new and wider possibilities, which can

only be countered by the use of the weapons traditionally provided by the criminal law. As the legislator intervenes increasingly in economic life, it becomes subject not only to legislative provisions of an 'economic' nature, but also to criminal ones as well, as the experience of Member States shows.

C. APPLICATION OF SANCTIONS

1. Application by the Community

6. It may be that the ideal would be to give the Community a supra-national criminal jurisdiction, with its own system of procedure, which would punish infringements of the Treaties in all Member States, but this is not something which is likely to be realised in the near future. The Commission, in reply to Written Question No. 596/74 by Mr Kater, stated: 'The Commission is well aware of the potential value of a European penal code in the campaign against economic fraud but prefers, given the present legal and political obstacles in the way of defining such a code, to concentrate its efforts on steps which will produce more immediate results.'[1] The Community, however, through its executive the Commission, is not entirely devoid of powers of sanction, although they are of a restricted nature.

7. The specific power to impose sanctions is given in Art. 87(2)(a), which provides that regulations made under Art. 87(1) (i.e. those giving effect to the principles set out in Articles 85 and 86 which concern the rules on competition) shall be designed in particular inter alia to ensure compliance with the prohibitions laid down in Art. 85(1) and 86 by making provision for fines and periodic penalty payments.

Council Regulation 17/62 implements Articles 85 and 86. Article 15 of this Regulation empowers the Community to impose on undertakings or associations of undertakings fines (i) of from 1,000 to 1 million units of account (or up to 10% of the last year's financial turnover, if greater) for substantive offences, e.g. infringements of Articles 85(1) or 86; and (ii) of from 100 to 5,000 units of account for procedural offences, i.e. those arising under the regulation, such as supplying incorrect or misleading information. Article 16 of the Regulation provides for periodic penalty payments of from 50 to 1,000 units of account

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[1] O.J. No. C.108, p.18, 15.5.1975

per day in order to compel undertakings or associations of undertakings to respect the EEC competition rules. Other regulations[1] permit the imposition of fines and periodic penalty payments, but so far it is only under Council Regulation 17/62 that sanctions have in fact been imposed, so it is this one that presents the greatest interest.

8. A quite considerable body of jurisprudence has been developed in relation to the imposition of sanctions, on the basis of Commission practice and the case law of the Court of Justice, but these sanctions remain something of a hybrid. Regulation 17/62, Article 15, stipulates that decisions imposing fines are not of a criminal law nature. It follows that a decision against an undertaking does not count as a criminal conviction. However, both the substantive law and the law of procedure which have developed with regard to fines have to some extent the characteristics of ordinary criminal law and it may be doubted whether those responsible for an undertaking, who are ordered to part with some of their profits, the amount being fixed in relation to their degree of fault, do not consider that they are being punished, in the same way as they might be in a criminal court. As legal persons are generally the object of fines, the complicated question of the criminal responsibility of such persons is part of any analysis of the true legal nature of fines.

9. It should be noted that the ECSC Treaty also makes provision for pecuniary sanctions in the form of fines and penalties. Although there are several relevant Articles[2], in practice sanctions have only been imposed, since 1954, under Article 47, paragraph 3 (evading obligations under decisions taken in pursuance of the Article or knowingly furnishing false information), Article 64 (infringing the provisions of the chapter relating to prices or decisions taken thereunder), and Article 65(5) (mainly infringing the law concerning agreements). Although there are some differences between the competiton law of the EEC and the ECSC, in particular as it relates to sanctions, the latter have been applied in

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[1] Council Regulation No. 1017/68, as amended, which applies the competition rules to transport by rail, road and inland waterways.

Commission Regulation No. 1630/69

Council Regulation No. 11/60 relating to the abolition of discriminatory charges and provisions in the field of transport.

[2] See Articles 54, para. 6, 58(4), 59(7), 66(6), 66(7) and 68(6).

accordance with the same principles, mutatis mutandis, in both cases. In general, the ECSC Treaty is more detailed and provides more opportunities for the imposition of pecuniary sanctions although, as has been seen, many of these have not been used.

The EAEC Treaty provides in Article 83 for sanctions of a non-pecuniary nature against persons or undertakings infringing provisions relating to safeguards. Its Article 194 lays down that an infringement of the obligation of secrecy shall be treated by each Member State as an act falling within the scope of its laws relating to acts prejudicial to the security of the state or to disclosure of professional secrets. This is an interesting provision, as it puts the obligation directly on the Member States, who are required at the request of any Member State concerned or of the Commission to bring a prosecution under national law. An instance of a similar obligation upon a Member State is found in the EEC Treaty in Article 27 of the Protocol on the statute of the Court of Justice, as well as in the corresponding provisions of the other two Treaties[1]. These provisions penalise perjury by witnesses in cases before the Court. There is no doubt that in all these situations criminal proceedings would be resorted to by the Member States concerned.

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[1] Art. 27 of this Protocol to the EEC Treaty reads as follows:

'A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court, the Member State concerned shall prosecute the offender before its competent court.'

Art. 28 of the corresponding Protocol to the EAEC Treaty is in the same terms.

Art. 28, para. 4, of the corresponding Protocol to the ECSC Treaty reads:

'Where it is established that a witness or expert has concealed facts or falsified evidence on any matter on which he has testified or been examined by the Court, the Court is empowered to report the misconduct to the Minister of Justice of the State of which the witness or expert is a national, in order that he may be subjected to the relevant penal provisions of the national law.'

Under the EEC and ECSC Treaties, natural persons as such are only subject to sanctions, by way of fine, in exceptional cases. One of these is provided by the ECSC Treaty, Article 66(6)[1] in relation to agreements and concentrations.

10. All the afore-mentioned possibilities of imposing sanctions depend, whatever may be their nature, on action taken by the Commission, the executive organ of the Community. Although the Commission as the guardian of the Treaties has the task of seeing that they are observed, sanctions imposed by it nevertheless have not been created by a democratically elected legislature, nor applied by a court of law although their imposition may be challenged before the Community Court of Justice (Article 173 of the EEC Treaty). This lays them open to objection as a basis of a Community system of law enforcement and it seems unlikely that they were ever intended to fulfil such a role.

11. Is there in fact a Community system of law enforcement? The EEC Treaty does not mention criminal law and gives no express power to the Community directly to make any act or omission a criminal offence in a Member State. The same is true of the ECSC and the EAEC Treaties, although the former, as already noted, has a much more complete system of 'administrative' sanctions than the other two. It would seem that

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[1] Article 66(6) of the ECSC Treaty reads as follows:

'The High Authority may impose fines not exceeding:

- 3 per cent of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in paragraph 4;

- 10 per cent of the value of the assets acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in paragraph 1; this maximum shall be increased by one twenty-fourth for each month which elapses after the end of the twelfth month following completion of the transaction until the High Authority establishes that there has been an infringement;

- 10 per cent of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have obtained or attempted to obtain authorisation under paragraph 2 by means of false or misleading information;

- 15 per cent of the value of the assets acquired or regrouped, on undertakings within its jurisdiction which have engaged in or been party to transactions contrary to the provision of this Article.

Persons fined underthis paragraph may appeal to the Court as provided in Article 36.'

the authors of the treaties, concerned primarily with the creation of a new system of law, did not direct their attention to any great extent to the enforcement of that system.

In view of this, the question has been raised whether the powers of the Community in this field might be extended by secondary legislation, i.e. in the case of the EEC particularly, by regulations, directives, or decisions. In this context, Article 172 of the EEC Treaty has been invoked, as perhaps giving the Council a right to impose sanctions generally, rather than only in particular, specified, cases. The Article reads as follows:

> 'Regulations made by the Council pursuant to the provisions of this Treaty may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations.'

An argument against this interpretation of the Article is the very general power which it would bestow upon the Council. This power would be open to the objection that it was an 'undemocratic' power, in the sense that an elected legislature would not intervene directly in, nor bear responsibility for, its exercise. This is a situation that might be affected by the direct election of the European Parliament, with the changes in the balance between the Community institutions that might be expected to result, but that stage has not yet been reached. The Council would be subject to some control in the exercise of such a power, if jurisdiction with regard to the penalties were given to the Court of Justice. The Court could also review the legality of the Council's acts, on the basis of Article 173 of the EEC Treaty, which would provide a somewhat drastic form of control if the Court considered the acts of the Council illegal because based on a wrong interpretation of Article 172. However, such a situation would hardly be desirable and indeed the Council has not sought so far to take advantage of the argument permitting a generous interpretation of Article 172. There is the further problem that such an interpretation would be against the traditions of Member States which usually require that legal texts affecting the liberty of the subject should be restrictively interpreted.

At present your committee therefore prefers to regard Article 172 as referring only to Council regulations made under provisions of the Treaty which give an express power to impose sanctions, such as Article 87 of the EEC Treaty.

12. Article 235 of the EEC Treaty[1] has also been invoked as giving the Council power to legislate in matters of criminal law. A recent opinion of the Court of Justice relating to the proposed draft convention on the suppression of infringements in certain domains of Community law, to which reference will be made later, gives some support to this use of Article 235.

So far, offences have only been created and penalties described in this way under Article 235 in special cases, such as that of the European Company, where the Commission has submitted proposals to the Council under Article 235 on quite another subject. Its criminal legislation under the Article has therefore always been incidental to other legislation. The question still remains as to whether this Article allows the Council to legislate generally in matters of criminal law.

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[1] Article 235 of the EEC Treaty reads as follows:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.'

II. Application of sanctions by the Member States

13. Article 5 of the EEC Treaty provides, inter alia, that:

'Member States shall take all appropriate measures whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.'

Although the exact nature of the obligations this provision places upon Member States has been debated, there is no doubt that, as a matter of fact, they alone dispose of the coercive machinery necessary for effective sanctions against infringements of Community law. In practice, therefore, the Community has to rely upon them for its criminal law. In order to 'take appropriate measures ..... to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community .....' they have to adopt national provisions. These are generally of an executory nature but at times also consist of penal or administrative sanctions.

14. This solution, although at present inevitable, is not, however, without its difficulties and disadvantages, which arise in part from the disparities between the legal provisions of Member States for dealing with infringements of Community law.

The first problem arises in determining when a breach of Community legislation has been committed. This is easiest in the case of a regulation, under which constitutive elements of a breach will be the same in all Member States. In the case of a directive, the relevant provisions of national law play a greater role and there are differences between the acts and/or omissions which will amount to a breach of Community law, with the undesirable result that what may be a breach in one Member State may not be so in another. Once the existence of a breach has been established, each Member State must determine what provisions of its national law it will apply to it. Some conduct constituting a breach of Community legislation will be considered as criminal in all Member States and will be followed by the application of criminal sanctions. Forgery is perhaps the best example. Other types of conduct may fall within the provisions of the criminal law in some Member States, whilst in others they will attract sanctions from the administration or from a professional body, which may also perhaps take disciplinary measures, or be dealt with by a civil court.

These differences lead to disparities in procedure and in the nature of the sanction applied, which could be imprisonment, a fine, a seizure of goods, payment of damages, exclusion from a professional body, or a combination of these, for the same conduct occurring in different countries.

Variations in procedure are not perhaps of vital concern, as they would occur even were all cases to be dealt with by a criminal court in every Member State, but those in the nature and severity of sanctions are difficult to reconcile with the principle, which no doubt would find favour in all Member States, that like cases should be treated alike.

15. There is also the question of distortion of competition to be borne in mind. Differences in the nature and severity of sanctions could create situations for different undertakings where competition between them would be distorted and the economy of the Community affected. This is only conjecture until research is carried out to discover exactly what effect the disparities between existing national provisions have. Some idea may be gained, in relation to a specific sector, from the report of the special Committee of Inquiry[1] set up by the Commission[2]. This concerned the Guarantee Section of FEOGA (dairy products sector) and dealt amongst other things with the problem of sanctions and subsidies improperly obtained. One of the committee's recommendations was that the disparities in the nature and scale of sanctions susceptible of creating privileged channels for frauds, should be eliminated[3]. The committee hoped that, as some of the problems it had noted could be solved by the harmonisation of criminal law, the Commission would accelerate the work it had begun on this.

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[1] For details of this committee, see p.15 post

[2] See Doc. No. SEC(74) 3981 final

[3] The Commission intends to examine difficulties in the application of criminal law for the protection of Community funds created by differences from one country to another as to what constitutes an offence and what penalties are applicable. See answer to Written Question No. 596/74 by Mr Kater (OJ C.108 of 15 May 1975).

16. One of the most important problems in this field does not arise from differences between Member States but from something which is common to them all. This is the principle of territoriality, whereby each state, as a general rule, concerns itself only with criminal conduct occurring on its own territory and takes no action with regard to what is done elsewhere. Any attempt to alter this situation would normally be regarded as unwarrantable interference with the sovereignty of the state. This principle causes particular problems where an offence is committed in relation to customs dues or taxation. A state's laws usually protect only its own customs dues and taxes and are not concerned with acts committed on its territory which may have the result of depriving another state of sums due to it in these ways. Since it is vital to the proper functioning of the Community that monies payable under Community legislation should be duly collected, the problem here is particularly acute.

Another difficulty is the danger that there may be proceedings against a legal or natural person in more than one Member State based on the one set of facts. It is important to ensure respect for the ne bis in idem principle in the application of Community law, which must not offer fewer guarantees for the respect of the rights of those involved in legal proceedings than are offered in the Member States.

17. The task of the Member States is, therefore, far from being an easy one, for their armoury of weapons was not fashioned to fight infringements of a supranational legal system. National sovereignty makes the subject a sensitive one, where psychological factors play a part together with the practical ones. Because of this, any encroachment upon the principle of territoriality risks being regarded with suspicion, as an encroachment upon state sovereignty. This is of course illogical because any changes would result in a state's gaining wider powers rather than more limited ones. The principle of territoriality in a Community context is a limiting one. The Community's set of regulatory measures are, however, insufficient and incomplete.

D. ACTION BY THE COMMUNITY INSTITUTIONS

I. Present position

18. The Community Institutions have to overcome the lack of cooperation between Member States and the limitations of their national legal systems, within the framework of the Treaties. The Commission is studying possible courses of action and two proposals have been sent to the Council.

19. One specific problem of a special nature has often been underlined by experts from Member States, who form part of a working group set up, and presided over, by the Commission. It is that of the criminal liability of officials of the Communities. This group's work on this subject resulted in 1972 in a draft convention and explanatory statement unanimously approved by the national experts. But this draft convention had to be re-examined following the accession of the new Member States. The Commission reported on progress to the Ministers of Justice at their meeting in Brussels on 26 November 1974, at which time the delegations from all the Member States had approved the draft in principle.

20. The Ministers of Justice of the Member States, meeting in Luxembourg on 3 June 1971, held an exchange of views relating to problems of criminal law in the economic sphere and decided that an active study should be made of them. The Commission was invited to submit proposals in this connection on the whole field of Community activity.

The Ministers indicated that they considered the problems to be particularly acute in the following cases:-

(i) agricultural law (compensatory amounts, subsidies, etc.)
(ii) law applying to food (measures relating to the quality of products)
(iii) fiscal law (VAT, harmonisation of levels)
(iv) customs law

Provisions concerning the quality of industrial products and relating to transport were added to the list by the Commission.

21. In the light of this decision of the Council, the Commission took a number of steps designed to prevent infringements by better methods of administrative control and assistance between Member States. These steps were intended to provide solutions to the problems arising in specific sectors[1]. By a decision of the Commission of 3 October 1973, a special Committee of Inquiry was set up to deal with the prevention of fraud.

Solutions have been found in some sectors and will be extended to others, where work is still continuing. The Commission wishes to organise co-operation between the various services concerned with the suppression of fraud, both with regard to the common agricultural policy and laws relating to food and industrial products. Appropriate proposals will be made on the basis of the findings of the special Committee of Inquiry.[2]

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[1] See e.g. Reg. 165/74 of 21 January 1974 relating to agents instructed by the Commission pursuant to Art. 14 (OJ L.20 of 24.1.1974)

[2] See p.10

22. To meet the problem of sanctions generally, a working group, composed of government experts and presided over by the Commission, was established. It drew up a preliminary draft of common rules for the suppression of infringements committed by individuals in matters governed by regulations, decisions and directives of the Communities. The group preferred a convention as the legal instrument for giving effect to the rules. At their meeting in Brussels on 26 November 1974, the Ministers of Justice of the Member States received a report from the Commission on the progress of the draft convention and invited it actively to pursue its work in order to submit a report to them during the course of 1975 if possible.

23. The Commission subsequently asked the Court of Justice to give its opinion on the draft Conventions. In its opinion, the Court indicated that it would be preferable that the provisions of the proposed Conventions be integrated into the system established by the Treaties.

24. The Court suggested that various methods might be used for this purpose. These were:

(a) Article 235[1] of the EEC Treaty

It is interesting to note that the Court of Justice includes this Article amongst those which might be used in relation to the subject matter of the draft conventions. This indicates that the Court takes the view that the Article permits the Council to legislate in matters of criminal law, for the Article specifically provides that the Council 'shall ..... take the appropriate measures'. The Court's opinion is not, however, authority that the Council may legislate to create criminal sanctions, for the creation of new sanctions was not the object of the draft conventions, which provided for the more effective application of existing ones.

(b) Article 236[2] (procedure for the amendment of the Treaty) and Art. 239[3] (annexation of Protocols to the Treaty) of the EEC Treaty.

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[1] See paragraph 12 ante

[2] Article 236 of the EEC Treaty reads:

'The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty.

If the Council, after consulting the Assembly and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.'

[3] Article 239 of the EEC Treaty reads:

'The Protocols annexed to this Treaty by common accord of the Member States shall form an integral part thereof.'

After considering the Court's opinion, the Commission has decided to replace the draft Conventions by draft Protocols to be annexed to the EEC Treaty.

25. In the first draft of this report, your rapporteur dealt at some length with the provisions of the draft conventions.

They have been referred to Parliament for its opinion, and will be dealt with in a separate report.

26. The Commission, in collaboration with the national experts, hopes to carry out studies on other problems, such as the execution of foreign criminal judgments pronounced for breaches of Community law and consisting of the payment of a criminal fine; the difficulties arising from the differences in substantive law and sanctions for the protection of Community funds by criminal law which are found in national legal provisions. It is intended that proposals be submitted eventually on the basis of these studies.

To the list of problems, there might be added that of the criminal liability of legal persons, to which your committee has already referred. This raises many difficult questions, for which the Member States have varying solutions. It would be very useful if the Commission could include this matter among those to be studied with a view to the presentation of proposals.

II. Future developments

(a) The approach of the Commission of the Communities

27. Clearly much work is being carried out by the Commission on this subject, not without result. There is no doubt that the signing of the Protocol relating to the general suppression of infringements committed by individuals should make the imposition of sanctions for breaches of Community legislation possible on a wider scale than has so far been the case.

The Commission's approach to the problem was revealed in written answers given in December 1974 to oral questions put by four members of the European Parliament[1]. In reply to Question No. 17 by Mr BAYERL, who asked why the Council had not acted in respect of offences against Community law under Article 100 or Article 235 of the EEC Treaty but intended to have the matter resolved by inter-governmental agreement, the Commission stated:

'Article 100 is concerned with the approximation of such provisions of national laws, regulations or administrative actions but to close the existing loop holes in prosecution for inter-state frauds, the parallel adoption of national codes does not provide a satisfactory solution. It does not solve problems of conflict between jurisdictions in different states. Article 235 envisages action by the Community and permits regulations as well as directives. It does not, however, seem to be sound legal practice for the Community to intervene in national criminal law to the extent of regulating that small part of the criminal code involved in this matter. National criminal law in each Member State covers a vast field. It is ordinarily the preserve of the national parliament.'

In Question No. 20, Mr BROEKSZ asked what the Commission considered the possibility to be of developing a uniform system of jurisdiction for the criminal prosecution of offences against Community law and of assuring identical application of the law. The Commission's reply was:

'The possibility of arriving at a uniform jurisprudence applicable to the whole of the Community and to guarantee a uniform application of the laws to be applied on infringements of Community law is difficult to conceive as long as there does not exist a uniform penal law in the Community. Such a harmonization meets technical and political obstacles. These obstacles cannot at the moment be overcome. In this situation, the only possibility of having an effective pursuit of infringements of Community law consists of an adoption of the proposed convention.'

What was said about the proposed convention must now, of course, be read in the light of the Court's opinion and the decision of the Commission resulting from it.

28. From these answers it appears that the Commission is at present concentrating on closing the loopholes which exist as a result of the principle of territoriality and the fact that the laws of Member States tend to provide insufficient protection for Community funds.

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[1] Questions No. 17 by Mr Bayerl, No. 18 by Mr Fellermaier, No. 19 by Mr Hansen, and No. 20 by Mr Broeksz; see Doc. 399/74 and OJ Annex No. 184 of December 1974.

See also Answer to Written Question No. 596/74 by Mr Kater in OJ No. C.108 of 15 May 1975.

So long as frontiers exist, the territorial principle will, no doubt, remain an essential one, even if attenuated, and action to overcome its effects is clearly necessary. It seems that the Commission intends to concentrate at present on such action and on prevention of offences by better administrative cooperation and improved procedures. The answer to the question by Mr BROEKSZ reveals that the Commission is not very hopeful for the success of any other type of action at the moment.

(b) Use of Article 100 of the EEC Treaty

29. The Commission has therefore taken and is taking action but only on a limited front. Your committee however considers that problems due to the disparities which exist between the various Member States in the field of protection of Community law by criminal law should be examined and, if possible, resolved.

A solution, at least in part, could lie in harmonisation under Article 100[1] of the EEC Treaty, provided that the conditions for the application of that Article are fulfilled. It should be recalled that Article 3(h) of the EEC Treaty includes amongst the activities of the Communities 'the approximation of the laws of Member States to the extent required for the proper functioning of the common market'. Community law creates an opportunity for sanctions and contains the elements of them, regulating conduct generally and commercial transactions more particularly, in the domains where the Treaties apply. This should be recognised by the Member States, who have conceded primary authority in those domains to the Community, and should be prepared to allow it to enforce its rules with regard to those bodies on which or those individuals on whom they are legally binding.

30. It would therefore be somewhat unreasonable for the Member States to object on political grounds (legal argument is of course a different matter) to the Community's utilising Article 100 to provide for the better enforcement of Community law, particularly as that Article lays down conditions for its use, with which compliance would be necessary. The Article refers to the 'approximation of

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[1] Article 100 of the EEC Treaty reads:

'The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.'

such provisions ..... as directly affect the establishment or functioning of the common market'. The fact that disparities between the laws of Member States have a direct effect would have to be established. As has already been stated, the evidence must first be collected. It seems more probable that the differences in the law applied, rather than the way in which the case is tried, may affect the functioning of the common market. So it is mainly substantive law that is of importance here.

31. Your committee considers that the Commission might be invited to take steps to find out the exact situation with which it has to deal, so that the best methods of acting may be devised. Member States might be asked to indicate how they deal with breaches of Community law, stating whether these are criminal offences; if so, what is the punishment for them and what is the provision of national law dealing with them. From this information a table could be compiled by the Commission, which would then have the material on which to work.

E . CONCLUSION

32. The relationship between Community law and criminal law is, it may be concluded, a somewhat uneasy one which poses many problems to which there are no simple solutions. However, if the Commission were to undertake a factual study of the sort proposed by your committee with a view to the use of Article 100 of the EEC Treaty, where seen to be both possible and necessary, the way would be open for the development of a true Community criminal law, a development to which the Community should be looking forward hopefully, whatever the obstacles which at present stand in the way.

ANNEX

Acknowledgments

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